

ECF CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SELLIFY LLC,

Plaintiff,

v.

AMAZON.COM INC.,

Defendant.

X



COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Sellify LLC, by and through its attorneys, SmithDehn LLP, and as and for its Complaint, states as follows:

1. This is an action for violation of the federal Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), and for false advertising and unfair trade practices in violation of Section 42-110b of CUTPA, the Connecticut Unfair Trade Practices Act and the regulations promulgated thereunder, as well as unfair competition and defamation under the common law of the State of Connecticut.

2. This action arises out of defendant's unfounded and willful efforts to brand the plaintiff company, an online retailer of mostly used cameras and other digital electronic equipment, as a "Scammer" and "Scam Artist." Upon information and belief, defendant has accomplished this largely by illicitly purchasing various forms of plaintiff's URL and service mark as a "keyword" on the Google internet search engine, so that when Web users perform online searches for information regarding plaintiff's business, sponsored advertisements with messages such as "Don't Buy from Scammers" and "Beware the SCAM Artists," and linked to the Amazon.com web site, pop up opposite the search results, which feature numerous links to Plaintiff's site. Defendant

thus creates the clear impression that plaintiff is a “scam artist” and that consumers who wish to avoid dealing with “scam artists” should do business with Amazon.

PARTIES

3. Plaintiff Sellify LLC is a Connecticut limited liability company, with its principal place of business in Stamford, Connecticut.

4. Defendant Amazon.com, Inc. is a Delaware corporation with its principal place of business in Seattle, Washington. Defendant regularly contracts to supply goods in the State of New York.

JURISDICTION

5. This Court has subject-matter jurisdiction over this action, pursuant to 28 U.S.C. §1331 (federal question jurisdiction), and supplemental jurisdiction over the related state claims pursuant to 28 U.S.C. §1367(a).

6. This Court has personal jurisdiction over defendant pursuant to section 302(a) of the Civil Practice Law and Rules of the State of New York, in that, upon information and belief, defendant regularly contracts to supply goods in this State and in this judicial District.

VENUE

7. Venue in this District is proper pursuant to 28 U.S.C. §1391 (a) and (c).

FACTS

8. Plaintiff Sellify LLC is a small online discount retailer of high-end electronic consumer goods, particularly videocameras, still digital cameras and professional-quality audio equipment, all of which it sells under the brand name

OneQuality.com. Plaintiff does business throughout the continental United States via a website accessible via the URL www.onequality.com (the "OneQuality Website").

9. The OneQuality Website was launched on or about March 3, 2007.

10. Plaintiff also operates an online store through ebay.com, accessible via the store name OneQuality-Store.

11. Plaintiff's application to register its mark ONEQUALITY.COM is pending before the U.S. Patent & Trademark Office (Serial No. 77732896).

Plaintiff's Business and Reputation

12. Plaintiff's business model is simple and straightforward.

13. Plaintiff acquires some of its merchandise from individuals and some from businesses.

14. Plaintiff then resells the merchandise for profit via the OneQuality Website, via the OneQuality-Store location at ebay.com, or via ebay.com's auction pages.

15. Plaintiff enjoys a high reputation for quality and integrity, both as a buyer and as a seller.

16. As of the filing of this Complaint, Plaintiff's business had received over 7,400 positive reviews on ebay.com under the eBay used-id OneQuality-Store, and currently enjoys a positive rating of 100%.

17. To Plaintiff's knowledge, the OneQuality Website enjoys a similar reputation for quality and integrity.

18. Plaintiff maintains its extremely positive reputation by selling only items that are of high quality and functionally consistent with the manner in which Plaintiff describes such items on the OneQuality Website and on ebay.com, and by paying for purchases from sellers and delivering goods to customers promptly.

19. Moreover, Plaintiff has consistently and without fail embraced the principle of truth in advertising, because Plaintiff knows that its future success is inextricably linked to its business reputation. In the Internet age, dissatisfied customers can quickly destroy a business. Whether in the form of negative feedback on ebay or critical remarks posted on online message boards or in the so-called “blogosphere,” customers’ negative impressions about dishonest or badly-run businesses (and particularly Internet-based businesses) travel more rapidly than ever.

Defendant’s Business and Reputation

20. Defendant Amazon.com, Inc. is perhaps the biggest and best-known online business in the world.

21. From its beginnings in 1995 as an online bookseller, Defendant has since branched out into retail sales of music CDs, videotapes and DVDs, software, consumer electronics, kitchen items, tools, lawn and garden items, toys & games, baby products, apparel, sporting goods, gourmet food, jewelry, watches, health and personal-care items, beauty products, musical instruments, clothing, industrial & scientific supplies, groceries, and more.

22. Defendant is now America’s largest online retailer. No other online business comes close to Defendant’s size and sales volume.

23. Indeed, Defendant's website was estimated to have attracted more than 615,000,000 visitors in 2008 twice as many as another Internet behemoth, walmart.com.

24. Defendant reported more than \$19 billion in revenues during 2008, and \$842 million in operating income for that year.

25. Thus, it is an understatement to say that Defendant is an online superpower. Its business strategies influence the purchasing habits of millions of Americans.

26. Moreover, Defendant has built its business by cultivating a reputation for excellent customer service. Defendant's founder, Jeffrey Bezos, is on record as proclaiming that Defendant's success is more closely correlated to its reputation among consumers than to any product it sells. He has been quoted as saying, "Your brand is what people say about you when you are not in the room." In other words, the strength of a company's brand is proportional to the strength of its reputation.

Unauthorized Use of Plaintiff's ONEQUALITY.COM Mark in Internet Advertising

27. Despite the huge disparities between the parties in terms of size, market power and relative influence, both Plaintiff and Defendants are online retailers, and both sell high-end consumer electronics items.

28. In that sense, Plaintiff and Defendant are competitors. It is not unusual, for example, for the two companies to be offering the same camcorder items at the same time.

29. Of course, Plaintiff is so dwarfed in size by Defendant, and is by comparison so insignificant, that it is difficult to imagine that anything Plaintiff might do would have any demonstrable effect on Defendant's business

30. Moreover, even if Plaintiff wanted to grow to Defendant's size, it would be constrained by its own business model (to name just one of a host of obvious barriers). For one thing, there are only so many marketable, high-quality used electronics items available to Plaintiff for resale at any given time.

31. Upon information and belief, Defendant runs a sophisticated and expensive advertising operation that encompasses most forms of consumer media, including the Internet.

32. A major vehicle for the execution of Defendant's Internet advertising strategy is its so-called "affiliate program" (the "Affiliate Program").

33. Upon information and belief, the Affiliate Program involves the recruitment of many other business entities (including both individuals and companies) (collectively, the "Affiliates") to act as Defendant's *de facto* agents in purchasing various types of Web advertisements that link back to the amazon.com web site. When Web users who have clicked on such ads make purchases from amazon.com, the Affiliates are awarded commissions by Defendant.

34. One of the most common methods by which Affiliates purchase ads on the web is to purchase terms known as "keywords" from widely used Web search engines such as Google. Whenever Google users input such keywords as search terms, the advertisements placed by the Affiliates appear above or adjacent to the search results as "Sponsored Ads" or "Sponsored Links."

35. Upon information and belief, Defendant is aware of the keyword-purchase technique and not only condones this practice but actually encourages it. Indeed, upon information and belief, Affiliates are encouraged to label their “sponsored” advertisements with the URL www.amazon.com or the Defendant’s corporate logo, so that such ads appear to have been placed by Defendant itself.

36. Users who click on such ads are thus encouraged to believe that such ads emanate directly from Defendant, and indeed, when they click on such ads, they are transported directly to Defendant’s web site. There is no indication at any point in this process that users clicking on such ads are dealing with anyone but Defendant.

37. Upon information and belief, one of Defendant’s agent-Affiliates was a company called Cutting Edge Designs (“Cutting Edge”).

38. Upon information and belief, Cutting Edge purchased the URL of Plaintiff’s OneQuality Website, onequality.com, among other terms, as an advertising keyword.

39. If a Google user were to types the term “camcorders,” in an attempt to find online sellers of such goods a similar list of sponsored ads would appear opposite the results, paid for by entities that sell camcorders – including the online arms of the well-known retailers Target, Sears and Circuit City.

40. But if, however, one were to type “onequality.com,” something very different would happen. Opposite the search results (the top three of which, unsurprisingly, reference the OneQuality Website), just one sponsored link would appear. The link reads as follows:

Sponsored Links

Beware the SCAM Artists

Camcorders at the Best Price
From the Trusted Source.
amazon.com

41. If the user clicked on the sponsored link, he or she would be directed to the amazon.com web page featuring camcorders – which are in many cases identical items to the ones offered for sale on the OneQuality Website).

42. Upon information and belief, there is no way in which this particular sponsored ad could appear opposite these particular results, other than if someone acting on its behalf, had purchased “onequality.com” from Google as a keyword.

43. A true and correct copy of a search result page displaying this result is attached hereto as Exhibit A.

44. Upon information and belief, Cutting Edge Defendant bought at least one similar keyword phrase – the confusingly similar, misspelled term “onequlaity.com.” If the Google user typed this phrase into the Google search engine, he or she would receive another list of results. In this case, the top two results (and three of the top four) link to the OneQuality Website. Opposite them is the same single paid advertisement (“Beware the SCAM Artists”).

45. Again, if the user clicks on the sponsored link, he or she is directed to the amazon.com web page featuring camcorders – in many cases identical items to the ones offered for sale on the OneQuality Website.

46. Again, upon information and belief, there is no way in which this particular sponsored ad could appear opposite these particular results, other than if Defendant, or someone acting on its behalf, had purchased “onequality.com” from Google as a keyword.

47. A true and correct copy of this search result page is attached hereto as Exhibit B.

48. If the user types in only the search term “onequality,” opposite the top search result, which references the OneQuality Website, appears the similarly false and defamatory but slightly different ad:

Sponsored Links

Don't Buy from Scammers

Camcorders at the Best Price
From the Trusted Source.
amazon.com

49. A true and correct copy of this search result page is attached hereto as Exhibit C.

50. It is beyond dispute that these keyword buys were calculated and intentional.

51. It is also beyond dispute that these keyword buys were intended to convey the clear impression that Plaintiff is a “scammer” or a “SCAM Artist,” and that consumers purchasing camcorders from Plaintiff are at risk of being ripped off.

52. Moreover, the sponsored ads in question were clearly labeled as coming from amazon.com – an enormous and prestigious company that stresses the

importance of its reputation. The mere fact that these ads appear to emanate directly from Defendant implies great credibility.

53. It is in this context especially significant that these sponsored ads are calculated to appear whenever a user types these terms into the Google search engine. Typically, a user simply seeking to go to the OneQuality Website would not bother to type onequality.com into the search engine but would simply type www.onequality.com as a URL.

54. Rather, it is highly likely that anyone typing such a term into the Google search engine is not immediately looking for the OneQuality Website itself but is searching for *the things that others are saying about it*. In other words, they want to know whether it is getting good reviews from customers. Is it a reputable site? Are customers satisfied?

55. Because of the agent-Affiliate Cutting Edge's cynical and illicit purchases of these terms as keywords, users looking for information about Plaintiff's business were greeted with Defendant's strongly implied statements that Plaintiff's business is a scam.

56. Plaintiff's business is not in fact a scam, but is reputable and honest.

57. Plaintiff has been and continues to be seriously injured by Defendant's false advertisements.

58. Upon information and belief, Defendant knew or should have known that its agent-Affiliate Cutting Edge was engaged in the activities alleged in this

Complaint, and that such activities served to confuse Plaintiff's customers and potential customers and lure them to Defendant's own web site to make their purchases.

59. Plaintiff has never sponsored, endorsed or consented to Cutting Edge's or Defendant's use of its mark, or any variations thereof, in connection with the sale of any products or services.

60. Upon information and belief, Cutting Edge's and Defendant's actions, as alleged herein, are willful and reflect an intent to confuse consumers.

61. The products sold by Defendant via the web pages to which the agent-Affiliate Cutting Edge's sponsored ads linked are offered through the same channels of distribution and to the same customers as the products sold by Plaintiff.

Plaintiff's Futile Objections to Defendant's False Ads

62. On at least two occasions, Plaintiff has demanded that Defendant cease and desist from its vicious and false advertising campaign, only to be ignored.

63. After first discovering the ads in question, on or about March 13, 2009, Plaintiff's principal contacted Defendant's customer service department to demand that these sponsored links be discontinued. In reply, Defendant sent two non-responsive form emails. Defendant took no further action and did not discontinue the ads.

64. On or about May 8, 2009, counsel for Plaintiff wrote to L. Michelle Wilson, Defendant's chief legal officer, a detailed letter that detailed the relevant issues, attached the offending ads and demanded the discontinuation of the ads along with monetary compensation. Defendant neither replied to the letter nor caused the ads to be taken down.

65. Defendant's remarkable inaction in the face of Plaintiff's clear and detailed complaints further illustrates the willfulness of Defendant's actions. Doubtless, if the ads had been the work of an overzealous or rogue marketing employee, they would have been taken down immediately. It became clear that the type of false advertising that targeted Plaintiff was condoned, if not planned, at the highest levels of the company, as a matter of corporate policy.

66. On or about May 13, 2009, counsel for Plaintiff wrote again to Ms. Wilson and several other in-house lawyers working for Defendant, enclosing a draft complaint. Shortly thereafter, Plaintiff's counsel received a telephone call from Kathryn Sheehan, Esq., Defendant's Associate General Counsel for litigation. Ms. Sheehan placed the blame on Cutting Edge and represented that the ads were beyond Defendant's control, but said that Cutting Edge's affiliate account had been suspended and that Defendant would demand that Cutting Edge remove the infringing ads.

67. Upon information and belief, the infringing ads were not in fact beyond Defendant's control; Defendant could have caused them to be removed instantly. Nonetheless, the ads were not removed.

68. Counsel for Plaintiff called Ms. Sheehan in July 2009 to demand that the ads be taken down, but they were not removed. Ms. Sheehan did not return the call.

69. Consequently, on August 6, 2009, counsel for Plaintiff wrote to Ms. Sheehan again, with a copy to Ms. Wilson, Defendant's General Counsel, demanding that the ads be taken down and demanding compensation for the injury to Plaintiff's business. Neither of the recipients responded.

70. The ads were apparently finally taken down in late August, more than five months after Plaintiff first demanded that the ads be removed.

COUNT ONE

(Lanham Act/Trademark Infringement, Federal Unfair Competition and False Advertising)

71. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 70 of this Complaint, as though fully set forth herein.

72. ONEQUALITY and ONEQUALITY.COM are common-law service marks belonging to Plaintiff.

73. Plaintiff has applied to register ONEQUALITY.COM as a service mark on the Principal Register of the U.S. Patent & Trademark Office, citing use in commerce as early as 2007.

74. In its attempts to advance its own business, and to advertise, promote, market and sell its own goods to consumers, Defendant, through its agent-Affiliate Cutting Edge, used Plaintiff's marks (and at least one deliberately misspelled variant thereof) as triggers for advertisements that falsely describe Plaintiff as a "scammer" and "SCAM Artist."

75. In so doing, Defendant misrepresented the nature, characteristics, and qualities of Plaintiff's goods, services and commercial activities.

76. There is absolutely no basis in fact for the scurrilous allegations about Plaintiff.

77. Plaintiff is likely to be, and in fact has been, damaged by Defendant's actions.

78. Whether or not Defendant itself placed the ads in question, it knew or should have known of such ads (and that the ads were placed by Cutting Edge on Defendant's behalf), and as such Defendant is at best contributorily liable for the damage done to Plaintiff.

79. Whether or not Defendant placed the ads in question, such ads were placed by Defendant's agent, and as such Defendant is vicariously liable for the damage done to Plaintiff.

80. Such actions by Defendant therefore violate the federal Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), and entitle Plaintiff to recover damages of three times Plaintiff's actual losses (including the diminution in value of Plaintiff's goodwill), and/or Defendant's ill-gotten profits, and the costs of this action, such amounts to be proven at trial.

81. Because Defendant's actions are particularly baseless, cynical and willful, this case constitutes an "exceptional case" entitling Plaintiff to the recovery of its attorneys' fees.

COUNT TWO

(Connecticut Unfair Trade Practices Act ("CUTPA"))

82. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 81 of this Complaint as though fully set forth herein.

83. The purchases of the aforementioned keywords by Defendant's agent-Affiliate from Google have resulted, and continue to result, in the appearance of false and injurious "sponsored links" which tar Plaintiff as a "scammer" or "SCAM Artist."

84. The terms “scammer” and “SCAM Artist” are not mere expressions of opinion, but have a plain and objective meaning and as such are false statements of fact that convey the clear and unambiguous idea that Plaintiff operates its business in a dishonest and criminal manner.

85. Defendant’s false and misleading sponsored web ads constitute conclusive evidence of prohibited unfair trade practices pursuant to Section 42-110b of CUTPA and Section 42-110b-18(g) of the regulations promulgated thereunder by the State of Connecticut.

86. Defendant is subject to CUTPA, and the regulations promulgated thereunder, because it engages in trade or commerce, and is doing business, in the State of Connecticut.

87. Plaintiff has suffered significant injury as a result of Defendant’s unfair trade practices.

88. Plaintiff is entitled to recover, and seeks herein, its actual damages arising out of Defendant’s violation of CUTPA, as well as punitive damages and its reasonable attorneys’ fees.

COUNT THREE

(Common Law Unfair Competition)

89. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 88 of this Complaint as though fully set forth herein.

90. Plaintiff and Defendant sell similar goods to the public, via similar channels of trade, and are thus in competition with each other.