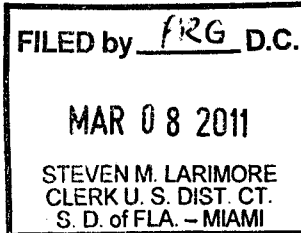


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 10-CIV-20718-COOKE/BANDSTRA



ALBERT SEGAL, and
MARIANNA CHAPAROVA,

Plaintiffs,

- vs. -

AMAZON.COM, INC.,

Defendant.

NOTICE OF PETITION FOR A WRIT OF MANDAMUS

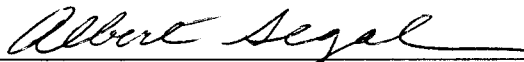
PLEASE TAKE NOTICE that the above named Plaintiffs have filed a Petition for a Writ of Mandamus with the United States Court of Appeals for the Eleventh Circuit to direct this Court to vacate its February 4, 2011 Order granting Amazon.com, Inc.'s motion to transfer venue. A true and correct copy of the petition is attached hereto.

This 4th day of March, 2011.

Respectfully submitted,



Marianna Chaparova, Plaintiff, *pro se*
E-mail: manach101@yahoo.com



Albert Segal, Plaintiff, *pro se*
P.O. Box 192464
Miami, FL 33199
E-mail: alby1969_98@yahoo.com

CERTIFICATE OF SERVICE

This is to certify that Plaintiffs, Albert Segal and Marianna Chaparova, have this day served upon Amazon's counsels of record the foregoing Petition for a Writ of Mandamus directing this Court to vacate its February 4, 2011 Order, via the electronic mail and/or standard U.S. mail.

This 4th day of March, 2011.

Respectfully submitted,


MARIANNA CHAPAROVA, Plaintiff, *pro se*


ALBERT SEGAL, Plaintiff, *pro se*

MAILING LIST

Carlton Fields, P.A.
City Place Tower, Suite 1200
525 Okeechobee Blvd.
West Palm Beach, Florida 33401

IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

In re: ALBERT SEGAL, and
MARIANNA CHAPAROVA,
in forma pauperis,

Petitioners.

*
*
* Case No.
*
* Petition for a Writ of Mandamus
* to Compel the District Court to
* Vacate its Order Granting
* Amazon.com, Inc.'s Motion to
* Transfer Venue Under § 1404(a)
*

**CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1, the Petitioners, Albert Segal and Marianna Chaparova hereby certify that the following persons and entities have or may have an interest in the outcome of this case:

Albert Segal – Petitioner

Marianna Chaparova - Petitioner

The Honorable Marcia G. Cooke – Trial Judge

Amazon.com, Inc. - Respondent

Carlton Field, P.A. – Counsel for Respondent

David B. Esau – Counsel for Respondent

PETITION FOR A WRIT OF MANDAMUS

The Petitioners, Albert Segal and Marianna Chaparova (“Petitioners”), *pro se* Plaintiffs in Civil Action No. 10-cv-20718, captioned as Albert Segal, and Marianna Chaparova v.

Amazon.com, Inc., in the United States District Court for the Southern District of Florida, Miami Division, hereby apply, pursuant to the provisions of section 1651, Title 28, United States Code, and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus to be issued by this Court directing the United States District Court for the Southern District of Florida to vacate its order granting Amazon.com, Inc.'s motion to transfer venue.

FACTUAL BACKGROUND

The Petitioners' Amended Complaint against Amazon.com, Inc. ("Amazon") alleges seven causes of action, which include, inter alia, Fraud and/or Fraud in the Inducement, Negligent Misrepresentation, Constructive Fraud, and violation of Florida Deceptive and Unfair Trade Practices Act (FDUTPA). These allegations are based on the Petitioners' experience with Amazon and information that became available to the Petitioners through contact with hundreds of former "Amazon Sellers." Like thousands of unsuspecting consumers who were induced by Amazon to become third-party sellers on Amazon.com, the Petitioners had an active "Amazon Buyer Account" for at least a year when Amazon began to persistently contact the Petitioners, via the email, with ads encouraging them to become "Amazon Sellers." In these ads, Amazon promised that, by selling merchandise on Amazon.com, the Petitioners will be able to "unlock the potential to generate income beyond [the Petitioners'] wildest dreams." Shortly thereafter, in October 2009, the Petitioners purchased merchandise for the sole purpose of selling it on Amazon.com. During the first three months of selling merchandise on Amazon.com, the Petitioners successfully fulfilled approximately seventy orders without receiving a single negative feedback from any of their customers. Most of these orders were for books - the same books Amazon sells as a direct seller on Amazon.com.

In late January 2010, Amazon notified the Petitioners regarding its decision to “reserve” the Petitioners’ funds for thirty days, not because of anything that the Petitioners had done wrong, but “as a routine practice intended to improve customer service.” Needless to say, Amazon never explained how withholding someone’s funds for a full month helps improve customer service. Ultimately, thirty days turned into nearly four months.

The Petitioners’ experience with Amazon is not atypical. Shortly after filing the instant lawsuit, Petitioners started receiving inquiries on daily basis from other former “Amazon Sellers” who, like the Petitioners, also had excellent feedback ratings and absolutely no claims filed against their seller accounts when Amazon froze their funds and suspended their listings. The most striking similarities include: (1) the fact that Amazon ended up denying these sellers access to their funds in excess of one hundred consecutive days, well beyond the period of time it allows buyers to dispute their transactions; (2) the fact that these sellers were selling the same merchandise Amazon sells as a direct seller on Amazon.com when Amazon terminated their listings; (3) the fact that Amazon continued to withhold funds from these sellers even after being provided with the tracking numbers and delivery-confirmation receipts for the relevant transactions; and (4) the *identical* form letters Amazon used to correspond with these sellers.

Amazon does not dispute, and cannot dispute, that it withheld the Petitioners’ funds from settled transactions and those transactions for which positive customer feedback had been received. This fact should not be overlooked because it substantiates the Petitioners’ claim that Amazon knowingly and willfully withholds funds from transactions that cannot possibly be disputed. Indeed, Amazon continued to deny the Petitioners access to their own money for well over one hundred consecutive days even after it was able to confirm that the Petitioners had fulfilled their orders. Amazon does not deny, and cannot deny, that it has benefited and

continues to benefit from such conduct. Consequently, Amazon's fraudulent, deceptive, unfair and anticompetitive business practices have harmed, and continue to harm, the Petitioners and countless others, and will continue absent judicial intervention.

On February 4, 2011, the United States District Court for the Southern District of Florida, having sat on this case for almost a full year, granted Amazon's motion to transfer venue to the Western District of Washington under 28 U.S.C. § 1404(a). The Petitioners now seek mandamus relief from the Honorable Eleventh Circuit Court of Appeal and pray that this Court grant the Petition for a Writ of Mandamus directing the District Court to vacate its February 4, 2011 Order. Petitioners also pray that the Court grant such other and further relief as appropriate.

JURISDICTION

This Court has jurisdiction to issue the writ. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) (holding that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act [28 U.S.C. §1651] confers on the Courts of Appeals the discretionary power to issue writs of mandamus . . .").

ISSUES PRESENTED

(1) Whether the District Court abused its discretion in granting Amazon's motion to transfer venue when it analyzed the issues in the context of the allegations in the original Complaint and completely neglected the allegations in the *operative* Amended Complaint.

(2) Whether the District Court abused its discretion in granting Amazon's motion to transfer venue when it failed to consider if enforcement of Amazon's forum-selection clause would be unreasonable and unjust in light of the § 1404(a) factors and the parties' relative bargaining power.

ABUSE OF DISCRETION

A writ of mandamus serves as a “useful safety valve for promptly correcting serious errors.” *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 608 (2009) (internal quotation and alteration omitted). It is well settled that mandamus is proper relief for an erroneous ruling on a motion to transfer under § 1404(a), and is available to correct a “clear abuse of discretion” where, as in the instant case, “the aggrieved party has no other adequate means to attain the desired relief.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004); *see also Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973) (applying “clear abuse of discretion” standard to an order entered under 28 U.S.C. § 1404(a)); *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965) (recognizing that a clear error of law or clear error of judgment leading to a patently erroneous result may constitute a clear abuse of discretion).

REASONS WHY THE WRIT SHOULD ISSUE

Petitioners are entitled to mandamus relief because the District Court abused its discretion in making the following clear errors of law and/or judgment:

First, and perhaps the most basic, clear error of law that the District Court made in the instant case was to analyze Amazon’s motion to transfer venue in the context of the Petitioners’ original Complaint (“Complaint”), which the Petitioners filed on March 10, 2010. The District Court very specifically referred to the Complaint and each of the four causes of action therein throughout its opinion. For example, as part of its analysis, the District Court stated that “[t]he Plaintiffs, Albert Segal and Marianna Chaparova, filed this lawsuit against Amazon.com, Inc., for alleged violations of the Florida Deceptive and Unfair Trade Practices Act, unjust enrichment, accounting, and tortious [sic] interference with business relationships under Florida law.” *See* Dist. Ct. Order at 1, attached hereto as “Exhibit A.” However, the causes of action in

the Petitioners' Amended Complaint, filed on June 21, 2010, are the only ones at issue here. Moreover, a cause of action for "accounting" is not contained in the Amended Complaint – it was dropped, while several causes of action, such as Fraud and/or Fraud in the Inducement (Count 2), Negligent Misrepresentation (Count 6), and Breach of Fiduciary Duty and Constructive Fraud (Count 7) were added. *See* Petitioners' Amended Complaint, attached hereto as "Exhibit B." The District Court clearly erred in failing to consider the Petitioners' Amended Complaint altogether in its analysis. This clear error of law in and of itself entitles Petitioners to mandamus relief.

Second, the District Court clearly erred in failing to engage in a thoughtful analysis of whether enforcement of Amazon's forum-selection clause would be unreasonable and unjust in light of the § 1404(a) factors and the parties' relative bargaining power. Instead, the District Court *assumed* that the forum selection clause is valid and dispositive, and reached its conclusion to transfer this case based upon that assumption, and did not weigh in its analysis the 1404(a) factors - the public and private interest factors, including convenience of the parties and witnesses, the sources of proof, the local interest, and the compulsory process factors, all of which significantly disfavor transferring this case to Washington state.

This Court and the Supreme Court have consistently held that a choice of forum clause will *not* be enforced where enforcement would be unreasonable and unjust. *See, e.g., Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972); *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987), cert. granted, 484 U.S. 894, 108 S. Ct. 225, 98 L. Ed. 2d 184, affirmed and remanded, 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22, on remand, 855 F.2d 762, on remand, 696 F. Supp. 583, mandamus granted, *In re Ricoh Corp.*, 870 F.2d 570, rehearing denied, 877 F.2d 975. In *Stewart*, the Supreme Court said:

Section 1404(a) is sufficiently broad to control the forum-selection issue. The statute is intended to place discretion in the district courts to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.

Id. at 2244.

A forum-selection clause should receive neither dispositive consideration nor no consideration, but rather the consideration for which Congress provided in § 1404(a).

Id. at 2245. Hence, while a valid, reasonable forum selection clause is an important factor that figures in the District Court's determination, the court *must* ultimately weigh the 1404(a) factors, and *must* consider the "fairness of transfer in light of the forum selection clause and the parties' relative bargaining power." *Id.* at 2244. Here, the District Court did *not* perform the required analysis, which constitutes a clear abuse of discretion for which mandamus relief should be granted.

It is well established that the plaintiffs' choice of forum is generally entitled to deference. *See, e.g., Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996). For the reasons stated in the Petitioners Memorandum in Opposition to Amazon.com, Inc.'s Motion to Transfer Venue ("Memorandum"), attached hereto as "Exhibit C," which the District Court also seems to have neglected, one cannot seriously argue that there is a more convenient venue in which to try this case than the Southern District of Florida. The § 1404(a) factors, including the convenience of parties and witnesses, in the interest of justice, weigh against transferring this case to the Western District of Washington. For instance, while Amazon's motion to transfer venue is based, by-in-large, on the location of its headquarters office, the Petitioners have shown that trial in Seattle, Washington, will be so gravely difficult and inconvenient that they will, for all practical purposes, be deprived of their day in court. Amazon, on the other hand, has litigated cases all over the United States and in numerous foreign countries and has retained a national

law firm to represent its interests in this case. The Petitioners have consistently argued this point, but, contrary to the District Court's assertion, have never suggested that one's financial circumstance by itself is sufficient ground for refusal to enforce a forum clause.

Similarly, the Petitioners have never argued that the forum clause should not be enforced merely because they did not read Amazon's agreement. On the contrary, the Petitioners have argued that reading and understanding the agreement would not have changed their predicament because the Petitioners would have had no choice but to accept it and, nevertheless, would have been in for a surprise. *See, e.g.*, Memorandum ¶ 2 at 7. Of course, the fact that Amazon's agreement is replete with clauses that are purposed to insulate it from liability for its intentional wrongdoing and is presented on a take-it-or-leave it basis, in a way calculated to assure a high probability that it will not be read or understood by most consumers, should not be overlooked. Indeed, the Petitioners have consistently argued against enforcement of the forum-selection clause at issue here on multiple grounds, and the facts of the instant case overwhelmingly support the Petitioners' claim that Amazon has taken an unfair advantage of its superior bargaining power and, at all relevant times, has acted intentionally and maliciously.

Also, while Amazon has not listed a single witness who is not its employee, the Petitioners have provided Amazon with a list of almost twenty *non-party* witnesses, none of whom reside within one hundred miles of Seattle, Washington. Moreover, since the District Court, in its Scheduling Order dated August 19, 2010, scheduled the trial to take place in Miami, Florida, on June 20, 2011, a number of the Petitioners' witnesses have already made arrangements to attend the trial in Miami. A copy of the District Court's Scheduling Order is attached hereto as "Exhibit D." As for the public interest considerations, Florida has a strong interest in adjudicating actions, such as this one, to redress injuries to its citizens. The District

Court clearly abused its discretion in failing to consider the § 1404(a) factors. For this reason alone, mandamus relief is warranted here.

In sum, while the District Court did acknowledge that a forum-selection clause, such as the one at issue here, is “subject to judicial scrutiny for fundamental fairness” (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)), it failed to consider the material facts of this case, the allegations in the *operative* Amended Complaint, the § 1404(a) factors, and the Petitioners’ valid arguments against enforcement of the forum clause.

There is overwhelming evidence in this case of bad faith by Amazon, and transferring this case to Washington state will not serve the convenience of the witnesses and parties or the interests of justice. Instead, it will unfairly shift the inconvenience on the Petitioners. Its most notable impact will be to delay the proceedings—an impact that will fundamentally prejudice the very core of the Petitioners’ claims.

The Petitioners have no other means to attain the desired remedy because, if the Petitioners were to lose their case in Washington state, on appeal the Petitioners would be unable to show that they would have attained a different result had the case been tried in the Southern District of Florida. *See, e.g., In re Nat’l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003). Therefore, mandamus relief is necessary and proper in this case.

RELIEF SOUGHT

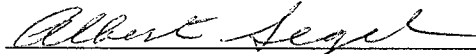
For the reasons stated above, the Petitioners respectfully request that this Court issue a Writ of Mandamus directing the United States District Court for the Southern District of Florida to vacate its order granting Amazon.com, Inc.'s motion to transfer venue, and Order this case to be transferred back to the Southern District of Florida. Petitioners also pray that the Court grant such other and further relief as appropriate.

This 4th day of March, 2011.

Respectfully submitted,



Marianna Chaparova, Petitioner, *pro se*
E-mail: manach101@yahoo.com



Albert Segal, Petitioner, *pro se*
P.O. Box 192464
Miami, FL 33199
(305) 781-4893
E-mail: alby1969_98@yahoo.com

CERTIFICATE OF SERVICE

This is to certify that the Petitioners, Albert Segal and Marianna Chaparova, have on this 4th day of March 2011 served an original and three true copies of the foregoing Petition for a Writ of Mandamus, via the U.S. Priority Mail, to the Clerk of the United States Court of Appeals for the Eleventh Circuit, and true copies were sent by electronic mail and/or U.S. Priority Mail to the following:

TRIAL COURT JUDGE:

The Honorable Marcia G. Cooke
United States District Court
Southern District of Florida
400 North Miami Avenue
Miami, Florida 33128

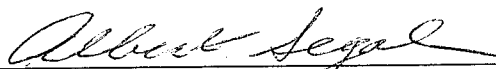
COUNSEL FOR RESPONDENT AMAZON.COM, INC.:

Carlton Fields, P.A.
City Place Tower, Suite 1200
525 Okeechobee Blvd.
West Palm Beach, Florida 33401

Respectfully submitted,



MARIANNA CHAPAROVA, Petitioner, *pro se*



ALBERT SEGAL, Petitioner, *pro se*

EXHIBIT A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 10-20718-Civ-COOKE/BANDSTRA

ALBERT SEGAL, and
MARIANNA CHAPAROVA

Plaintiffs,

vs.

AMAZON.COM, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE

THIS MATTER is before me on the Defendant's Motion to Dismiss for Improper Venue, Or Alternatively, Motion To Transfer Venue (ECF No. 26). I have reviewed the Parties' arguments, the record, the complaint, and the relevant legal authorities. For the reasons explained in this order, the Motion To Transfer Venue is granted.

I. BACKGROUND

The Plaintiffs, Albert Segal and Marianna Chaparova, filed this lawsuit against Amazon.com, Inc., for alleged violations of the Florida Deceptive and Unfair Trade Practices Act, unjust enrichment, accounting, and tortious interference with business relationships under Florida law. According to the Plaintiffs, beginning in November 2009, the Plaintiffs purchased and sold merchandise on the Defendant's website, specifically the "Amazon Marketplace." On January 31, 2010, the Plaintiffs received an e-mail from Amazon.com stating that funds in the Plaintiffs' "Seller Account" would be held for a period of thirty days. The Plaintiffs claim that, after a nearly two-week period of correspondence, Amazon.com refused to disburse the funds in Plaintiffs' "Seller Account" and blocked Plaintiffs' listings.

When registering for an Amazon Marketplace Seller Account, all prospective sellers are required to navigate through a series of registration prompts and webpages. Prospective sellers provide certain information, create a password, and agree to the terms and conditions for using the Amazon Marketplace. These terms and conditions are known as the “Participation Agreement.” Paragraph 18 of the Participation Agreement, entitled “Applicable Law,” reads:

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 those 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.

(Def.’s Mot. to Dismiss, p. 3, ECF No. 26).

Amazon.com, relying on the Participation Agreement, moves for dismissal for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406 or, in the alternative, to transfer for improper venue to the U.S. District Court for the Western District of Washington pursuant to 28 U.S.C. § 1404(a) or, in the alternative, to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Amazon.com argues venue is improper because the Participation Agreement includes a mandatory forum-selection clause that provides for exclusive jurisdiction against them in King County, Washington. In response, Plaintiffs argue the forum-selection clause is unfair, and is both procedurally and substantively unconscionable.

II. LEGAL STANDARD

“For the convenience of 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.” 28 U.S.C. § 1404(a). Under a Section 1404(a) analysis, a choice of forum clause is ““a

significant factor that figures *centrally* in the district court's calculus.” *P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). “[W]hile 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.” *Id.* (citation omitted). “By enforcing the contractual forum, the Court is not attempting to limit the plaintiff's usual right to choose its forum, but is enforcing the forum that the plaintiff has already chosen.” *Id.* Under federal law, forum-selection clauses are “prima facie valid” and will be enforced unless shown to be “unreasonable under the circumstances.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (internal quotation omitted).

III. DISCUSSION

The Plaintiffs argue they are not bound by the forum-selection clause included in the Participation Agreement. They claim the terms were not freely bargained for and are unconscionable, and that complying with the forum-selection clause would effectively deprive them of their day in court.

In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) the Supreme Court upheld a forum-selection clause on the back of a cruise ticket purchased by a consumer who was later injured aboard the vessel. The Supreme Court rejected the lower court's finding that the plaintiffs were “physically and financially incapable of pursuing [their] litigation in Florida.” *Id.* at 594. The Court rejected the lower court's “determination that a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining,” and found that the plaintiffs had not met the “heavy burden of proof required to set aside the clause on grounds of inconvenience.” *Id.* at 593, 595 (internal citation omitted).

The Supreme Court explained that forum selection clauses “are subject to judicial

scrutiny for fundamental fairness.” *Id.* at 594. A forum-selection clause can only be invalidated on a showing of a “bad faith motive” where the forum was chosen “as a means of discouraging [parties] from pursuing legitimate claims.” *Id.* at 595. After noting that Florida was the principal place of business for the cruise line and that many cruises departed from that location, the Court concluded that there was no evidence of a bad-faith motive.

In this case, there is no discernible fraud or bad-faith motive sufficient to invalidate the forum-selection clause. The Defendant has its principal place of operation in Washington, the forum specified in the Participation Agreement. There is no evidence that Defendant chose this forum to prevent parties from pursuing legitimate claims. Furthermore, like the plaintiffs in *Shute*, the Plaintiffs here agreed to the terms of the Participation Agreement, *including the forum-selection clause*. The fact that a forum-selection clause is contained within a so-called “clickwrap agreement,” where a user accepts a website’s terms and conditions, does not in and of itself render the clause invalid. “In Florida and the federal circuits . . . clickwrap agreements are valid and enforceable contracts.” *Salco Distributors, LLC v. iCode, Inc.*, 2006 WL 449156, at *2 (M.D. Fla. 2006); *see also A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008), *rev’d on other grounds by A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (finding that the parties entered into a valid contract when the plaintiffs clicked “I Agree” to a clickwrap agreement on one occasion); *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162–63 (E.D. Cal. 2003) (finding forum selection clause enforceable where plaintiff clicked once on a button marked “I agree.”).

The Plaintiffs’ admitted failure to read the Participation Agreement does not excuse compliance with its terms. *See Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (noting that “[a]bsent a showing of fraud, failure to read an enforceable clickwrap

agreement, as with any binding contract, will not excuse compliance with its terms.”).

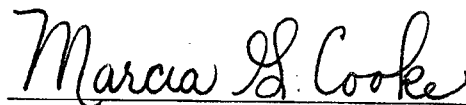
The Plaintiffs could bring the present action in Washington. While Plaintiffs claim that doing so is financially unfeasible, this does not rise to the level of difficulty and inconvenience that would deprive them of their day in court. *See, e.g., P & S Bus. Mach., Inc. v. Canon U.S.A., Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (noting “[t]he financial difficulty that a party might have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause”) (citing *Bonny v. Society of Lloyd’s*, 3 F.3d 156, 160 n.11 (7th Cir. 1993) (reasoning that a “party’s financial status at any given time in the course of litigation cannot be the basis for enforcing or not enforcing a valid forum selection clause”)).

IV. CONCLUSION

For the reasons set forth above, it is **ORDERED and ADJUDGED** as follows:

1. The Defendant’s Motion To Transfer Venue (ECF No. 26) is **GRANTED**.
2. The Clerk shall take all necessary steps to **TRANSFER** this case to the U.S. District Court for the Western District of Washington.

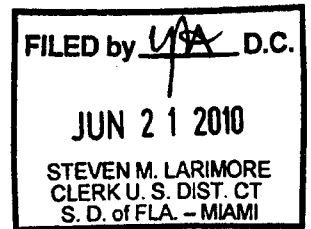
DONE and ORDERED in chambers, at Miami, Florida, this 4th day of February 2011.



MARCIA G. COOKE
United States District Judge

Copies furnished to:
Ted E. Bandstra, U.S. Magistrate Judge
Counsel of record

EXHIBIT B



IN THE 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.

**AMENDED COMPLAINT FOR CIVIL PENALTIES, DAMAGES, INJUNCTIVE AND
OTHER EQUITABLE RELIEF**

We, Plaintiffs Albert Segal and Marianna Chaparova (“Plaintiffs”), on our own behalf, as both consumers (“Buyers”) and merchants (“Sellers”), file this Amended Complaint against Defendant Amazon.com, Inc. pursuant to Federal Rule of Civil Procedure 15(a)(2), with the opposing counsel’s written consent (attached hereto as “Exhibit 1”), and state as follows:

I. NATURE OF PROCEEDINGS

This is an action in law and equity to remedy acts of, inter alia, fraudulent, unfair and dishonest business activity, deceptive and unfair trade practices under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (Fla. Stat. § 501.201 *et seq.*), conversion, unjust enrichment, common law tortious interference with business opportunities, all caused by Defendant Amazon.com, Inc.’s willful and intentional disruption of Plaintiffs’ ability to engage in trade and commerce.

II. PARTIES

1. Plaintiffs are citizens of the United States and residents of Miami-Dade, Florida.
2. At all relevant times, Plaintiffs have been residing at 10490 S.W. 12th Terrace, Apt. #202, Miami, Florida 33174.
3. Upon information and belief, Amazon.com, Inc. (“Amazon”) is a Delaware corporation with its principal place of business at 1200 12th Ave. South, Ste. 1200, Seattle, Washington 98144.

III. JURISDICTION AND VENUE

4. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) (diversity of citizenship, since the damages in this action are in excess of the sum of \$75,000.00, exclusive of interests and costs); 28 U.S.C. § 1367 (supplemental jurisdiction); and Florida’s consumer protection laws.
5. Upon information and belief, this Court has personal jurisdiction over Amazon because Amazon has engaged and continues to engage in acts or omissions within this judicial district causing injury, has engaged and continues to engage in acts or omissions outside of this judicial district causing injury within the district; or has otherwise made/established contacts with this judicial district sufficient to permit the exercise of personal jurisdiction, or has had continuous and systematic contacts with this forum as a result of business regularly conducted within this district via sales over the Internet.
6. Upon information and belief, Amazon maintains thousands of sales to residents of the state of Florida each year, and at all pertinent times has engaged in “trade or commerce,” as defined by Fla. Stat. § 501.203(8), within the State of Florida and within Miami-Dade County.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and (c) because the wrongful conduct and/or omissions giving rise to the claims occurred in the Southern District of Florida.

IV. FACTUAL ALLEGATIONS

8. Plaintiffs have been purchasing merchandise from Amazon since February of 2008.

9. In November of 2009, Plaintiffs established an Amazon merchant account (“Seller Account”), and started selling textbooks and other various merchandise. As part of the verification process, Amazon placed a hold of fourteen (14) days on all funds in the Plaintiffs’ account. The hold was placed as a “security requirement,” and prevented disbursement of funds to the Plaintiffs’ checking account during that period. (Amazon’s confirmation e-mail and “Seller Account Information” are attached hereto as “Exhibit 2.”)

10. Between November 30, 2009 and January 31, 2010, Plaintiffs purchased as well as sold thousands of dollars worth of merchandise on Amazon.com without having received a single complaint or negative feedback from any of the consumers and/or merchants with whom Plaintiffs had established business relationships.

11. On January 31, 2010, Plaintiffs received an e-mail from Amazon informing that, as part of Amazon’s “ongoing commitment to improving the customer experience on Amazon.com,” the funds in the Plaintiffs’ Seller Account would be “reserved” for thirty (30) days. The e-mail further stated that this action is taken “regularly,” and that it is not a negative reflection of the Plaintiffs’ selling history. (A copy of that e-mail is attached hereto as “Exhibit 3.”)

12. Upon receiving Amazon’s e-mail of January 31st, Plaintiffs e-mailed Amazon,

expressing concern over the funds having been made unavailable for disbursement without a reasonable justification, without any compensation, and for reasons unrelated to Plaintiffs' performance as either Buyers or Sellers. (A copy of that e-mail is attached hereto as "Exhibit 4.")

13. Amazon never provided Plaintiffs with an explanation as to how holding the Plaintiffs' funds interest-free for thirty (30) days at a time helps improve "customer experience" on Amazon.com.

14. On February 5, 2010, Plaintiffs received an e-mail from Amazon, which stated that "funds are held equivalent to any claim for 30 days." As of February 5, 2010, however, there had not been any claims filed and there was not a single negative feedback left by any of the Plaintiffs' customers to justify the hold. Nonetheless, as of February 5, 2010, Amazon was refusing to disburse over \$1,384.00 of the Plaintiffs' "available funds," without a reasonable justification, and without any compensation. (Amazon's e-mail of February 5th is attached hereto as "Exhibit 5.")

15. On February 13, 2010, in response to Plaintiffs' numerous attempts to get Amazon to disburse the Plaintiffs' funds, Amazon sent an e-mail to Plaintiffs stating that the Plaintiffs' account would be "blocked" and that all listings would be "removed." Amazon's new reason for not disbursing the Plaintiffs' funds was the 2.5% pre-fulfillment cancellation rate. The e-mail further stated that the funds will be "reserved" for ninety (90) days from February 11th, rather than the initial thirty (30) days from January 31st. (A copy of that e-mail is attached hereto as "Exhibit 6.")

16. Upon receiving Amazon's e-mail of February 13th, Plaintiffs, yet again, e-mailed Amazon, explaining that, due to lack of inventory, Plaintiffs had voluntarily cancelled certain

orders, and had issued full refunds for those orders. This was something Plaintiffs had done for the benefit of the customer, and was a reflection of Plaintiffs' good-faith effort to provide good customer service. Plaintiffs also emphasized that Amazon's actions have been causing them to suffer monetary losses, and that they needed to have access to their "available funds" to be able to continue to buy and sell merchandise over the Internet. (A copy of that e-mail is attached hereto as "Exhibit 7.")

17. By February 14, 2010, Amazon was refusing to disburse over \$1,500.00 of the Plaintiffs' "available funds" without a reasonable justification, despite the fact that, as of February 14, 2010, there was not a single negative feedback left by any of the Plaintiffs' customers and not a single claim filed against the Plaintiffs' Seller Account. In fact, Plaintiffs had a customer satisfaction rating of 4.7 out of 5.0 with feedback remarks such as:

"Received book on time and in the condition described."

"Great service!"

(Copies of the "Feedback Report" and "Payments Summary" are attached hereto as "Exhibit 8.")

18. On February 14, 2010, in response to Plaintiffs' request for more information regarding the status of their Seller Account, Amazon sent an e-mail to Plaintiffs, which stated that the closure of the account is a "permanent action," and that "[f]urther correspondence regarding the status of your selling account will not be answered". (A copy of that e-mail is attached hereto as "Exhibit 9.")

19. Plaintiffs, like countless of other unsuspecting Florida consumers, became Amazon Sellers without knowing about the manner in which Amazon systematically and arbitrarily withholds funds for over one hundred days (100) at a time, closes fixed-price listings,

and suspends or terminates accounts without any advance notice, in contravention of its statutory and common law duties.

20. Plaintiffs were induced into investing in becoming Amazon Sellers by the representations made by Amazon in advertisements, press releases, and through its website.

21. Plaintiffs believed the representations made by Amazon and justifiably relied on them, since there was nothing to make Plaintiffs suspect that Amazon's representations were false.

22. Plaintiffs have been damaged, and continue to be damaged, as a result of being denied access to the available funds in their account for over one hundred (100) days and having their account terminated.

23. Plaintiffs, the Plaintiffs' customers and others, including countless of Florida consumers, have overpaid, and continue to overpay, for merchandise purchased from Amazon on Amazon.com as a result of not having access to the listings of honest third-party Sellers whose accounts Amazon has terminated without any reason or justification.

24. Amazon has pocketed ill-gotten profits as a direct result of withholding the Plaintiffs' funds and blocking the Plaintiffs' listings.

V. CAUSES OF ACTION

COUNT 1

DECEPTIVE AND UNFAIR TRADE PRACTICES (CHAPTER 501 PART II, FLORIDA STATUTES)

25. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-24 as if fully set forth herein.

26. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.20 *et seq.*,

makes it unlawful for “unfair methods of competition, unconscionable acts or practices and unfair or deceptive acts or practices in a conduct of any trade or commerce.” Amazon has engaged in activities that violate said statute. Specifically, Amazon has unlawfully and without a reasonable justification denied Plaintiffs access to their funds for a period of over one hundred (100) days; has directly and/or indirectly made use of those funds; and has denied the Plaintiffs’ customers and other consumers access to the Plaintiffs’ listings.

27. Plaintiffs, prior to entering into a business relationship with Amazon, could not have possibly foreseen that Amazon would refuse to disburse the available funds in the Plaintiffs’ account for many months at a time, without having a reasonable justification to do so.

28. Plaintiffs, prior to entering into a business relationship with Amazon, could not have possibly foreseen that Amazon would deny them access to their own money for almost four (4) months, and would leave them without the funds they needed to continue to engage in honest trade and commerce.

29. Amazon’s failure to disclose and explain its systematic practice of withholding funds in the absence of any disputes, in light of its assurances of funds being made available to Sellers “[a]fter executing [its] world-class payment protection and verifying the [Buyer’s] information,” is intended to deceive third party Sellers, such as Plaintiffs.

30. Amazon is a leading Internet retailer whose original focus on on-line book sales has expanded into online retail of just about every type of merchandise, including consumer electronics, tools, apparel, health and personal care items, baby products, groceries, and more. According to Amazon’s recent SEC filing, it leases “additional” corporate office, fulfillment and warehouse operations, customer service, and other facilities throughout the United States,

including Florida, and at least nine (9) foreign countries. See Amazon's 2008 SEC filing, Form 10-K at 16. (A copy of that filing is attached hereto as "Exhibit 10.")

31. Plaintiffs had been selling many of the same books as Amazon sells on its own website. In fact, Plaintiffs had over sixty (60) different book titles listed at or below the lowest prices of Amazon's listings for identical books. (A printout of the Plaintiffs' listings is attached hereto as "Exhibit 11.")

32. Amazon's actions have made it impossible for Plaintiffs and other Sellers to offer consumers books for less money than Amazon is charging, as a direct seller, on Amazon.com, thereby causing thousands of unsuspecting consumers, including Florida consumers, to pay more for those same books.

33. Upon information and belief, Amazon has engaged and continues to engage in a systematic practice of using dishonest and anticompetitive tactics for its own benefit and profit.

34. Amazon systematically, and in its sole discretion, withholds funds for over one hundred (100) days at a time, closes fixed-price listings, suspends or terminates accounts, without providing any information or justification.

35. Plaintiffs have recently conducted a Google search of the words "Amazon.com withheld funds." The search results included countless of complaints from persons whose money Amazon withheld from them for many months at a time without a reasonable justification. The following is an example of the types of complaints that have been posted:

"Amazon suspended payments during the review period and will now hold all my remaining funds for 90 days. I was never trying to rip people off. I have usually sent my orders in a timely fashion except when I realized there was an issue, like a DVD was loose in the case and I had to get a replacement. I was really scared of ever refunding money if I realized a product may be defective and rather bought a new one because I did not want to get bad feedback. Since they use refunds as a measure of seller quality, you're damned if you do and you're damned if you don't refund if a buyer contacts you and claims that they 'did not intend to make' an order

or 'ordered the wrong thing'....

So now I am not only unable to sell the merchandise I have bought to be sold on Amazon, stuff I had to pay for, but I also had to pay for postage for the orders I already fulfilled. This money was taken out of my credit card. I will have to pay interest. Amazon is keeping my money for four months. Since my A-Z claims over the three years I have been selling on Amazon were less than \$500, how can they withhold \$3000 for possible future claims?...

I have sent a few emails to Amazon but to no avail. If I do get a response, it's a form letter that does not really answer the question. They suspend accounts because of 'poor customer service' and their customer service is either a cookie cutter reply or a friendly "we will not answer any further emails". An individual has no chance getting through to them!"

(A printout of a mere sampling of the complaints is attached hereto as "Exhibit 12.")

36. Plaintiffs have very limited resources, and the funds that Amazon refused to disburse represent a significant portion of all of the Plaintiffs' financial resources.

37. As defined by Fla. Stat. § 501.203, Amazon's conduct is unlawful as it constitutes "unfair methods of competition," "unconscionable acts or practices," and/or "unfair or deceptive acts or practices in the conduct of any trade or commerce." See also Fla. Stat. § 501.204.

38. Amazon's actions have caused Plaintiffs to discontinue all buying and selling activity on the Internet and, in effect, have forced Plaintiffs out of business.

39. Amazon's conduct as set forth herein was "willful" and constitutes violation under said statute. See Fla. Stat. § 501.203(3).

40. Amazon's conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and, therefore, a violation of § 501.20 et seq.

41. As a direct and proximate result of Amazon's activities and conduct in violation of Florida's Deceptive and Unfair Trade Practices Act, Plaintiffs are aggrieved persons as

defined by said statute and have suffered damages within the meaning of said statute. *See Fla. Stat. § 501.203(6), (7); and Fla. Stat. § 501.211.*

42. In addition, because Amazon's actions were undertaken with actual malice, and despite knowledge of a high probability that injury or damage would result, Plaintiffs are entitled to punitive damages.

43. Unless Amazon is permanently enjoined from engaging further in the acts and practices complained of herein, the continued activities of Amazon will result in irreparable damage, loss and injury to Plaintiffs for which there is no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 2

FRAUD AND/OR FRAUD IN THE INDUCEMENT

44. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-43 as if fully set forth herein.

45. Amazon's marketing campaign is intended to induce persons and small businesses into becoming Sellers on Amazon.com under the guise that selling on Amazon.com is secure, easy, and profitable. For example, in its "Selling on Amazon - How It Works" online demo, Amazon outlines the "five easy steps to selling on Amazon" because Amazon wants "you to see the benefit of teaming up with the world's leading internet retailer and unlocking the potential of your business," as follows:

Step 1: "Upload Your Product Inventory – With Selling on Amazon, uploading inventory is a quick and easy task."

Step 2: “Customers See Your Products on Amazon.com – Amazon.com is a leading web site which is a stop for millions of online shoppers. With active customer accounts worldwide, your business and products are exposed to millions of potential customers every day.”

Step 3: “Customers Purchase Your Products – Amazon.com makes buying your products a snap. With detailed product pages, visual representation, and 1-click purchase and a brand millions of customers trust, we help your customers make quick, easy and worry-free purchases.”

Step 4: “You Ship Products to Customers – Amazon notifies you by email when an order has been placed. You simply pack and ship your item to the customer.”

Step 5: “Amazon Transfers Payment to You – After executing our world-class payment protection and verifying the customer information for you, Amazon deposits payment into your bank account and also sends you an email notifying you that your payment has been sent.”

The demo concludes with the following statements:

“Selling on Amazon is just that easy.”

“Build Your Business with Amazon.com.”

See www.amazonservices.com/content/how-it-works-sell-on-amazon.htm

46. Amazon’s marketing campaign intentionally fails to disclose that Amazon routinely and arbitrarily withholds funds for four (4) months at a time and terminates accounts regardless of the Sellers’ performance, and in the absence of any disputes, which has the effect of forcing Sellers out of business.

47. Amazon does not disclose anywhere that it systematically withholds funds in excess of the amount of time it allows Buyers to dispute their transactions.

48. Amazon does not disclose anywhere that it arbitrarily determines whether to withhold funds, and in fact systematically withholds funds that cannot possibly be subject to any disputes.

49. Amazon does not disclose anywhere that it systematically terminates listings and/or Seller accounts without a reasonable justification. In fact, in most cases, once Amazon denies Sellers access to their funds, it also ends-up terminating their accounts. Amazon does this regardless of Buyer feedback, which is the primary matrix by which Amazon supposedly evaluates the Sellers' performance.

50. Amazon's marketing campaign, upon which Plaintiffs relied, intentionally fails to disclose that Sellers are not allowed the opportunity to challenge its decision to withhold funds, debit bank accounts, close listings for fixed-price merchandise, terminate accounts, et cetera.

51. Amazon knows that no-one will invest his/her time and money to become a Seller on Amazon.com without the misrepresentations and material omissions regarding its common course of conduct.

52. Plaintiffs relied on Amazon's fraudulent representations and material omissions in its multimillion dollar marketing campaign and, like thousands of other "Amazon Sellers," purchased merchandise for the sole purpose of selling it on Amazon.com.

53. Plaintiffs believed the representations made in Amazon's advertisements, press releases, and the representations made through its website, and justifiably relied on those representations because Plaintiffs had no reason to suspect that they were false.

54. Once Plaintiffs bought into the Amazon's marketing campaign, became Sellers on Amazon.com and entrusted Amazon with their personal and financial information, as well as with their life savings, Amazon denied Plaintiffs access to their own money, closed their listings, and effectively forced them out of business.

55. Plaintiffs reasonably expected to generate income, and were in fact generating income, through a quick and efficient inventory turnover. Plaintiffs were able to purchase additional inventory upon receiving their funds from previously executed transactions, which lead to increased profitability.

56. Amazon's scheme is designed to adversely affect third party Sellers' ability to maintain high inventory velocity. It is not possible for any business to survive without being able to turnover inventory quickly and efficiently. In fact, Amazon's own success depends almost entirely on its ability to maintain high inventory velocity, which allows it to collect payments from its customers before its payments to suppliers come due. *See* Amazon's 2009 SEC filing, Form 10-K at 20, attached hereto as "Exhibit 13." According to Amazon, for every 1% of additional inventory valuation allowance at December 31, 2009, Amazon would have recorded an additional cost of sales of approximately \$23 million. *Id.* at 21, attached hereto as "Exhibit 14."

57. Amazon's scheme is calculated to make use of the Sellers' funds long enough to affect its profit margin, while forcing third-party Sellers with whom it is in direct competition out of business. Plaintiffs, for example, were forced out of business after fulfilling over seventy (70) orders, many of which were for the same books Amazon sells on its website. Plaintiffs were able to offer many of the exact same books Amazon sells at twenty-to-twenty-five percent below Amazon's prices.

58. At all relevant times, Amazon was fully cognizant of the fact that Plaintiffs were involved in honest trade and commerce.

59. As evidence of Amazon's fraudulent intent, Plaintiffs site Exhibits 2 – 9. Amazon refused to disburse the undisputed funds belonging to Plaintiffs for over one hundred (100) days, terminated the Plaintiffs' Seller Account without providing any justification, and refused to respond to Plaintiffs' communication regarding their Seller Account or provide any information regarding the outcome of its so-called "investigation" of Plaintiffs' selling activities.

60. Plaintiffs have no agreement with Amazon, written or verbal, that would allow Amazon to withhold the Plaintiffs' funds for almost four (4) months.

61. With the Amazon's initial notification to Plaintiffs that it was placing a "hold" on their funds, Amazon knowingly started the process of procuring ownership of the Plaintiffs' funds with the intention of exercising complete control over these funds in excess of thirty (30) days.

62. As Plaintiffs site in Exhibit 12, Amazon's conduct is systematic and is intended to generate a profit under the false pretense of providing "customer service."

63. Amazon, without any regard whatsoever for honesty, fairness or truth, has falsely claimed that it needed to investigate Plaintiffs, all in an effort to retain and make use of the Plaintiffs' funds for profit, and to force Plaintiffs out of business.

64. Amazon has deceived and injured Plaintiffs and countless of others like them, and is likely to continue to deceive and injure others, absent judicial intervention.

65. As set forth above and herein, Amazon made:

- (a) False representations;
- (b) Material to the transaction at hand;

- (c) Made falsely and with knowledge of their falsity and/or recklessness as to whether the statements were true and/or false;
- (d) With the intent of misleading Plaintiffs into relying upon the misrepresentations;
- (e) That Plaintiffs justifiably relied upon;
- (f) That caused and/or proximately caused Plaintiffs damages and/or injuries.

66. Amazon abused the Plaintiffs' trust, and has acted untruthfully, unfairly, fraudulently, and in a way that is outrageous and offensive to any decent individual.

67. As a result of Amazon's fraudulent and deceptive common course of conduct, Plaintiffs were defrauded, sustained damages and were harmed in an amount to be determined at trial, and furthermore are entitled to punitive damages as awarded by the fact-finder at trial.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 3

CONVERSION

68. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-67 as if fully set forth herein.

69. Amazon had a duty to maintain and preserve the funds in the Plaintiffs' account and to prevent their diminishment through its own wrongful acts.

70. Amazon has, without proper authorization, assumed and exercised the right of ownership over the Plaintiffs' funds, in hostility to the rights of Plaintiffs, and without legal justification.

71. Amazon continued to retain these funds unlawfully without the consent of Plaintiffs for over one hundred (100) days, thereby making it impossible for Plaintiffs to generate income while increasing its own profits.

72. Amazon intended to permanently deprive Plaintiffs of the income that was being derived from said funds.

73. These funds are properly owned by Plaintiffs, not Amazon, which has claimed that it is entitled to the benefits it has received as a result of procuring ownership of said funds, contrary to the rights of Plaintiffs.

74. At all relevant times, Plaintiffs were entitled to the immediate possession of these funds.

75. Amazon wrongfully converted these specific and readily identifiable funds in violation of law.

76. Amazon's wrongful conduct is systematic and is continuing.

77. As a direct and proximate result of this wrongful conversion, Plaintiffs have suffered and continue to suffer damages.

78. By reason of the foregoing, Plaintiffs are entitled to recover from Amazon all damages and costs permitted by law, including any and all other amounts that Amazon has wrongfully converted.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 4

UNJUST ENRICHMENT

79. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-78 as if fully set forth herein.

80. Amazon unlawfully denied Plaintiffs access to their own financial resources for over one hundred (100) days, and used the Plaintiffs' resources for profit, which profit was an unjust enrichment to Amazon.

81. Plaintiffs have no agreement with Amazon, written or verbal, that would allow Amazon to withhold the Plaintiffs' funds for over one hundred (100) days.

82. Amazon has voluntarily accepted and retained these profits and benefits, derived from Plaintiffs, with full knowledge and awareness that, as a result of its outrageous misrepresentations and wrongdoings, Plaintiffs were unable to benefit from their business transactions on Amazon.com in a way that had been represented by Amazon.

83. Based upon Amazon's unauthorized and unlawful use of the Plaintiffs' funds for profit and in conjunction with Amazon's failure to provide any reasonable and fair compensation to Plaintiffs, Amazon has received and appreciated benefits under circumstances by which it would be unfair and unjust for Amazon to retain such benefits without compensation to Plaintiffs.

84. As a direct and proximate result of Amazon's unjust enrichment, the Plaintiffs have suffered damages.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 5

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

85. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-84 as if fully set forth herein.

86. Plaintiffs have entered into and/or had a reasonable expectation of being able to

maintain or enter into contracts or business relationships with certain third parties who were the Plaintiffs' existing customers and/or had communicated their interest in establishing prospective relationship with the Plaintiffs. Plaintiffs had fulfilled a substantial number of orders and had established a customer base by providing good customer service, and offering competitive prices and other incentives.

87. Amazon was aware of the Plaintiffs' existing and prospective business relations.

88. Amazon knowingly, willfully and unjustifiably interfered in the Plaintiffs' expectancies by diverting the Plaintiffs' customers through the use of deceptive, unfair, and anticompetitive trade practices, such as denying the Plaintiffs' customers access to the Plaintiffs' listings.

89. At all relevant times, Amazon's conduct as complained of herein was knowing, deliberate and malicious.

90. Amazon's intentional interference with the Plaintiffs' existing contractual ongoing business relationships is causing, and threatens to continue to cause, serious and irreparable harm to Plaintiffs, including harm to Plaintiffs' reputation, credibility and good will, as well as lost sales.

91. Amazon has been profiting and continues to profit from the purported unlawful activity, which includes withholding funds and denying honest consumers and merchants, such as Plaintiffs, access to (Amazon's competitors') listings on Amazon.com.

92. Plaintiffs have been damaged and continue to be damaged by the Amazon's conduct as complained of herein.

93. In addition, because Amazon's actions were undertaken with actual malice, and despite knowledge of a high probability that injury or damage would result, Plaintiffs are entitled

to punitive damages.

94. Amazon's aforesaid acts, unless enjoined by this Court, will continue to cause Plaintiffs irreparable damage, loss and injury, for which Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 6

NEGLIGENT MISREPRESENTATION

95. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-94 as if fully set forth herein.

96. Amazon, in all of its marketing campaigns, misrepresents its role as being a mere facilitator of a platform for third party Sellers, and does not disclose the true nature of its involvement, and the extent to which it systematically, unreasonably, and without justification interferes in the business relations between Buyers and Sellers.

97. Amazon's marketing slogans, such as "[we] look forward to seeing your business grow in ways you never thought imaginable with the help of Amazon.com," "Build Your Business with Amazon.com," and "... we help your customers make quick, easy and worry-free purchases," are intended to induce the unsuspecting consumers into purchasing merchandise that they reasonably expect to sell to independent Buyers on Amazon.com.

98. Amazon's false statements and material omissions are made knowingly, and with the intention of inducing others to act on them.

99. Plaintiffs, having relied on the assurances made in Amazon's marketing campaign, invested their savings to become Sellers on Amazon's platform.

100. Plaintiffs, acting in justifiable reliance on the Amazon's false statements and material omissions, have suffered, and continue to suffer, damages in an amount to be determined at trial, and furthermore are entitled to punitive damages as awarded by the fact-finder at trial.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 7

BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD

101. Plaintiffs adopt, re-allege and incorporate herein by reference, the allegations contained in paragraphs 1-100 as if fully set forth herein.

102. Amazon owed a legal, moral, and social duty to Plaintiffs to perform its duties and obligations and to act in the best interest of the Plaintiffs.

103. Plaintiffs had entrusted Amazon with their private information, including their credit card account and personal checking account information.

104. The relationship between Plaintiffs and Amazon is confidential in nature in that Amazon is obligated not to publicly disclose any of the Plaintiffs' sensitive financial and personal information.

105. Due to Amazon's control and maintenance of the accounting and financial information with regard to Plaintiffs' buying and selling activities on Amazon.com, as well as all funds in their "Seller Account," Amazon was in a superior position to that of the Plaintiffs to ensure that Plaintiffs' funds were promptly disbursed to their checking account.

106. At all relevant times, Amazon acted in an arbitrary manner that served to further its own interests over those of Plaintiffs'.

107. Plaintiffs reasonably relied upon Amazon to discharge these duties owed and had no reason to believe that Amazon, without an explanation or reasonable justification, would deny them access to their funds for over one hundred (100) days, thereby depriving Plaintiffs the compensation to which they were and are entitled.

108. Amazon's conduct in this regard is a breach of the fiduciary duties owed to Plaintiffs and constitutes constructive fraud.

109. As a result of Amazon's breach of fiduciary duties and constructive fraud, Plaintiffs have been significantly damaged.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that the Court render judgment against Amazon in each claim for relief jointly and severally, and as follows:

A. Issuing a temporary, preliminary, and permanent injunction preventing Amazon from further engaging in the unlawful conduct set forth in this Complaint, including but not limited to, requiring Amazon to:

- (1) Reinstate the Plaintiffs' Seller Account;
- (2) Make the Plaintiffs' listings available to the Plaintiffs' customers and all other consumers; and
- (3) Cease any further unlawful conduct set forth in this Complaint.

B. Awarding Plaintiffs declaratory relief, establishing that Amazon has been profiting and continues to profit from the purported unlawful activity, such as denying Plaintiffs, the Plaintiffs' customers and other consumers, access to Amazon's competitors' listings on

Amazon.com, denying honest consumers and merchants, such as the Plaintiffs, access to their own funds without a reasonable justification, and engaging in the purported unlawful activity knowingly, intentionally, and with actual malice;

C. Awarding Plaintiffs compensatory damages, treble damages, punitive damages, and any other damages permitted by law, in the amount to be determined at trial, but in excess of \$75,000.00, plus Plaintiffs' costs and fees in this suit;

D. Awarding Plaintiffs other appropriate equitable relief, including, but not limited to, disgorgement of all profits obtained from Amazon's wrongful conduct;

E. Awarding Plaintiffs prejudgment and post-judgment interest at the maximum rate allowed by law;

F. Awarding Plaintiffs costs and expenses in this litigation; and/or

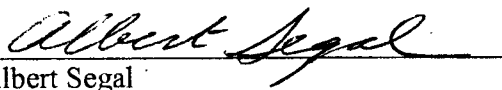
G. Awarding Plaintiffs any other and further relief this Honorable Court deems equitable and just.

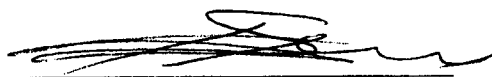
VII. REQUEST FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs request a trial by jury as to all issues so triable.

DATED: June 21, 2010

Respectfully submitted, .

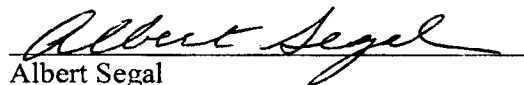

Albert Segal
Plaintiff, pro se
10490 S.W. 12th Terr., Apt# 202
Miami, FL 33174
(908) 510-3584
E-mail address: alby1969_98@yahoo.com


Marianna Chaparova
Plaintiff, pro se
10490 S.W. 12th Terr., Apt# 202
Miami, FL 33174
E-mail address: manach101@yahoo.com

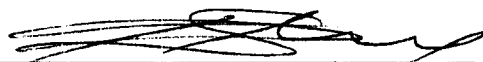
CERTIFICATE OF SERVICE

We, Plaintiffs Albert Segal and Marianna Chaparova, hereby certify that on June 21, 2010, we filed the foregoing document with the Clerk of the Court. We also certify that a true copy of the foregoing document is being furnished this day by electronic mail and U.S. Priority Mail upon counsels of record identified on the Service List.

Respectfully submitted,



Albert Segal
Plaintiff, pro se



Marianna Chaparova
Plaintiff, pro se

SERVICE LIST

David B. Esau, Esq.
Carlton Fields, P.A.
City Place Tower, Suite 1200
525 Okeechobee Blvd.
West Palm Beach, FL 33401

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Cause No. 10-20718-CV-COOKE-BANDSTRA

FILED by KS D.C.
AUG 2 - 2010
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S. D. of FLA. - MIAMI

ALBERT SEGAL and
MARIANNA CHAPAROVA,

Plaintiffs,

vs.

AMAZON.COM, INC.,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
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"**

Plaintiffs, Albert Segal and Marianna Chaparova ("Plaintiffs"), on their own behalf, respectfully ask this Court to *DENY* 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" ("Motion"). In support thereof, Plaintiffs state as follows:

I. INTRODUCTION AND FACTUAL BACKGROUND

Defendant Amazon.com, Inc. ("Amazon") holds itself out to the public as the leading internet retailer in the world, and actively markets its website—Amazon.com—as the only internet site through which consumers and third party sellers can buy and sell just about any type of merchandise. Plaintiffs invested their savings in purchasing books that they reasonably expected to be able to resell, for a modest profit, on Amazon.com. Plaintiffs made their investment after seeing Amazon's many ads and after being persistently contacted by Amazon via the e-mail regarding opportunities to generate income from selling books on Amazon.com.

In fact, Plaintiffs continue to receive e-mail correspondence from Amazon regarding such opportunities to this day. Plaintiffs believed Amazon's representations and entrusted Amazon with their savings and their sensitive personal and financial information. Plaintiffs also believed that they would be able to improve their financial circumstances by being honest and hard-working. Within a short period of time of becoming "Amazon Sellers," Plaintiffs' hard work began to pay off, as evidenced by their selling record that reflects a steady and consistent increase in fulfilled orders and an overwhelmingly positive feedback from their customers.

What Plaintiffs did not know prior to making their investment, and had absolutely no reason to know, was that Amazon systematically withholds active Sellers' funds for four (4) months at a time, and almost always suspends their accounts shortly thereafter, regardless of customer feedback, and in the absence of any disputes. It is a fact that Plaintiffs had a near perfect buyer feedback rating and no claims filed against their Seller Account when Amazon decided that it was reasonable to withhold the Plaintiffs' funds for over one hundred (100) days, including funds from settled transactions and those transactions for which positive customer feedback had been received. This point cannot be overemphasized since it proves that Amazon continues to withhold funds when it knows for a fact that no dispute can arise over those funds.

Amazon's sole justification for its actions is its "Participation Agreement" ("Agreement"). See "Declaration of Catherine Ceely" (Decl. "Exhibit 1" at 3), filed as part of Amazon's Motion. It is stated in Amazon's Motion that, under the Agreement, Amazon is allowed to "temporarily withhold funds if Amazon suspects that the seller is engaged in unscrupulous conduct." See, e.g., Amazon's Motion, ¶ 1 at 2. It is also stated in Amazon's Motion that Amazon is allowed to "terminate sellers' access to the Amazon Marketplace for any reason in its sole discretion." *Id.* Amazon, however, does not address the fact that it routinely

acts in contravention of its Agreement. As stated in the Plaintiffs' Amended Complaint, Plaintiffs have no agreement with Amazon, written or verbal, that would allow Amazon to deny Plaintiffs access to their funds, without a reasonable justification, for nearly four (4) months.

Plaintiffs filed their lawsuit against Amazon as consumers (having purchased thousands of dollars worth of books from Amazon), and as "Amazon Sellers" (having purchased merchandise for the sole purpose of selling it on Amazon.com), pursuant to, inter alia, Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Plaintiffs' claims arise out of Amazon's fraudulent, deceptive, willful and unlawful conduct that was carefully calculated to deceive and take an unfair advantage of unsuspecting consumers for the sake of profit-making. The FDUTPA was passed to protect the Florida consumers, such as Plaintiffs, from exactly the type of business conduct in which Amazon is currently engaged.

Plaintiffs have very limited resources and, if this Court grants Amazon's motion, Plaintiffs will be denied their day in court. It is certain that, if this Court grants Amazon's motion, Amazon will not be held accountable for the harm it caused Plaintiffs and will continue to act with impunity.

II. ARGUMENT

Plaintiffs brought this action to remedy Amazon's unlawful acts pursuant to, inter alia, Florida Deceptive and Unfair Trade Practices Act (FDUTPA). *See* Fla. Stat. § 501.202 (stating that "the provisions of this part shall be construed liberally. . . to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce"); *see also* *PNR v. Beacon Property Management*, 842 So. 2d 773, 777 (2003) (stating that "an

unfair practice [under FDUTPA] is one that ‘offends established public policy’ and one that is ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers’).

Amazon’s one and only defense to this lawsuit is its heavily one-sided Agreement that unfairly favors Amazon. The Agreement was intentionally written in such a way as to make it impossible for laypersons to be able to read and understand, and is presented to the unsuspecting consumers on a take-it-or-leave-it basis. The fact is that no-one assents to such an Agreement and its intended consequences knowingly and willingly. Furthermore, the registration process was intentionally designed in such a way that the user is able to complete the lengthy registration process without ever seeing the Agreement. There can be no doubt that Amazon made a carefully calculated decision to have the Agreement written and presented in this way.

Amazon’s argument that the Agreement represents a “strictly an arms-length, business-to-business contractual relationship” is absurd. *See, e.g.*, Amazon’s Motion at 14.

Had Plaintiffs been able to read and understand the Agreement, they still would have been in for a surprise. And, of course, Amazon’s own noncompliance with the Agreement further undermines its credibility. Moreover, the Agreement is irrelevant to the Plaintiffs’ consumer-related causes of action. Nonetheless, even if the Agreement were to be considered in the context of Plaintiffs’ Amended Complaint, the Agreement must be rendered both procedurally and substantively unconscionable and, therefore, unenforceable as a matter of law.

A. Amazon’s Agreement is Unconscionable and Unenforceable

It is unclear, due to the conflicting decisions by various Florida courts, what analytical framework should be used to determine whether a contract is substantively and/or procedurally

unconscionable.¹ Some Florida courts require a showing of both substantive and procedural unconscionability. *See, e.g., Murphy v. Courtesy Ford, L.L.C.*, 944 So.2d 1131, 1134 (Fla. 3d DCA 2006). Other Florida Courts, however, appear to reject the procedural-plus-substantive unconscionability requirement as a rule of law or use a balancing or sliding scale approach. *See Steinhardt v. Rudolph*, 422 So.2d 884, 889 (Fla. 3d DCA 1982) (stating that although most courts take a "balancing approach," requiring "a certain quantum of procedural plus a certain quantum of substantive unconscionability," the "procedural-substantive analysis is . . . only a general approach to the unconscionability question and is not a rule of law"); *Hiialeah Automotive, LLC v. Basulto*, 22 So.3d 586, 592 (Fla.App. 3 DCA 2009) ("Clearly, if a contract is sufficiently inequitable to meet the test of substantive unconscionability, then it should not be enforced").

Under any analysis, however, Amazon's Agreement is both procedurally and substantively unconscionable, for the following reasons:

1. Amazon's Agreement is Procedurally Unconscionable

For procedural unconscionability, "a court must look to the manner in which the contract was entered into." *See Murphy*, 944 So. 2d at 1134. Courts must consider "whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract or whether the terms were merely presented on a 'take-it-or leave-it' basis; and whether he or she had a reasonable opportunity to understand the terms of the contract." *Id.*; *see also Powertel Inc., v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999) (holding that, although not dispositive, the fact that a contract is one of adhesion is significant in determining whether it is procedurally unconscionable). In addition, Florida courts "might find that a contract is procedurally

¹ The 11th Circuit has certified the issue to the Florida Supreme Court. *See Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010).

unconscionable if important terms were hidden in a maze of fine print and minimized by deceptive sales practices.” *Id.*

Amazon’s counsel argues that individuals cannot register to become Sellers on Amazon.com without truly assenting to the Agreement. It is, therefore, necessary to understand the registration process, which is as follows:

First, unless you already have something that you want to sell, you cannot even initiate the registration process. Plaintiffs, like thousands of other unsuspecting consumers who became “Amazon Sellers,” had purchased merchandise with the specific intention of selling on Amazon.com. Once the listing has been created for the item(s) one wishes to sell, the second step is to create and confirm a “password.” The third step requires the entry of personal information, including the proper mailing address, telephone number, et cetera. The telephone number is immediately verified and a “PIN” is generated to allow one to continue with the registration process. The fourth step requires the entry and “verification” of financial information (e.g., personal credit card number, checking account information, etc.). Finally, you are prompted to “Confirm,” which includes checking on the box in front of a sentence stating that you agree to the terms and conditions of the “Agreement.” The inconspicuous text of the ten-page (single-spaced) Agreement, however, does not appear anywhere during the entire registration process. The registration process does not require one to click on the word “Agreement,” let alone scroll through and read it, before clicking on the word “Confirm.” If you do not click on “Confirm,” you get to walk away without being able to sell your merchandise. Needless to say, no-one walks away.

In *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y., 2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002), the court held that the user did not assent to the terms of the agreement,

and emphasized the importance of requiring the user to scroll down to a submerged screen or click on a series of hyperlinks to view the Agreement. Like the impermissible Agreement in *Specht*, Amazon's Agreement is not immediately visible to the user, and the user is permitted to complete registration without reading the terms of the Agreement. Moreover, the length and complexity of the Agreement, as well as its small font, render scrolling down to view and understand all of the terms impermissible.

The different and sometimes seemingly contradictory terms that are buried within the maze of many lengthy paragraphs and subparagraphs are difficult to understand. Plaintiffs are not attorneys, and the Agreement was clearly not written to be easily understood by laypersons. Moreover, even if Plaintiffs could have read and understood the Agreement, the result would have been the same because they would have had no choice but to accept it, since it is presented on a take-it-or-leave-it basis, and given the lack of any meaningful alternative. *See, e.g., Bragg v. Linden Research Inc.*, 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007) (holding that, "Although Bragg is an experienced attorney . . . he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the ["Terms of Service"] that Linden offered").

Amazon's Agreement is a classic "adhesion contract." *See Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543, 544 (Fla. 3d DCA 1995). While that in itself does not automatically make the Agreement unenforceable, the facts of this case overwhelmingly support Plaintiffs' argument against its enforcement. Amazon's counsel argues that the traditional principles of contract formation are satisfied in this case, as if Plaintiffs had an opportunity to negotiate the terms of the Agreement. He goes so far as to state that "this was strictly an arms-length business-to-business relationship." *See Amazon's Motion at 14.* In a truly arms-length business

relationship, however, Plaintiffs would have been able to challenge Amazon's decision to withhold their funds, and Amazon would not have been able to deny Plaintiffs access to their funds without having to provide Plaintiffs with a reasonable justification. See Amazon's e-mail, Plaintiffs' Complaint at 45. It is also worth noting here that Amazon never disclosed any details regarding the timing and outcome of its "investigation," and that Amazon refused to release the funds until at least mid-May regardless of the timing and outcome of its "investigation."

In *Gatton v. T-Mobile USA Inc.*, 61 Cal. Rptr. 3d 344, 352 (Cal. Ct. App. 2007), the court stated that, "Oppression [for purposes of rendering a contract provision procedurally unconscionable] arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." Here, Amazon took an unfair advantage of its superior bargaining power. For example, buried within the myriad of legal jargon, are provisions that allow Amazon, "in its sole discretion," to withhold funds, restrict accounts, amend terms retroactively, and also indemnify it from being liable for its own negligent acts. Plaintiffs lacked any meaningful alternatives, since Amazon dominates the online retail business, and is the only retailer that provides a platform for independent Buyers and Sellers to sell just about any type of merchandise for a fixed price.² Therefore, under any analytical framework, Amazon's Agreement is procedurally unconscionable.

2. Amazon's Agreement is Substantively Unconscionable

Under Florida law, substantive unconscionability focuses on the terms of the agreement itself and whether the terms of the contract are "unreasonable and unfair." *Powertel*, 743 So.2d at 574; *Kohl v. Bay Colony Club Condo., Inc.*, 398 So.2d 865, 868 (Fla. 4th DCA 1981);

² While eBay also allows independent third parties to engage in commerce on its website, it is primarily an "auction" website and does not provide for fixed-price selling. Moreover, its "User Agreement" contains similar provisions as the ones in Amazon's "Participation Agreement."

Steinhardt, 422 So.2d at 889 (stating that substantive unconscionability focuses "directly on those terms of the contract itself which amount to an outrageous degree of unfairness to the same contracting party").

In *Steinhardt*, Judge Hubbard explained that "[i]t seems to be established by the authorities that where it is perfectly plain to the court that one party [to a contract] has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, that a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness." *Id.* at 889 (citing *Peacock Hotel, Inc. v. Shipman*, 138 So. 44, 46 (1931)).

In *Bland ex rel. Coker v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 256 (Fla. 2d DCA 2006), the court pointed out that a substantively unconscionable contract is one that "no man in his senses and not under delusion would make on one hand, and [that] no honest and fair man would accept on the other." It would have been nonsensical for Plaintiffs to take the deal, so to speak, had they understood Amazon's Agreement and its true intention of allowing Amazon to act with impunity, and had they known about Amazon's systematic practice of withholding funds, without any reasonable justification, for four (4) months at a time. Florida's jurisprudence lacks a clear precedent on the issue of unconscionable, prewritten e-commerce agreements, such as the one involved here. A number of courts outside of Florida, however, have had to decide cases with facts strikingly similar to those of this case. Most notable is *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002). In *Comb*, the court had to determine whether the disputed contract provisions of PayPal's "User Agreement" were unconscionable. The court found a lack of mutuality where the agreement allowed PayPal "at its sole discretion" to restrict accounts, withhold funds, undertake its own investigation of a

customer's financial records, close accounts, and procure ownership of all funds in dispute unless and until the customer is "later determined to be entitled to the funds in dispute." *Id.* at 1173-74. The court stressed the fact that PayPal acted unconscionably in requiring that arbitration take place in Santa Clara County, California, "PayPal's backyard," and found that PayPal had engaged in an adhesive take-it-or-leave-it contract with customers who lacked meaningful choice. *Id.* Also significant was the fact that the "User Agreement" was "subject to change by PayPal without prior notice (unless prior notice is required by law), by posting of the revised Agreement on the PayPal website." *Id.* The court found that the disputed provisions were an attempt by PayPal "to insulate itself contractually from any meaningful challenge to its alleged practices," and noted that the substantive component is satisfied by "overly harsh or one-sided results that 'shock the conscience.'" *Id.*

Similarly, in *Bragg v. Linden Research Inc.*, 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007), the arbitration provision was buried in a take-it-or-leave-it set of terms presented to customers before they could participate on the site. The provision's lack of mutuality, the costs of arbitration, and the forum selection clause demonstrated that the arbitration clause favored the site operators over the participants; *see also Harris v. Blockbuster, Inc.*, No. 3:09-cv-217-M (N.D. Tex. April 15, 2009) (holding that disputed provision in Blockbuster's Agreement was "illusory" because it allowed Blockbuster to modify the terms of the contract, "at its sole discretion" and "at any time").

Here, Amazon's Agreement contains many of the same elements that made the agreements in the above-mentioned cases substantively unconscionable. For example, ¶ 2 of the Agreement states the following regarding Amazon's right to amend it:

Amazon Services LLC ("Amazon") reserves the right to change any of the terms and conditions contained in this Participation Agreement or any policies or

guidelines governing the Site or Services, at any time and in its sole discretion. Any changes will be effective upon posting of the revisions on the Site.

Amazon has given itself the unrestricted ability to amend the terms of the Agreement,³ suspend or terminate accounts at any time and for any reason, to withhold funds in its sole discretion, to use the withheld funds in order to generate income without having to compensate the owners of the funds, and to hold itself unaccountable for its unlawful actions regardless of the consequences of those actions.

The important provisions of the Agreement that are material to determining the outcome of any dispute between Amazon and “Amazon Sellers” are heavily tilted in Amazon’s favor. Hence, the Agreement is fundamentally unfair. Moreover, for the above-stated reasons, Amazon’s genuine assent to be bound by the terms of the Agreement is lacking.

While Amazon started out as a bookstore, it now sells just about every type of merchandise. It also operates retail websites for numerous companies, such as Target, Timex Corporation, Marks & Spencer, Mothercare, and Lacoste.⁴ Until 2006, Amazon was also operating an online store for Toys “R” Us, but that relationship was severed as a result of Amazon’s willful breach of its exclusivity agreement with Toys “R” Us.⁵

In fact, according to Amazon, it has undertaken a multimillion dollar marketing campaign to accomplish “customer awareness.” In its SEC (2008) filing, Amazon stated that it has over 1.3 million “active seller customers.” *See* SEC (2008), Form 10-K. Amazon describes its main

³ A contract requires manifestation of mutual assent and consideration, and the modification of the Agreement without the user’s assent and without any consideration from the developer is not an enforceable contract.” Restatement (Second) Contracts § 17 (1981).

⁴ Source: <http://en.wikipedia.org/wiki/Amazon.com>

⁵ The Judge in that case repeatedly complained about Amazon’s ambiguous use of language in memorandums, contract agreements and discussions, stating that “the language as drafted whether intentional or inartful gave Amazon the words to play the game their way.” N.J. Super., No. C-96-04, opinion at.131.

current and potential competitors to include physical-world retailers, catalog retailers, publishers, vendors and distributors, some of which currently sell, or may sell, products or services through the Internet, mail order, or direct marketing. *Id.* Plaintiffs had invested time and money to become “Amazon Sellers” without knowing that they would be viewed and treated by Amazon as “potential competitors.” Amazon’s marketing campaign does not disclose this information, just as it does not disclose the fact that Amazon routinely withholds funds from Sellers who have acted in good faith and have received only positive reviews from their customers.

The Agreement upon which Amazon now relies to justify its intentional, malicious, deliberate and unlawful conduct is replete with clauses that are purposed to insulate Amazon from any liability for its intentional wrongdoing. *See, e.g.*, the “Limitation of Liability” clause, which is buried on p. 8 of the Agreement at ¶ 17(b).

Under Florida law, exculpatory clauses, such as the one in Amazon’s Agreement, that attempt to limit one’s liability for deceptive or unfair trade practices, are contrary to public policy and unenforceable. *See, e.g., John’s Pass Seafood Co. v. Weber*, 369 So. 2d 616 (Fla. 2d DCA 1979) (“It would be contrary to public policy to enforce an exculpatory clause that attempts to immunize one from liability for breach of a positive statutory duty”).

The following is Amazon’s termination clause:

Amazon, in its sole discretion, may terminate this Participation Agreement, access to the Site or the Services, or any current fixed price sales immediately without notice for any reason. Amazon, in its sole discretion, also may prohibit any Seller from listing items for fixed price sales.

Id. at ¶ 21.

Amazon’s Agreement allows Amazon to use self-help (e.g., suspend or terminate accounts, withhold funds, et cetera) to resolve disputes, and does not limit it to a particular forum or choice of law, while the Agreement limits the forum and choice of law for the weaker party.

Plaintiffs do not have the resources to travel thousands of miles to Seattle, Washington, to litigate their case against Amazon. The provisions at issue here, including the forum selection and choice of law clause, were intended to make it impossible for those with limited resources, such as Plaintiffs, to be able to hold Amazon responsible for its unlawful conduct. Amazon crafted an ominously one-sided agreement that lacks mutuality and is fundamentally unfair. As such, Amazon's Agreement is substantively unconscionable.

For the reasons discussed above, there can be no doubt that, under any analysis, the provisions of Amazon's Agreement, upon which Amazon now relies to deprive Plaintiffs of their day in court, are both procedurally and substantively unconscionable, and unenforceable as a matter of law. Therefore, Plaintiffs respectfully ask the Honorable Court to deny Amazon's Motion.

B. The Southern District of Florida is the Most Appropriate Forum

I. The Plaintiffs' Choice of Forum Is Entitled To Deference

Venue is proper in this Court under 28 U.S.C. § 1391(a)(2) because a substantial part of the events giving rise to Plaintiffs' claims—namely, Amazon's fraudulent, deceptive, unfair and unlawful business practices from which it obtains an ill-gotten profit—have occurred and continue to occur in this district. Contrary to Amazon's assertion, this fact is more than adequately pled in the Complaint.

"The Eleventh Circuit has articulated a policy of being restrictive in transferring actions, stating that the plaintiff's choice of forum should not be disturbed unless the movant can show that it is clearly outweighed by other considerations." *Carl v. Republic Sec. Bank*, 2002 WL 32167730, at *5 (S.D. Fla. 2002) (internal quotation marks and alterations omitted); *see Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996). The Southern District of

Florida is the chosen venue of the named Plaintiffs. Indeed, the balance of the § 1404(a) factors, including the convenience of non-party witnesses, the place of the alleged wrong, the cost of obtaining witnesses, and the possibility of delay or prejudice, is strongly in favor of Plaintiffs and, therefore, Plaintiffs' choice of forum should not be disturbed.

2. **The Interest of Justice and Private Convenience and Fairness Factors Favor the Southern District of Florida**

The private convenience and fairness factors, including ease of access to sources of proof, relative convenience to parties, and relative convenience to witnesses favor the Southern District of Florida. Amazon's motion in the alternative to transfer venue to the King County, Washington, should also be rejected. Amazon's counsel argues that transfer is warranted on the basis of: the convenience of Amazon's witnesses; the location of relevant documents; and the convenience of the parties (Amazon). None of these factors, however, when considered in light of the actual governing law or the facts, weighs in favor of transfer. A change in venue would not serve the convenience of the witnesses and parties or the interests of justice. Instead, it would unfairly shift the inconvenience on Plaintiffs. Its most notable impact would be to delay the proceedings—an impact that would fundamentally prejudice the very core of the Plaintiffs' claims.

The fact that transfer is convenient for Amazon and its employees—the only Amazon's witness known at this time—is irrelevant. This factor looks principally to the convenience of *non-party* witnesses, not to the parties or their employees. *See, e.g., Mason v. Smithkline Beecham Clinical Laboratories*, 146 F. Supp. 2d 1355, 1362-63 (S.D. Fla. 2001); 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3851 (2008).

Amazon's motion has not identified any non-party witnesses or addressed potential inconvenience to them of forum choice. This Court has previously stated that, in seeking transfer based on the alleged convenience of the witnesses, the party seeking transfer must "clearly speci[fy] the key witnesses to be called and particularly stat[e] the significance of their testimony." *Mason* at 1355, 1362; *see also* Wright, Miller & Cooper § 3851 ("The party seeking the transfer must specify clearly, typically by affidavit, the key witnesses to be called and their location and must make a general statement of what their testimony will cover"). There is no such showing here.

The location of Amazon's headquarters and employees is of little relevance to the "convenience of witnesses" analysis. *See, e.g., Mason* at 1361-63; *see also J.I. Kislak Mortg. Corp. v. Conn. Bank & Trust Co., N.A.*, 604 F. Supp. 346, 348 (S.D. Fla. 1985). The location of documents also does not favor transfer of venue. Neither party has indicated an unwillingness to exchange documents by mail or other delivery. The convenience of witnesses employed by a party is largely irrelevant to the venue analysis: *See, e.g. Wright, Miller & Cooper* § 3851. Moreover, given the advances in technology, and the fact that Amazon conducts business in Florida and has litigated cases here and in other states, Amazon undoubtedly has a system in place to handle litigation outside of Seattle, Washington. *See, e.g., Ivax Corp. v. B. Braun of America, Inc.*, 2001 WL 253253, at *2 (S.D. Fla. 2001) (holding that the location of data is of little relevance "[i]n the real world of computerization and electronic transfer of information"). Thus, the location of the documents is of no real importance.

3. Amazon's Forum Selection Clause is Unfair and Unreasonable

Courts must adjudicate motions to transfer based on an "individualized, case-by-case consideration of convenience and fairness," weighing a number of factors. *Van Dusen v.*

Barrack, 376 U.S. 612, 622, 84 S. Ct. 805 (1964). A moving party carries the burden of having to show the need for a transfer, if “the forum selection clause is valid, which requires that there have been no ‘fraud, influence, or overweening bargaining power.’” *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S. Ct. 1907, 1914-15 (1972). The burden falls on the Plaintiffs to demonstrate why they should not be bound by their “contractual choice of forum.” *Id.*

Plaintiffs have met their burden here.

Amazon’s Agreement is a fundamentally unfair adhesion contract. For reasons discussed above, the Agreement, in general (and the forum selection clause in particular), is unconscionable. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94, 111 S. Ct. 1522 (1991), the Court established that forum selection clauses are subject to judicial scrutiny for fundamental fairness. In applying the “fundamental fairness standard” the Court introduced in *Carnival* to the facts of this case, there is sufficient basis to invalidate Amazon’s forum selection clause. There is ample evidence in this case of bad faith by Amazon.

Moreover, the forum selection clause at issue here violates a strong public policy of this forum. Indeed, it would be inconsistent with the public policy of this forum to enforce Amazon’s forum selection clause because of the inequitable effect such enforcement would have. Plaintiffs are entitled to their day in court and do not have the resources to hire an attorney in Washington, or to travel to Washington in order to litigate their claims against Amazon. Plaintiffs never assented to the Agreement, and its enforcement would reward Amazon rather than hold it accountable for its unlawful actions.

Litigating this dispute in Washington would be impossible for Plaintiffs because they lack the financial resources to cover the travel and other related expenses. Therefore, unless this case remains in the Southern District of Florida, Plaintiffs will be deprived of their day in court.

4. **The Choice-of-Law Provision is Unenforceable Because It Was Included in the Agreement to Protect Amazon From the Consequences of Its Unlawful Conduct**

The choice-of-law provision in the Agreement was included by Amazon to protect itself from the consequences of its unlawful conduct, which was known to Amazon, but not to Plaintiffs. Hence, it cannot fairly be said that the choice-of-law provision was not also procured through fraud. Moreover, unlike Florida, Washington does not appear to recognize an exception to the economic loss rule in the context of fraudulent inducement claims. *See, e.g.*, Amazon's Motion n.5 at 12. There can be no doubt that Amazon now seeks to enforce the choice-of-law provision to avoid having to answer for its intentional wrongdoing. It is well established that, as a matter of public policy, Florida will not enforce parties' contractual attempts to exempt themselves from liability for their own fraud.

This Court's decision in *HTP, Ltd. v. Lineas Aereas Costarricenses*, 685 So. 2d 1238 (Fla. 1996), illustrates the Florida courts' aversion to fraud. In *HTP*, the Court determined that a cause of action for fraud in the inducement of a settlement agreement is a tort independent of the contract, not barred by any of the economic loss rule concerns that arise in purely contractual litigation. In so holding, the Court quoted with approval the portion of Judge Altenbernd's dissent in *Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995), which recognized that claims for fraud serve an important societal interest: [T]he interest protected by fraud is society's need for true factual statements in important human relationships, primarily commercial or business relationships. In keeping with its history of refusing to countenance fraud, Florida law has long provided Florida litigants access to the courts to have their fraud claims determined by a trier of fact. *See, e.g., Florida East Coast Railway Co. v. Thompson*, 111 So. 525 (Fla. 1927)

(stating that “[a] contract procured through fraud is never binding upon an innocent party thereto”).

For the foregoing reasons, this Court should deny Amazon’s motion to transfer this case to the Western District of Washington.

C. Amazon’s Argument That Plaintiffs Failed to State A Claim Upon Which Relief May Be Granted is Without Merit

In *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957), the Court held that, “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief.” *See also Ronald Olsen v. Charles (Chip) Lane, Jr., etc., et al*, 832 F. Supp. 1525, 1527 (M.D. Fl. 1993) (stating that “[t]he pleadings of a pro se litigant are to be held to less stringent standard than those drafted by an attorney.” (quoting *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972))). The pro se litigant must meet the “minimal pleading standard.” *Id.*

While Plaintiffs have pled their claims with adequate particularity, well beyond the “minimal pleading standard,” they would still like to provide a detailed response to Amazon’s argument on this issue. However, since Plaintiffs are restricted to the twenty (20) page limit to respond to Amazon’s Motion, Plaintiffs are forced to limit their response on this issue as follows:

To maintain a FDUTPA claim, a party must allege: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *See Rollins, Inc. v. Orkin Exterm. Co., Inc.*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). The elements of a FDUTPA claim in paragraphs 25 through 43 (“Count I”) of Plaintiffs’ Amended Complaint are adequately pled. In addition, the facts are specifically stated to support these elements in paragraphs 8 through 24 (“Factual Allegations”).

Likewise, the Plaintiffs’ Amended Complaint alleged all of the facts necessary to state causes of action for fraud in the inducement under Florida law and, at the motion to dismiss

stage, "it is axiomatic that those allegations are taken as true." *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992). It is mind-boggling that Amazon can now argue that it did not have a duty to be truthful and to disclose what it in fact concealed, which ultimately devalued the investment Plaintiffs made in becoming "Amazon Sellers," and which caused Plaintiffs to suffer economic and non-economic damages, including harm resulting from damage done to the Plaintiffs' reputation. An arrangement in which one party puts up funds for an investment, and another has a responsibility for managing the investment, is a classic example of a fiduciary relation. Moreover, the duty to disclose here arises not just from the parties' fiduciary relations but from the Amazon's awareness that Plaintiffs were acting on the basis of a false belief. Amazon's argument to the contrary is simply wrong.

Amazon's argument that the Plaintiffs' claims should be dismissed is supported by false statements and mischaracterizations of the facts of this case. For example, it is stated in Amazon's Motion that Plaintiffs based their fraudulent inducement claim on "nothing more than an on-line tutorial," and that "[a]nyone who viewed that tutorial and wanted to participate in the Marketplace necessarily would have been re-directed to the comprehensive Participation Agreement." See Amazon's Motion ¶ 1 at 15. The fact is that what Amazon now calls a "tutorial" is in fact marketing of its website. Also, the statement that the viewer is "re-directed" to the Agreement is blatantly false. Moreover, Plaintiffs used that ad to point out the types of representations Amazon makes in its marketing campaign, and did not base any of their claims on that one ad alone.

Amazon argues in its Motion that it cannot be held accountable for unreasonably interfering in the business relationships that are established by independent Buyers and Sellers

on Amazon.com, and conveniently ignores the following provision that appears in the Agreement under the heading of "Amazon's Role":

Amazon provides a platform for third-party sellers ("Sellers") and buyers ("Buyers") to negotiate and complete transactions. Amazon is not involved in the actual transaction between Sellers and Buyers and is not the agent of and has no authority for either for any purpose.

Agreement at ¶ 4; *see also* "General Release" at ¶ 16.

Amazon procures ownership of Sellers' funds when it determines, in its sole discretion, that disputes "may" occur, thereby leaving Sellers without the funds they need to fulfill their orders. This action only makes it more likely that disputes will occur. *See also* Agreement at ¶ 19 ("Disputes").


Since Amazon merely provides a platform for independent buyers and sellers to develop business relationships, and since it is not involved in the transaction itself and is not liable for any disputes that arise between Buyers and Sellers, it should not be allowed to intentionally and unjustifiably interfere with such business relationships, as it did in this case.


III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Amazon's Motion be *DENIED* in its entirety.

This 2nd day of August, 2010.

Respectfully submitted,


ALBERT SEGAL, Plaintiff, *pro se*
10490 S.W. 12th Terr., #202
Miami, FL 33174
(908) 510-3584
E-mail: alby1969_98@yahoo.com


MARIANNA CHAPAROVA, Plaintiff, *pro se*
10490 S.W. 12th Terr., #202
Miami, FL 33174
E-mail: manach101@yahoo.com

CERTIFICATE OF SERVICE

This is to certify that Plaintiffs, Albert Segal and Marianna Chaparova, have this day served upon Amazon's counsels of record the foregoing Memorandum in Opposition to 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" by electronic mail and United States Certified Mail.

This 2nd day of August, 2010.

Respectfully submitted,



ALBERT SEGAL, Plaintiff, *pro se*



MARIANNA CHAPAROVA, Plaintiff, *pro se*

SERVICE LIST

David B. Esau, Esq.
Carlton Fields, P.A.
City Place Tower, Suite 1200
525 Okeechobee Blvd.
West Palm Beach, FL 33401

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 10-20718-CIV-COOKE/BANDSTRA

ALBERT SEGAL and
MARIANNA CHAPAROVA,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

ORDER SETTING CIVIL JURY TRIAL DATE AND PRETRIAL DEADLINES

Pursuant to Local Rule 16.1, and the Court having considered the parties' Rule 16.1 Scheduling Report, it is hereby

ORDERED as follows:

1. **Trial Date and Calendar Call**. This case is set for trial on the Court's two-week trial period commencing **June 20, 2011, at 9:30 a.m.**, before the undersigned United States District Judge at the Federal Courthouse, Courtroom 11-2, 400 North Miami Avenue, Miami, Florida. Calendar Call shall be held on Wednesday, **June 15, 2011, at 3:00 p.m.**, at the same location. The case shall be assigned to the standard case management track.

2. **Pretrial Conference**. No Pretrial Conference shall be held in this action, unless the Court determines that a pretrial conference is necessary. Should a pretrial conference be set, the compliance deadlines as set forth in the remainder of this Order shall remain unaltered.

3. **Pretrial Deadlines**. The pretrial deadlines are as follows:

[October 8, 2010] Joinder of parties and amendment of pleadings.

- [December 3, 2010] Parties shall furnish opposing counsel with a written list containing the names and addresses of all fact witnesses intended to be called at trial and only those witnesses listed shall be permitted to testify unless good cause is shown and there is no prejudice to opposing party. The parties are under a continuing obligation to supplement discovery responses within ten (10) days of receipt or other notice of new or revised information.
- [January 3, 2011] All fact discovery must be completed.
- [January 21, 2011] Plaintiff must furnish expert witness list to the Defendant, along with the summaries/reports required by Local Rule 16.1.K, and only those expert witnesses shall be permitted to testify. Within the fourteen day period thereafter, Plaintiff shall make its experts available for deposition by Defendant.
- [January 7, 2011] All dispositive and other pretrial motions not explicitly excluded by S.D. Fla. L.R. 7.1.A.1 and accompanying memoranda of law, must be filed, as well as any motions to exclude or limit proposed expert testimony.
- [February 4, 2011] Defendant must furnish expert witness list to the Plaintiff along with the summaries/reports required by Local Rule 16.1.K, and only those expert witnesses shall be permitted to testify. Within the fourteen day period thereafter, Defendant shall make its experts available for deposition by Plaintiff.
- [February 18, 2011] All expert discovery must be completed.
- [March 4, 2011] Mediation must be completed. The Court has issued concurrently herewith a separate Order of Referral.
- [May 06, 2011] (a) A Joint Pretrial Stipulation must be filed. The stipulation shall conform to Local Rule 16.1.E and include a joint, neutral summary of the claims and defenses in the case, not to exceed one short paragraph per litigant claim, to be read as an introduction for voir dire examination. The Court will not accept unilateral pretrial stipulations, and will strike sua sponte any such submissions. Should any of the parties fail to cooperate in the preparation of the joint pretrial stipulation, all other parties shall file a certification with the Court stating the circumstances. Upon receipt of such certification, the Court shall issue an order requiring the non-cooperating party or parties to show cause why such party or parties (and their respective

attorneys) have failed to comply with the Court's order. A copy of the joint pretrial stipulation shall be delivered to chambers in Corel WordPerfect format at the time of filing via computer disk, or emailed to: Cooke@flsd.uscourts.gov); and

(b) A Joint Summary of the Parties' Motion(s) *in Limine* must be filed. The joint summary shall contain a cover page providing the style of the case and an index of the motion(s) *in limine*. For each evidentiary issue, the joint summary must include: a one page argument identifying the evidence sought to be excluded or included at trial and citing legal authority supporting exclusion or inclusion; and a one page response to the argument citing legal authority in support of admission or exclusion of the disputed evidence. The parties shall work together to prepare the joint summary, and are encouraged to resolve evidentiary issues through stipulation. Motions *in limine* will not be accepted in any other form.

[June 10, 2011]

(a) Final proposed jury instructions and verdict form must filed.¹ The parties shall submit a SINGLE, JOINT set of proposed jury instructions and verdict form, though the parties need not agree on the proposed language of each or any instruction or question on the verdict form. Where the parties do agree on a proposed instruction or question, that instruction or question shall be set forth in Times New Roman 14 point typeface. Instructions and questions proposed only by the plaintiff(s) to which the defendant(s) object shall be italicized. Instructions and questions proposed only the defendant(s) to which the plaintiff(s) object shall be bold-faced. Each jury instruction shall be typed on a separate sheet and must be supported by citations of authority. Each disputed jury instruction shall also state the basis for the objection(s) at the bottom of the sheet, before the citations of authority. In preparing their requested jury instructions, the parties shall utilize as a guide the Pattern Jury Instructions for Civil Cases approved by the United States Eleventh Circuit, including the Directions to Counsel contained therein. A copy of the proposed jury instructions and verdict form shall be delivered to chambers in Corel WordPerfect format at the time of filing via computer disk, or emailed to: Cooke@flsd.uscourts.gov);

¹If this action is to be set for a bench trial the Parties are directed to submit proposed findings of fact and conclusions of law in lieu of proposed jury instructions.

(b) A trial witness list indicating each witness who will testify at trial, a one sentence synopsis of the testimony, and in consultation with opposing counsel, indicate the amount of time needed for direct and cross examination;

(c) a list of witnesses with some identifying information (address or place of employment) to provide to jury; and

(d) Proposed Voir Dire questions specific to the case (general voir dire questions should not be included).

4. **Trial Instructions.** All exhibits must be pre-marked. The Plaintiff's exhibits shall be marked numerically preceded by the letter "P." Defendant's exhibits shall be marked numerically preceded by the letter "D." For example, Plaintiff's exhibit shall be marked P-1, P-2, P-3 etc. Likewise, Defendant's exhibit shall be marked D-1, D-2, D-3 etc. A typewritten exhibit list setting forth the number and letter, and description of each exhibit must be submitted at the time of trial. The parties shall submit said exhibit list on Form AO 187, which is available from the Clerk's office.

5. **Motion for Continuance.** A Motion for Continuance shall not stay the requirement for the filing of a Pretrial Stipulation and, unless an emergency situation arises, a motion for continuance will not be considered unless it is filed at least fourteen (14) days prior to the date on which the trial calendar is scheduled to commence. A continuance of the trial date will be granted only on a showing of compelling circumstances.

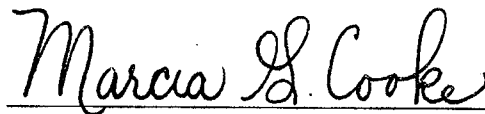
6. **Referral to Magistrate.** The above-styled action is referred to the Honorable Ted E. Bandstra, United States Magistrate Judge for the Southern District of Florida, for appropriate resolution of all non-dispositive pretrial matters, in accordance with 28 U.S.C. §§ 636(b)(1)(A) and (B). Motions in Limine and any motion affecting deadlines set by the Court's Scheduling Order are excluded from this referral, unless specifically referred by separate order. It shall be the responsibility

of the respective parties in this case to note on all materials necessary to the resolution of the referred matters the name of Magistrate Judge Bandstra on the case number caption (i.e., Case No. 99-1234-CIV-COOKE/BANDSTRA) and that courtesy copies of such materials shall be directed to his Chambers.

7. **Non-Compliance**. Non-compliance with any provision of this Order may subject the offending party to sanctions, including denial of the motion, dismissal of claims or striking of defenses. It is the duty of all counsel to enforce the timetable set forth herein in order to insure an expeditious resolution of this cause.

8. **Settlement**. If this case is settled, counsel are directed to inform the Court promptly by calling Chambers and submitting an appropriate order for dismissal within ten (10) days of notification of settlement to the Court, pursuant to Fed. R. Civ. P. 41(a)(1). The case will remain on the trial calendar until an order dismissing the action is entered by the Court.

DONE AND ORDERED in Miami, Florida, this 19th day of August, 2010.



MARCIA G. COOKE
United States District Judge

cc: The Honorable Ted E. Bandstra
All counsel of record