UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SELLIFY LLC,

Plaintiff,

- against -

AMAZON.COM, INC.,

Defendant.

---x

09 Civ. 10268 (JSR)
ECF Case

**MEMORANDUM OF LAW OF DEFENDANT AMAZON.COM, INC.
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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Defendant Amazon.com, Inc. ("Amazon") respectfully submits this memorandum of law in support of its motion for summary judgment dismissing plaintiff Sellify LLC's ("Sellify") First Amended Complaint (the "Complaint" or "Cplt.") in its entirety.

PRELIMINARY STATEMENT

More than three million individuals and entities with their own websites participate in Amazon's Associates Program. Associates place a link to the Amazon website on their own web pages, and if a customer clicks on that link and then makes a purchase from Amazon, the Associate earns an advertising fee. Sellify, an Internet retailer of used camcorders and other used electronics through its website, "onequality.com," and its eBay store, "OneQuality-Store," alleges that, from March to August 2009, one Associate, Cutting Edge Designs ("Cutting Edge"), ran advertisements on Google that infringed Sellify's onequality.com service mark and disparaged the OneQuality brand. Sellify alleges that Amazon is liable for Cutting Edge's conduct under a number of theories, all of which are premised on the allegation that Cutting Edge acted on Amazon's behalf, as its agent, or that Cutting Edge was under Amazon's control.

Amazon moves for summary judgment on two principal grounds. First, there is no evidence that Cutting Edge acted as Amazon's agent, or that Amazon controlled the actions of Cutting Edge, and overwhelming evidence to the contrary. The Operating Agreement that governs the Associates Program expressly provides that Associates are not Amazon's agents and that they are responsible for their own sites. Moreover, the suggestion that Amazon would empower over three million individuals and entities to bind the company, or that Amazon would control the operations of those three million independent website operators is implausible on its face, as well as contrary to the testimony of all witnesses with knowledge. And far from directing, endorsing or ratifying Cutting Edge's conduct, which violated the rules of the

Operating Agreement, Amazon threatened to terminate Cutting Edge as an Associate and to withhold its advertising fees if it did not cease its misconduct. Amazon took both steps when Cutting Edge did not comply.

Second, there is no evidence from which a jury could conclude that Sellify was injured by the conduct of Cutting Edge, let alone from which it could make a rational estimation of damages. Sellify's damage calculation assumes that every dollar by which its 2009 profits were below 2007 profits is attributable to Cutting Edge, despite the fact that the OneQuality business was shut down at the end of 2007 and virtually dormant throughout 2008, and despite the fact that only a small fraction of Sellify's potential customers ever saw the allegedly disparaging advertisements at issue. The calculation further assumes, without evidence, that even though the ads were seldom seen and were displayed for only five months, their impact on Sellify's reputation and sales would be permanent, yielding damages nine times greater than the decline in profits. Sellify's claim of damages, unsupported by any expert testimony, is wholly speculative, and it is inconsistent with substantial evidence, as well as common sense. For that reason, in addition to the insufficiency of its liability claims, Sellify's Complaint should be dismissed.

STATEMENT OF FACTS[1]

The OneQuality Brand

Christopher Maki, the president and sole proprietor of Sellify, graduated college in 2002. (Maki 8:17-19, 9:4-5, 44:12-14.) He attended one year of law school but dropped out to buy

[1] Deposition transcripts are cited with the last name of the deponent, followed by the transcript citation. The deposition transcripts are attached to the accompanying Declaration of Robert D. Kaplan in the following order: Anne Tarpey (Ex. A), Muneer Mirza (Ex. B), Eric Herrmann (Ex. C), Christopher Maki (Ex. D), and Nathaniel Landau (Ex. E). Declarations are cited with the last name of the declarant, followed by "Dec."

used camcorders and other electronics on Craigslist and eBay, and then resell them on eBay, hopefully at a profit. (*Id.* 14:13-15:16, 16:12-13, 20:16-21.) At some point, Maki did not remember the year, he joined with Adrian Meli and Meli's fiancée, Jennifer O'Connor, to create OneQuality LLC (the "LLC"). (*Id.* 17:23-24, 26:12-20, 29:19-30:3, 33:6-25, 44:15-20.) The LLC also bought used electronics on Craigslist and eBay and resold them on eBay through eBay's auction pages and through an online eBay store called OneQuality-Store. In March 2007, the LLC created a website, onequality.com, and began selling used electronics through that channel as well. (*Id.* 35:24-36:4, 42:23-43:13; Cplt. ¶¶ 11-12, 14-16.)[2]

The LLC earned profits of $638,935 in 2006 but only $317,181 in 2007. (Wang Dec. Ex. B.) In late 2007, Meli, who was in control, decided to shut down the business. (Maki 95:8-10.) The LLC stopped restocking inventory and, in 2008, the website and eBay store operated only minimally, merely selling off Meli's share of the remaining inventory and some of his personal items. (*Id.* 59:15-60:3, 97:10-18; Wang Dec. Ex. B.) To the best of Maki's knowledge, Meli stopped advertising for the OneQuality website and eBay store, and stopped "running [those properties] as a business." (Maki 59:25-60:2, 105:22-106:8.)

In the settlement of a dispute among the LLC members, Maki (through Sellify) acquired the rights to the OneQuality brand and he began operating the website and eBay store in early 2009. (*Id.* 116:12-24.) He did not do anything in particular to re-launch the brand after its minimal presence throughout 2008 – "Pretty much you just click a button and it's back up." (*Id.* 127:18-23.) Maki had less inventory in 2009 than the LLC had had in 2007, and whereas the LLC had used five, or possibly as many as nine employees, Maki worked alone until the end of

[2] The Complaint is annexed as Ex. A to the Wang Dec.

the year, when he hired one employee. (*Id*. 45:22-46:8, 120:22-121:3, 129:13-17.) Maki estimates that Sellify's 2009 profits were approximately [redacted]. (*Id*. 115:9-17; Wang Dec. Ex. B.)

The Amazon Associates Program

Amazon is one of the largest and best-known Internet retailers. (Cplt. ¶ 22.) Through its Associates Program, Amazon allows more than three million individuals and entities that have their own websites to place a link to the Amazon website (www.amazon.com) on their own web pages. If a customer comes to the Amazon website by clicking on the link on an Associate's site, the Associate earns an advertising fee (usually around 4%) on items placed in the customer's online shopping cart on the Amazon site within 24 hours (provided the items are ultimately purchased). (Cotter Dec. ¶¶ 3-4; Tarpey Dec. ¶¶ 3-4; Mirza 23:8-24:11; Tarpey 5:7-25.)

Given the vast number of Associates, Amazon cannot and does not monitor the content of Associates' websites. (Cotter Dec. ¶ 9; Tarpey 14:1-6.) Likewise, Amazon cannot and does not authorize the more than three million Associates to act on Amazon's behalf, or in any fashion to act as or hold themselves out as agents or representatives of Amazon. (Cotter Dec. ¶¶ 7, 9.) The Associates Program Operating Agreement, which is binding on all Associates (*id*. ¶ 5; Tarpey Dec. ¶ 4 & Ex. A), expressly provides that the Associates are responsible for the content of their own websites, and that they are responsible, *inter alia*, for avoiding any content that disparages, or that infringes the intellectual property of, any other person or entity (Cotter Dec. ¶ 8; Tarpey Dec. Ex. A ¶¶ 2(c), 2(h), 5). The Operating Agreement also expressly states that Associates are not Amazon's agents and that they may not represent otherwise. (Tarpey Dec. Ex. A ¶ 16.)

If Amazon learns, from a third party or otherwise, that an Associate is violating the Operating Agreement, it acts to enforce the Agreement. In many cases, Amazon issues a warning, telling the Associate to cease the improper practice, and notifying the Associate that, if it fails to do so, Amazon will terminate its account and withhold any accrued advertising fees. If Amazon learns that the Associate has not complied, it terminates the Associate's account and withholds any accrued fees, as it explained it would. (Tarpey Dec. ¶¶ 8, 11, 13-14.)

Amazon takes enforcement steps against approximately 50 to 75 Associates each week (more than 3000 a year). (*Id*. ¶¶ 13-14; Tarpey 8:18-23.) Enforcement actions cover a range of violations of the Operating Agreement and include the infringement of third party intellectual property rights and the misrepresentation of the nature of the Associate's relationship to Amazon. (Tarpey 10:18-11:7, 61:8-14, 62:8-20.) Terminating the Associate's account and withholding advertising fees destroys the economic incentive for the Associate's misconduct, so in many cases, threatening these steps resolves the problem. (Tarpey Dec. ¶ 14; Tarpey 30:9-20.) If not, Amazon terminates the account and does not pay the accrued fees. (Tarpey 30:9-20.)

Until May 1, 2009, Associates could earn advertising fees in another manner. They could purchase "keywords" from search engine providers such as Google and Yahoo!. If an Internet user searched the purchased keyword, the search engine would display an advertisement (called a "sponsored ad") designed by the purchaser alongside of or above the natural search results returned by the search engine. The Associate could include a link to the Amazon website in the sponsored ad, and if the Internet user clicked the link and made a purchase, the Associate would earn an advertising fee just as it would if the user made a purchase after coming to the Amazon site from a link on the Associate's own website. (Herrmann Dec. ¶¶ 3, 11-12; Herrmann 16:2-7; Tarpey Dec. ¶ 7.)

Effective May 1, 2009, Amazon forbade its Associates from purchasing keywords to generate sponsored ads containing a link to the Amazon site and it stopped paying advertising fees for any purchases made by customers who came to the Amazon site through such a link. (Herrmann Dec. ¶¶ 11-12; Tarpey Dec. ¶ 7.) Amazon changed its policy for business reasons. Keywords are priced according to demand. The Associates were driving up the price of keywords and recouping their costs through the advertising fees they earned. Amazon concluded that it was, in essence, subsidizing its own competitors and that it was better off buying the keywords itself. (Herrmann Dec. ¶ 13; Herrmann 7:9-8:7, 11:6-14; Tarpey 28:9-15.)

All Associates received notice of the policy change from an April 6, 2009 email and a posting to the Associates Blog (Tarpey Dec. ¶ 9 & Exs. C, D; Tarpey 52:7-15, 53:14-16), and some (including Cutting Edge) received a second notice on April 27 (Tarpey Dec. ¶ 9 & Ex. E). In the months after the change in policy, Amazon took enforcement action against approximately 150 Associates who continued to direct traffic to the Amazon website through sponsored ads. (Tarpey 33:1-7.)

<u>The Cutting Edge Ads and the Parties' Responses to Them</u>

Sellify claims ownership of the service marks OneQuality and onequality.com. (Cplt. ¶ 76.) In March 2009, Cutting Edge bought the keyword "onequality.com," and several close variants, from Google. (Cplt. ¶¶ 40, 46; Sheehan Dec. ¶ 4; Tarpey Dec. ¶ 6; Abbott Dec. Ex. A.) When a Google user searched for the keywords purchased by Cutting Edge, Google would return a sponsored ad saying "Don't Buy from Scammers" or "Beware the SCAM Artists" and containing a link to the Amazon website (the "Cutting Edge Ads"). The Cutting Edge Ads appeared above, or to the side of, the natural search results, which included links to the onequality.com site. (Cplt. ¶¶ 42, 50; Herrmann Dec. ¶ 5; Tarpey Dec. ¶ 5.) The Cutting Edge Ads were purchased from Google without the knowledge or consent of Amazon. (Tarpey Dec. ¶ 6 & Exs. B, F; Sheehan Dec. ¶ 4; Herrmann Dec. ¶ 6; Herrmann 33:5-11; Maki 284:16-25.)

Because the Cutting Edge Ads were purchased from Google, displayed on the search results page generated by Google, and hosted on the Google servers, Google could have removed them, as both Mr. Maki and his expert witness understood. (Maki 153:4-10; Landau 58:3-21.) It is Google's publicly disclosed policy that it takes claims of infringement from intellectual property rights holders seriously, and that it will investigate such claims. (Herrmann Dec. ¶ 10 & Ex. B.) Nevertheless, based on the advice of its counsel, Sellify chose not to ask Google to remove the Cutting Edge Ads, or to contact Google at all. (Maki 151:5-9, 153:4-12, 291:12-17, 291:24-292:10.) Sellify's own expert testified that asking Google to remove the ads would have been reasonable and prudent. (Landau 59:25-61:10.)

After learning that the ads had been placed by Cutting Edge, Sellify also chose, based on advice of counsel, not to ask Cutting Edge to remove the ads and not to contact Cutting Edge at all. (Maki 307:23-308:16.) Sellify's expert testified that asking the company that had placed the ads to take them down would also have been reasonable and prudent. (Landau 61:7-10, 62:2-10.)

Christopher Maki testified that when he saw the Cutting Edge Ads in March, he telephoned Amazon, although he did not recall to whom he spoke. He did remember that the person he spoke to told him that he could not help him. (Maki 147:4-15, 148:3-6.)[3] An email sent to Maki by Amazon shows that Maki had contacted Amazon's Seller Central department, a part of Amazon solely dedicated to matters concerning companies that sell their products on the Amazon website. (Tarpey Dec. ¶ 15 & Ex. H.) Sellify's concern – the allegedly disparaging content of an ad displayed as the result of an allegedly infringing keyword purchase from Google

[3] Maki thought he that might also have sent an email (Maki 148:17-149:3), but there is no record of such a communication and Maki could not produce a copy of any email.

– had nothing to do with third party sales on Amazon and did not involve anything related in any way to Seller Central. (Tarpey Dec. ¶ 15.) Although Maki was told by the Seller Central representative that he could not help, Maki did not contact Amazon's law department or take any other steps to contact anyone else at Amazon.

The same day Maki contacted Seller Central he did contact his own lawyer. (Maki 149:6-10, 150:22-151:4.) His lawyer made no effort to contact Amazon for almost two months. Then, on May 8, 2009, Sellify's counsel wrote to the General Counsel of Amazon alleging that Amazon had placed the Cutting Edge Ads. The letter (which made no mention of any attempt to contact Amazon in March) threatened a lawsuit for $5,000,000 in damages unless Amazon made a "serious proposal for settlement that reflects the gravity (and potential application in other contexts) of Sellify's potential claims against Amazon." (Wang Dec. Ex. C.)

After receipt of counsel's letter, Amazon's law department contacted Anne Tarpey, the Amazon employee in charge of enforcing the rules of the Associates Program. By examining the URL in the Cutting Edge Ads, Tarpey was able to confirm that Amazon had not purchased the keywords or placed the ads. That had been done by Cutting Edge. (Tarpey Dec. ¶ 6.)

Because the Cutting Edge Ads were purchased from and hosted by Google, Amazon had no authority or ability to remove them itself from the Internet. (Mirza Dec. ¶ 5; Mirza 58:7-9; Landau 57:12-58:14.)[4] However, Tarpey immediately wrote to Cutting Edge, informing them that onequality.com (i.e., Sellify) had contacted Amazon complaining about Cutting Edge's

[4] Sellify alleges that Amazon could have created a mechanism whereby any person clicking on the Amazon link contained in the ads would have been diverted to some special web page. (Cplt. ¶¶ 69, 74.) As explained below, there were compelling business reasons not to take this approach. Sellify's own expert could not opine that *any* Internet retailer approached inappropriate advertisements or links in the manner suggested by Sellify, or even that such an approach would be reasonable. (*See* pp. 17-18.)

purchase of the onequality.com keyword. Tarpey instructed Cutting Edge to stop doing so. Tarpey also told Cutting Edge that directing customers to Amazon through a link in *any* sponsored ad was prohibited, and instructed Cutting Edge to cease any such activity. Tarpey told Cutting Edge that, if it did not comply with her instructions, its Associates account would be closed and any accrued advertising fees withheld. (Tarpey Dec. ¶ 8 & Ex. B.)

After writing the May 8, 2009 letter, Sellify did not contact Amazon again for over two months. Then, on July 13, Sellify's counsel wrote another letter to Amazon's law department. (Wang Dec. Ex. D.) From this letter, Amazon learned that Cutting Edge had not stopped purchasing keywords from Google or running the Cutting Edge Ads. (Sheehan Dec. ¶ 2.) The next day, Amazon terminated Cutting Edge's account and withheld all unpaid fees, informing Cutting Edge of these actions by email. (Tarpey Dec. ¶ 11 & Ex. F; Sheehan Dec. ¶ 6; Herrmann Dec. ¶ 8; Tarpey 47:2-15.) In addition, although Sellify itself had never contacted Google, the Amazon employee in charge of Amazon's own sponsored advertising called and emailed Amazon's Google account representative to inform the representative about the Cutting Edge Ads. (Herrmann Dec. ¶ 9 & Ex. A; Herrmann 33:7-19.) The Cutting Edge Ads ceased appearing in August 2009. (Maki 134:14-20.)

Only a very small fraction of Sellify's potential customers – those who searched for "onequality.com" (or a couple of close variants) on Google between March and August 2009 – ever saw the Cutting Edge Ads. Potential customers who searched by product – e.g., for "camcorder," "camera," "Canon," or the like – and were served a link to the OneQuality website did not see the ads. Those who typed the URL onequality.com directly into their browsers did not see the ads. Those who used any search engine other than Google did not see the ads. Those who found the OneQuality-Store by searching on eBay did not see the ads. And, of course, even those who searched the purchased keywords on Google did not see the ads if they did so before March or after August. (*Id*. 74:24-75:8, 75:23-76:6, 136:17-21, 216:25-217:7, 220:15-19, 222:2-223:11, 226:3-19.) In total, while 45,958 people visited the onequality.com website in 2009, and more than 19,000 others likely visited the OneQuality eBay store, the Cutting Edge Ads were viewed only 1069 times (and clicked on only 61 times). (Wang Dec. Ex. E; Abbott Dec. Ex. A.)[5]

On December 17, 2009, Sellify commenced this case against Amazon, asserting claims under the Lanham Act, the Connecticut Unfair Trade Practices Act, the common law of unfair competition, and the common law of defamation. During discovery, Sellify produced a calculation purporting to show damages of $2,404,629. (Wang Dec. Ex. B.)

ARGUMENT

I. THERE ARE NO FACTS THAT WOULD SUPPORT A FINDING OF LIABILITY AGAINST AMAZON UNDER THE LANHAM ACT

The Complaint does not specify whether Sellify is alleging direct, vicarious, or contributory liability under the Lanham Act, but there is no evidence sufficient to support a judgment against Amazon on any of these theories.

A. Direct Liability

Direct liability exists only where the defendant itself uses the mark at issue (here, “onequality.com”) in commerce. *See* 15 U.S.C. § 1125(a); *Fare Deals, Ltd. v. World Choice Travel.com, Inc.*, 180 F. Supp. 2d 678, 684 (D. Md. 2001). As Amazon’s witnesses testified, Amazon’s contemporaneous documents reveal, Google’s documents record, Christopher Maki admitted at deposition, and the Complaint itself alleges, Cutting Edge – not Amazon – purchased

[5] The 45,958 number is understated because Sellify provided no data for January or February 2009. The 19,000 number is estimated, as explained at n.10 below, because Sellify did not provide data for visitors to its eBay store.

the onequality.com keyword (and its variants) from Google. (*See* citations at 56.1 Stmt. ¶¶ 25 & 27 and at p. 6 above.)[6]

B. Vicarious Liability

Although no court in this Circuit has recognized the doctrine of vicarious liability under the Lanham Act, courts in other circuits have done so where the direct infringer acted as the defendant's agent.[7] Sellify alleges that, in buying the keywords and placing its ads, Cutting Edge *was* acting as Amazon's agent (Cplt. ¶¶ 2, 35, 37, 44, 48, 57, 78, 79, 86, 90, 91, 101, 102, 109), and, indeed, 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" (*id*. ¶ 67). There is, however, no evidence at all to support these contentions, as to which Sellify bears the burden of proof. *See* 2A N.Y. Jur. 2d AGENCY § 26 (plaintiff has burden of proving the agency).

As courts in this Circuit have long held, an agency is created only when the principal manifests its intention that the agent act on the principal's behalf and subject to its control. *See, e.g., Ahn v. Rooney, Pace Inc.*, 624 F. Supp. 368, 370-71 (S.D.N.Y. 1985) (no agency relationship established); *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295-96 (2d Cir. 1984) (affirming district court's holding of no agency relationship).

Here, the Associates Program Operating Agreement, far from manifesting the intention to create an agency, expressly states that Associates are *not* Amazon's agents (Tarpey Dec. Ex. A ¶ 16), and that they may not "misrepresent or embellish the relationship between us and you . . ."

[6] References to "56.1 Stmt." are to Defendant Amazon.com's Statement Pursuant to Local Rule 56.1.

[7] *See Gucci Am., Inc. v. Frontline Processing Corp.*, No. 09 Civ. 6925, 2010 WL 2541367, at *11 (S.D.N.Y. June 23, 2010) (noting lack of recognition in Second Circuit and citing cases from Seventh and Ninth Circuits).

(*id*. ¶ 10). These provisions are not mere formalities. Amazon has taken enforcement action against Associates who misrepresented their relationship to Amazon. (Tarpey 61:8-14, 62:8-20.)

Courts have also held that the essential elements of an agency relationship include the defendant's direction and control over the alleged agent, the alleged agent's duty to act for the primary benefit of the defendant, and the authority of the alleged agent to bind the defendant. *See In re Shulman*, 744 F.2d at 295 ("[a]n essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control"); *Mouawad Nat'l Co. v. Lazare Kaplan Int'l Inc.*, 476 F. Supp. 2d 414, 422-23 (S.D.N.Y. 2007) ("[t]he agent's power to alter legal relations between the principal and third persons is also an essential element of the agency relationship;" "the entire purpose of an agency relationship is to empower the agent to take actions on behalf of and for the benefit of the principal – not the agent" (quotations and emphasis omitted)); *Frontline*, 2010 WL 2541367, at *11 (dismissing vicarious liability claim where facts did not support an inference of control "akin to joint ownership"). The uncontradicted evidence with respect to all of these factors proves that the parties did not create, and did not intend to create, an agency relationship between them.

Amazon does not control what Associates place on their websites. (Cotter Dec. ¶ 9; Tarpey 14:1-6.) The Operating Agreement provides that Associates are "solely responsible for your site, including its development, operation, and maintenance and all materials that appear on or within it." (Tarpey Dec. Ex. A ¶ 5.) As the director of the Associates Program testified, it would be impossible for Amazon to monitor and control the content of three million independent websites, and it does not do so. (Cotter Dec. ¶ 9.)

To be sure, three million Associates do not operate their own websites for the primary benefit of Amazon. With respect to Cutting Edge, there are no facts to support the contention that Cutting Edge placed its ads with Amazon's knowledge or consent, let alone that such advertising is planned or condoned at the highest levels of the company. Amazon did *not* know that Cutting Edge was placing the sponsored ads; indeed, ads that disparage or infringe the intellectual property rights of third parties are prohibited by the Operating Agreement, and as of May 1, 2009, the purchase of *any* sponsored ad containing a link to the Amazon site was forbidden. When Amazon learned of the Cutting Edge Ads it first threatened, and then followed through on its threat, to terminate Cutting Edge as an Associate and not to pay any accrued advertising fees. Amazon – unlike Sellify itself – also contacted Google to alert Google to the ads. (*See* citations at 56.1 Stmt. ¶¶ 15, 21, 25, 27, 37, 39, 42, 43 and at pp. 4-9 above.) Sellify cannot argue that Cutting Edge placed its ads on Amazon's behalf.

Lastly, there is no evidence that Associates have the power to bind Amazon, and there is clear evidence that they do not. The Operating Agreement expressly states that Associates "have no authority to make or accept any offers or representations on our or our affiliates' behalf." (Tarpey Dec. Ex. A ¶ 16.) For obvious reasons, it is of critical importance to Amazon that its three million Associates have no power to bind the company to any representation, offer, or agreement. (Cotter Dec. ¶ 9.)

Fare Deals addressed the issue of vicarious liability on facts virtually indistinguishable from those here.[8] In *Fare Deals*, defendant HRN operated an affiliate marketing program similar to the Amazon Associates Program. Like Sellify here, plaintiff Fare Deals alleged that a marketing affiliate had engaged in trademark infringement, and it tried to hold HRN liable on the

[8] *Fare Deals* has been cited favorably – and recently – in this district. *See Nomination di Antonio e Paolo Gensini S.N.C. v. H.E.R. Accessories Ltd.*, No. 07 Civ. 6959, 2009 WL 4857605, at *6 (S.D.N.Y. Dec. 14, 2009).

theory that the affiliate was HRN's agent. The court noted that, under the operative agreement, the affiliates had responsibility for the development, operation and maintenance of their own websites, that HRN did not, in fact, monitor or supervise affiliate operations, that the affiliates operated primarily for their own benefit, and that affiliates had no power to bind HRN to any contract. On these facts – precisely the facts in this case as well – the court held that the affiliate was *not* HRN's agent, and dismissed the claim of vicarious liability. 180 F. Supp. 2d at 684-86.

C. <u>Contributory Liability</u>

In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S. Ct. 2182 (1982), the Supreme Court held that a plaintiff alleging contributory infringement must prove either that the "manufacturer or distributor intentionally induce[d] another to infringe a trademark," or that "it continue[d] to supply its product to one whom it kn[ew] or ha[d] reason to know [was] engaging in trademark infringement." *Inwood Labs*, 456 U.S. at 854; *see also Nomination di Antonio e Paolo Gensini S.N.C. v. H.E.R. Accessories Ltd.*, No. 07 Civ. 6959, 2009 WL 4857605, at *4 (S.D.N.Y. Dec. 14, 2009). The first prong of the *Inwood Labs* test is plainly inapplicable. As discussed above, there is no evidence that Amazon intentionally induced Cutting Edge to purchase the keywords or advertisements from Google and ample proof that it did not. (*See* citations at 56.1 Stmt. ¶¶ 27, 39, 42, 43 and at pp. 6-9 above.)

With respect to the second prong, Amazon did not supply any product at all to Cutting Edge. At most, Amazon supplied a service – participation in the Associates Program. As Judge Batts noted in *Nomination*, the courts have "struggled" to make clear how, if at all, the contributory liability doctrine of *Inwood Labs* extends to defendants who do not manufacture or distribute the product that is alleged to have infringed the plaintiff's mark. *Nomination*, 2009

WL 4857605, at *5. Many courts in this district have resolved the issue by following *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999), which held that:

> when measuring and weighing a fact pattern in the contributory infringement context without the convenient "product" mold dealt with in *Inwood Lab.*, we consider the extent of control exercised by the defendant over the third party's means of infringement. … Direct control and monitoring of the instrumentality used by a third party to infringe the plaintiff's mark permits the expansion of *Inwood Lab.*'s "supplies a product" requirement for contributory infringement.

Id. at 984; *see also Nomination*, 2009 WL 4857605, at *5; *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 104-05 (2d Cir. 2010) (same); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 416 n.14 (S.D.N.Y. 2001) (same). Applying the *Lockheed* approach, Amazon cannot be held liable. Just as Amazon did not induce Cutting Edge to purchase the keywords or ads, it did not participate in – let alone control or direct – the creation, distribution, or promotion of the ads. (*See* citations at 56.1 Stmt. ¶¶ 13, 15, 27, 39, 42, 43 and at pp. 4-9 above.) There is no evidence to the contrary.

Both *Nomination* and *Fare Deals* are on point. In *Nomination*, the direct infringers made counterfeit jewelry. Plaintiffs also sued various entertainment and media companies (the "Licensor Defendants") that had licensed to the direct infringers their rights in famous characters (such as Popeye and Betty Boop) that were depicted in the infringing items. 2009 WL 4857605, at *1. Finding no evidence that they had manufactured, distributed, or otherwise exercised direct control over the counterfeit jewelry, the court concluded that the Licensor Defendants were not liable. In particular, while noting that the plaintiffs had alleged that the Licensor Defendants "carefully control and monitor the licensing *of their respective intellectual property*," *id.* at *6 (emphasis in original), the court held that this was insufficient: "That Licensor Defendants monitor and control the licensing of their own mark, however, does not entail that they also monitor and control the manufacture and distribution of the counterfeit bracelets produced by [the direct infringers]." *Id.*

Here, Amazon allows its Associates limited use of the amazon.com mark to establish links to the Amazon site on the Associates' own sites, but it does not follow, and it is not true, that Amazon monitors or controls the content of the Associates' sites, or the content of the ads they might purchase. As in *Nomination*, Amazon may monitor and control the licensing of its *own* mark, but it does not monitor or control what three million Associates put up on their own Internet sites and advertisements. (*See* citations at 56.1 Stmt. ¶¶ 13, 15, and at p. 4 above.)

Fare Deals, on which *Nomination* relies, is even more directly analogous to this case. HRN had allowed the direct infringer to use the HRN mark for the purpose of establishing a link to the HRN site on the allegedly infringing Fare Deals site. HRN did not control the operations of the Fare Deals site nor did it steer customers to that site. *Fare Deals*, 180 F. Supp. 2d at 689-90. The mere licensing of its own mark, the court held, did not give rise to liability because "a licensor of a mark does not ordinarily have a duty to prevent a licensee's misuse of another party's mark." *Id*. (citing *Mini Maid Servs. Co. v. Maid Brigade Sys., Inc.*, 967 F.2d 1516, 1520 (11th Cir.1992) ("[To hold otherwise] would impose responsibility upon a [licensor] not for failing to maintain the integrity of its own trademark, but for failing to prevent another entity's violation of the law.")). Likewise here, Amazon neither controlled the creation, content, or maintenance of the Cutting Edge Ads and it took no steps of any kind to steer customers to those ads. Again, there is no contrary evidence of any kind.

There can be no liability under the second prong of the *Inwood Labs* test for yet another reason. Amazon did not "continue[] to supply" its service to Cutting Edge once it became aware of the ads. *See Inwood Labs*, 456 U.S. at 854. Amazon demanded that Cutting Edge discontinue the ads and when Cutting Edge failed to comply, it terminated Cutting Edge as an Associate – thereby terminating its right to use the Amazon mark to link to the Amazon site, the only service Amazon was providing to Cutting Edge. Amazon even alerted Google to the ads in the hope that Google would stop providing services to Cutting Edge, i.e., that it would take down the Cutting Edge Ads. (*See* citations at 56.1 Stmt. ¶¶ 39, 42, 43 and at pp. 8-9 above.)

Sellify has suggested that Amazon could have removed the ads from the Internet itself, but there is no evidence that Amazon had the authority or ability to take down ads hosted and displayed by Google; the evidence, in fact, is to the contrary. (Mirza Dec. ¶ 5; Mirza 58:7-9; Landau 57:12-58:14.) Sellify has also suggested that Amazon should have screened all customer web sessions initiated on the Amazon site to filter out and divert those that came from Cutting Edge. There is, however, clear, unopposed evidence that taking such an approach to improper advertisements and links would not have been reasonable.

As Sellify's expert agreed, for an Internet retailer like Amazon, the speed with which web pages load in the customer's browser is vitally important. (Landau 65:19-24; *see also* Mirza Dec. ¶ 12; Mirza 27:1-12.) As Sellify's expert agreed, screening each of the hundreds of millions of web sessions initiated on the Amazon site each day, looking for the sessions that originated from the Cutting Edge Ads (a total of 61 over five months (Abbott Dec. Ex. A)), could slow down page delivery – increasing what is called "latency." (Landau 63:16-65:18; *see also* Mirza Dec. ¶¶ 6, 11; Mirza 46:11-23, 48:12-18.)

Even more fundamentally, Amazon takes enforcement steps against Associates thousands of times a year. (Tarpey Dec. ¶¶ 13-14; Tarpey 8:18-23.) In May and June 2009, enforcement steps were taken against some 150 Associates just with respect to the improper purchase of keywords. (Tarpey 33:1-7.) Applying a "filtering" approach to deal with every inappropriate Associate advertisement or link would unquestionably have a negative impact on latency. (Mirza Dec. ¶ 14; Mirza 50:3-51:4.) Once again, Sellify's expert agrees. (Landau 66:17-67:6.)

In light of the latency problem, Amazon uses a "filtering" approach only to screen for the most profound threats to the entire system – those threats that could literally make the Amazon website unavailable – and it does *not* use such an approach for individual problems without a systemic impact. (Mirza Dec. ¶¶ 8-14; Mirza 25:17-26:2, 28:22-29:2, 46:11-23, 47:9-19.) Requests to set up such a filter for more limited problems, even if they come from within Amazon, are routinely turned down; the mechanism is reserved to defeat the actions of hackers trying to take down the Amazon website. (Mirza Dec. ¶ 16; Mirza 55:4-23.)

To address inappropriate links to its website created by Associates, Amazon removes the economic incentive for such links by closing the Associate's account and refusing to pay advertising fees. Sellify's expert agreed this was a reasonable approach. (Landau 69:17-21.) He could *not* opine that *any* Internet retailer uses a "filtering" approach to address inappropriate links to its website, let alone that such an approach was an industry standard, nor could he even opine that such an approach would be commercially reasonable. (*Id*. 56:22-57:11, 69:22-71:13.)

*   *   *

Amazon did not buy the keywords or place the ads, either itself or through Cutting Edge, it did not induce Cutting Edge to do so, and it did not monitor or control the ads, of which it was unaware until Sellify complained. When it became aware, its actions were to try to get Cutting Edge to take down the ads, to terminate Cutting Edge and withhold advertising fees when it did not comply, and to notify Google of the allegedly infringing ads, a step Sellify itself chose not to take. On these undisputed facts, there is no basis for liability under the Lanham Act.

II. THERE ARE NO FACTS THAT WOULD SUPPORT A FINDING OF LIABILITY AGAINST AMAZON UNDER STATE LAW

Sellify's state-law claims – violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), unfair competition, and defamation/trade libel – all require proof that Amazon itself placed the Cutting Edge Ads or that Cutting Edge did so in its capacity as Amazon's agent. *See Conaway v. 84 Forest, LLC*, Nos. CVH 6091, H-1180, 1999 WL 1076141, at *4 (Conn. Super. Nov. 22, 1999) (respondeat superior liability under CUTPA requires that wrongdoer was defendant's agent, acting with actual authority); *Larsen Chelsey Realty Co. v. Larsen*, 656 A.2d 1009, 1022, 1024 (Conn. 1995) (company's liability for unfair competition predicated on agency relationship with wrongdoer); *Oparaji v. Atl. Container Line*, No. 07 Civ. 2124, 2008 WL 4054412, at *11 (S.D.N.Y. Aug. 28, 2008) (where defendants themselves did not defame plaintiff, "any liability imputed to defendants must be predicated on the existence of an agency between defendants and the authors" of the defamatory material). Not surprisingly, Sellify bases its state-law claims on the same allegation of agency on which its Lanham Act claim was premised. (*See* Cplt. ¶¶ 90, 91, 101, 102, 109.)

As discussed in detail above (*see* Point I(B)), there is no evidence that Cutting Edge acted as Amazon's agent in purchasing the keywords or placing the ads. There is extensive testimonial and documentary evidence that neither Cutting Edge nor any of the more than three million Amazon Associates acts as the company's agent in any capacity. On these facts, Cutting Edge cannot prevail on any of its state-law causes of action.

III. SELLIFY'S DAMAGES CLAIM IS WHOLLY SPECULATIVE

To prevail on any theory, Sellify would have to prove that the Cutting Edge Ads caused the injury it claims to have suffered. In addition, Sellify would have to establish the amount of its damages with competent evidence, and with reasonable certainty. A damages claim based on nothing but speculation does not suffice. *See, e.g., 24/7 Records, Inc. v. Sony Music Entm't, Inc.*, 566 F. Supp. 2d 305, 316 (S.D.N.Y. 2008) ("[d]amages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes") (citation omitted); *Life Indus. Corp. v. Ocean Bio-Chem, Inc.*, 827 F. Supp. 926, 933 (E.D.N.Y. 1993) ("[A]ctual damages will only be awarded where [plaintiff] successfully shows (1) causation and (2) the amount of damages suffered . . . .").

In fact, Sellify simply *assumes* that the Cutting Edge Ads cost it money, and its calculation of how much money is simply made up. Sellify's damages analysis – unsupported by any expert testimony – ignores the compelling evidence that the ads had little or no impact, and ignores *every* factor *other* than the ads that would account for the company's decreased profits. Its analysis also assumes, without evidence, that although the ads (which appeared for only five months) were seldom seen by anyone, they destroyed Sellify's business *in perpetuity*. And it posits, again without support, that the proper measure of damages is nine times the difference between Sellify's 2009 and OneQuality LLC's 2007 net income. Sellify's damages claim rests wholly on speculation – speculation that would be insufficient to survive summary judgment even if Sellify's liability claims were otherwise viable.

A. Sellify Cannot Prove That the Cutting Edge Ads Caused It Any Injury

In its entirety, Sellify's damages analysis consists of the following chart, in which it subtracts its 2009 estimated profits from the LLC's 2007 profits and multiplies the difference by nine, generating a damage claim of $2,404,629:

[redacted]			[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
		[redacted]	

(Wang Dec. Ex. B; *see* Maki 85:21-86:11.)

Sellify did not offer any evidence from any source that any potential customer chose not to buy from Sellify because he or she had seen the Cutting Edge Ads. Sellify just treated the causal relationship between the ads and the decline in its profits as a given. That is speculation. *See MapInfo Corp. v. Spatial Eng'g Consultants*, No. 02-CV-1008, 2006 WL 2811816, at *4-5, 10-11 (N.D.N.Y. Sept. 28, 2006) (granting summary judgment on Lanham Act claim where counterclaim plaintiff could show that it had lost customers but had no evidence that the loss of any customer was due to the alleged disparagement).

To be sure, there is no justification for assuming that the ads caused the profit decline. Profits fell by 50% between 2006 and 2007, long before the ads appeared. (Wang Dec. Ex. B.) At the end of 2007, Adrian Meli shut the business down and OneQuality had virtually no presence on the Internet throughout 2008. When he started up again in 2009, Christopher Maki had less inventory, no partners, and no employees, and he did nothing in particular to re-launch the brand. (Maki 45:22-46:8, 59:15-60:3, 95:8-10, 97:10-18, 105:22-106:8, 120:22-121:3, 127:18-23, 129:13-17.) On these facts, the assumption that 2009 profits should have matched 2007 is not only speculative, it is contrary to common sense.

Likewise, given how infrequently the ads were seen, the assumption that they were the cause – let alone the sole cause – of the fall in profits is unwarranted. Customers who found

OneQuality by searching on Google or elsewhere for a particular product (rather than for "onequality.com" *per se*), or found OneQuality by looking on eBay, or by searching for onequality.com on Yahoo! or any search engine other than Google, or by searching before March or after August 2009, would not have seen the ads. (*Id*. 74:24-75:8, 75:23-76:6, 136:17-21, 216:25-217:7, 220:15-19, 222:2-223:11, 226:3-19.) While at least 45,958 people visited the onequality.com website in 2009,[9] and it is likely that more than 19,000 others visited the OneQuality eBay store,[10] only 1069 people ever saw the Cutting Edge Ads (and only 61 of them clicked on the ads). (Wang Dec. Ex. E; Abbott Dec. Ex. A.) Once again, on these facts, there is no basis for Sellify – and there would be no basis for the jury – to assume that the ads caused the profit decline, and Sellify has offered no evidence to prove the connection.[11] *See Life Indus. Corp.*, 827 F. Supp. at 933 (rejecting claim for lost profits because plaintiff produced no evidence of causation).

B. <u>Sellify Cannot Prove the Amount of Its Damages With Reasonable Certainty</u>

Even if one were to *assume*, like Sellify, that the Cutting Edge ads had some effect on Sellify's 2009 profits, Sellify has come forward with nothing from which the jury could make a rational calculation of the amount of damages. To begin with, in light of the factors discussed

[9] This number is actually understated because Sellify did not provide data for January or February. (Wang Dec. Ex. E.)

[10] The precise number of eBay visitors is unknown because Sellify did not provide the data. However, eBay sales from March through December 2009 were 41.9% of website sales. (Wang Dec. Ex. G Sched. 1.) Assuming the ratio of purchases to site visits is the same on both platforms, there would have been 19,256 visitors to the eBay store during that period.

[11] To be precise, Sellify is *assuming* that even though approximately 65,000 people visited its sites in 2009 (more if January and February are included), the fact that 1069 people saw the ads caused an [redacted]% drop in profits.

above, there is nothing on which to base a determination of how much Sellify would have sold, but for the Cutting Edge Ads, from March to August 2009. Beyond that, Sellify has offered no evidence from which a rational conclusion could be drawn as to how much might be lost in sales from August 2009 forward as a result of any lingering effect the ads might have.

Sellify's damages analysis is predicated on the proposition that the ads would affect Sellify's profitability *forever* (Maki 207:7-10, 214:12-19, 237:20-23), but that is pure speculation unsupported by any evidence at all. In fact, the number of visitors to onequality.com rose from 3,090 in March 2009 to 8,489 in March 2010 (Wang Dec. Ex. E), and Sellify was unable to find any Internet posting that copied or referred to the Cutting Edge Ads or any other evidence that the ads had gone "viral," as Christopher Maki speculated. (Maki 155:7-16, 162:6-11.)

All Sellify could point to was a single inquiry on a Yahoo! questions and answers page about investing from someone who was thinking of buying a camcorder from onequality.com but did not know the site. He asked if it could be trusted. (Wang Dec. Ex. F) The question did not refer to the ads, or otherwise suggest that onequality.com could *not* be trusted, and there was no response to the inquiry from anyone, let alone a response referencing the ads or stating that OneQuality was not trustworthy. (*Id.*) This mere inquiry is hardly evidence that the Cutting Edge Ads have gone viral, or that they will have a continuing impact in the future. *Cf. Real World News Project, Inc. v. Independent World Television, Inc.*, No. 06 Civ. 4322, 2009 WL 2229830, at *17 (S.D.N.Y. May 27, 2008) ("[m]ere inquiries about the relationship between an owner of a mark and an alleged infringer do not amount to actual confusion as such inquiries are arguably premised upon a lack of confusion between the products such as to inspire the inquiry itself") (citations omitted). On eBay, not only is there no evidence of ongoing reputational injury, the positive feedback rate for the OneQuality-Store is 100%. (*See* http://myworld.ebay.com/onequality-store/; Cplt. ¶ 19.)

Finally, Sellify assumes that the proper way to quantify its damages is, first, as discussed above, to assume that the entire decline in profits from 2007 to 2009 is attributable to Cutting Edge, and second, to multiply that decline by nine. Sellify offers no justification for the magnitude of the multiple except that Amazon, a company with $24.5 billion in sales, is valued at a greater multiple of earnings. (Maki 180:7-13.) That is a *non sequitur*. The absurdity of the figure thus generated – $2,404,629 – is perhaps best illustrated by assuming – without evidence – that nobody who saw the ads made a purchase from Sellify, and further assuming – again without evidence – that those who saw the ads would otherwise have purchased in the same proportion as those who visited the onequality.com website. Giving Sellify the benefit of both assumptions, its additional profits would have been approximately $1,300. (Wang Dec. Ex. G at 11-12.)[12]

In sum, other than stating that 2009 profits were below 2007 and then (a) assuming that the Cutting Edge Ads were the sole source of the profit decline, despite the fact that OneQuality was virtually gone from the Internet in 2008, and despite the fact that only a tiny fraction of potential customers ever saw the ads; (b) assuming that the ads, which only 1069 people saw and which were removed after five months, would have a permanent and non-diminishing effect on Sellify's reputation and sales; and (c) assuming that the proper measure of the impact of those ads is the 2007-2009 profit decline times nine, Sellify has offered no evidence or analysis on

[12] If one looks to the profit to the wrongdoer as another reality check on Sellify's analysis, the results are the same. Cutting Edge earned (ignoring the withholding of fees by Amazon) $242.91 in advertising fees from the ads. (Tarpey Dec. Ex. G.)

damages at all. It has, therefore, failed come forward with facts from which it can prove that the ads caused it any injury, or from which it can prove the amount of its damages with the requisite reasonable certainty. *See Dockery v. Tucker*, No. 97-CV-3584, 2006 WL 5893295, at *26 (E.D.N.Y. Sept. 6, 2006) (summary judgment proper where plaintiff failed to consider all the other factors that might have affected its business; "no rational fact-finder could calculate with 'reasonable certainty' the profits that would be owed to plaintiff as a result of any wrongful conduct by defendants").[13] Separate and apart from its inability to prove liability, Sellify's inability to prove damages warrants summary judgment dismissing the Complaint.

CONCLUSION

For the reasons stated above, the Court should grant Amazon's motion for summary judgment dismissing the Complaint in its entirety.

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Respectfully submitted,

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[13] While Sellify offered no expert testimony on damages, Amazon has submitted a report from an expert in financial and damage analysis. (Wang Dec. Ex. G.) The expert critiques Sellify's approach to damages and concludes that "I do not believe that the Plaintiff has been able to establish any damages at all, let alone quantify those damages in a reasonable manner." (*Id.* at 13.)