

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

FIRST PREMIER BANK, PREMIER
BANKCARD LLC, AND PREMIER
NEVADA, LLC,

Plaintiffs,

v.

ODYSSEAS PAPADIMITRIOU AND
EVOLUTION FINANCE, INC.,

Defendants.

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Case 4:14-cv-04055-LLP

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

First Premier—a company widely recognized as offering the worst credit cards in the nation—filed this case in a transparent attempt to intimidate and silence a website that offers a public forum for consumer reviews about credit cards. First Premier’s tactics have worked before: It recently forced another website to remove key content about First Premier cards.¹ By filing this lawsuit—which relies on a radical interpretation of federal trademark law—First Premier hoped to force CardHub to do the same.

But now, faced with our motion to dismiss and widespread public scrutiny of its claims, First Premier has retreated.² It no longer claims the legal right to force CardHub to remove *all* content about First Premier. Instead, according to its amended complaint, First Premier’s only beef is with the existence of a single hyperlink that has since been removed. On this new theory, that link—and nothing else—ran afoul of trademark law to the extent that it took users to a “transactional” page rather than an “informational” page on First Premier’s website.

This odd legal theory compels dismissal even on its own terms. As First Premier concedes, CardHub’s link did *not* take users to a transactional page; it took them to an “intermediary landing page” run by First Premier that “encourage[d] users to review the terms and conditions of the [First Premier] credit card”—that is, an informational page. Am. Compl. ¶ 38. And “[n]owhere in the amended complaint does [First Premier] seek to preclude Defendants from having links on the Accused Website that redirect to informational pages.” Oppo. 4.

¹ CBS News, *Card Comparison Site Gets Sued For Showing Rates, Fees*, Aug. 21, 2014, <http://perma.cc/5TKV-MGVD> (“Ted Rossman, a spokesman for CreditCards.com, acknowledged that his site removed the data at First Premier’s request.”).

² Because our arguments apply equally to First Premier’s amended complaint, we respectfully request that the Court treat our motion as directed to the amended complaint.

But even setting aside the theory's self-defeating logic, First Premier has backpedalled itself out of federal court. Our motion to dismiss explained, among other things, that First Premier failed to allege any cognizable trademark injury. The problem now is even more stark. By taking aim only at a now-nonexistent link to its own website, First Premier's amended complaint fails to present any plausible theory of injury or legally cognizable harm caused by the link's past existence, let alone one that would be redressed by a favorable decision. Nor has First Premier provided any coherent explanation of how the link could possibly have caused any consumer confusion or why it is not protected by the First Amendment and fair-use principles. As the Supreme Court recently held in the Lanham Act context: "If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). The same is true for the three elements of Article III standing: injury, causation, and redressability. Because First Premier can't meet these thresholds requirements, the complaint must be dismissed. The bottom line is this: First Premier has asked this Court to award damages of over \$5 million, but it hasn't explained how it has been deprived of even five cents.

Apart from these case-specific failings, First Premier's legal theory defies common sense and the First Amendment. If entertained by the courts, it would threaten basic discourse on the Internet, which depends on links to function. Consider the following real-world examples:

- Could Sony sue the *New York Times* for linking to Sony's website in the paper's recent review of wireless speaker systems?³ The review links to the product page on Sony's website, "*i.e.*, the webpage where consumers engage in a transaction." Reply 5. The review is accompanied by advertisements, provides no disclaimers, and sends users who click on the link directly to the page on Sony's website—without any referrer

³ <http://www.nytimes.com/2014/09/04/technology/personaltech/sound-delivered-via-bluetooth-right-to-speakers.html>

page indicating that users are leaving the *New York Times* website. And the review includes facts, such as price, which don't match the facts on Sony's page.

- Did KSFY, the local ABC affiliate in South Dakota, open itself up to liability under the Lanham Act when it published an article on its website titled "5 of the juiciest portable battery chargers money can buy"?⁴ The article links without disclaimers to the Amazon.com pages of five different battery chargers, where consumers can purchase those products, and misstates the listed prices of several of the chargers.
- Could the band known as White Buffalo sue the *Argus Leader* for trademark infringement based on a recent article linking to a webpage where consumers can buy tickets to the band's upcoming October 26 concert in Sioux Falls?⁵ The *Argus Leader* is chock-full of advertisements, offers no disclaimers or referrer pages, and does not mention a \$1.82 transaction fee that is added to every ticket purchase.
- Could American Express sue the technology news website *Digital Trends* for unfair competition for running an article on "The Five Best Credit Cards for Earning Rewards"?⁶ The article includes a bright-blue "Sign up" link that brings users directly to the American Express page for the credit card, without any disclaimers or referrer pages.

Of course, nobody was confused by these websites' use of links to those pages, just as no one was or could have been confused by CardHub's links to First Premier. Virtually everyone who uses the Web knows that links alone don't constitute an endorsement or affiliation; they just send you to another page.

⁴ <http://www.ksfy.com/story/25957105/5-of-the-juiciest-portable-battery-chargers-money-can-buy>

⁵ <http://www.argusleader.com/story/entertainment/music/2014/09/16/white-buffalo-perform-icon-lounge/15721209/>

⁶ <http://www.digitaltrends.com/home/best-credit-cards-earning-rewards/>

Not one of the links in the articles listed above has an “affiliate” link (a standard Internet advertising arrangement under which the publication gets a commission)—but would it matter if they did? Consider the following examples:

- Some common book-review websites—like the *Washington Post Book Review* and the *New York Review of Books*—include “affiliate” links to many of the books they review—without including any disclaimers.⁷ Could a book’s publisher sue either the *New York Review* or the *Washington Post* if they changed those links from affiliate links to standard, non-affiliate links? It’s an absurd thought, because with non-affiliate links the publishers would get the same amount of traffic without having to give the *New York Review* or *Washington Post* a cut of the sales. But that’s exactly the absurd theory of unfair competition that First Premier is attempting to pursue with this lawsuit.
- Or take an example closer to home. Could Tanka—a local producer of health food bars and beef jerky (based on the Pine Ridge Indian Reservation)—sue *South Dakota Magazine* for its recent article that linked to the Tanka website without any disclaimers?⁸ Tanka has an affiliate program that provides affiliates with “banners and links that are specific to [the affiliate] to place within [the affiliate’s] site. When a user clicks on one of [the affiliate’s] links, they will be brought to the TankaBar.com website and their activity will be tracked by [Tanka’s] affiliate system.”⁹ But *South Dakota Magazine* doesn’t appear to be an affiliate of Tanka. Could Tanka sue *South Dakota Magazine* for unfair competition because the magazine linked to Tanka’s site without being a part of its affiliate program?

To ask these questions is to answer them. Because First Premier can offer this Court no convincing distinction between any of these garden-variety links and the link at issue in this

⁷ See, e.g., Bill Sheehan, ‘Edge of Eternity,’ the Final Installment in Ken Follett’s *Sweeping Trilogy*, *Washington Post*, <http://wapo.st/1v0h4Uy>; Gordon Wood, *A Different Idea of Our Declaration*, *New York Review of Books*, <http://bit.ly/1v0gVk2>.

⁸ John Andrews, *Wasna for a New Generation*, *South Dakota Magazine*, <http://bit.ly/1sDezos>.

⁹ <http://bit.ly/Xvxc4V>.

lawsuit, one does not need a law degree to understand why this case must be dismissed. First Premier’s confusing and self-contradictory complaint urges this Court to extend the boundaries of the law well past the point of common sense. This Court should decline the invitation.

ARGUMENT

I. CardHub’s now-removed links to First Premier’s website were non-commercial fair use protected by the First Amendment and are not actionable under trademark and unfair-competition law.

A. When Tim Berners-Lee first proposed the technology we know as the “World Wide Web,” the chief technological innovation of his proposed system was the hyperlink: a string of computer code that would allow a user to click on a word or image and be directed to a specific page hosted on a web server. This “network of links is called a web,” Berners-Lee wrote. *WorldWideWeb: Proposal for a HyperText Project*, Nov. 12, 1990, <http://www.w3.org/Proposal.html>. Since that time, the Web has evolved well beyond Berners-Lee’s original idea, but the link has remained the linchpin of the modern Web. A webpage without links is simply not a webpage. Today, the world’s third-largest corporation, Google, runs a website that allows people to type a few words and get a list of links to other websites.¹⁰

Links are speech entitled to full First Amendment protection. Whatever else it may do, a link “points” to or references another page on the Internet. Much valuable commentary and criticism would be restrained if the digital equivalent of pointing were proscribed by trademark law. Just as the First Amendment would protect a disgruntled costumer who stood atop a soap box in the traditional town square, lambasting a local merchant or politician, and pointing in his

¹⁰ A much earlier pioneer, a turn-of-the-century Belgian information scientist named Paul Otlet, “was the first to imagine all the world’s knowledge as one vast ‘web,’ connected by ‘links’ and accessed remotely through desktop screens”—a development he believed would advance the free communication of ideas—but he lacked the technology to make his utopian vision a reality. Molly Springfield, *Inside the Mundaneum*, Triple Canopy (March 17, 2010), http://canopycanopycanopy.com/issues/8/contents/inside_the_mundaneum.

direction, the First Amendment protects pointing on the Internet. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003). Thus, courts have consistently found that hyperlinks are subject to First Amendment protection. *See, e.g., Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 456 (2nd Cir. 2001) (explaining that a link is speech because it “conveys information, the Internet address of the linked web page,” and applying First Amendment analysis to an injunction on linking); *Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., v. Templeton*, 954 F. Supp. 2d 1205, 1220 (D. Kan. 2013) (applying “exacting First Amendment scrutiny” to a state statute that regulated the placement of hyperlinks and noting that an organization expresses itself “through the use of links on the website”); *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 331 (1st Cir. 2009) (recognizing that the selection and placement of hyperlinks may communicate important information). Were the law otherwise, the state could censor speech by passing a law forbidding links to undesirable political parties, disfavored religious groups, or purveyors of unpopular ideas.

B. Our motion to dismiss explained that First Premier’s unfair-competition claims are barred by the First Amendment and by the doctrines of commercial-use, non-trademark use, and nominative fair use. Rather than offer a response, First Premier merely asserts that “the First Amendment is not implicated in this [a]ction.” *Oppo.* at 3-4. That is so, says First Premier, because “[t]he relief sought in the amended complaint does not seek to preclude [CardHub] or anyone else from commenting upon, reviewing or criticizing Premier and its services or from using the First Premier mark in and of itself” and because First Premier’s amended complaint does not seek to censor links that “redirect to informational pages on First Premier’s website.” *Id.* at 4 (capitalization omitted).

In reframing the case in this way, First Premier presents the Court with a syllogism that cripples its own claims. Premier states that “[n]owhere in the Amended Complaint does P[remier] seek to preclude Defendants from having links on the Accused Website that redirect to

informational pages on F[irst] P[remier]’s website,” and that First Premier’s claims stem only from “links on the Accused Website which direct consumers to the application page, *i.e.*, a transactional page, on [First Premier’s] website.” Oppo. 4. Yet First Premier admits that the link—which no longer exists—pointed users *not* to a transactional page, but to an “intermediary landing page” that “encourage[d] users to review the terms and conditions of the First Premier credit card and provide[d] a link to a First Premier credit card application.” Amended Compl., ¶ 38 (capitalization omitted). It is undisputed that the webpage to which CardHub linked was—and is—controlled by First Premier. Premier, not CardHub, chose to provide a link to the “transactional page.” By its own logic, First Premier doesn’t have a claim.

C. In any event, First Premier’s distinction between “transactional” and “informational” links makes no sense, and makes no difference under the First Amendment or trademark law. As we explained in our motion, the relevant point is that CardHub does not sell credit cards or any other product or service that competes with First Premier’s products or services or that could be confused with them in any way. Rather, CardHub provides informational content to its readers about a wide range of credit cards and, as part of that content, includes links to the websites of the card issuers. And just to ensure that there is absolutely no confusion, CardHub includes disclaimers and a special referrer page that explicitly tells users that they are being redirected to the site of the credit card issuer when they click a link.

Through this lawsuit, Premier alleges that the mere appearance of a link on a website can constitute unfair competition under the Lanham Act and common law. If that were the case, the implications not merely for trademark law but for global discourse and commerce would be profound. If every website that linked to another site was opening itself up to liability for trademark infringement, the “web” of interconnected links that makes up the Internet would be threatened. CardHub’s use of the First Premier link was the same sort of non-commercial,

descriptive fair use protected by the First Amendment that sites like the *New York Times* and the *Argus Leader* engage in all the time. To be sure, all of these sites make money from advertising—and many of their advertising partners are competitors of the products they are reviewing. But these sites' use of links is not “commercial use” in the relevant sense for trademark-law analysis. If the law were otherwise, all of the hypotheticals listed in the introduction—the *New York Times* stereo review, the *Argus Leader* concert review, the *Washington Post* book review—would constitute commercial speech and, indeed, trademark infringement. That is not the law.

II. First Premier's claim of confusion is implausible, and is even less plausible now that First Premier has narrowed its claims to merely the link.

Now that it has amended its complaint, First Premier's “unfair competition argument is based solely on the Defendants' use of the F[irst] P[remier] mark in conjunction with the [a]ccused [l]inks on the [a]ccused [w]ebsite.” Reply 4. First Premier must now show that the mere appearance of a hyperlink to First Premier's website on CardHub is likely to cause confusion actionable as unfair competition under the Lanham Act and common law.

As explained above, linking is the fundamental technology of the Web, and users understand that a link does not indicate endorsement or affiliation of any kind. First Premier's entire claim rests upon a fantastical theory of confusion that is simply out of sync with the way the Web is actually used and understood by its users.

But the courts take a different view from First Premier: “The mere appearance on a website of a hyperlink to another website will not lead a web user to conclude that the owner of the site he is visiting is associated with the owner of the linked site.” *Knight-McConnell v. Cummins*, 2004 WL 1713824, *2 (S.D.N.Y. July 29, 2004); *see also Ford Motor Co. v. 2600 Enterprises*, 177 F. Supp. 2d 661, 664 (E.D. Mich. 2001) (“Trademark law does not permit [a company] to enjoin persons from linking to its homepage simply because it does not like the domain name or other

content of the linking webpage.”); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1168 (C.D. Cal. 1998) (“The essence of the Internet is that sites are connected to facilitate access to information. Including linked sites as grounds for finding commercial use or dilution would extend the statute far beyond its intended purpose of protecting trademark owners from uses that have the effect of lessening the capacity of a famous mark to identify and distinguish goods or services.”).

Where, as here, a plaintiff has not plausibly alleged a likelihood of confusion, it has failed to state a claim on which relief can be granted and the complaint must be dismissed. *See, e.g., Hensley Manufacturing, Inc. v. ProPride, Inc.*, 579 F.3d 603, 610 (6th Cir. 2009) (dismissing Lanham Act claim because “the complaint does not allege facts sufficient to show that [defendant]’s use of the [plaintiff’s] name creates a likelihood of confusion”); *Fortres Grand Corp. v. Warner Bros. Entm’t Inc.*, --- F.3d ---, 2014 WL 3953972, at *2 (7th Cir. 2014) (“Allegations of consumer confusion in a trademark suit, just like any other allegations in any other suit, cannot save a claim if they are implausible.”); *Eastland Music Group, LLC v. Lionsgate Entertainment, Inc.*, 707 F.3d 869, 871 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 204 (2013) (finding that the plaintiff’s complaint did “not allege that the use of [the mark] has caused any confusion []—and any such allegation would be too implausible to support costly litigation”); *Vedder Software Grp. Ltd. v. Ins. Servs. Office, Inc.*, 545 F. App’x 30, 33 (2d Cir. 2013).

III. First Premier has not pled or suffered any cognizable injury, let alone injury caused by CardHub’s conduct, redressable by this Court, and cognizable under federal trademark law.

Leaving aside all the legal niceties, First Premier simply hasn’t explained how it was harmed at all by CardHub’s links, let alone harmed in a way the law recognizes. As we demonstrated in our motion to dismiss (at 18), First Premier has not alleged any cognizable

trademark injury. By trimming back its claim to only “links on the [a]ccused [w]ebsite,” *Oppo*, 4, First Premier has further weakened any claim of injury.

Put differently, this is a lawsuit in search of a real-world controversy. Because First Premier still hasn’t managed to articulate a theory of injury, even after taking the opportunity to amend its allegations, its complaint runs aground on a more basic barrier: Article III standing. A plaintiff who brings a trademark lawsuit, like any plaintiff who calls upon the power of the federal courts, “must have suffered or be imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). These three criteria—injury, causation, and redressability—form the “irreducible minimum” of standing under Article III. *Lujan*, 504 U.S. at 590. A plaintiff must allege all three, but First Premier strikes out completely.

Aside from failing to articulate a plausible theory of injury, First Premier has not even *attempted* to show that any injury is “fairly traceable” to CardHub’s now-removed links, and it has not offered any hint how any such harm could be redressed by this Court. *Lexmark*, 134 S. Ct. at 1386. Addressing standing under 15 U.S.C. § 1125(a), the Supreme Court recently recognized that a Lanham Act plaintiff’s injuries must be both within the “zone of interests” protected by the Act and proximately caused by the violation of the statute. *Id.* The Court was clear: In the Lanham Act context, proximate cause “must be adequately alleged at the pleading stage in order for the case to proceed.” *Id.* at 1391 n.6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009)). “If a plaintiff’s allegations, taken as true, are insufficient to establish proximate causation, then the complaint *must* be dismissed.” 134 S. Ct. at 1391 n.6 (emphasis added).

Even apart from the lack of Article III standing, this case fails both the “zone of interests” and proximate-cause inquiries. First Premier has asked this Court to find that consumer confusion arising from the placement of a mere hyperlink is not only plausible but likely, despite First Premier’s own admission that a user would have to ignore disclaimers and two intermediate referral pages in order to reach the First Premier site. But even if First Premier’s dubious consumer-confusion theory made sense, any confusion could not have caused First Premier any injury. Premier doesn’t claim that the supposedly incorrect information on CardHub about First Premier rates and fees led or could lead some customers to decide *not* to apply for a First Premier card, thus negatively impacting sales. But even if First Premier *had* properly alleged such a theory, such an injury would not be proximately caused by CardHub’s use of the link. The presence or omission of a link could not plausibly affect any consumer’s decision not to apply for a First Premier card.

Even if First Premier were alleging false advertising rather than unfair competition, the Supreme Court recently observed that a “plaintiff who does not compete with the defendant will often have a harder time establishing proximate causation.” *Lexmark*, 134 S. Ct. at 1392. That observation is even more applicable to First Premier—a plaintiff who seeks to bring an *unfair-competition* claim without alleging any relevant *competition*. And, it bears repeating, if the proximate-causation requirement is not met, “then the complaint *must* be dismissed.” *Id.* at 1391 n.6 (emphasis added). The Federal Rules demand more than “threadbare recitals of the elements of a cause of action,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), but when it comes to proximate causation, First Premier’s allegations fall short of even that low bar. And First Premier’s incoherent theories of injury and redressability fare no better.

IV. First Premier's contract claim fails as a matter of law.

A. The contract's purpose and text preclude First Premier's claim.

As a backstop to its defective trademark claim, First Premier seeks to stretch the language of a long-since-terminated contract well beyond the breaking point. Our motion explained why that attempt fails at the threshold. Now that it has narrowed its claim to CardHub's links, First Premier's contract theory is even less plausible. For First Premier to prevail, this Court would have to be willing to look past the contract's purpose, invent a meaning for the term "banner" that goes well beyond both its ordinary meaning and its plausible meaning in context, and transform a lapsed marketing agreement into a perpetual gag order.

1. Purpose. Despite First Premier's steadfast refusal to acknowledge it, the standard-form "Internet Marketing Agreement" had a clear purpose: It was an Internet marketing agreement. It created and defined a short-term arrangement under which CardHub placed ads on its website in the form of banners directing traffic to the advertiser—just as like the ads on the *Argus Leader* and *Washington Post* websites. Is it really conceivable from the contract's language that it was meant to censor CardHub from linking to First Premier, for any purpose, forever?

As we mentioned in our motion, when First Premier first "demanded" that CardHub "immediately remove from [its] website any mention of the Avention credit card, and any and all reference to First Premier Bank," First Premier didn't even mention the contract. Ex. 5 to Complaint. Only later, after Papadimitriou pointed out that its trademark claims made no sense, did it conjure up its contract theory. Papadimitriou Decl., Exhibits 7-8. If banning links *ad infinitum* was the contract's true purpose, that apparently wasn't clear to First Premier.

Premier's tortured interpretation demands that this Court dispense with the agreement's obvious purpose. But South Dakota law is not on Premier's side. As the South Dakota Supreme Court recently put it: "In many current technical and lengthy contracts, if one looks hard enough

one can probably find some type of technical breach. However, it is not the purpose of the contract to turn it into a game of ‘gotcha.’” *Thunderstik Lodge, Inc. v. Reuer*, 585 N.W.2d 819, 824 (S.D. 1998). The point is that this Court should consider “the real purpose of the contract,” not some creative and hyper-technical construction made up from words taken in isolation. *W. Town Site Co. v. Lamro Town Site Co.*, 139 N.W. 777, 780 (S.D. 1913); *see also U.S. Fid. & Guar. Co. v. Pierson*, 97 F.2d 560, 563 (8th Cir. 1938) (“The dominant purpose of the contract as a whole must be borne in the mind, and any attempt to divide it into distinct, separate parts is to obscure and subvert the intention of the contract and defeat the natural and reasonable expectation of the parties.”); *Barco Urban Renewal Corp. v. Hous. Auth. of City of Atl. City*, 674 F.2d 1001, 1009 (3d Cir. 1982) (The clause “must be given an interpretation consistent with the dominant purpose of the contract.”).

2. Language. But even under a myopic reading that ignores purpose, the contract still doesn’t say what Premier wants it to say. First Premier’s definition of the term “banner,” on which it hangs its theory, is inconsistent with the contract itself. To succeed, Premier must show that a “link” is included within the meaning of “banner.” Otherwise, the obligation to remove First Premier’s banner ads would not have encompassed the links about which First Premier now says it is complaining. And yet the contract itself distinguishes between these terms, most clearly in Section 2(a): “Operator hereby agrees to provide on Operator’s Website a Banner or Banners, together with a Link.” Exhibit 3 to McCord Decl., 3. Banners and links, in other words, are two different things. The contract also defines “banner” in part as a “graphic message that appears in a Link,” again distinguishing between the two concepts. *Id.* at 2. In this way, the contract ratifies common sense and common usage: A link is not a banner.

But whatever verbal gymnastics are required to get beyond the definition of these basic terms, the game ends there. Even a hyper-literal reading of the contract’s language doesn’t get

First Premier to the finish line. Here is the language of the termination clause on which First Premier relies:

Upon the effective date of termination of this Agreement, Operator shall remove all Banners from all websites maintained by Operator *and/or* shall cease sending e-mails promoting Bank's credit card products.

Exhibit 3 to McCord Decl., 6 (emphasis added). It is undisputed that Evolution Finance has “cease[d] sending e-mails promoting [Premier]’s credit card products.” The conjunction *and/or*, “though undeniably clumsy, does have a specific meaning ($x \text{ and/or } y = x \text{ or } y \text{ or both}$).” Bryan Garner, *A Dictionary of Modern Legal Usage* 56 (2nd ed. 1995). That is to say, *and/or* “commonly mean[s] ‘the one or the other or both.’” *Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 627 (1st Cir. 1981). So, even under a literal reading of the contract, Evolution Finance was required only to “remove all Banners from all websites maintained by Operator [*or*] shall cease sending e-mails promoting Bank’s credit card products.” Because there is no claim that Evolution Finance failed to fulfill both obligations, First Premier’s claim fails even if one takes the leap of interpreting “banner” to encompass “links” and even if one interprets the contract as having an effect that has nothing whatsoever to do with its purpose.

B. First Premier still hasn’t offered a theory of injury or damages stemming from the alleged breach of contract.

Even setting aside the contract’s language and purpose, First Premier’s contract claim fails for an equally fundamental reason: the failure to plead or explain any coherent theory of damages. That failure, like the failure to allege any plausible harm on the unfair-competition claims, is fatal.

In response to our argument on this score, First Premier simply punts. It acknowledges that “resulting damages” are an element of a contract claim in South Dakota. *Oppo*, 5. This is black letter law: In South Dakota, “[n]o damages can be recovered for a breach of contract

which are not clearly ascertainable in both their nature and their origin.” SDCL § 21-2-1; *see also Paulsen v. Ability Ins. Co.*, 906 F. Supp. 2d 909, 913 (D.S.D. 2012). Yet, even after amending its complaint, First Premier still hasn’t adequately alleged damages or any theory linking the alleged breach of contract to an injury. Although Premier claims to have alleged “much more than a ‘recital[] of the elements of a cause of action,’” for its damage claim, it hasn’t alleged *any* theory whatsoever that could allow the Court to draw the reasonable inference that the alleged breach of contract caused the alleged damages. Oppo. 6. In fact, the very sentence that First Premier cites for the proposition that “all that is required is for P[remier] to allege that it has incurred an unspecified amount of damages” states that South Dakota law demands far more—it requires an allegation “[t]hat as a *proximate* result of the breach of contract[], the plaintiff suffered damages.” PI Mtn. 16 (citing *Guthmiller v. Deloitte & Touche*, 699 N.W.2d 493 (S.D. 2005) (emphasis added)).

Over the course of two complaints and three memoranda, First Premier hasn’t given this Court even a hint about how it could have or might have been damaged by the alleged breach of contract or how any such damage could be linked to the alleged breach. The contract claim should therefore be dismissed for failure to state a claim.¹¹

¹¹ First Premier has also quietly dropped its attempt to pierce the corporate veil through its contract claim, amending its complaint to drop all contract claims against Mr. Papadimitriou. That’s because the contract was between *Evolution Finance* and First Premier.

First Premier’s attempt to pierce the corporate veil through its trademark claim is likewise based on a lack of due diligence. First Premier alleges that Mr. Papadimitriou is the “sole employee and sole shareholder” of *Evolution Finance*. Amended Complaint ¶ 7. Not so. *Evolution* has many employees, as even a cursory examination of its website would reveal. And had First Premier bothered to do a search of public filings before flinging accusations, it would have learned that *Evolution* has multiple owners too. *See* <http://1.usa.gov/1qj4gnG> (SEC Form D); *see also Horizon Asset Mgmt. v. H & R Block*, 580 F.3d 755, 761 (8th Cir. 2009) (taking judicial notice of SEC filing). Other than unsupported allegations, First Premier offers no basis to pierce the corporate veil. *See Bravado Int’l Group Merch. Servs. v. Ninna*, 655 F. Supp. 2d 177 (E.D.N.Y. 2009) (plaintiffs failed to properly plead veil-piercing claim in trademark case).

* * *

Admittedly, it's difficult to discern what First Premier was trying to accomplish by filing this lawsuit. First Premier's pleadings are by turns ambiguous and contradictory. Did First Premier really think that CardHub's links to the First Premier page were so confusing to consumers that it was worth making a federal case out a few links? Or did First Premier hope that by merely filing such a lawsuit it could scare CardHub into removing all content relating to First Premier cards, just as it originally demanded? One thing is certain: Whatever First Premier's motivations for pursuing this lawsuit, its claims have no basis in existing law.

CONCLUSION

This Court should dismiss the amended complaint for failure to state a claim on which relief can be granted.

Respectfully submitted,

/s/ Deepak Gupta

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