

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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TABLE OF CONTENTS

<u>**TABLE OF AUTHORITIES**</u>

Page(s)

CASES

RULES

PRELIMINARY STATEMENT

Sellify concedes almost all of the facts on which Amazon's motion is based. For those it purports to dispute, it cites no evidence. (*See* Sellify Rule 56.1 Stmt. ¶¶ 1-2.) Sellify's opposition to summary judgment is not based on a *bona fide* fact dispute, but on its contention that, because Amazon is very big, and because it derives significant revenue from its Associates Program, it should be accountable for the content of the websites and ads of more than three million independent website operators it does not and cannot control.

It is undisputed that Amazon did not design, create, purchase, host, encourage, or otherwise have anything to do with the Cutting Edge Ads, of which it was unaware. It is undisputed that the ads violated the rules of the Associates Program, that Amazon demanded that Cutting Edge remove the ads when it learned of them, that Amazon terminated Cutting Edge as an Associate when Cutting Edge refused to comply, and that Amazon – unlike Sellify itself – notified Google, the entity that could take down the ads, of their existence. It is, in other words, indisputable that Amazon neither controlled nor condoned the conduct of Cutting Edge.

On these facts, there is no basis for a finding of liability against Amazon. The two most directly relevant authorities, *Nomination* and *Fare Deals*, so hold. Sellify has no response, except to urge the Court not to follow *Nomination* because it arose outside the Internet context. As to *Fare Deals*, on which *Nomination* relies, and which *is* an Internet case, Sellify is silent. Lacking any evidence that Amazon played any role at all in the creation of the offending ads, Sellify's opposition reduces to the proposition that an Internet retailer is liable for what is said on *any* website, whether it exercises control over that site or not, if the retailer allows that site to link to its own. That is not, nor should it be, the law.

Sellify's opposition also fails to cite any evidence from which a rational determination of damages could be made. In light of the undisputed evidence that the OneQuality brand was virtually absent from the Internet in 2008, and that only about 1000 people, compared to some 65,000 annual visitors to the OneQuality sites, ever saw the Cutting Edge Ads, Sellify has abandoned its own damage calculation: (2007 profits - 2009 profits) x 9. Instead, Sellify simply argues that the jury should decide the existence and extent of any damage. But the jury cannot assess damages without evidence from which it can do so rationally, and Sellify has offered none. Indeed, all it has done is to replace an unfounded and grossly speculative calculation with the equally unfounded and speculative assumption that the 1000 people who saw the Cutting Edge Ads might otherwise have bought $2000 camcorders from Sellify. There is no evidence in the record from which that conclusion – or *any* conclusion about lost sales – can be derived.

Finally, Sellify argues that, even in the absence of actual damages, it might be entitled to punitive damages under state law if it can prevail on the theory that Cutting Edge was Amazon's agent. It is settled, however, that where liability is imposed on a principal solely for the wrongful acts of an agent, the malice of the agent is not imputed to the principal. Punitive damages are *not* available against a principal based on misconduct of the agent that the principal neither directed, encouraged, nor condoned.

ARGUMENT

I. THERE IS NO EVIDENCE THAT WOULD SUPPORT A FINDING OF LIABILITY AGAINST AMAZON

A. Sellify Has Not Demonstrated the Existence of Any Material Fact Dispute

Of the 59 facts set forth in Amazon's Rule 56.1 Statement, Sellify admits 49. (Sellify Rule 56.1 Stmt. ¶ 1.) As to the remainder, in disregard of Rule 56.1, Sellify cites no evidence demonstrating an actual dispute. (Sellify Rule 56.1 Stmt. ¶ 2.) Having failed to set forth the grounds of its dispute with Amazon's Rule 56.1 Statement in correspondingly numbered paragraphs, with citations to supporting evidence, Sellify is deemed to have admitted the remaining ten contentions as well. S.D.N.Y. Local Rule 56.1(c). In any case, there is no evidence demonstrating a dispute as to the few facts Sellify claims to contest.

B. There Is No Evidence From Which a Jury Could Conclude That Cutting Edge Was Amazon's Agent or That Amazon Controlled Cutting Edge

Sellify argues that Amazon is very big, that its network of Associates is very big, and that affiliate advertising is important in the Internet age. None of that bears on the relevant questions – whether Cutting Edge acted as Amazon's agent, and whether Amazon controlled the actions of Cutting Edge.

The undisputed evidence shows that Amazon does not empower the three million participants in the Associates Program to bind the company, that those three million website operators do not run their sites for the primary benefit of Amazon, that the Associates Program Operating Agreement expressly states that Associates are not the company's agents and may not represent otherwise, and that Amazon cannot and does not control the content posted by millions of independent website operators. (*See* Amazon Mem. at 4.) With respect to Cutting Edge, there is no evidence that Amazon ever authorized Cutting Edge to act on its behalf, or that Amazon wrote, encouraged, or even knew of the Cutting Edge Ads. All of the evidence is to the contrary. When Amazon learned of the ads, it demanded that Cutting Edge take them down, it terminated Cutting Edge as an Associate when it did not do so, and it notified Google – which sold the ads and hosted them on its servers – of the existence of the Cutting Edge Ads. (*Id*. at 6-9.) On these facts, there is no basis for a conclusion that Cutting Edge was Amazon's agent or that Amazon controlled the actions of Cutting Edge, and therefore no basis for a finding of liability.

Sellify writes at length about various tools that Amazon makes available to Associates to make it easy for them to place links to the Amazon site on their own sites – online explanatory materials, customizable widgets with the appropriate computer code, "aStores," etc. The fact that Amazon helps its Associates set up the link to the Amazon website does not, however, translate into control of the content of the Associates' sites. Despite Sellify's rhetoric about Amazon's "unprecedented amount of control over its affiliates" (Sellify Mem. at 15), the fact remains that the Associates are millions of independent operators running their own websites for their own purposes. Amazon does *not* monitor or control the content of Associates' sites and there is no evidence of any kind demonstrating otherwise. Indeed, even the notion that Amazon would or could control three million independent websites (or that the websites' owners would permit that) is plainly absurd.

Moreover, with respect to Cutting Edge – the only Associate at issue – there is no evidence that Amazon provided any assistance of any kind, let alone that Amazon participated in the design or purchase of the Cutting Edge Ads. Sellify argues that Amazon makes customizable widgets and aStores available to Associates (*see* Maki. Dec. Exs. C and D), but this case is not about the content of an Amazon-designed widget or aStore. This is *not* a case in which Amazon wrote an allegedly defamatory ad, or encouraged someone else to do so. Amazon had nothing whatsoever to do with the design, content, or purchase of the Cutting Edge Ads, nor did it control any other aspect of Cutting Edge's conduct. There is no evidence to the contrary and that ends the inquiry in this case.[1]

[1] Needless to say, Sellify does not contend that any Amazon-designed widget or other tool ever contained any infringing or defamatory material, with respect to the marks and products of Sellify or anyone else.

Sellify cites no authority that would support a different conclusion. Sellify cites *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir. 2009), but there the Court held that Google might have infringement liability for selling plaintiff's mark as a keyword and encouraging advertisers to buy that keyword. Google sold the allegedly infringing keyword here too, but Sellify has not sued Google, and Amazon did *not* sell the keyword or encourage Cutting Edge to buy it. Sellify argues that, if Google could be liable for selling and encouraging the sale of a keyword that improperly uses a mark, then one who buys such a keyword "for nefarious purposes" must also be at fault. (Sellify Mem. at 13-14.) But the point here is that *Amazon* did not do that – Cutting Edge bought the keyword and designed the ads. *Rescuecom* does not suggest that a party that did not buy, sell, or use a keyword, and did not encourage its purchase, sale, or use, has any liability.

As discussed at length in Amazon's opening brief, both *Nomination di Antonio e Paolo Gensini S.N.C. v. H.E.R. Accessories Ltd.*, No. 07 Civ. 6959, 2009 WL 4857605 (S.D.N.Y. Dec. 14, 2009), and *Fare Deals, Ltd. v. World Choice Travel.com, Inc.*, 180 F. Supp. 2d 678 (D. Md. 2001), are on point. In *Nomination*, the infringers made counterfeit jewelry. The defendants, who had licensed their rights in cartoon characters to the infringers, but who played no role in the manufacture or distribution of the jewelry, had no liability for the infringers' misconduct. Likewise here, Amazon gave Cutting Edge (until it was terminated) limited use of the amazon.com mark, but it played no role in the design, purchase, or display of the Cutting Edge Ads.

Sellify argues that while *Nomination* was correctly decided, that is only so because the fact pattern in the case follows the "'old' model," as opposed to the "21st-century ad model." (Sellify Mem. at 17-18.) That cryptic formulation establishes no meaningful distinction between

Nomination and this case.[2] Moreover, *Nomination*, a 2009 opinion, relies on *Fare Deals*, which arose from precisely the Internet affiliate advertising context Sellify calls the 21st century model.

In *Fare Deals*, the defendant allowed the infringer to use defendant's mark to establish a link from the infringer's website to the defendant's website – the exact conduct at issue here. The court held that, because the defendant did not direct or control the infringer's actions, it was not liable. Merely licensing its own mark to third parties did not make the defendant responsible for the actions of those parties. Sellify never explains if or why it believes that the indistinguishable *Fare Deals* case was wrongly decided. It just ignores the case.

Amazon.com LLC v. New York State Department of Taxation and Finance, 23 Misc. 3d 418, 877 N.Y.S.2d 842 (Sup. Ct. N.Y. Co. 2009), which Sellify cites, has no bearing on this case. That decision (which is on appeal) concerned the constitutionality of a statute requiring out-of-state merchants to collect sales taxes on sales solicited from in-state customers through independent contractors. The statute creates a presumption that a merchant is soliciting business, within the meaning of the statute, if an in-state independent contractor refers the merchant more than $10,000 of sales to in-state customers through "a link on an internet website or otherwise," and is compensated for those sales. *Id*. at 421-22, 877 N.Y.S.2d at 845-46.

The court held the statute to be constitutional because, *inter alia*, only "more than a slightest presence" in-state is required by the Commerce Clause to impose a tax collection obligation on an out-of-state merchant. *Id*. at 423, 877 N.Y.S.2d at 847. The case did *not* hold

[2] In another cryptic remark, Sellify says that, unlike the jewelry makers in *Nomination*, Amazon's Associates "perform no other function" than to funnel business to Amazon. (Sellify Mem. at 18.) The Associates operate millions of websites of every imaginable variety from blogs to music sites to news sites to virtually everything else. Indeed, if the Associate websites had no purpose, no one would visit them and the Amazon links on those sites would be useless. The contention that Associates "perform no other function" makes no sense.

that independent website operators with links to the Amazon site are Amazon's agents. To the contrary, the opinion assumes that Associates are independent contractors. It recites the Operating Agreement provision stating that Associates are independent contractors, and the statute at issue expressly applies to sales through links established by independent contractors. Likewise, nothing in the opinion states or even considers whether Amazon controls the content of Associate websites or advertisements. There is nothing at all in the case that suggests directly, or by implication, that Associates are Amazon's agents, or that they are controlled by Amazon in a manner that would give Amazon liability for the content of their websites or ads.

Lastly, Sellify continues to argue that Amazon should have employed a "kill switch," i.e., that it should have screened all of the hundreds of millions of sessions initiated on the Amazon site each day and diverted those that originated from the Cutting Edge link. The wholly undisputed evidence is that a filtering approach to inappropriate links is not commercially reasonable. (*See* Amazon Mem. at 17-18.) Sellify says that using a filter for just this one ad would not have increased latency appreciably, but the point is that Amazon must deal with thousands of inappropriate links (there are tens of millions of links to the Amazon site), and adding more and more links to a filter would unquestionably increase latency. For that reason, filtering is reserved for those links that threaten to take down the entire website.

No witness testified that using a filter for improper links that do not present an existential threat to the site would be reasonable. Sellify's own expert – whose report Sellify has chosen not to submit to the Court – confirmed that he knew of no Internet retailer that used the filtering mechanism Sellify advocates, and he expressly refused to opine that such a filtering approach would be reasonable. (*See* Amazon Mem. at 17-18.) There is no evidence at all in the record that a "kill switch" would have been a reasonable response here, just Sellify's *ipse dixit*.

II. THERE IS NO EVIDENCE FROM WHICH A JURY COULD MAKE A RATIONAL DETERMINATION OF DAMAGES

In discovery, Sellify asserted damages of $2.4 million based on the assumption that the decline in profits from 2007 to 2009 was wholly attributable to the Cutting Edge Ads, that the impact of the ads on profitability would be permanent, and that nine times the profit decline was the proper measure of damages. Unable to dispute the fact that the OneQuality brand was almost completely gone from the Internet in 2008, that only a small fraction of Sellify's potential customers ever saw the ads (and only over a five-month period), and that there is no evidence of any continuing impact from the ads, let alone of a permanent impact, Sellify has abandoned that approach to damages.

Now, Sellify argues that it should simply be left to the jury to decide if and to what extent Sellify was damaged by the ads. But Sellify has offered no evidence from which the jury could make those findings rationally. Damages cannot be based on mere speculation, and it is the plaintiff's burden to come forward with evidence from which a non-speculative determination of damages can be made. Having abandoned one speculative theory, Sellify has replaced it with nothing, except the equally speculative suggestion that the jury might find that everyone who saw the ads would otherwise have bought a $2000 camcorder.

Sellify offers no rational basis on which a jury could decide that any of those 1000 individuals would have bought a $2000 camcorder (or anything else), let alone how many of them would have done so. Indeed, the only relevant evidence, offered by Amazon, shows that if those 1000 individuals had made purchases in the same proportion and of the same value as other visitors to Sellify's sites, they would have generated additional profits of $1,300.

The undisputed facts here are that profits from the OneQuality sites dropped 50% from 2006 to 2007, long before the Cutting Edge Ads appeared in 2009. In 2008, profits dropped to, or close to, zero as the OneQuality brand virtually disappeared from the Internet and only run-off inventory and Adrian Meli's personal items were available for sale. In 2009, in the midst of a profound recession, Sellify attempted to re-launch the moribund OneQuality brand and to restart a business selling high-end electronics. Against that background, despite the fact that only 1000 people saw the ads, and without a *single* example of an actual customer who saw the ads and thereafter decided not to buy, Sellify argues that the jury can determine not only that Sellify was injured, but the extent to which it was injured. That is not plausible.

Sellify is asking that the jury simply be allowed to speculate, without reference to any reasonable method of ascertaining damages. Sellify need not prove the precise amount of its damages with certainty, but it must proffer evidence from which a reasonable damage calculation can be made, and it has not done that.

Finally, Sellify argues that it can recover punitive damages on its Connecticut-law claims even if it cannot establish actual damage. As explained in Amazon's opening brief, liability on any state-law claim would depend on a finding that Cutting Edge was Amazon's agent, a finding that this record will not support. (Amazon Mem. at 19.) In any event, where liability is imposed solely because of the acts of an agent, the principal is not exposed to punitive damages even if the agent acted wantonly or maliciously. Liability for *actual* damages may be imposed on a principal on a theory of *respondeat superior*, but the malice of the agent is not imputed to the principal, and such malice will not support an award of punitive damages against the principal. *Maisenbacker v. Society Concordia*, 71 Conn. 369, 379, 42 A. 67, 70 (1899); *Matthiessen v. Vanech*, 266 Conn. 822, 837, 836 A.2d 394, 404-05 (2003) (vacating punitive damage award against principal because "at common law, there is no vicarious liability for punitive damages"); *Kalinowski v. Waddell & Reed, Inc.*, No. X02 CV 970146924S, 1998 WL 800241, at *1-2 (Conn. Super. Ct. 1998) (dismissing punitive damage demand in CUTPA case and holding that in "Connecticut, punitive damages cannot be awarded against a principal where, as here, its liability is based solely on a theory of respondeat superior or vicarious liability"). There can be no argument that Amazon – which terminated Cutting Edge for its conduct and which contacted Google in an effort get the ads taken down – itself acted wantonly, or with malice. Even if Cutting Edge did so, no claim for punitive damages against Amazon will lie.[3]

CONCLUSION

For the reasons stated above, and in Amazon's opening memorandum, the Court should grant Amazon's motion for summary judgment.

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August 20, 2010

Respectfully submitted,

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[3] Even if punitive damages were available, the common law of Connecticut limits punitive damages to the recovery of attorney's fees and related litigation costs. *Berry v. Loiseau*, 223 Conn. 786, 825, 614 A.2d 414, 434 (1992) (affirming the "longstanding rule in Connecticut limiting common law punitive damages to a party's litigation costs").