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 RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Defendant Amazon.com, Inc. ("Amazon") files this Response in Opposition to Plaintiffs' Motion to Compel Production of Documents [D.E. 39] (the "Motion to Compel"), and in support thereof, submits the following memorandum of law:

MEMORANDUM OF LAW

I. Introduction and Background

This action arises from a business relationship between *pro se* Plaintiffs and Amazon related to Plaintiffs' use of the Amazon website (www.amazon.com), and specifically the "Amazon Marketplace," to sell textbooks and other merchandise over the internet. Plaintiffs complain that Amazon improperly withheld, temporarily, some $1,300 of their funds pending an investigation into Plaintiffs' illicit sales practices on the Amazon Marketplace, and that Amazon unfairly terminated Plaintiffs' access to the Amazon Marketplace after its investigation. Based solely on these allegations, Plaintiffs assert seven different causes of action, which are identified in Plaintiffs' Motion to Compel.

On July 6, 2010, Amazon filed a Motion to Dismiss Plaintiffs' Amended Complaint. [D.E. 26] ("Motion to Dismiss"). In its Motion to Dismiss, Amazon moved to dismiss this case for improper venue or, alternatively, to transfer the matter to the United States District Court for the Western District of Washington because the written contract governing the relationship between the parties (the "Participation Agreement") contains an express choice of law provision mandating that any dispute be adjudicated in Washington State, and that any such claims would be governed by Washington law. Amazon also moved to dismiss each of Plaintiffs' seven causes of action for a variety of reasons, including that the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claim is barred by the choice of law provision in the Participation Agreement, and because the Participation Agreement expressly contemplates (and permits) the conduct about which Plaintiffs complain. [D.E. 26]. Amazon's Motion to Dismiss is fully briefed, but the Court has not yet ruled on it.

As Plaintiffs state in their Motion to Compel, on November 4, 2010, Plaintiffs sent counsel for Amazon an email containing what appeared to be Plaintiffs' First Request for Production of Documents ("First Request"). *See* Exhibit 2 to Plaintiffs' Motion to Compel. The First Request was sent solely in the body of Plaintiffs' November 4th email. Plaintiffs did not sign the First Request, and they did not include a Certificate of Service. Nevertheless, Amazon timely served its written responses to the First Request on December 4, 2010. *See* Exhibit 3 to Plaintiffs' Motion to Compel.

In their First Request, Plaintiffs sought what would likely amount to tens of millions of pages of documents related to all of Amazon's tens of millions of other customers and tens of thousands of employees. For example, the First Request sought "any and all internal company correspondence," and every company record related to any Participation Agreement between

Amazon and any of its customers, and "any and all financial records" of Amazon, and "any and all complaints from Amazon's Seller-Customers."

These requests are grossly overbroad, and have nothing to do with Plaintiffs' claims that Amazon withheld certain of their funds, or unfairly terminated their access to the Amazon Marketplace, or that Amazon otherwise breached the parties' Participation Agreement. While Amazon could easily have objected to the First Request in its entirety, Amazon agreed voluntarily to produce documents that are related to the Plaintiffs' use of the Amazon Marketplace, and that are specific to the Plaintiffs' seller account. Amazon produced more than five hundred pages of documents related to those issues, and completed its production before Plaintiffs filed the instant Motion to Compel.[1]

Apparently frustrated with Amazon's unwillingness to conduct an onerous search for and production of documents that have nothing to do with the claims or defenses in this case, Plaintiffs sent Amazon "simplified" requests for production of documents on December 8, 2010 (the "Second Request"), again unsigned, without a Certificate of Service, and solely in the body of an email. *See* Exhibit 4 to Plaintiffs' Motion to Compel. Amazon has not yet responded to the Second Request and, according to Rule 34 of the Federal Rules of Civil Procedure, Amazon's responses to the Second Request are not due until January 7, 2011, if at all.[2]

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[1] Contrary to Plaintiffs' assertion, the documents produced by Amazon were not "identical" to those produced by the Plaintiffs. Plaintiffs likely recognize many of the documents produced by Amazon because Amazon produced voluminous correspondence related to Plaintiffs' seller-account with Amazon. It certainly is not unusual for both parties to possess copies of the same electronic correspondence between them.

[2] Since Amazon's deadline to respond to the Second Request falls four days after the Court-ordered January 3, 2011 deadline to complete fact discovery in this case [D.E. 31], Amazon need not respond to the Second Request at all. *See* Local Rule 26.1(f)(2) ("Discovery must be completed in accordance with the court-ordered discovery cutoff date. Written discovery requests and subpoenas seeking the production of documents must be served in sufficient time that the response is due on or before the discovery cutoff date…. Failure by the party seeking

Plaintiffs filed the instant Motion to Compel on December 22, 2010. For the reasons discussed below, Plaintiffs' Motion to Compel should be denied in its entirety.

II. Argument

While the basis for their Motion to Compel is not entirely clear, Plaintiffs appear to be asking the Court to compel Amazon to produce documents responsive to Plaintiffs' Second Request, which is dated December 8, 2010. *See* Motion to Compel, at 4-5. Since Amazon has not yet even served its written responses to the Second Request, and its deadline to do so has not yet elapsed as of the undersigned date (*see* Fed.R.Civ. P. 34 -- providing a responding party 30 days to respond to a request for production of documents), Plaintiffs' Motion is not yet ripe, and should be denied in its entirety.

To the extent Plaintiffs are suggesting in their Motion to Compel that Amazon's responses to Plaintiffs' First Request are somehow deficient, Plaintiffs fail to articulate which specific requests and responses are at issue in their Motion to Compel, or how Amazon's responses are deficient -- as required by Local Rule 26.1(h)(2). Amazon has no way of responding to a motion to compel that does not identify which of Amazon's responses are deficient, or which documents are even at issue in the motion. For that reason too, the Motion to Compel should be denied in its entirety.

Even if the Court were inclined to examine Plaintiffs' entire First Request and Amazon's corresponding responses, all of Amazon's objections should be sustained. As articulated in Amazon's responses (attached as Exhibit 3 to Plaintiffs' Motion to Compel), Plaintiffs seek in their First Request what would likely amount to tens of millions of pages of documents related to nearly every aspect of Amazon's business. For example, Plaintiffs request "[c]opies of any and

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discovery to comply with this paragraph obviates the need to respond or object to the discovery, appear at the deposition, or move for a protective order").

all financial records, including a complete accounting of all funds that have been withheld/reserved by Amazon from its Seller-Customers for any reason." *See* Plaintiffs' First Request, Number 5. Documents responsive to this request go way beyond whether Amazon improperly withheld funds from these Plaintiffs, or whether Amazon unfairly terminated Plaintiffs' seller account on the Amazon Marketplace, or whether such conduct breached the parties' Participation Agreement or otherwise constitutes tortious behavior as to these Plaintiffs. Plaintiffs have no need for a vast array of information about tens of millions of Amazon's other customers, let alone "any and all financial records" of Amazon (which alone could amount to many warehouses full of documents). In any event, Amazon is a publicly traded company, and its "financial records" are publicly available through the website of the United States Securities and Exchange Commission, and on the Amazon.com website.

Similarly, Plaintiffs seek "[c]opies of any and all internal company correspondence, including, memos, letters, notes, emails (in their original form), and all other documents that relate to the Amazon's "Participation Agreement" (Plaintiffs' First Request, Number 1), and "any and all complaints from Amazon's Seller-Customers and documents related to Amazon's responses to those complaints." Plaintiffs' First Request, Number 4. Again, these requests go way beyond these Plaintiffs, their seller account, and the claims in the Amended Complaint. Moreover, Amazon has tens of thousands of employees, and tens of millions of users worldwide. A search for "any and all internal company correspondence," or any such correspondence relating in any way to the Amazon Participation Agreement with any customer, or "any and all complaints from Amazon's Seller-Customers" would require a company-wide search, and would take many, many months and significant resources to complete. There is simply nothing about these requests that describes "with reasonable particularity" the items to be inspected

(Fed.R.Civ.P. 34(b)(1)(A)), or that is "relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1).

Plaintiffs may argue in reply (although they failed to do so in their Motion to Compel) that they need information about Amazon's millions of other customers to show that Amazon is "systematically" engaged in conduct similar to that which allegedly occurred with respect to their account. This argument is without merit, though, because none of the Plaintiffs' claims requires a "systematic" or "pattern" or "course of conduct" element, and none of the Plaintiffs' claims has anything to do with Amazon's other customers. *See e.g., Macias v. HBC of Fla., Inc.,* 694 So.2d 88, 90 (Fla. 3d DCA 1997) (to support a FDUTPA claim, plaintiff must plead and prove the conduct complained of was unfair and deceptive and that the plaintiff specifically was aggrieved by the unfair and deceptive act. No "pattern" or "course of conduct" or "systematic" element is necessary); *C&J Sapp Publishing Co. v. Tandy Corp.*, 585 So.2d 290, 292 (Fla. 2d DCA 1991) (identifying elements of fraud; no pattern or course of conduct element is necessary); *Azar v. National City Bank*, 2009 WL 3668460 (M.D. Fla. Oct. 26, 2009) (identifying elements for negligence and breach of fiduciary duty claims; no pattern or course of conduct element necessary); *North American Clearing, Inc. v. Brokerage Computer Systems, Inc.*, 2008 WL 341309 (M.D. Fla. Feb. 5, 2008) (identifying elements of a conversion claim; no pattern or course of conduct element necessary); *Diamond "S" Development Corp. v. Mercantile Bank*, 989 So.2d 696, 697 (Fla. 1st DCA 2008) (identifying elements of unjust enrichment claim; no pattern or course of conduct element necessary); *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987) (identifying elements of tortious interference claim; no pattern or course of conduct element necessary).

This case is not about Amazon's tens of millions of other customers. Rather, it is solely about the relationship between Amazon and Mr. Segal and Ms. Chaparova, and whether Amazon withheld these Plaintiffs' funds for longer than that permitted under their Participation Agreement, and whether these Plaintiffs were improperly terminated from the Amazon Marketplace. Since information about Amazon's other customers is not reasonably calculated to lead to the discovery of admissible evidence based on the claims or defenses in this case, and because a search for such documents would be disproportionately burdensome, Amazon's objections should be sustained.

Even if the Court concludes that information related to Amazon's other customers is somehow relevant to Plaintiffs' FDUTPA claim (which it should not), that claim is barred as a matter of law pursuant to the parties' Participation Agreement, and Amazon should not be subject to discovery on that claim at all. As discussed at length in Amazon's Motion to Dismiss [D.E. 26, at 16-18], Plaintiffs voluntarily agreed in the Participation Agreement to be bound by Washington State, not Florida, law. *See* D.E. 26, at 16-18. As such, Plaintiffs' Florida statutory claim is barred as a matter of law, and Amazon's objection to producing documents related to that claim should be sustained.

In any event, the Court should stay Amazon's obligation to conduct such a heavily burdensome search for and production of documents until the Court rules on Amazon's threshold Motion to Dismiss. [D.E. 26]. Amazon respectfully suggests that it should not be required to engage in wide-ranging, costly, and expansive discovery on claims that almost certainly will be dismissed at the pleading stage, or that should be transferred to another district.

In *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), the Eleventh Circuit addressed just such an issue. In that case, the defendant filed in the trial court a motion to

dismiss for failure to state a claim upon which relief could be granted, but the district court allowed discovery and other pretrial proceedings to go forward without ruling on the motion. The Eleventh Circuit held that the discovery should have been stayed pending disposition of the motion based on the significant burdens and expenses imposed by the discovery process:

> [D]iscovery . . . carr[ies] significant costs . . . . Discovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged. The party seeking discovery also bears costs, including attorneys' fees generated in drafting discovery requests and reviewing the opponent's objections and responses. Both parties incur costs related to the delay discovery imposes on reaching the merits of the case. Finally, discovery imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes.

Id. at 1367-68. Because of these burdens, the Eleventh Circuit held:

> Facial challenges to the legal sufficiency of a claim . . . , such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins.

Id. at 1367; *accord In re Managed Care Litig.*, 2001 WL 664391, *2 (S.D. Fla. June 12, 2001) ("[t]his Court firmly abides by *Chudasama's* instructions that '[d]iscovery should follow the filing of a well-pleaded complaint'…and that 'any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage, if possible.'") (quoting *Chudasama*, at 1367-68) (internal marks and citations omitted).

Chudasama squarely applies here. If the Court finds that the Plaintiffs are entitled to some or all of the documents sought in their document requests (beyond those already produced by Amazon), Amazon should be spared the expense of responding to such extraordinarily burdensome discovery until the Court rules on Amazon's Motion to Dismiss.

Finally, as to Plaintiffs' suggestion that Amazon somehow waived its attorney/client privilege by not providing a privilege log: Plaintiffs' First Request seeks information related to virtually every Amazon customer and from every Amazon employee and about every aspect of Amazon's business. As Amazon indicated in its responses, Amazon has no reasonable method of searching for or compiling privileged documents that would be responsive to Plaintiffs' wildly overbroad requests. Indeed, since the proper scope of discovery is plainly at issue here, Amazon does not yet even know what will fall into the category of discoverable documents. Once the scope of permissible discovery in this case is determined by the Court, Amazon will provide a privilege log of documents withheld from production, if any. *See Gosman v. Luzinski*, 937 So.2d 293 (Fla. 4th DCA 2006) (obligation to provide privilege log does not arise until written objections such as irrelevance and over-breadth are ruled upon).

III. Conclusion

Amazon respectfully requests the Court to deny Plaintiffs' Motion to Compel in its entirety or, alternatively, to stay Amazon's obligation to respond to the discovery requests until the Court rules on Amazon's Motion to Dismiss.

Dated: January 3, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, 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:

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