EXHIBIT E

TO THE

DECLARATION OF

ROBERT D. KAPLAN

(LANDAU DEPOSITION TRANSCRIPT EXCERPTS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SELLIFY LLC,

                        Plaintiff,

              -against-   No. 09 CV
                                           10268 (JSR)

AMAZON.COM, INC.,

                        Defendant.

                        May 24, 2010
                        10:00 a.m.

Videotaped deposition of NATHANIEL LANDAU, taken

by Defendant, pursuant to Notice, held at the

offices of Friedman Kaplan Seiler & Adelman LLP,

1633 Broadway, New York, New York, before Joseph R.

Danyo, a Shorthand Reporter and Notary Public

within and for the State of New York.

HUDSON REPORTING & VIDEO, INC.

124 West 30th Street, 2nd Fl.

New York, New York 10001

Tel: 212-273-9911 Fax: 212-273-9915

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 2 A P P E A R A N C E S :
 3
       SMITH DEHN LLP
 4   Attorneys for Plaintiff
          381 Park Avenue South
 5   Suite 713
          New York, New York 10016
 6
       By: FRANCIS X. DEHN, ESQ.
 7
 8
       FRIEDMAN KAPLAN SEILER & ADELMAN LLP
 9   Attorneys for Defendant
          1633 Broadway
10   New York, New York 10019-6708
11   By: ROBERT KAPLAN, ESQ.
12
13
    Also Present:
14
       HENRY MARTE,
15   Videographer
16
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 1
 2   THE VIDEOGRAPHER: This marks the
 3 beginning of videotape number one in the
 4 videotaped deposition of Mr. Nathaniel
 5 Landau in the matter of Sellify LLC versus
 6 Amazon.com filed in the United States
 7 District Court for the Southern District
 8 of New York.
 9   This deposition is being held at
10 Friedman Kaplan Seiler & Adelman, 1633
11 Broadway, New York, New York on Monday,
12 May 24, 2010 at approximately 10 a.m. The
13 court reporter is Joe Danyo. The
14 videographer is Henry Marte. We are both
15 here on behalf of Hudson Reporting &
16 Video.
17   Would counsel please identify
18 themselves for the record.
19   MR. DEHN: Frank Dehn, Smith Dean
20 LLP, for the plaintiff.
21   MR. KAPLAN: Robert Kaplan, Friedman
22 Kaplan Seiler & Adelman, for the
23 defendant.
24   THE VIDEOGRAPHER: The time is 10:01
25 a.m. We are going off the record.

 1
 2   IT IS HEREBY STIPULATED AND AGREED, by and
 3 between the attorneys for the respective parties
 4 hereto, that the sealing and filing of the within
 5 deposition be, and the same hereby are, waived;
 6 and that the transcript may be signed before any
 7 Notary Public with the same force and effect as
 8 if signed before the Court.
 9   IT IS FURTHER STIPULATED AND AGREED that
10 all objections, except as to the form of the
11 question, shall be reserved to the time of trial.
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 1   Landau
 2   (Discussion off the record)
 3   THE VIDEOGRAPHER: The time is 10:01
 4 a.m. We are going back on the record.
 5 N A T H A N I E L   L A N D A U, having been
 6 first duly sworn by Joseph R. Danyo, a Notary
 7 Public for the State of New York, was examined
 8 and testified as follows:
 9 EXAMINATION BY MR. KAPLAN:
10   Q. Good morning, Mr. Landau. My name is
11 Bob Kaplan. I represent Amazon.com in this
12 lawsuit. I am going to be asking you some
13 questions this morning about the expert report
14 that you had submitted in this case. If there is
15 anything I ask you that you don't understand my
16 question, just please ask me to clarify and I
17 will be happy to do that. If you answer, I will
18 assume that you have understood my question. Is
19 that okay?
20   A. Yes.
21   Q. Thanks. I would like to start by
22 getting your educational background. Can you
23 tell me where you went to college?
24   A. Sure. I went to Vassar College and I
25 graduated in 1996.

Landau

1 Landau
2   A. I haven't thought about that
3 eventuality. That would be significantly
4 trickier and may or may not be possible.
5   Q. So that is not what you mean when you
6 say that a filtration mechanism would enable it
7 to determine whether a link originated from a
8 particular source. If I understand you
9 correctly, you mean that if someone clicked
10 through?
11   A. Correct.
12   Q. You would then know that that traffic
13 came from a particular link?
14   A. That's correct.
15   Q. Can you just describe what that
16 mechanism would do that you are suggesting is
17 possible?
18   A. Certainly. You could look within a
19 URL for a particular term or set of terms which
20 in this case would be the affiliate ID. You
21 could couple that with refer information to know
22 that it came from say Google, although you
23 wouldn't necessarily need to do that to be able
24 to satisfy Mr. Dehn's client's requests, and once
25 you found that piece of information, which is the

1 Landau
2 affiliate ID in that URL, Amazon servers could
3 create any number of effects to put either a
4 different web page or different messaging in
5 front of the consumer who clicked on that link.
6   Q. So what would happen is if you
7 clicked on that link, even though the URL said
8 www.Amazon.com you would be taken to some other
9 page selected by Amazon, is that right?
10   A. Correct. It would still be -- my
11 guess is that it would still be an Amazon.com.
12 Yes. It is not for me to say what they would do.
13   Q. Now that paragraph also says that it
14 is your opinion that Amazon either has or should
15 be able to implement a filtration system. Is it
16 your opinion that Amazon already has such a
17 mechanism?
18   A. No.
19   Q. So what do you mean when you say that
20 either they have it or they should be able to
21 implement it?
22   A. I don't know if they do or not, so
23 they might very well have it. I don't know. If
24 they don't have it, they could certainly build
25 it.

1 Landau
2   Q. Have you ever created such a
3 filtration mechanism?
4   A. I have. It is not exactly the same,
5 because I have not managed affiliate programs
6 before, but I have created many products that
7 have parsed pieces of URLs and then created some
8 customized experience based on data that is in
9 that URL.
10   Q. So you have created mechanisms that
11 make use of information in the URL for business
12 purposes unrelated to severing a link or
13 suppressing an advertisement?
14   A. Correct.
15   Q. Now am I right that there are other
16 companies out there besides Amazon.com that have
17 advertising affiliates?
18   A. I believe that is true.
19   Q. Do you know any companies that do
20 that?
21   A. Off the top of my head, no.
22   Q. Are you aware of any companies at all
23 that use the type of filtration mechanism that
24 you describe for the purpose of addressing
25 inappropriate advertisements or links?

1 Landau
2   A. No.
3   Q. Do you know if any such company does
4 that?
5   A. No.
6   Q. So it is not part of your opinion
7 that such a filtration mechanism is the standard
8 in the industry for addressing inappropriate
9 links to a company's website?
10   A. That's correct. I'm not an expert in
11 this.
12   Q. Now you said that Amazon could
13 develop this mechanism that would cause someone
14 who clicks on a sponsored advertisement to land
15 somewhere other than the ordinary Amazon page.
16 Just so I am clear, you are not saying that this
17 mechanism would cause the advertisement itself
18 not to appear, is that right?
19   A. That's correct.
20   Q. Who actually serves the advertisement
21 when the viewer sees it? Who is actually serving
22 that ad?
23   A. It could be in many places. In the
24 examples that I have seen it was on Google, which
25 means that Google and Google AdWords was serving

 1   Landau
 2   that ad.
 3   Q.   Let me ask the question more
 4   specifically. Let us assume that the person
 5   buying the ad bought it from Google, bought a
 6   keyword on Google, and when you typed a search
 7   using that keyword into Google, this sponsored ad
 8   comes back. In that set of facts, where would --
 9   who would be serving this sponsored ad?
10   A.   Google would be serving that
11   sponsored ad.
12   Q.   So is it correct that Google could
13   take that ad completely off the Internet?
14   A.   They certainly could.
15   Q.   They could just stop displaying that
16   ad?
17   A.   If they had reason to.
18   Q.   Yes. I am asking you as a technical
19   matter. It would certainly be possible for
20   Google to take that ad off the Internet?
21   A.   Yes.
22   Q.   Do you know if Sellify, the plaintiff
23   in this case, asked Google to stop displaying the
24   ad?
25   A.   I don't know.

 1   Landau
 2   Q.   Do you know if they contacted Google
 3   at all?
 4   A.   I don't know.
 5   Q.   Do you have any experience of asking
 6   Google to remove an advertisement or a link that
 7   you thought was inappropriate for some reason?
 8   A.   No.
 9   Q.   Do you have any experience asking
10   Google to remove an advertisement for any reason
11   at all?
12   A.   No.
13   Q.   Do you know what Google's policy is
14   if they receive such a request?
15   A.   I do not.
16   Q.   Do you know whether Google has a
17   policy with respect to advertisements, for
18   example, for counterfeit goods?
19   A.   I don't know.
20   Q.   Do you know if they have any policy
21   with respect to ads that disparage a competitor
22   if that is called to their attention?
23   A.   I'm not familiar with Google's
24   policies.
25   Q.   If someone purchased Zerve.com or

 1   Landau
 2   some variant thereof as a keyword on Google to
 3   display an ad that you thought was disparaging of
 4   Zerve, would you ask Google to stop displaying
 5   that ad?
 6   A.   Most likely.
 7   Q.   Would that be a reasonable thing to
 8   do in your opinion?
 9   A.   I believe it would.
10   Q.   Would it be a prudent thing to do in
11   your opinion?
12   A.   Absolutely.
13   Q.   If someone purchased a keyword on
14   Google to display an ad that disparaged Sellify,
15   the plaintiff in this case, do you think that it
16   would have been reasonable for Sellify to ask
17   Google to stop displaying that ad?
18   MR. DEHN: Bob, I have given you some
19   latitude, but I object to this question.
20   It has nothing to do with his opinion.
21   MR. KAPLAN: You can object.
22   A.   I personally do think that is
23   reasonable.
24   Q.   You think that would have been a
25   prudent thing to do?

 1   Landau
 2   A.   I do.
 3   Q.   It's an entity that buys the keyword
 4   that generates the ad in this situation, isn't
 5   that right?
 6   A.   Yes.
 7   Q.   The company that buys the ad could
 8   also cause it to be taken down, isn't that
 9   correct?
10   A.   Yes.
11   Q.   Do you know what company it was in
12   this case that purchased the Google ad that is at
13   issue?
14   A.   I do not.
15   Q.   Have you ever heard of a company
16   called Cutting Edge Designs?
17   A.   No.
18   Q.   Do you know whether at some point
19   Sellify learned that it was Cutting Edge that was
20   buying this advertisement?
21   A.   I don't know.
22   Q.   So I take it you don't know whether
23   Sellify ever asked Cutting Edge to take the ad
24   down?
25   A.   No.

 1   Landau
 2   Q. If someone purchased Zerve.com again
 3   as a keyword on Google that generated an ad that
 4   you thought disparaged Zerve and you knew who had
 5   purchased that ad, would you ask that company to
 6   take down the ad?
 7   A. Most likely.
 8   Q. Do you think that would be a
 9   reasonable and prudent thing to do?
10   A. I do.
11   Q. Do you know if there was any reason
12   why Sellify couldn't ask the company that
13   purchased the ad to take it down?
14   A. I don't know.
15   Q. Now in this situation that we have
16   all been discussing, which is where some entity
17   buys a Google keyword that generates an ad that
18   plaintiff believes is disparaging of its
19   business, if Google did in fact stop displaying
20   the ad, that would not have any impact on
21   Google's other customers or users, would it?
22   A. Not to my knowledge.
23   Q. It would have no impact on the
24   experience of someone who was running a Google
25   search for OneQuality.com other than the fact

 1   Landau
 2   that that offensive ad would not appear, is that
 3   correct?
 4   A. To my knowledge, that's correct.
 5   Q. And it would have no impact of any
 6   kind on the millions or billions of people
 7   running other Google searches?
 8   A. Correct.
 9   Q. Similarly, if Cutting Edge, the
10   company I will represent to you who bought this
11   ad, had taken it down, that would not have any
12   impact on the experience of someone running a
13   search for OneQuality.com except that the ad
14   would no longer appear, is that right?
15   A. I believe so.
16   Q. If Amazon created a filtration system
17   such as the one that you say is possible, any
18   time any Internet user clicked on any link to
19   Amazon.com, that session would have to run
20   through that filter, isn't that right?
21   A. That's correct.
22   Q. It is not just sessions originating
23   from the problematic ad, it is sessions that
24   originate anywhere on the Internet?
25   A. That is one way to build it. You

 1   Landau
 2   could also limit it to only sessions originating
 3   from Google, for example, but for it to be
 4   100 percent effective, it would need to be every
 5   link going to the Amazon site.
 6   Q. The whole point of the filter is to
 7   check all new Amazon web sessions as they are
 8   initiated to see if it comes from this improper
 9   source, is that correct?
10   A. That's correct.
11   Q. Do you have any sense of how many
12   sessions are initiated on Amazon every day?
13   A. I do not. I imagine it is billions,
14   but I don't know.
15   Q. And what percentage of those billions
16   do you think came from this Cutting Edge
17   advertisement?
18   A. An incredibly small percentage.
19   Q. But even though only an incredibly
20   small percentage of these billions of searches
21   originate from the offensive ad, all of the
22   searches would have to go through this filter?
23   A. That's correct.
24   Q. Now you have already, it is in your
25   report that you have no knowledge of Amazon's

 1   Landau
 2   Internet operations. But do you know whether
 3   running this filter mechanism on every web
 4   session might affect the speed with which an
 5   Amazon page is delivered to a user?
 6   A. It might.
 7   Q. Are you familiar with the term
 8   "latency"?
 9   A. Yes.
10   Q. Can you describe what latency is?
11   A. Latency is the amount of time that
12   transpires between a request being served and a
13   response to that request.
14   Q. So creating this filtering mechanism
15   as a solution to the problem of this single bad
16   advertisement might increase latency for all of
17   the billions of Amazon users, isn't that correct?
18   A. Yes.
19   Q. Based on your experience in Internet
20   commerce, would you agree that maximizing the
21   speed at which a page is delivered minimizing
22   latency is important to a web retailer like
23   Amazon?
24   A. Yes.
25   Q. Do you know whether the filtration

Landau

 1   Landau
 2 mechanism would have any other effect on Amazon's
 3 Internet operations?
 4   A. I don't know if it would, but it is
 5 possible that it would increase their need for
 6 new servers and possibly other databases as well.
 7 There is potentially a large capital outlay that
 8 they would need to have to support this.
 9   Q. Now do you have any estimate as to
10 how many links there are around the Internet to
11 Amazon?
12   A. I would never presume to estimate
13 that, but it is quite large.
14   Q. It would be many millions, would you
15 assume?
16   A. Yes.
17   Q. If among those many millions of links
18 if any other one was inappropriate for any reason
19 and you wanted to use this same mechanism, you
20 would have to create a filter with respect to
21 that link as well, isn't that right?
22   A. Yes.
23   Q. So, if you applied this same solution
24 to the problem of inappropriate links and there
25 are in fact among the many millions of links

 1   Landau
 2 others that are inappropriate, that would
 3 compound the latency problem even more, wouldn't
 4 it?
 5   A. Potentially. There are efficiencies
 6 of scale, but, yes.
 7   Q. Do you know whether Amazon became
 8 aware at some point of the content of this
 9 disputed advertisement?
10   A. I don't know.
11   Q. Do you know what steps, if any,
12 Amazon took with respect to the ad?
13   A. I believe that they disabled the
14 affiliate account in question.
15   Q. Let me back up for a second. A
16 company like Cutting Edge, which was the
17 affiliate here that generated the ad at issue,
18 why would they do that?
19   A. For them, it is a way to try to
20 increase their own sales by piggybacking off of
21 somebody else's brand.
22   Q. Let me see if I understand what that
23 means. The ad that was served when somebody
24 typed OneQuality or something like that was an ad
25 that said something like don't buy from scammers

 1   Landau
 2 and then had a link to Amazon.com. How is
 3 that -- why is that a useful thing for Cutting
 4 Edge to do from their point of view?
 5   A. In my opinion?
 6   Q. Yes.
 7   A. It is creating the impression that a
 8 legitimate business is in fact a scammer and that
 9 you should buy from this other company that is
10 not a scammer.
11   Q. How does that help Cutting Edge?
12   A. It helps them by incenting more
13 people to click on their affiliate link.
14   Q. How does that help them?
15   A. Because if somebody ends up
16 purchasing through that link, they would get paid
17 a commission as part of the Amazon affiliate
18 program.
19   Q. So in your opinion the motive for
20 doing this is to get people to click on the link,
21 buy something on Amazon, thereby generating a
22 commission?
23   A. Correct.
24   Q. Do you know whether Amazon told
25 Cutting Edge that it would cancel its account if

 1   Landau
 2 it didn't stop buying keywords on Google to
 3 create an ad with a link to Amazon?
 4   A. I don't have that information.
 5   Q. Do you know if Amazon told Cutting
 6 Edge it would not pay a commission for purchases
 7 made by clicking on that ad?
 8   A. No, I have no information about that.
 9   Q. Do you know whether they in fact
10 canceled Cutting Edge's account?
11   A. I believe I was told that they did,
12 but I don't know for certain.
13   Q. Do you know if they stopped paying
14 Cutting Edge for purchases that were made by
15 clicking on that ad?
16   A. I don't know.
17   Q. Would you agree that cutting off the
18 revenue stream from an inappropriate
19 advertisement is a reasonable approach to getting
20 the advertiser to stop doing it?
21   A. It seems to me that it would be.
22   Q. Now you have testified that it is
23 your opinion that it would be possible for Amazon
24 to create the type of filtration mechanism that
25 you describe. Am I correct that you have not

1   Landau
2   offered an opinion that such a mechanism is the
3   only way to address the problem?
4   A. Correct.
5   Q. And that you have not offered an
6   opinion that such a mechanism is the best way to
7   address the problem?
8   A. That is also correct.
9   Q. And that you have not offered an
10   opinion that such a mechanism would have no
11   impact on Amazon's other operations?
12   A. Correct.
13   Q. And you have not offered the opinion
14   that such a mechanism would have no other impact
15   on the experience of Amazon users?
16   A. Correct.
17   Q. And you have not offered an opinion
18   that such a mechanism would be cost-efficient?
19   A. That is also correct.
20   Q. You have not offered an opinion that
21   such a mechanism would be commercially reasonable
22   in these circumstances?
23   A. I don't know if it would be or not.
24   Q. And you have not offered an opinion
25   that such a mechanism is the industry standard

1
2   C E R T I F I C A T I O N
3
4   I, Joseph R. Danyo, a Shorthand
5   Reporter and Notary Public, within and for the
6   State of New York, do hereby certify:
7   That I reported the proceedings in
8   the within entitled matter, and that the within
9   transcript is a true record of such proceedings.
10   I further certify that I am not
11   related, by blood or marriage, to any of the
12   parties in this matter and that I am in no way
13   interested in the outcome of this matter.
14   IN WITNESS WHEREOF, I have hereunto
15   set my hand this 25th day of May, 2010.
16
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18
19   JOSEPH R. DANYO
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1   Landau
2   way to address this type of problem?
3   A. Correct.
4   Q. And you have not offered the opinion
5   that such a mechanism is used by other large
6   Internet retailers?
7   A. Correct.
8   Q. And, in fact, you haven't offered an
9   opinion that such a mechanism is used by any
10   business that you are aware of to address the
11   problem of an inappropriate link or
12   advertisement?
13   A. Correct.
14   MR. KAPLAN: I have no further
15   questions. Thank you.
16   THE VIDEOGRAPHER: This marks the end
17   of today's deposition. The time is 11:08
18   a.m. We are going off the record.
19   (Time noted: 11:08 a.m.)
20   _____
21
22   Subscribed and sworn to
23   before me this_____day of_____, 2010.
24   _____
25

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