UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CIV-20718-COOKE/BANDSTRA

ALBERT SEGAL, and
MARIANNA CHAPAROVA,

Plaintiffs,
- vs. -

AMAZON.COM, INC.,

Defendant.
_____/

DEFENDANT AMAZON.COM, INC.'S MOTION TO DISMISS FOR IMPROPER VENUE OR, ALTERNATIVELY, MOTION TO TRANSFER VENUE OR, ALTERNATIVELY, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406, Defendant Amazon.com, Inc. ("Amazon") respectfully moves the Court to dismiss this action for improper venue based on a forum selection clause in the parties' contract requiring any dispute between the parties to be adjudicated in federal or state court in Washington state. Alternatively, Amazon moves the Court to transfer this action pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Western District of Washington, or to dismiss this action, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim a claim upon which relief may be granted. In support of this Motion, Amazon states as follows:

I. INTRODUCTION AND FACTUAL BACKGROUND

A. The Parties, Basic Allegations, and the Terms of Use

This dispute arises from a business relationship between Plaintiffs and Amazon related to Plaintiffs' use of the Amazon website (www.amazon.com) and, specifically, the "Amazon

Marketplace," to sell textbooks over the internet. *See* Am. Compl, at ¶ 9. The Amazon Marketplace is a fixed-price online marketplace that allows third party sellers to offer their products for sale to anyone with internet access. Amazon provides buyers and sellers with access to the Marketplace, facilitates transactions through its payment system, and charges a small fee or commission on sales made through the Marketplace.

Pursuant to the Amazon Marketplace terms and conditions, Amazon may temporarily withhold funds sent through Amazon's payment system if Amazon suspects that the seller is engaged in unscrupulous conduct. *See* terms and conditions (the "Participation Agreement"), at ¶ 5(h), attached to the Declaration of Catherine Ceely (filed herewith as Exhibit A).[1] This policy is designed to protect buyers (and the funds they send over the internet) while Amazon conducts an investigation into the sellers' conduct. Amazon is also permitted under the Participation Agreement to terminate a sellers' access to the Amazon Marketplace for any reason in its sole discretion. Participation Agreement, at ¶ 21.

Plaintiffs allege that in November 2009, they signed-up for an Amazon Marketplace Seller Account to sell textbooks and various other merchandise. Am. Compl., at ¶ 9. Sometime thereafter, Amazon allegedly withheld certain of Plaintiffs' funds while Amazon investigated the Plaintiffs' sales practices [Am. Compl., at ¶¶ 11-15], and ultimately terminated their access to the Amazon Marketplace. Am. Compl., at ¶ 22. While their injuries are not readily apparent from the face of the Amended Complaint, Plaintiffs allege generally that their damages exceed the jurisdictional threshold of $75,000. Am. Compl., at ¶ 4.

[1] In considering a motion to dismiss for improper venue, "the court may consider matters outside the pleadings such as affidavit testimony, 'particularly when the motion is predicated upon key issues of fact.'" *Wai v. Rainbow Holdings*, 315 F.Supp.2d 1261, 1268 (S.D.Fla. 2004) (quoting *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F.Supp.2d 1317, 1320 (S.D.Fla. 2000)).

B. The Amazon Marketplace Forum Selection Clause

When registering for an Amazon Marketplace Seller Account, all prospective Sellers are required to navigate through a series of registration prompts and web pages where they provide certain information, create a password, and agree to the terms and conditions for using the Amazon Marketplace, known as the "Participation Agreement." *See* Ceely Declaration, at ¶ 2. Only those individuals who agree to the Participation Agreement can become registered Amazon Marketplace Sellers. *Id*. The Participation Agreement constitutes a contractual agreement between Amazon and the registered Seller that governs their relationship.

The Participation Agreement contains unambiguous forum-selection and choice of law clauses that control the resolution of any disputes involving the Amazon Marketplace, including disputes such as those raised in Plaintiffs' Amended Complaint. Specifically, Paragraph 18 of the Participation Agreement, entitled "Applicable Law," states as follows:

> The laws of the state of Washington govern this Participation Agreement and all of its terms and conditions, without giving effect to any principles of conflicts of laws or the Convention on Contracts for the International Sale of Goods. Any dispute with Amazon or its affiliates relating in any way to these terms and conditions or your use of the Services in which the aggregate total claim for relief sought on behalf of one or more parties exceeds $7,500 shall be adjudicated in any state or federal court in King County, Washington, and you consent to exclusive jurisdiction and venue in such courts.
>
> Participation Agreement, at ¶ 18.

When Plaintiffs registered to use the Amazon Marketplace, they necessarily agreed to be bound by the Participation Agreement (*see* Ceely Declaration, at ¶ 2), which mandates that this lawsuit be resolved by a court in King County, Washington.

II. MEMORANDUM OF LAW

A. This Case Should Be Dismissed For Improper Venue Because The Parties Are Bound By Their Forum Selection Clause

A motion to dismiss premised upon a choice of forum clause is properly brought pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. *See Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998). On a motion to dismiss based on improper venue, the Plaintiffs have the burden of showing that venue in the forum is proper. *See Wai v. Rainbow Holdings*, 315 F.Supp.2d 1261, 1268 (S.D. Fla. 2004).

It is well settled that parties to a contract may bargain in advance to select the forum in which their disputes will be adjudicated. *See M/S Breman v. Zapota Off-Shore Co.*, 407 U.S. 1, 12-14 (1972).[2] Forum selection clauses are presumed valid and "should be enforced unless a strong showing is made that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching." *BP Products North America, Inc. v. Super Stop 79, Inc.*, 464 F.Supp.1253, 1256 (S.D. Fla. 2006) (Cooke, J.); *see also In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (finding that the district court abused its discretion in denying transfer motion based on forum selection clause because the case did not "present the type of 'exceptional' situation in which judicial enforcement of a contractual choice of forum clause would be improper") (quoting *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22 (1988)); *Paper Express Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) (a forum selection clause is prima facie valid and will be enforced unless the plaintiff establishes that it is unreasonable or unjust or if the clause was procured by fraud or overreaching).

Forum selection clauses found in form or adhesion contracts are similarly valid and

[2] Consideration of whether to enforce a forum selection clause in a diversity case such as this one is governed by federal, not state, law. *See P&S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003).

enforceable. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (forum selection clause in adhesion contract is not unreasonable, especially where the defendant has a special interest in limiting the fora in which it potentially could be subject to suit).

Here, there can be no dispute that Amazon and the Plaintiffs agreed to be bound by the terms and conditions of their Participation Agreement contract. Plaintiffs voluntarily sought out the Amazon Marketplace and assented, without objection, to the Participation Agreement when they signed-up to use the Marketplace. Amazon only permitted them to sell their goods on the Marketplace in reliance on such voluntary assent. Nor can there be any dispute that the forum selection clause in the Participation Agreement requires any dispute exceeding $7,500, such as this one, to be brought and adjudicated in King County, Washington. Since Plaintiffs' claims all arise out of their use of the Amazon Marketplace and its related services, Plaintiffs are bound by the forum selection clause in the Marketplace Participation Agreement, and venue is not proper in this Court. Under these circumstances, dismissal is appropriate. *See e.g., Lipcon*, 148 F.3d at 1290.

Plaintiffs do not contend in their Amended Complaint that the Participation Agreement or its forum selection clause are unenforceable, but should they choose to make that argument in opposition to this Motion, the burden will be on the Plaintiffs to show unenforceability, and the burden is a heavy one. *See, e.g. Breman,* 407 U.S. at 10 (listing factors a plaintiff must overcome to invalidate a forum selection clause); *Stewart Org.,* 487 U.S. at 26 (Kennedy, J., concurring) ("[A] valid forum selection clause is given controlling weight in all but the most exceptional cases"); *Mitsui & Co (USA) v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997) ("The burden of proving unreasonableness is a heavy one, carried only by a showing that the clause results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court"). Courts around the country have held that nearly identical forum

selection clauses in nearly identical "clickwrap" agreements are valid and enforceable. *See, e.g., Tricome v. Ebay, Inc.,* 2009 WL 3365873 (E.D. Pa. Oct. 19, 2009); *Novak v. Overture Servs., Inc.*, 309 F.Supp.2d 446, 451 (E.D.N.Y. 2004); *Person v. Google*, 457 F.Supp.2d 488, 493 (S.D.N.Y. 2006); *Universal Grading Service v. eBay, Inc.*, 2009 WL 2029796, at *11 (E.D.N.Y. June 10, 2009) (enforcing forum selection clause in clickwrap agreement); *Feldman v. Google*, 2007 WL 966011 (E.D. Pa. March 29, 2007) (same); *Appliance Zone, LLC v. Nextag, Inc.*, 2009 WL 5200572, *4 (S.D. Ind. Dec. 22, 2009) (same).

Plaintiffs will not be deprived of their day in court if they have to re-file this case in Washington state, and the forum selection clause does not violate public policy. In fact, enforcing the parties' chosen choice of forum supports the Florida public policies protecting freedom of contract and enforcement of contractual obligations. *See In re Ricoh Corp.*, 870 F.2d at 573 (recognizing strong public policy favoring enforcement of contractual obligations); *Walls v. Quick & Reilly, Inc.,* 824 So.2d 1016, 1018 (Fla. 5th DCA 2002) (recognizing Florida's strong public policy protecting freedom of contract). And, since Washington law governs this dispute (*see* Participation Agreement, at ¶ 18), it is more appropriate and efficient for a Washington court to hear this case. For these reasons, the Court should dismiss this action under Fed.R.Civ.P. 12(b)(3).

B. Alternatively, This Case Should Be Transferred To The Western District Of Washington

If the Court decides that dismissal is not warranted, this case should be transferred to the United States District Court for the Western District of Washington. Pursuant to 28 U.S.C. § 1404(a), "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Windmere Corp. v. Remington Prod.*, 617 F.Supp. 8, 10 (S.D. Fla. 1985). Here, the parties entered into a clear and unambiguous forum-selection clause designating King County,

Washington as the exclusive forum for disputes between them. In the interest of justice, this Court should enforce the parties' previously established choice of forum.

In deciding whether to transfer a case, the Court must weigh several factors, including convenience, cost, judicial economy, and the expedition of discovery and trial processes. *See Manuel v. Convergys Corp*., 430 F.3d 1132, 1135 (11th Cir. 2005). A forum-selection clause, however, is "a significant factor that figures centrally in the District Court's calculus." *Stewart Org*., 487 U.S., at 29. Indeed, "the Eleventh Circuit gives nearly conclusive weight to such a clause in deciding a § 1404(a) transfer motion." *General Pump & Well, Inc. v. Laibe Supply Corp*, 2007 WL 4592103, *4 (S.D. Ga. Dec. 28, 2007) (emphasis added) (citing *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989), and also stating that "while other factors might 'conceivably' militate against a transfer…the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors"); *see also P&S Bus. Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003). And, as discussed in the preceding section above, courts in this District and throughout the Eleventh Circuit recognize that parties opposing enforcement of a forum selection clause bear a heavy burden.

If this action is not dismissed for improper venue, the Court should transfer this case to the Western District of Washington because Plaintiffs, who are registered Amazon Marketplace users, assented to the forum selection and choice of law provisions contained in the Participation Agreement. The Participation Agreement expresses the parties' intent that all suits arising out of the Participation Agreement and the services provided by the Amazon Marketplace shall be adjudicated in King County, Washington. Participation Agreement, at ¶ 18.

Beyond the strength of the forum-selection clause in the Participation Agreement (and the strong presumption of validity afforded such provisions in general), the Western District of

Washington is otherwise the most convenient forum under Section 1404(a). Although the inquiry into convenience is comprised of several factors, the primary concern is the convenience of the parties and witnesses. *See Meterlogic, Inc. v. Copier Solutions, Inc.*, 185 F.Supp.2d 1292, 1301 (S.D. Fla. 2002). When considering the 1404(a) factors in *Thermal Technologies, Inc. v. Dade Service Corp.*, 282 F.Supp.2d 1373, 1376 (S.D. Fla. 2003), this Court gave great weight to the fact that the defendant's headquarters was located within the transferee district. Similarly, Amazon's headquarters and principal place of business is located in Seattle, Washington, which is within the proposed transferee district. *See* Ceely Decl., at ¶ 3. Upon information and belief, all Amazon employees with knowledge of the matters raised in the Amended Complaint work in Washington (*id.*), and there do not appear to be any witnesses in this case who reside in Florida apart from the Plaintiffs. Moreover, Amazon's relevant documents, systems, and records are all located in Washington. *Id.* Thus, along with being the forum selected by agreement between Amazon and the Plaintiffs, Washington is the most convenient forum for this case.

That Plaintiffs reside in Florida is not determinative. This Court has transferred cases out of this District when the majority of the defendant's witnesses are in the transferee district, and even where the plaintiffs and their witnesses are located in this District. *See Trace-Wilco, Inc. v. Symantec Corp,* 2009 WL 455432, *4 (S.D. Fla. Feb. 23, 2009) (transferring case to where the defendant's witnesses reside and where the defendant is headquartered, despite the fact that the plaintiffs were residents of Florida); *see also General Pump & Well, Inc. v. Laibe Supply Corp*, 2007 WL 4592103, *4 (S.D. Ga. Dec. 28, 2007) (granting defense motions to transfer away from the home state of the plaintiffs based upon the convenience of the parties and the interests of justice); *Ellis v. Whirlpool Corp*., 2007 WL 4706908, *2 (N.D. Ala. Nov. 27, 2007) (same).

If this case were to remain in the Southern District of Florida, Amazon would suffer a considerable burden in litigating in a distant location. Amazon would be forced to incur considerable travel and accommodation expenses to attend trial, if any, and party witnesses would have to travel and incur related expenses. Additionally, given that no known non-party witnesses reside in Florida, compulsory process is more readily available for a greater number of non-party witnesses in Washington than in Florida.

Finally, venue is proper in the Western District of Washington. Under 28 U.S.C. § 1391(a)(1), venue in a case such as this—where subject matter jurisdiction is founded on diversity jurisdiction—is proper in any district where the defendant resides. While Amazon does business worldwide over the internet, it is headquartered in Seattle, Washington, which is located in the Western District of Washington, and thus venue is proper there. Accordingly, this action could have been brought there, and transfer to that district is permissible. *See Meterlogic,* 185 F.Supp.2d at 1301 (transferring a case to the Western District of Missouri -- where the Defendant's principal place of business was located).

Given that (i) the Plaintiffs and Amazon agreed to Washington as the forum for this dispute; (ii) Amazon and potential witnesses reside in Washington; (iii) substantially all of the relevant documents, records, and systems are located in Washington; and (iv) no identified relevant witnesses or documents – other than Plaintiffs and their documents – are located in Florida, the record shows that this case should be transferred to the Western District of Washington. As such, Amazon respectfully requests that the Court transfer this case to the United States District Court for the Western District of Washington to effectuate the parties' intent that their disputes be litigated in King County, Washington.

C. Alternatively, This Case Should Be Dismissed For Failure To State A Claim Upon Which Relief May Be Granted

Alternatively, the Court should dismiss each of the causes of action alleged in the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). "A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face." *Sinaltrainal v. The Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009). While the pleadings of *pro se* litigants are held to less stringent standards than those drafted by an attorney, they must still meet minimal pleading requirements. *See Olsen v. Lane*, 832 F.Supp. 1525, 1527 (M.D.Fla. 1993). The Amended Complaint should be dismissed in its entirety for the following reasons:

1. Counts 2, 3, 5, 6, And 7 Are Barred By The Economic Loss Rule

Plaintiffs' claims for fraud, conversion, tortious interference, negligent misrepresentation, and breach of fiduciary duty (Counts 2, 3, 5, 6, and 7, respectively) are barred by the economic loss rule. Under the economic loss rule, parties in contractual privity must pursue contract remedies, and not tort claims, for economic losses. *See HTP, Ltd. v. Lineas Aereas Costarricenes, S.A.*, 685 So.2d 1238, 1239 (Fla. 1996) (a contractual relationship precludes the parties from utilizing tort law to resolve disputes unless the tort is "independent of the contractual breach"); *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So.2d 532, 536 (Fla. 2004) ("when parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement"); *Vesta Construction and Design, LLC v. Lotspeich &*

Associates, Inc., 974 So.2d 1176, 1181-82 (Fla. 5th DCA 2008) (economic loss rule bars negligent misrepresentation claims); *Alejandre v. Bull*, 159 Wn.2d 674, 683 (Wash. 2007) ("the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses").[3]

As discussed above, there can be no dispute that the parties here are in privity of contract.[4] While Plaintiffs may now be unhappy with the terms of their agreement, they are still bound by it and cannot use the courts to obtain a better bargain. *See American Aviation,* 891 So.2d, at 542. The tort claims here are all based, in essence, on two allegations: (1) that Amazon supposedly withheld funds beyond the 90 day period permitted by the Participation Agreement; and (2) that Amazon supposedly terminated Plaintiffs' Seller account on the Amazon Marketplace without justification. *See* Am. Compl, at ¶¶ 12, 14-19, 22, 46-50, 54, 59-61, 70-73, 80-81, 88, 91, 107. This conduct, however, is expressly contemplated by the parties' Participation Agreement. *See* Participation Agreement, at ¶ 5(h) (authorizing Amazon to withhold funds to investigate potential problems with the account); *id*., at ¶ 21 (authorizing Amazon to terminate Plaintiffs' access to the Amazon Marketplace and its related services).

Amazon's supposed retention of funds for longer than that permitted under the Participation Agreement and termination of Plaintiffs' Seller account without justification are, if

---

[3] Federal courts sitting in diversity apply the conflict-of-laws rules of the forum state. *See Grupo Televisa, S.A. v. Telemundo Communs. Group, Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007). Under Florida law, contractual choice of law provisions are presumptively valid. *See Mazzoni Farms, Inc. v. E.I. DuPont DeNemours and Co.*, 761 So.2d 306, 311 (Fla. 2000). The forum selection clause in the Participation Agreement here dictates that Washington law governs this dispute. Even if the Court concludes that Florida law applies, the results would not differ.

[4] While Plaintiffs did not attach the Participation Agreement to their Amended Complaint, it is indisputably integral to, and forms the basis of, the parties' relationship and the claims in the Amended Complaint. As such, it may be considered by the Court on a motion to dismiss. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

anything, breach of contract issues; not tort claims. Since that conduct is the sole basis for Plaintiffs' tort claims, the tort claims are barred by the economic loss rule.[5] This is further underscored by the fact that Plaintiffs do not allege any damages beyond those emanating from conduct involving performance under the parties' contract. *See Argonaut Dev. Group, Inc., SWH Funding Corp.*, 150 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001) (no fraud claim will lie unless "there is damage due to fraud that is separate from damages resulting from any subsequent contractual breach"); *Alejandre,* 159 Wn.2d at 683. Thus, the tort claims should be dismissed.

2. Counts 1, 2, And 6 Are Barred Because They Are Based On Alleged False Representations That Are Adequately Dealt With Or Expressly Contradicted By The Parties' Later Written Contract

Plaintiffs' claims for violation of FDUTPA, fraudulent inducement, and negligent misrepresentation (Counts 1, 2, and 6, respectively) should be dismissed because they are all based on supposed misrepresentations (or omissions) that are adequately dealt with or expressly contradicted by the parties' subsequently executed Participation Agreement. Under settled law, "[a] party cannot recover for alleged false misrepresentations that are adequately dealt with or expressly contradicted in a later written contract." *See, e.g., Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.,* 850 So.2d 536, 542-43 (Fla. 5th DCA 2003). "To hold otherwise is to invite contracting parties to make agreements of the kind in suit and then avoid them by simply taking

[5] Florida courts have held that certain fraudulent inducement claims are not barred by the economic loss rule. *See, e.g., HTP, Ltd. v. Lineas Aereas Costarricenes, S.A.,* 685 So.2d at 1240; *Hotels of Key Largo, Inc. v. RHI Hotels, Inc*., 694 So.2d 74, 78 (Fla. 3d DCA 1997). However, where the supposed misrepresentations are inseparable, interwoven, and/or indistinct from the duties underlying the parties' contract, such as here, they are barred by the economic loss rule. *See id.; see also Straub Capital Corp. v. L. Frank Chopin, P.A*., 724 So.2d 577, 579 (Fla. 4th DCA 1998) ("a party may not avoid the economic loss rule by entitling a claim a 'fraudulent inducement' claim"). This is especially true where, as here, no damages are alleged beyond those emanating from the parties' contract. Washington does not appear to conclusively apply such an exception for fraudulent inducement claims. *Cf. Alejandre,* 159 Wn.2d at n. 6 (recognizing that some courts apply a fraudulent inducement exception to the economic loss rule, but declining to address whether that exception applies under Washington law).

the stand and swearing that they relied on some other statement." *Tevini v. Roscioli Yacht Sales, Inc.,* 597 So.2d 913, 914 (Fla. 4th DCA 1992); *see also Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1441 (S.D. Fla. 1996) (reliance is inherently unreasonable when the promisee enters into a subsequent written contract with the promisor); *TRG Night Hawk, Ltd. v. Registry Dev. Corp.*, 17 So.3d 782 (Fla. 2d DCA 2009) ("a party who signs a contract whose terms contradict the alleged misrepresentation on which he relied is barred from seeking relief pursuant to FDUTPA, as he acted unreasonably"); *Zaffrullah v. Countrywide Home Loans, Inc.*, Case No. 09-cv-61142-JIC (S.D. Fla. Feb. 8, 2010), at D.E. 36 (page 8) ("a party that signs a contract whose terms contradict the alleged misrepresentations on which he relied is barred from seeking relief pursuant to FDUTPA, as the party did not reasonably rely on the misrepresentation"); *AEA Intern. USA, Inc. v. Boudreaux*, 2001 WL 1338452, *5 (Wash. App. 2001) (reliance is unreasonable as a matter of law when the parties execute a subsequent written contract); *Williams v. Joslin*, 399 P.2d 308, 309 (Wash. 1965).

Here, Plaintiffs allege that Amazon induced them into participating in the Marketplace by failing to disclose in its "marketing campaign" that Amazon may withhold funds and/or terminate their seller account. *See* Am. Compl., at ¶¶ 27-29, 45-49, 52, 97. Since Plaintiffs subsequently agreed to the comprehensive written Participation Agreement, which expressly contemplates Amazon's retention of funds and termination of seller accounts, any prior misrepresentations (or omissions) related to those issues -- such as those that form the basis of Counts 1, 2, and 6 -- are negated altogether. As such, Counts 1, 2, and 6 should be dismissed.

3. Counts 2, 6, And 7 Should Be Dismissed Because, Among Other Things, No Legal Duty Exists Between The Parties Apart From Their Contract

Plaintiffs' negligent misrepresentation and breach of fiduciary duty claims should also be dismissed because no duty exists between the parties apart from the duties imposed by the

Participation Agreement contract. And none is sufficiently alleged. "The threshold determination of whether a duty exists is a question of law." *Curtis v. Lein,* 150 Wash.App. 96, 102-03 (Wash. App. 2009). Since this was strictly an arms-length, business-to-business contractual relationship, Amazon had no duty to protect the Plaintiffs, and certainly owed them no fiduciary duty. *See Watkins v. NCNB Nat. Bank of Florida, N.A.*, 622 So.2d 1063, 1065 (Fla. 3d DCA 1993) (in an arms-length transaction, "there is no duty imposed on either party to act for the benefit or protection of the other party"); *Azar v. National City Bank*, 2009 WL 3668460 (M.D. Fla. Oct. 26, 2009) (dismissing negligence and breach of fiduciary duty claims because no duty existed); *Matthys v. MERS*, 2009 WL 3762632 (M.D. Fla. Nov. 10, 2009) (dismissing negligence-based claims because no duty is imposed in arms-length contractual relationships); *Curtis,* 150 Wash.App. at 102-03 (no duty in arms-length transaction); *Van Dinter v. Orr,* 157 Wn. 2d 329, 334 (Wash. 2006) (Washington law requires a plaintiff to plead and prove the existence of a special duty in order to recover for negligent misrepresentation). Absent a duty -- let alone a sufficient factual allegation of any such duty -- Plaintiffs' breach of fiduciary duty and negligent misrepresentation claims fail as a matter of law.

Similarly, Plaintiffs' fraudulent inducement claim fails because Amazon had no duty to disclose the supposedly omitted information. Plaintiffs' fraudulent inducement claim is based on Amazon's supposed failure to disclose information in its "marketing campaign." *See, e.g.,* Am. Compl., at ¶ 46. Under well established law, however, to state a cause of action for fraudulent non-disclosure, the plaintiff must allege that the defendant had a duty to disclose the supposedly omitted facts. *See Gutter v. Wunker*, 631 So.2d 1117 (Fla. 4th DCA 1994); *Wash. Mutual Savings Bank v. Hedreen,* 125 Wash.2d 521, 525 (Wash. 1994). Plaintiffs make no such allegation here. Nor can they, especially inasmuch as the parties had no relationship whatsoever

at the time Plaintiffs were supposedly "induced" into using the Amazon Marketplace. Amazon's "marketing campaign" simply does not give rise to an independent duty to disclose other information to these Plaintiffs.

Additionally, while the so-called "fraudulent marketing campaign" is not sufficiently explained in the Amended Complaint, it appears to be nothing more than an on-line tutorial on the Amazon.com website (for which would-be sellers would need to affirmatively search), detailing certain procedures for using the Amazon Marketplace. Anyone who viewed that tutorial and wanted to participate in the Marketplace necessarily would have been re-directed to the comprehensive Participation Agreement [*see* Ceely Decl., at ¶ 2], which describes in detail the exact information that Plaintiffs now complain was "omitted."[6]

With regard to their negligent misrepresentation claim, Plaintiffs also do not adequately allege what was misrepresented. Plaintiffs assert that Amazon's marketing slogan says that Amazon "look[s] forward to seeing your business grow," and that Amazon helps customers "make quick, easy, and worry-free purchases," but these marketing representations, like those underlying the fraud claim, are mere puffery and are not actionable as a matter of law. *See Wasser v. Sasoni*, 652 So. 2d 411, 412 (Fla. 3d DCA 1995). And, "[a]n omission alone cannot constitute negligent misrepresentation." *Ross v. Kirner*, 162 Wash.2d 493, 499 (Wash. 2007). Plaintiffs also do not explain how the supposed misrepresentations are false, when they were said, in what medium they were made, how they were material to Plaintiffs' decision to use the

[6] The fraudulent inducement claim should also be dismissed because it: (a) is not alleged with the particularity required by Fed.R.Civ.P 9(b); (b) alleges no facts demonstrating that Amazon had the requisite intent to defraud these Plaintiffs; and (c) alleges no actual damages that were proximately caused by the supposed "inducement." In fact, any claim for damages related to being "fraudulently induced" into using the Amazon Marketplace would be absurd given that Plaintiffs also ask the Court to require Amazon to reinstate their access to the Marketplace. *See* Am. Comp., at Prayer for Relief.

Amazon Marketplace, or how Plaintiffs were damaged as a result of the supposed misrepresentations. These deficiencies require dismissal.

4. Count 1 (Violation Of FDUTPA) Should Be Dismissed Because Washington, Not Florida, Law Governs The Parties' Relationship

Plaintiffs' FDUTPA claim should also be dismissed because the parties agreed that Washington (not Florida) law would apply to disputes arising out of Plaintiffs' use of the Amazon Marketplace and the Participation Agreement. Under these circumstances, the Florida statutory claim should be dismissed. *See Hopkins v. GNC Franchising, Inc.*, 2006 WL 2266253, *4 (W.D. Pa. Jan. 13, 2006) (dismissing FDUTPA claim because the parties agreed to a choice of law provision requiring Pennsylvania, not Florida, law to apply); *DeJohn v. The .TV Corp. Int'l*, 245 F.Supp.2d 913, 919 (N.D. Ill. 2003) (choice of law provision requiring New York law to apply bars claims under the Illinois consumer fraud and deceptive trade practices statute).

The parties' Participation Agreement expressly states that it is governed by the laws of the state of Washington. Participation Agreement, at ¶ 18. Florida courts are required to enforce choice of law provisions in contracts unless the law of the foreign state contravenes the strong public policy of Florida. *See Mazzoni Farms Inc. v. E.I. DuPont De Nemours & Co.*, 761 So.2d 306, 311 (Fla. 2000) (contractual choice-of-law provisions are presumptively valid and enforceable in Florida unless the law of the chosen forum contravenes strong public policy). The party who seeks to prove a choice of law provision invalid bears the burden of proof. *Id.,* at 311. Routine policy considerations are insufficient to invalidate choice-of-law provisions, (*id.*), and a mere difference between Florida law and the law of the foreign state does not prevent the enforcement of foreign law. *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (5th Cir. 1947).

Here, there is no reason to disturb the parties' contractual choice of law. The parties agreed to be bound by Washington state law, and they have sufficient contacts with Washington

state. Moreover, application of Washington law here does not contravene the public policy of Florida. Florida courts routinely hold that consumer-protection statutes do not provide a strong enough public policy to override contractual choice of law provisions. *See, e.g., Continental Mortg. Investors v. Sailboat Key, Inc.*, 395 So.2d 507, 513 (Fla. 1981) (in usury case, the laws of Massachusetts would apply, as contractually agreed by the parties, because the contacts Defendant had with Massachusetts, particularly in its domicile and place of business, established that it had a vital, natural and normal relationship with that state); *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.,* 404 So.2d 1059, 1062 (Fla. 1981) (upholding choice-of-law provision even though the parties' purpose in making it was to avoid the restrictive effects of Florida's usury laws); *see also Burroughs Corp. v. Suntogs of Miami, Inc.,* 472 So.2d 1166, 1169 (Fla. 1985) ("the contractual provision shortening the period of time for filing a suit was not contrary to a strong public policy"). Surely, if Florida courts do not attach a strong public policy to Florida's usury laws and statutes of limitations, this Court should not attach a strong public policy to the Florida Deceptive and Unfair Trade Practices Act.

Indeed, public policy supports upholding the choice of law provision here because Florida has a strong public policy protecting freedom of contract. *See Pizza U.S.A. of Pompano Inc. v. R/S Assocs. of Fla.,* 665 So.2d 237, 239 (Fla. 4th DCA 1995); *Mazzoni Farms*, 761 So.2d at 311; *L'Arbalete, Inc. v. Zaczac*, 474 F.Supp.2d 1314 (S.D. Fla. 2007); *Walls v. Quick & Reilly, Inc.,* 824 So.2d 1016, 1018 (Fla. 5th DCA 2002) ("the term 'strong public policy' means that the public policy must be sufficiently important that it outweighs the policy protecting freedom of contract"). Moreover, public policy supports upholding the choice of law provision here because Amazon has a strong interest in contractual uniformity with respect to its users and sellers who are scattered across the country and around the world. *See Hopkins,* 2006 WL 2266253, at *4.

For these reasons, the FDUTPA claim should be dismissed with prejudice.[7]

5. Count 3 (Conversion) Is Barred By The Parties' Contract

A claim for conversion requires three elements: (1) an act of dominion wrongfully asserted; (2) over another's property; and (3) that is inconsistent with his ownership therein. *North American Clearing, Inc. v. Brokerage Computer Systems, Inc.*, 2008 WL 341309 (M.D. Fla. Feb. 5, 2008); *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wash.2d 601 (Wash. 2009) (finding no conversion claim where the money was received pursuant to authorization under a contractual relationship, such as here).

Here, although Plaintiffs allege that Amazon improperly withheld funds and that "at all relevant times, Plaintiffs were entitled to the immediate possession of these funds" [Am. Compl., ¶¶ 71, 74], their contentions are belied by the clear language of the Participation Agreement, which specifically authorizes Amazon to retain funds to investigate potential problems with the account. *See* Participation Agreement, at ¶ 5(h). Thus, Plaintiffs' conversion claim is factually wrong and legally insufficient. Moreover, Plaintiffs fail to mention in their Amended Complaint that Amazon has already returned the funds at issue in this case, so Plaintiffs have no damages.

6. Count 4 (Unjust Enrichment) Is Barred By The Parties' Contract

Plaintiffs' unjust enrichment claim should be dismissed because, "where there is an express contract between the parties, claims arising out of that contractual relationship will not support a claim for unjust enrichment." *Moynet v. Courtois*, 8 So.3d 377, 379 (Fla. 3d DCA 2009); *see also Diamond "S" Development Corp. v. Mercantile Bank*, 989 So.2d 696, 697 (Fla. 1st DCA 2008) ("a plaintiff cannot pursue a quasi-contract claim...if an express contract exists

[7] Moreover, Plaintiffs fail to mention in their Amended Complaint that Amazon has returned the funds at issue in this case. Since Plaintiffs thus have no "actual damages," the FDUTPA claim is legally insufficient. *See Rollins v. Butland*, 951 So.2d 860, 869 (Fla. 2d DCA 2006) (FDUTPA requires actual damages; consequential damages are not recoverable).

concerning the same subject matter"); *Cox v. O'Brien*, 150 Wash.App. 24 (Wash. App. 2009) (affirming dismissal of unjust enrichment claim where the parties had a written contract).

Like the rest of their claims, Plaintiffs' unjust enrichment claim is premised on the theory that Amazon improperly withheld funds related to Plaintiffs' Amazon Marketplace account. *See* Am. Compl., ¶¶ 11-15; 80-83. Amazon's retention of those funds, however, is expressly governed by the parties' Participation Agreement. *See* Participation Agreement, at ¶ 5(h) (authorizing Amazon to withhold funds to investigate potential problems with the account). Since Plaintiffs' unjust enrichment claim arises directly from Amazon's conduct under the parties' contract, the claim is barred as a matter of law.

7. Count 5 (Tortious Interference) Should Be Dismissed

Plaintiffs' tortious interference claim fails for at least two additional reasons. First, as a matter of law, Amazon cannot be held liable for interfering with a relationship to which it is a party or in which it has an interest. *See Ernie Haire Ford, Inc. v. Ford Motor Co*., 206 F.3d 1285, 1294 (11th Cir. 2001) (interfering defendant must be a third party, or a "stranger" to the business relationship); *Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683, 684-85 (Fla. 3d DCA 1986) (no interference where the party is safeguarding its own financial or economic interest); *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wash.App. 1 (Wash. App. 1989) (same).

Plaintiffs' tortious interference claim is predicated solely on Amazon's supposed decision to terminate Plaintiffs' ability to use the Amazon Marketplace. Am. Compl., ¶ 88. As reflected in the Participation Agreement, however, Amazon is no "stranger" to the transactions between Plaintiffs and their customers. In fact, since these transactions were all accomplished through the Amazon Marketplace, Amazon necessarily had contractual relationships with Plaintiffs and each of their customers because anyone using the Amazon Marketplace must agree to the

Participation Agreement terms and conditions. *See* Ceely Declaration, at ¶ 2; *see also* Participation Agreement, at Introductory Paragraph. Indeed, Amazon has a strong interest in ensuring that participants in the Amazon Marketplace are conducting themselves in an appropriate and non-predatory manner.

Amazon also had an express financial interest in these transactions, as Amazon is paid a commission or fee on each sale made through the Amazon Marketplace. *See* Participation Agreement, at ¶ 2 (discussing fee schedule and listing fees); *see also id*., at ¶ 5 ("In order to sell items in Marketplace, you must register with Amazon and use the Amazon Payment Service"); *see also id.*, at "Fees and Pricing" Addendum (listing Amazon's fees and charges for use of the Amazon Marketplace). Since Amazon was not an uninterested stranger to these transactions, the tortious interference claim should be dismissed with prejudice.

Second, Plaintiffs' tortious interference claim should be dismissed because the Participation Agreement specifically authorizes Amazon to terminate Plaintiffs' access to the Amazon Marketplace. Participation Agreement, at ¶ 21. Where, as here, a contract provision expressly permits the alleged "interference," a tortious interference claim is barred as a matter of law. *See Birkenwald Distributing,* 55 Wash.App., at 12 (affirming dismissal of tortious interference claim where the defendant had a contractual right to engage in the alleged "interference"); *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987) (holding same).

III. CONCLUSION

For the reasons discussed above, this case should be dismissed or transferred to the United States District Court for the Western District of Washington.

LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), undersigned counsel for Amazon certifies that he has conferred with Plaintiffs in an effort to resolve the venue-related issues raised in this motion, and that Plaintiffs have indicated that they oppose the relief requested.

Dated: July 6, 2010

CARLTON FIELDS, P.A.
CityPlace Tower – Suite 1200
525 Okeechobee Boulevard
West Palm Beach, Florida 33401
Telephone: (561) 659-7070
Facsimile: (561) 659-7368

By: */s/ David B. Esau*
James B. Baldinger
Florida Bar No.: 869899
jbaldinger@carltonfields.com
David B. Esau
Florida Bar No.: 650331
desau@carltonfields.com

Counsel for Defendant Amazon.com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing system:

/s/ David B. Esau
David B. Esau

SERVICE LIST

Albert Segal
Marianna Chaparova
10490 S.W. 12th Terr.
Apt# 202
Miami, FL 33174
(via U.S. Mail)