

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SELLIFY LLC,	:
	:
Plaintiff,	:
	:
- against -	:
	:
AMAZON.COM, INC.,	:
	:
Defendant.	:
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09 Civ. 10268 (JSR)  
ECF Case

**DEFENDANT AMAZON.COM, INC.’S STATEMENT  
PURSUANT TO LOCAL RULE 56.1<sup>1</sup>**

Pursuant to Southern District of New York Local Civil Rule 56.1, defendant Amazon.com, Inc. (“Amazon”) respectfully submits the following statement of material facts as to which there is no genuine issue to be tried.

1. Christopher Maki, the president and sole proprietor of Sellify, graduated college in 2002. He attended one year of law school but dropped out to buy used camcorders and other electronics on Craigslist and eBay, and then resell them on eBay. (Maki 8:17-19, 9:4-5, 14:13-15:16, 16:12-13, 20:16-21, 44:12-14.)

2. At some point, Maki joined with Adrian Meli and Meli’s fiancée, Jennifer O’Connor, to create OneQuality LLC (the “LLC”). (Maki 17:23-24, 26:12-20, 29:19-30:3, 33:6-25, 44:15-20.)

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<sup>1</sup> 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.”

3. 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. (Maki 35:24-36:4, 42:23-43:13; Cplt. ¶¶ 11-12, 14-16.)<sup>2</sup>

4. The LLC earned profits of \$638,935 in 2006 but only \$317,181 in 2007. (Wang Dec. Ex. B.)

5. In late 2007, Meli, who was in control, decided to shut down the business. (Maki 95:8-10.)

6. 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. (Maki 59:15-3, 97:10-18; Wang Dec. Ex. B.)

7. 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.)

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. (Maki 116:12-24.)

9. Maki did not do anything in particular to re-launch the brand after its minimal presence throughout 2008. (Maki 127:18-23.)

10. Maki had less inventory in 2009 than the LLC had had in 2007, and

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<sup>2</sup> The First Amended Complaint ("Cplt.") is annexed as Ex. A to the Wang Dec.

whereas the LLC had used five, or possibly as many as nine employees, Maki worked alone until the end of the year, when he hired one employee. (Maki 45:22-46:8, 129:13-17, 120:22-121:3.)

11. Maki estimates that Sellify's 2009 profits were approximately [REDACTED]. (Maki 115:9-17; Wang Dec. Ex. B.)

12. 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](http://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.)

13. Amazon does not monitor the content of Associates' websites. (Cotter Dec. ¶ 9; Tarpey 14:1-6.)

14. Amazon 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.)

15. The Associates Program Operating Agreement, which is binding on all Associates, 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. The Operating Agreement also expressly states that Associates are not Amazon's agents and that they may not represent otherwise. (Cotter Dec. ¶¶ 5, 8; Tarpey Dec. ¶ 4 & Ex. A ¶¶ 2(c), 2(h), 5, 16.)

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.)

17. Amazon takes enforcement steps against approximately 50 to 75 Associates each week (more than 3000 a year). (Tarpey Dec. ¶¶ 13-14; Tarpey 8:18-23.)

18. 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.)

19. Terminating the Associate's account and withholding advertising fees would destroy the economic incentive for the Associate's misconduct, so in many cases, threatening these steps resolves the problem. If not, Amazon terminates the account and does not pay the accrued fees. (Tarpey Dec. ¶ 14; Tarpey 30:9-20.)

20. Until May 1, 2009, Associates 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.)

21. 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.)

22. All Associates received notice of the policy change from an April 6, 2009 email and from a posting to the Associates Blog. (Tarpey Dec. ¶ 9 & Exs. C, D; Tarpey 52:7-15, 53:14-16.)

23. Some Associates (including Cutting Edge Designs) received a second notice on April 27. (Tarpey Dec. ¶ 9 & Ex. E.)

24. 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.)

25. In March 2009, an Amazon Associate called Cutting Edge Designs bought the keyword “onequality.com,” and several close variants, from Google. (Cplt. ¶¶ 40, 46; Sheehan Dec. ¶ 4; Tarpey Dec. ¶ 6; Abbott Dec. Ex. A.)

26. 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.)

27. 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.)

28. 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. (Maki 153:4-10; Landau 58:3-21.)

29. 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.)

30. 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.)

31. 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.)

32. 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.)

33. 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.)

34. Sellify's concern – the allegedly disparaging content of an ad displayed as the result of an allegedly infringing keyword purchase from Google – had nothing to do with third party sales on the Amazon site and did involve anything related in any way to Seller Central. (Tarpey Dec. ¶ 15.)

35. The same day Maki contacted Seller Central he contacted his own lawyer

about the Cutting Edge Ads. (Maki 149:6-10, 150:22-151:4.)

36. Sellify's lawyer did not 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.)

37. 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.)

38. Amazon had no authority or ability to remove the Cutting Edge Ads from the Internet. (Mirza Dec. ¶ 5; Mirza 58:7-9; Landau 57:12-58:14.)

39. Tarpey immediately wrote to Cutting Edge, informing them that onequality.com (i.e., Sellify) had contacted Amazon complaining about Cutting Edge's 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.)

40. 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.)

41. From this letter, Amazon learned that Cutting Edge had not stopped purchasing keywords from Google or running the Cutting Edge Ads. (Sheehan Dec. ¶ 2.)

42. 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.)

43. In addition, 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.)

44. The Cutting Edge Ads ceased appearing in August 2009. (Maki 134:14-20.)

45. 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; Mirza Dec. ¶ 12; Mirza 27:1-12.)

46. Screening each of the hundreds of millions of web sessions initiated on the Amazon site each day, looking for sessions that originated from the Cutting Edge Ads, could slow down page delivery – increasing what is called “latency.” (Landau 63:16-65:18; Mirza Dec. ¶¶ 6, 11; Mirza 46:11-23, 48:12-18.)

47. 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; Landau 66:17-67:6.)

48. 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.)

49. 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. ¶ 15; Mirza 55:4-23.)

50. To calculate its damages, Sellify subtracted its 2009 estimated profits from OneQuality LLC's 2007 profits and multiplied by nine, generating the number \$2,404,629. (Wang Dec. Ex. B; Maki 85:21-86:11.)

51. This calculation assumed that, but for the Cutting Edge Ads, Sellify's 2009 profits would have been the same as the LLC's 2007 profits – i.e., that every dollar in the profit decline was attributable to the ads – and that these “lost profits” should be multiplied by nine to determine Sellify's damages. (Maki 197:9-20, 230:15-23.)

52. 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.)

53. OneQuality LLC's profits fell by 50% between 2006 and 2007. (Wang Dec. Ex. B.)

54. Only Internet users who searched for onequality.com (or a couple of close variants) on Google between March and August 2009 were shown the Cutting Edge Ads. Users 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, users who typed the URL onequality.com directly into their browsers did not see the ads, users who used any search engine other than Google did not see the ads, users who found the OneQuality-Store by searching on

eBay did not see the ads (the majority of the LLC's 2007 sales were through eBay), and, even those who searched the purchased keywords on Google did not see the ads if they did so before March or after August. (Maki 74:24-75:8, 75:23-76:6, 93:7-13, 136:17-21, 216:25-217:7, 220:15-19, 222:2-223:11, 226:3-19.)

55. 45,958 people visited the onequality.com website from March to December 2009. (Wang Dec. Ex. E.)

56. The precise number visitors to OneQuality's eBay store in 2009 is unknown because Sellify did not provide the data. However, sales through the eBay store from March through December 2009 were 41.9% of website sales. 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. (Wang Dec. Exs. E, G Sched.1.)

57. The Cutting Edge Ads were viewed only 1069 times and clicked on only 61 times. (Abbott Dec. Ex. A.)

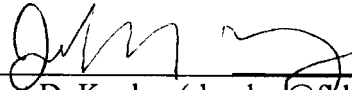
58. The number of visitors to onequality.com (which rose even while the ads were being shown) rose from 3,090 in March 2009 to 8,489 in March 2010. (Wang Dec. Ex. E.)

59. On eBay, the positive feedback rate for the OneQuality-Store is 100%.

(See <http://myworld.ebay.com/onequality-store/>; Cplt. ¶ 19.)

Dated: New York, New York  
July 1, 2010

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