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.
_____/

AMAZON'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL THE DEPOSITION OF AMAZON'S CORPORATE REPRESENTATIVE

Defendant Amazon.com, Inc. ("Amazon") files this Response in Opposition to Plaintiffs' Motion to Compel the Deposition of Amazon's Corporate Representative [D.E. 43] (the "Motion"),[1] 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 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.

On July 6, 2010, Amazon filed a Motion to Dismiss Plaintiffs' Amended Complaint.

[1] In their Motion, Plaintiffs also responded to Amazon's Motion to Compel [D.E. 40]. Amazon filed a separate Reply in Support of its Motion to Compel at Docket Entry 44.

[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 forum selection clause mandating that any dispute be adjudicated in Washington State, and that any claims 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.

On December 3, 2010, Plaintiffs sent counsel for Amazon an email requesting Amazon to designate a Rule 30(b)(6) corporate representative for deposition on the following topics: "all matters raised in [the] Amended Complaint, including Amazon's management, operational, and financial matters." A copy of Plaintiffs' December 3rd email is attached hereto as Exhibit 1.[2] Shortly after receiving these deposition topics, counsel for Amazon sent Plaintiffs an email informing them that the topics were too broad, and that Amazon would have trouble identifying and properly preparing a witness (or even several witnesses) to testify about everything involving Amazon's "management, operational, and financial matters." Amazon requested Plaintiffs to narrow their deposition topics, and to serve a formal deposition notice.

On December 12, 2010, Plaintiffs sent another email, which again purported to direct

[2] While Plaintiffs attached to their Motion certain select emails, they neglected to include their December 3rd email, and omitted (and in some cases affirmatively redacted) several emails sent from Amazon's counsel in response to their emails.

Amazon to designate a corporate representative for deposition "on each of the subject matters set forth in" Plaintiffs' December 3rd email, and also those matters "related to the claims in [the] Amended Complaint and Amazon's SEC filings (10-Q and 10-K filings)." Plaintiffs elaborated by stating: "[i]f you are unclear about the meaning of the terms such as 'management,' 'operational' and 'financial,' you should read those filings." A copy of Plaintiffs' December 12, 2010 email is attached hereto as Exhibit 2, and was attached as Exhibit A to Plaintiffs' Motion. Plaintiffs demanded that the deposition occur either on Sunday, January 2, or Monday, January 3, 2011. *Id.*

After Amazon's counsel again requested clarification of Plaintiffs' deposition topics, and requested a formal deposition notice, Plaintiffs sent another email on December 16, 2010 demanding that the deposition occur on January 3, 2011 at 9:30 a.m. EST via telephone. Since Amazon's designated corporate representative is based in Seattle, Washington, Amazon agreed to make her available telephonically commencing at 10:00 a.m. PST (1:00 p.m. EST) on January 3rd to testify as to matters related to the Plaintiffs' seller account and to Plaintiffs' experience on the Amazon Marketplace. A copy of the relevant correspondence is attached hereto as Exhibit 3. Amazon also served written objections to the deposition topics listed in Plaintiffs' December 12th email. A copy of Amazon's written objections is attached hereto as Exhibit 4.

Through several additional emails over the holidays, Plaintiffs alternately canceled the deposition of Amazon's designated corporate representative, then demanded that the deposition occur <u>in the morning</u> of January 3rd (despite knowing that Amazon's designated representative is based in Seattle, Washington, and was not available until 1:00 p.m. EST), and then finally canceled the deposition altogether on December 30, 2010. Copies of the relevant correspondence are attached hereto as Exhibit 5.

Amazon was prepared to produce a corporate representative for a telephonic deposition on January 3, 2011 at 10:00 a.m. PST, but Plaintiffs elected not to take the deposition. Instead, Plaintiffs filed the instant Motion on January 6, 2011 (three days after the fact discovery cut-off), which seeks to compel Amazon to "designate its corporate representative to appear for his/her deposition to answer questions on the topics designated by Plaintiffs." Plaintiffs' Motion should be denied for the numerous reasons discussed below.

II. Argument

While the basis for their Motion is not entirely clear, Plaintiffs appear to be asking the Court to compel Amazon to produce a corporate representative to testify as to the matters identified on page three of their Motion, which include: "(1) Amazon's handling of the funds it withholds from the seller-customers"; and "(2) "Operational and Managerial" [sic]. Plaintiffs' Motion should be denied for at least four reasons:

First, Plaintiffs' Motion should be denied because they failed to serve a proper deposition notice, and their proposed deposition topics are entirely unclear. Rule 30(b)(6) requires a party seeking the deposition of a corporation to serve a deposition notice identifying with reasonable particularity the matters for examination. Fed.R.Civ.P. 30(b)(6); *see also Beaulieu v. The Board of Trustee of the University of West Florida*, Case No. 3:07-cv-00030-RV-EMT, at 10-11 (N.D. Fla. Oct. 4, 2007, D.E. 65) (attached hereto as Exhibit 6) (under similar circumstances involving a *pro se* plaintiff, finding that plaintiff's request for a 30(b)(6) deposition was improper because it was served through letters that also addressed other discovery issues; and stating that "if Plaintiff wishes to proceed with a 30(b)(6) deposition of Defendant, she must provide a specific notice of deposition that identifies with reasonable particularity the matters on which she is requesting examination"); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan.

2007) ("the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute").

As discussed above, despite repeated requests from Amazon, Plaintiffs refused to serve a proper deposition notice with all of their topics identified in one place. Instead, Plaintiffs scattered their proposed (and evolving) deposition topics across multiple convoluted emails spanning several weeks. *See* Exhibits 1-3, 5. While Amazon recognizes that Plaintiffs are prosecuting this action *pro se*, and that some degree of latitude with procedural requirements may be appropriate, Plaintiffs' refusal to serve a proper, stand-alone deposition notice has made Amazon's task of identifying and preparing a witness, scheduling the deposition, confirming that the Plaintiffs would actually appear for the deposition,[3] and responding to this Motion exceedingly difficult. In fact, Amazon still does not know for sure what deposition topics are even at issue in this Motion because the specific topics identified on page three of the Motion – one of which is incomprehensible – did not even appear in Plaintiffs' December 3rd, December 12th, or December 16th (or any other) emails. *Id.* Since Plaintiffs failed to serve a proper deposition notice, and failed to articulate the deposition topics at issue in this Motion, the Motion should be denied.

Second, and relatedly, Plaintiffs' Motion should be denied because it would be impractical for the Court to rule in a vacuum before the proposed deposition. As discussed above, this is not a situation where a party refused to appear for deposition altogether, or refused to answer specific deposition questions. Rather, Amazon agreed voluntarily to produce a witness for deposition on January 3, 2011. Plaintiffs were free to conduct that deposition and ask any

[3] Each Plaintiff has already failed to appear for properly noticed depositions on two other occasions in this case. *See* D.E. 42.

question at all. While Amazon objected to many of the proposed deposition topics in Plaintiffs' emails, Plaintiffs elected to forgo taking the deposition altogether, and instead filed the instant Motion to force Amazon to produce a witness capable of testifying about virtually everything about the company.

Under these circumstances, Plaintiffs should have taken the deposition, and then sought to compel additional answers, if any, after the deposition. As this Court held in *New World Network Ltd. v. M/V Norwegian Sea*, 2007 WL 1068124, at *2 (S.D. Fla. Apr. 6, 2007), Rule 30(b)(6) is

> intended to be self-executing and must operate extrajudicially….[and] the proper operation of the Rule does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule deposition… Instead, the better procedure to follow for the proper operation of the Rule is for a corporate deponent to object to the designation topics that are believed to be improper and give notice to the requesting party of those objections, so that they can either be resolved in advance or otherwise. The requesting party has the obligation to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers, if necessary, following the deposition.

Id., at *4 (emphasis in original). The *New World Network* Court concluded that:

> the reason that is a better procedure is that the deponent's answers to relevant questions at the deposition will have a great deal of impact upon the strength of the arguments in support of or against a motion to compel. The answers provided will give the Court a factual record with which to judge whether a particular topic or question asked should be compelled or not. And that forces a responding party to ensure that the witness provides as much relevant or possibly relevant information as possible given the liberal scope of discovery provided by Rule 26 to forestall the necessity of a motion to compel.

Id. The *New World Network* Court found the above-described procedure especially appropriate where, as here, the proposed deposition topics included phrases such as "all matters related to" a given topic. The Court simply should not have to rule in a vacuum, or without a factual record with which to determine whether a particular topic or question asked should be

compelled. Since Plaintiffs have not even attempted to take the deposition yet, their Motion is not ripe, and should be denied.

Third, Plaintiffs' Motion should be denied because the fact discovery deadline has already elapsed, and Plaintiffs have not requested an extension of time to complete their discovery. To the contrary, when counsel for Amazon requested consent from the Plaintiffs to extend the fact discovery period to complete the discovery now at issue in the parties' pending motions to compel [D.E. #s 39, 40, 43], Plaintiffs refused. *See* December 16, 2010 email from Plaintiff Albert Segal, attached hereto as Exhibit 3 (stating that the Plaintiffs "will not ask the Court to extend the deadlines for fact-discovery, dispositive and other pretrial motions"); *see also* Amazon's previous and subsequent requests for an extension in the same chain of emails (also included in Exhibit 3). After Plaintiffs informed Amazon that they would not agree to an extension of the discovery period, Amazon unilaterally moved for an extension to complete its discovery. [D.E. 40]. Plaintiffs have not moved for a similar extension to complete their discovery.

Even if the Court treats the instant Motion as a request to extend Plaintiffs' fact discovery deadline, Plaintiffs filed their Motion three days after the fact discovery deadline had already elapsed. Under the Local Rules of this Court, this type of request is "treated with special disfavor." *See* Appendix A to the Local Rules, Discovery Practices Handbook ("Motions for extension of discovery time are treated with special disfavor if filed after the discovery completion date"). Since Plaintiffs elected to forego taking the deposition as scheduled on January 3rd, and failed to seek (or agree to) an extension of the fact-discovery deadline, their Motion should be denied.

Fourth, even if the Court were inclined to examine the deposition topics in Plaintiffs'

Motion (or those scattered across Plaintiffs' numerous emails), Amazon's objections should be sustained because the topics are overbroad and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs ask Amazon to designate a witness capable of testifying about Amazon's "management, operational, and financial matters," along with matters "related to the claims in [the] Amended Complaint and Amazon's SEC filings (10-Q and 10-K filings)." *See* Exhibits 1-3. These topics are virtually limitless, and could include nearly anything about Amazon.com, on every level of detail. They simply are not stated with reasonable particularity. *See, e.g., Beaulieu* (Exhibit 6), at *10 (deposition topic seeking matters related to "the entire complaint" is overbroad); *New World Network*, at *5 (topics using the phrase "all matters related to" "clearly appear[] to go beyond what is necessary or permitted").

This case is about whether Amazon withheld funds improperly from these Plaintiffs, whether Amazon unfairly terminated Plaintiffs' seller account on the Amazon Marketplace, and/or whether such conduct breached the parties' Participation Agreement or otherwise constitutes tortious behavior as to these Plaintiffs. While Amazon agreed to designate a witness capable of testifying about these issues, Amazon has no possible way of preparing a witness to testify as to everything else about its "management, operational, and financial matters," or all matters "related to the claims in [the] Amended Complaint and Amazon's SEC filings (10-Q and 10-K filings)." These topics could include virtually anything, and they are too broad, and not reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs also appear to seek a witness to testify as to: "(1) Amazon's handling of the funds it withholds from the seller-customers"; and "(2) "Operational and Managerial" [sic]. As a preliminary matter, these topics were not listed in any of Plaintiffs' previous email communications (let alone in a proper, stand-alone deposition notice). Since they were raised for

the first time in Plaintiffs' Motion, they are not ripe for consideration here. Moreover Amazon does not know what the phrase "Operational and Managerial" means, and has no way of preparing a witness to testify about that topic.

With respect to Amazon's handling of funds it withholds from its seller-customers, this topic is overbroad and unduly burdensome in that, as framed, it would require Amazon's witness to have detailed knowledge regarding tens of millions of customers -- all of which necessarily have unique and individualized issues. In any event, this case is not about Amazon's tens of millions of other customers, or how Amazon "handled" their funds (whatever that term means). 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 in this case, 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, fraud, conversion, or tortious interference claims (which it should not), those claims are insufficient as a matter of law for the reasons discussed in Amazon's Motion to Dismiss, and Amazon should not be subject to discovery on those claims at all. Especially problematic is Plaintiffs' FDUTPA claim, which is barred pursuant to the parties' Participation Agreement. 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. As such, Plaintiffs' Florida statutory claim is barred as a matter of law, and Amazon's objection to discovery related to that claim (and others) should be sustained.

Relatedly, the proper scope of discovery in this case necessarily will be impacted by the Court's ruling on Amazon's threshold Motion to Dismiss. Thus, Amazon respectfully suggests that the Court should stay ruling on the instant Motion until a ruling on Amazon's Motion to Dismiss is issued. [D.E. 26]. Amazon should not be required to engage in wide-ranging, costly, and expansive discovery on claims that almost certainly will be dismissed (or significantly narrowed) at the pleading stage, or that should be transferred to another district. Indeed, Amazon strongly objects to venue even being appropriate in this Court (*see* D.E. 26 (discussing forum selection and choice of law clauses in the parties' contract)), and if Amazon is forced to continue litigating this case here, based on Florida law, it would be denied the benefit of its bargain in the Participation Agreement to resolve this dispute in Washington State under Washington law.

In *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), the Eleventh Circuit addressed a similar 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 applies here, and Amazon should be spared the expense of conducting costly and burdensome discovery and witness preparation (if any additional discovery is even ordered) until the Court determines that Plaintiffs actually have viable claims that should proceed in this Court, for which discovery is needed and permitted.

III. Conclusion

For these reasons, the Court should deny Plaintiffs' Motion to Compel in its entirety.

Dated: January 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 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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