IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNATHAN ERLER, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
HASBRO, INC. and	:	CIVIL ACTION NO.
WIZARDS OF THE COAST LLC,	:	1:19-CV-02658-AT
	:	
Defendants.	:	

ORDER

This is a putative class action involving Plaintiffs' attempted eBay purchases of special edition expansion versions of the trading card game, Magic: The Gathering, from Defendants Hasbro, Inc. ("Hasbro") and Wizards of the Coast LLC ("Wizards"). Plaintiffs allege that after they bought the special edition games, Defendants unilaterally canceled their purchases. Plaintiffs assert claims for breach of contract, breach of the duty of good faith and fair dealing, and negligence. Defendants have filed the instant Motion to Dismiss the Second Amended Complaint [Doc. 34]. For the following reasons, Defendants' Motion to Dismiss is **GRANTED,** and Plaintiffs' Second Amended Class Action Complaint [Doc. 32] is **DISMISSED WITH PREJUDICE**.[1]

[1] Defendants filed a Motion for Oral Argument [Doc. 35] in conjunction with their Motion to Dismiss. The Court **DENIES** this Motion, finding that oral argument is not necessary given the extensive briefing provided and the Court's ultimate analysis in this matter. Fed. R. Civ. Pro. 78(b).

I. FACTUAL BACKGROUND[2]

Sale of the Special Edition Expansion Game:

Defendant Hasbro is a toy and board game company incorporated and headquartered in Rhode Island[3], registered to do business in Georgia. (Second Amended Complaint ("SAC"), Doc. 32 ¶ 29.) Defendant Wizards is a subsidiary of Hasbro. (*Id*. at 1.) On April 18, 2019, Defendants Hasbro and Wizards announced the sale of a special edition Magic: the Gathering expansion game, the *War of the Spark Mythic Edition* ("WSME"). (*Id*. ¶ 31.) The announcement gave buyers a taste of the cards included in the forthcoming expansion pack:

[2] The Court derives the factual background herein from Plaintiffs' Second Amended Complaint, which the Court presumes true for purposes of resolving Defendants' Motion to Dismiss. *See Duke v. Cleland*, 5 F.3d, 1399, 1402 (11th Cir. 1993). The Court also considers the text of the eBay User Agreement and communications surrounding the alleged contracts for sale. *La Grasta v. First Union Sec., Inc.,* 358 F.3d 840, 845 (11th Cir. 2004) (explaining that, in analyzing the sufficiency of the complaint, a court should limit its consideration to "the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed."). *See also, Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (explaining that courts may consider documents attached to motions to dismiss where the document is central to plaintiffs' claims and undisputed, noting that "a document need not be physically attached to a pleading to be incorporated by reference into it.")

[3] The Court takes judicial notice of the public records of Rhode Island's Department of Business Services, which indicate that Defendant Hasbro's Principal Office is located in Rhode Island. *McDaniel v. Burlington Coat factory of Florida, LLC*, 2016 WL 10932749 (S.D. Fla. Dec. 29, 2016) (judicially noticing defendant's state of incorporation and principal place of business).

(*Id.* ¶ 31, Ex. 3.) In addition, this special edition announcement teased:

> Similar to Ravnica Allegiance Mythic Edition, War of the Spark Mythic Edition will be **limited to only 12,000 units** and will be available for sale on Hasbro's eBay store starting Wednesday May 1 at 3 p.m. ET (noon PT/8 p.m. GMT). Limit 2 per person. There will be no reprints of War of the Spark Mythic Edition—**once it's gone, it's gone.**

(*Id.*) (emphasis added). After much anticipation, on May 1, 2019, at 3 p.m. ET, the sale went live. Defendants, using the eBay platform, listed the *War of the Spark Mythic Edition* game at a "Buy It Now" price of $249.99 per unit. (*Id.* ¶¶ 57, 64.) In a frenzy, Jonathan Erler and the other Plaintiffs—who hail from twenty-five different states across the nation—clicked the "Buy It Now" button to purchase one or more units of the special edition game. (*Id.* ¶¶ 32, 63, 64.) After they clicked the "Buy It Now" button, Plaintiffs received email notification from eBay, stating "Your order is confirmed," (*id.* ¶¶ 34, 65, Ex. 4, eBay Order Confirmation) as well as emails from PayPal confirming that payment had been sent to the seller "HasbroToyShop." (*Id.* ¶ 37, Ex. 5, PayPal Receipt).

Within "several days" of the alleged purchases, however, Plaintiffs all received "cancellation requests" from Defendants, noting that the product ordered was "out of stock." (*Id.* ¶¶ 40, 41, 44.)[4] Plaintiffs and other disappointed fans also received emails from eBay first stating that "technical issues resulted in the set being oversold beyond the limited quantity available. As a result, we were not able to successfully complete your order. We'll issue your refund very shortly

[4] Although these "cancellation requests" are referenced in Plaintiffs' Second Amended Complaint, the Parties have not attached an exemplar communication to the pleadings.

in your original form of payment," and, second, promising a $20 coupon towards a future purchase as well as "something special" to every person whose order was cancelled. (eBay Refund Emails, Docs. 34-7, Ex. D, Ex. E.) Plaintiffs allege that they received these refund emails at some point after Defendants' sent the cancellation requests, though they do not explicitly note the timeframe. (SAC ¶ 45.)[5] Plaintiffs further claim that Defendants delayed issuing refunds for as long as two weeks in certain cases. (*Id.* ¶ 49.) Consequently, Plaintiffs were deprived of the WSME game they believed they had purchased, left only with the option to buy this rare product at a higher price from third parties. (*Id.* ¶ 48.)

eBay User Agreement:

In order to buy and sell products on eBay, all users agree to abide by eBay's User Agreement. (SAC ¶ 61; User Agreement, Doc. 34-7, Ex. A ("You agree to comply with all terms of this User Agreement when accessing or using our services.")) The User Agreement imposes specific obligations on buyers and sellers. For buyers, the User Agreement dictates, "You enter into a legally binding contract to purchase an item when you commit to buy an item, your offer for an item is accepted, or if you have a winning bid (or your bid is otherwise accepted)." (User Agreement) (emphasis added). For sellers, the Agreement requires

[5] The eBay refund emails attached to Defendants' Motion to Dismiss are dated May 2, 2019 and May 3, 2019, within two days after the attempted purchases. (eBay refund emails, Docs. 34-7, Ex. D, Ex. E.)

compliance with eBay's Listing Policies and Selling Practices Policy. (*Id.*)[6] The Selling Practices Policy specifically allows for the cancellation of orders:

> "Occasionally, you may need to cancel a transaction because the item is broken, you made a mistake in your listing, or the item is out of stock. In these cases, you must first contact the buyer and let them know that you are canceling the transaction and the reason why. Make sure you use the correct process in My eBay or Seller Hub to cancel these transactions. Learn more about Canceling a transaction (linking to the specific "Canceling a transaction" policy).

(Selling Practices Policy, Doc. 34-7, Ex. C.) This referenced "Canceling a transaction" policy provides specific direction for sellers seeking to do just that. (Cancel a Transaction Policy, Doc. 34-7, Ex. B.) The text of the policy states:

> If you can't complete a sale with a buyer—for example, the item is damaged, or you have fewer items in stock than you thought—you can cancel the transaction....
>
> You can cancel a transaction as long as:
>
> - You haven't sent the item yet
> - The buyer hasn't asked us to step in and help because they didn't receive the item
> - You haven't opened an unpaid item case
>
> You can cancel a transaction by selecting the button below. After you cancel, we'll let the buyer know. If they've already paid, they'll get a refund....
>
> You can cancel a transaction up to 30 days after a sale, even if your buyer has already paid.

(*Id.*) The User Agreement contains one final term of note. Under a section entitled "Purchase Conditions" that details obligations of buyers, the Agreement contains a provision addressing relevant law, explaining that "Utah Code

[6] The User Agreement explicitly incorporates "all policies and additional terms posted on our sites, applications, tools and services." (*Id.*)

Annotated § 70A-2-401(2) and Uniform Commercial Code § 2-401(2) apply to the transfer of ownership between the buyer and the seller, unless the buyer and the seller agree otherwise." (User Agreement.)

II. PROCEDURAL BACKGROUND

Plaintiff Erler originally filed this action in the State Court of Gwinnett County on May 8, 2019, alleging breach of contract, breach of the duty of good faith and fair dealing, and negligence. (Doc. 1, ¶ 2.) A few weeks later, Plaintiff amended his complaint to include twenty-seven additional plaintiffs, from twenty-five different states, alleging the same operative claims. (*Id.* ¶ 3, Ex. A.) Shortly after this amendment, Defendants removed the case to federal court pursuant to the Class Action Fairness Act, *see* 28 U.S.C. § 1332; (Doc. 1 ¶¶ 8-9), and then filed a Motion to Dismiss for Failure to State a Claim. (Doc. 21.) In turn, Plaintiffs filed their Response (Doc. 25), and a Motion for Leave to File Amended Complaint. (Doc. 24.)

On January 30, 2020, the Court granted Plaintiffs leave to amend their complaint[7] and thus denied as moot Defendants' initial Motion to Dismiss. (Doc. 31.) In its Order, the Court expressed concerns about the Parties' failure to discuss choice of law issues surrounding Plaintiffs' claims and instructed the Parties to address issues of applicable law in the event of a renewed motion to dismiss. (*Id.*) Since then, Defendants have in fact filed the instant Motion to

[7] Plaintiffs' Motion to Amend was granted to the extent the Court's approval was necessary. *See* Doc. 31.

Dismiss the Second Amended Complaint (Doc. 34), which—after Plaintiffs' Response (Doc. 43) and Defendants' Reply (Doc. 45)—is now ripe for resolution.

III. STANDARD FOR MOTION TO DISMISS

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the purposes of a motion to dismiss, the court must accept all factual allegations in the complaint as true; however, the court is not bound to accept as true a legal conclusion couched as a factual allegation. *Twombly*, 550 U.S. at 555. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Although the plaintiff is not required to provide "detailed factual allegations" to survive dismissal, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Twombly*, 550 U.S. at 555, 570; *Iqbal*, 556 U.S. at 678.

IV. ANALYSIS

A. Contract Claims (Counts I and II)

The Court first addresses Plaintiffs' claims for breach of contract and breach of the duty of good faith and fair dealing. Before proceeding to the merits of these claims, however, the Court must determine what law applies.

i. Choice of Law

As noted, in its January 30, 2020 Order, the Court instructed the Parties to address issues related to the appropriate law to apply to Plaintiffs' claims, as Plaintiffs reside and attempted to purchase the *War of the Spark Mythic Edition* game in twenty-five different states, and because the User Agreement references Utah's U.C.C. statute. (Doc. 31, Order.) In so doing, Defendants argue that Plaintiffs' contract claims must be analyzed pursuant to the state law of the twenty-five states where Plaintiffs reside. However, they argue that Plaintiffs' contract claims fail for largely the same reasons, regardless of the state. (Motion to Dismiss at 8-9.) Plaintiffs, on the other hand, argue that "Georgia common law applies to all of Plaintiffs' claims,"[8] and that, even if Georgia law does not apply, the "applicable law in all of the class representatives' states is largely the same;" thus, the Court need not resolve the choice of law problem because the relevant law in all states is "in harmony." (Pl. Resp. at 6.)

To start, as the Court's jurisdiction in this matter is based on diversity of citizenship, the Court must apply the choice of law rules of the forum state of Georgia. *U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 550 F.3d 1031, 1033 (11th Cir. 2008) (citing *Klaxon Co. v. Stento Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941)). Under these rules, Georgia "follows the traditional doctrine of *lex loci contractus*: contracts are 'governed as to their nature, validity and interpretation

[8] Plaintiffs argue that Georgia common law applies to all claims because no foreign statutes are involved. However, as Defendants note, each state has adopted their own version of the U.C.C. by statute, all of which apply to sales of goods.

by the law of the place where they were made' unless the contract is to be performed in a state other than that in which it was made." *Boardman Petroleum, Inc. v. Federal Mut. Ins. Co.*, 135 F.3d 750, 752 (11th Cir. 1998) (quoting *Gen. Tel. Co. v. Trimm*, 252 Ga. 95 (1984)). "In order to determine where a contract was made, the court must determine where the last act essential to the completion of the contract was done." *Trimm*, 252 Ga. at 95.[9]

The Defendants dispute the existence of any contracts. (Mot. To Dismiss at 12; Pl. Resp. at 10.) As discussed *infra*, however, *if* contracts exist here, the last act essential to their completion would have been Defendants' acceptances of Plaintiffs' offers to purchase the WSME games. Defendant Hasbro is incorporated and has its principal place of business in Rhode Island. Defendant Wizards is a subsidiary of Hasbro. (SAC at 1.) The WSME products were available for sale on Defendant Hasbro's eBay store. (eBay Order Confirmation, SAC, Ex. 4) (listing the seller as "hasbro-toy-shop.") Thus, the Court finds that, *if* Defendants accepted Plaintiffs' offers to purchase the special edition game, thereby forming contracts, the Court reasonably concludes that they would have done so in Rhode Island. *International Business Machines Corp. v. Kemp.*, 536 S.E.2d 303, 307 (Ga. Ct. App. 2000) (applying Georgia contract choice of law analysis and explaining that, where last act essential to form contract is the

[9] The Court must first conduct its choice of law analysis before applying the relevant Uniform Commercial Code provisions. *Calhoun v. Cullum's Lumber Mill, Inc.*, 545 S.E.2d 41, 44 (Ga. Ct. App. 2001) (first conducting Georgia *lex loci contractus* analysis and finding that South Carolina law applied, then applying South Carolina's U.C.C. statute).

acceptance, then the contract would be completed in the state where the acceptance occurred). The Court therefore applies the law of Rhode Island.

Like the other forty-nine states, Rhode Island applies the U.C.C. to the sale of goods. R.I. Gen. Laws § 6A-2-102. Rhode Island's U.C.C. statute includes a choice of law provision that is identical to the corresponding provision in the U.C.C. § 6A-1-301; U.C.C. § 1-301. This choice of law provision allows parties to agree that the law of a certain state shall govern their rights and duties if the transaction bears a reasonable relation to that state. § 6A-1-301(a).[10] However, "[i]n the absence of an agreement effective under subsection (a) … the Uniform Commercial Code applies to transactions bearing an appropriate relation *to this state*." § 6A-1-301(b) (emphasis added). The Court thus must determine if the transactions at issue bear an "appropriate relation" to Rhode Island.

Under the U.C.C., to determine whether a transaction bears an appropriate relation to a state, a court should consider:

(a) The place of contracting;
(b) The place of negotiations of the contract;
(c) The place of performance;
(d) The location of the subject matter of the contract; and

[10] Although the Parties did not address this issue, the eBay User Agreement includes a term masquerading as a choice of law provision. This term provides that "Utah Code Annotated § 70A-2-401(2) and Uniform Commercial Code § 2-401(2) apply to the transfer of ownership between the buyer and the seller, unless the buyer and the seller agree otherwise." (User Agreement at 11, Doc. 34-7 Ex. A.) However, the Court determines that this is not a valid choice of law provision. While it references Utah's U.C.C. provision, it does not mention Utah common law, and the parties certainly have not agreed to be so bound. Further, it does not reference anything specific about the purported transactions at issue here but rather eBay transactions generally. In any event, the Court finds that the transactions at issue do not bear a reasonable relation to Utah (except, perhaps, in the case of the single plaintiff from Utah) and therefore it is unlikely the parties could choose to apply Utah law under § 6A-1-301(a), even if they so desired.

> (e) The domicile, residence, nationality, place of incorporation, and place of business of the parties.

1B Lawrence Anderson, *Uniform Commercial Code* § 1-307:7 [Rev] (3d. ed.). Here, Rhode Island may be the most appropriate relation for the contract claims at issue. Rhode Island is not only the "place of incorporation" and the principal place of business of Defendant Hasbro (the parent company of Defendant Wizards), but, as explained above, *if* there is a contract, it is the "place of contracting." *Id.* Moreover, Rhode Island is the common factor with respect to the twenty-eight Plaintiffs. Two core purposes of the U.C.C. are to "simplify, clarify, and modernize the law governing commercial transactions" and "to make uniform the law among the various jurisdictions." U.C.C. § 1-103(a)(3). To apply a host of different states' law to Plaintiffs' putative class action contract claims under current circumstances would contravene those core purposes.

Accordingly, the Court will apply the U.C.C., with general principles of contracting and Rhode Island common law supplementing where necessary. *See* U.C.C. § 1-103 cmt. 2 (noting that, while the U.C.C. "is the primary source of commercial law rules in the areas that it governs," it was drafted "against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways."). The Court notes, however, that because all fifty states have adopted the U.C.C., "decisions from other jurisdictions interpreting the same uniform statute are instructive." *In re Pillowtex, Inc.*, 349 F.3d 711, n. 8 (3d Cir. 2003); *In re QDS*

Components, Inc., 292 B.R. 313, n. 3 (W.D. Ohio Oct. 1, 2002) ("Because the U.C.C. is a uniform law, decisions from other state and federal courts [interpreting the U.C.C.] also may be considered."); *In re Grubbs Cont. Co.*, 319 B.R. 698, 712 (M.D. Fla. Jan. 7, 2005).

ii. Breach of Contract

On the merits, the Parties first dispute whether contracts were formed between Defendants and Plaintiffs. Defendants argue that there were no contracts because "there was no meeting of the minds here," as Defendants could not have entered into contracts to sell Plaintiffs the WSME when there was no more product to sell. (Mot. To Dismiss at 12.) In contrast, Plaintiffs assert that Defendants offered to sell the WSME at the listed price, Plaintiffs accepted the offers, and Defendants accepted Plaintiffs' payments, thereby creating enforceable contracts (Pl. Resp. at 10.)[11]

Under the U.C.C., "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." U.C.C. § 2-204. It is axiomatic that "there must be an offer and acceptance in order to give rise to a contract." Anderson, *supra,* § 2-2-04:16.

"An offer is made when the offeror leads the offeree to **reasonably believe** that an offer has been made." Anderson, *supra,* § 2-2-04:16 (emphasis added) ("[T]he question of whether an offer was made seems to be one dependent

[11] Plaintiffs also argue that "Defendants' unilateral mistake is not a valid defense" (Pl. Resp. at 10); in doing so, they attack a position Defendants have not asserted.

on the intention of the parties, and being such, it depends on the facts and the circumstances of the particular case. The U.C.C. changes none of these principles of law.") "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed *knows or has reason to know that the person making it does not intend to conclude a bargain until he has made further manifestation of assent*." Restatement (Second) of Contracts § 26 (1981) (emphasis added).

For this reason, it is generally agreed that public advertisements of goods for sale at a certain price are invitations to soliciting offers rather than offers themselves. 1 Samuel Williston, *Contracts* § 4:10 (4th ed.) (explaining that "if goods are advertised for sale at a certain price, it is generally not an offer, and no contract is formed by the statement of an intending purchaser that he or she will take a specified quantity of the goods at that price"); Restatement (Second) of Contracts § 26 cmt. b (1981); 1 Arthur Linton Corbin, *Contracts* § 2.4 (Rev. ed.). This presumption is long-standing. *See e.g.*, *Freeman v. Poole*, 93 A. 786, 794 (R.I. 1915) (holding that bid at auction was offer, not acceptance of offer, and that contract did not exist until the bid was accepted by the falling of the hammer).

Further, this principle is no different under the U.C.C. *See,* U.C.C. § 2-206 ("An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods."); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1067 (R.I. 2009) (explaining that "The U.C.C. creates

the assumption that, unless circumstances unambiguously demonstrate otherwise, the buyer is the offeror and the seller is the offeree") (emphasis added); *OR Spex, Inc. v. Motorola, Inc.*, 507 F.Supp. 2d 650, 660 (E.D. Tex. 2007) ("Under the U.C.C., Oakley's willingness to accept pre-orders did not constitute offers to sell. Instead, any response received from a customer would be viewed as an offer to buy, which would invite Oakley's acceptance by prompt shipment of goods.")

A key justification for this tenet—that a public advertisement, circular, catalog or similar listing constitutes a preliminary negotiation as opposed to an offer—relates to problems of limited quantity. Specifically, an offer does not exist when:

> a proposal for a limited quantity has been sent to more persons than its maker could accommodate … Otherwise, supposing a shopkeeper were sold out of a particular class of goods, thousands of members of the public might crowd into the shop and demand to be served, and each one would have a right of action against the proprietor for not performing his contract. A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory.

E. Allan Farnsworth, *Contracts,* § 3.10 (4th ed.).[12]

On this point, *Mesaros v. U.S.*, 845 F.2d 1576 (Fed. Cir. 1988) is illustrative.[13] In that case, the United States Mint announced the sale of various

[12] This is likewise the case under Georgia law, which Plaintiffs argue applies. *See, Georgian Co. v. Bloom*, 108 S.E. 813 (Ga. Ct. App. 1921) ("A business advertisement … stating that the advertiser has a certain quantity or quality of goods which he wants to dispose of at a certain price, are not offers which become contracts as soon as any person to whose notice it may come signifies his acceptance by notifying the other that he will take a certain quantity of them. They are mere invitations to all persons who may read them that the advertiser is ready to receive offers for the goods at the price stated.")

commemorative coins and mailed certain advertising materials to persons who were previous customers, many of whom were coin collectors. *Id.* at 1578. Like here, demand for certain coins far exceeded the available supply, resulting in a number of disappointed would-be purchasers, who then brought a putative class action for breach of contract. *Id.* Like here, the plaintiffs sent in payments for the desired product and, upon submitting payment, committed to the purchase, agreeing "all sales are final." *Id.*[14] In evaluating the plaintiffs' breach of contract claim, the *Mesaros* Court found that the Mint's advertisements were solicitations to offer, not offers, especially because eager buyers were made aware that stock of certain coins was limited; therefore, the "the contention of the plaintiffs that they reasonably believed the materials were intended as an offer is unreasonable as a matter of law." *Id.* at 1581.

Here, the Court similarly finds that the listing of the *War of the Spark Mythic Edition* on Defendants' eBay site did not constitute an offer but was instead an invitation to offer. Defendants' eBay listing advertised a good to be sold to the general public, just like a traditional advertisement, circular, or catalog. In posting the sale to the public, Defendants explicitly noted, in the previous special edition announcement and in the listing, that there was a limited

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[13] While the *Mesaros* Court does not indicate whether it is applying the U.C.C., it applies general tenets of contract law which are especially illuminating considering the comparable circumstances at hand.

[14] This commitment is similar to the portion of the User Agreement that instructs *buyers* that "You enter into a legally binding contract to purchase an item when you commit to buy an item, your offer is accepted, or if you have the winning bid (or your bid is otherwise accepted)." (User Agreement) (emphasis added). This provision is discussed further below.

quantity of the game. (SAC Ex. 3; Pl. Resp. at 12.) Indeed, they used the scarcity to drum up excitement:

> Similar to Ravnica Allegiance Mythic Edition, War of the Spark Mythic Edition **will be limited to only 12,000 units** and will be available for sale on Hasbro's eBay store starting Wednesday May 1 at 3 p.m. ET (noon PT/8 p.m. GMT). **Limit 2 per person**. **There will be no reprints of War of the Spark Mythic Edition—once it's gone, it's gone.**

(*Id.* ¶ 31, Ex. 3 at 5) (emphasis added). A reasonable (albeit eager) buyer, under the circumstances, had ample reason to know that Defendants were not proposing an offer that every willing purchaser could accept and thereby create a binding contract. In fact, Plaintiffs themselves plead and argue that this set of circumstances occurred with a prior Magic: the Gathering product (*see* SAC at 1*;* Pl. Resp. at 3), placing them on further notice of the possibility that they would not be successful in purchasing items that were clearly in short supply. Restatement (Second) of Contracts § 26 (1981) (explaining that "willingness to enter into a bargain is not offer if person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made further manifestation of assent."). The Court therefore finds that Defendants' eBay listing was not an offer.

However, the inquiry does not stop there: even though the listing was not an offer, "a contract may still be formed when a customer, in reliance on the advertisement, makes an offer that is then accepted by the advertising seller." Lawrence, *supra,* § 2-206:19. Applied here, this means that Plaintiffs' clicking the

"Buy it Now" button constituted offers to purchase the WSME game. Yet, the Court finds that Plaintiffs offers were never accepted *by Defendants*.

Plaintiffs contend that Defendants consummated the sales when they sent Plaintiffs confirmations of their purchases and accepted their payments. (SAC ¶¶ 65, 67; Pl. Resp. at 10.) In response, Defendants argue that *they* did not accept any offers from Plaintiffs because *they* did not send any emails to Plaintiffs confirming their purchases; rather, Plaintiffs received one automated email *from eBay* confirming *their order* and one automated email *from PayPal* confirming that payment was sent to "HasbroToyShop." (eBay Order Confirmation; PayPal Receipt; Mot. To Dismiss at n. 12, 13.) Neither eBay nor PayPal are parties to this action. It is undisputed that Defendants never initiated shipment of the WSME games to Plaintiffs, foreclosing any argument that Defendants accepted Plaintiffs' offers in that manner.

Further, Plaintiffs have not pled and do not argue any specific contrary facts that they received any confirmation emails promising shipment *from Defendants*. The Court's review of all documents central to the purported agreements and attached to the Second Amended Complaint uncovers nothing that could constitute acceptances by Defendants. Accordingly, Plaintiffs have not adequately pled any facts to support that *Defendants* accepted their offers to purchase the WSME sufficient to create an enforceable contract. *Twombly*, 550 U.S. at 555. ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.")

In arguing that a contract was formed, Plaintiffs contend that the language of the "Purchase Conditions" section of the User Agreement, which reflects the "Rules and policies for buyers," unequivocally establishes a valid contract because it directs buyers that, "You enter into a legally binding contract to purchase an item when you commit to buy an item, *your offer for an item is accepted*, or if you have a winning bid (or your bid is otherwise accepted)." (Pl. Resp. at 2) (emphasis added.) But this provision, directed towards buyers generally, clearly states that a contract is created when "your offer for an item is accepted." (User Agreement.) As discussed, Plaintiffs have not plead facts to support that their offers to purchase the WSME games were accepted by Defendants and therefore this provision does not establish the existence of valid contracts. Besides the fact that there were no acceptances, this general provision, which governs the rules for buyers, cannot be read to bind the seller-Defendants where it in no way addresses the circumstances of the particular transactions at issue, which involve Defendants' public notice that their supply was limited.

Plaintiffs rely on other cases in which courts found the existence of contracts in the realm of eBay transactions. But these cases are inapposite. *Amiros v. Rohr*, 243 Ariz. 600, 605 (Az. Ct. App. 2018) involved the sale of a single good (a ring), not a large number of goods, and the buyer and seller engaged in extended back-and-forth regarding the details of the agreement. 243 Ariz. at 602. Indeed, the parties in *Amiros* communicated and agreed that they "had a deal" prior to the buyer clicking "Buy It Now" on eBay. Moreover, after the

eBay sale, the parties arranged to meet to complete the transaction. *Id.* Thus, there was clearly offer and acceptance sufficient to show agreement, as well as conduct by both parties which recognized the existence of a contract. *See*, U.C.C. § 2-204. Likewise, *Smith v. Dinelli*, 47 Misc. 3d 431, 436 (N.Y. Just. Ct. 2013) and *Sayeedi v. Walser*, 15 Misc.3d. 621, 630 (N.Y. Civ. Ct. 2007) are distinguishable as the sellers in those cases shipped the goods to the buyers, evidencing acceptances of the respective offers to buy, unlike here. In *Daniec v. Boatarama, Inc.*, 588 Fed.Appx. 947, 948 (11th Cir. 2014), the parties entered into a written contract outside of eBay, evidencing their agreement to contract, also unlike here.

Plaintiffs cannot circumvent Defendants' lack of acceptances by arguing that eBay or PayPal acted as an agent of Defendants and could therefore contractually bind them. (Pl. Resp. at 22-24.) Plaintiffs do not allege that eBay or PayPal served as an agent for Defendants, plead any facts asserting that Defendants authorized eBay or PayPal to act on their behalf, or plead facts that Defendants ratified eBay's or PayPal's actions.[15] In addition, at least one other district court interpreting eBay's relationship with sellers on its platform has held that eBay is not an agent of the sellers. *See, Estate of Graham v. Sotheby's, Inc.*, 178 F. Supp. 3d 974, 998 (C.D. Cal. 2016) (assessing argument that eBay was an agent for sellers under the California Resale Royalty Act and finding that "Defendant eBay is a **platform** that permits sellers and buyers to interact with

[15] It also bears noting that the eBay and PayPal "acceptances" upon which Plaintiffs rely involve confirmation of an order (not a confirmation that an order was accepted or shipped) and confirmation that payment was sent to the seller.

one another—not an agent") (citing Cal. Att'y Gen. Op. No. 02-111 (2003)), *aff'd in part, rev'd in part and remanded on other grounds sub nom. Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018). Furthermore, as Defendants point out, the User Agreement disclaims the creation of an agency relationship between sellers and eBay generally. (User Agreement at 31) ("No agency, partnership, joint venture, employee-employer or franchiser-franchisee relationship is intended or created by this User Agreement.") In light of Plaintiffs' failure to plead an agency relationship, the holding of at least one other district court on this question, and the text of the User Agreement, Plaintiffs' cited authority and position that issues of agency are jury questions are not persuasive.[16] Accordingly, based upon the pleadings and attached documents, Plaintiffs have not pled facts sufficient to support that an enforceable contract was formed between themselves and Defendants. As a result, they cannot make out a breach of contract claim.

Additionally, the Court finds that, even *if* Plaintiffs had adequately pled that Defendants entered into contracts with Plaintiffs, their breach of contract

[16] In *Potomac Leasing Co. v. Thrasher*, 354 S.E.2d 210 (Ga. Ct. App. 1987), cited by Plaintiffs, the purported agent (a salesman) allegedly made false representations in his negotiations with the lessee. The alleged principal *undisputedly accepted* the lease negotiated by the salesman and the lessee. Thus, the *Potomac Leasing* Court explained that "a principal who accepts a contract procured by fraudulent conduct of an agent, regardless of such agent's authority, is bound by such fraudulent conduct." *Id.* at 884. Here, Plaintiff has pled no comparable acceptance of a contract on the part of the alleged principals (Defendants) or that eBay had the authority to negotiate any sales. *Brooks Peanut Co., Inc. v. Great Southern Peanut, LLC*, 746 S.E.2d 272 (Ga. Ct. App. 2013) involved the question of whether a broker between peanut sellers was the agent of both parties, and it was undisputed that both parties had authorized the broker to act on their behalf. Thus, despite Plaintiffs' assertions of agency in their briefing (wholly absent from the Second Amended Complaint), their "bare assertion of agency … is a mere conclusion which does not support a jury question." *Stewart v. Georgia Mut. Ins. Co.*, 282 S.E.2d 728, 730 (Ga. Ct. App. 1981).

claim would still fail because any such contracts would necessarily encompass the eBay User Agreement, which specifically allows a seller to cancel a purchase. In using eBay, the Parties undisputedly "agreed to abide by eBay's user agreement before using eBay's services." *Amiros v. Rohr*, 243 Ariz. 600, 605 (Az. Ct. App. 2018); (SAC ¶ 61; *see also* User Agreement, Doc. 34-7 Ex. A). The eBay User Agreement incorporates the "Cancel a transaction" policy, which provides:

> If you can't complete a sale with a buyer—*for example*[17], the item is damaged, or you have fewer items in stock than you thought—you can cancel the transaction....
>
> You can cancel a transaction as long as:
>
> - You haven't sent the item yet
> - The buyer hasn't asked us to step in and help because they didn't receive the item
> - You haven't opened an unpaid item case
>
> You can cancel a transaction by selecting the button below. After you cancel, we'll let the buyer know. If they've already paid, they'll get a refund....
>
> You can cancel a transaction up to 30 days after a sale, *even if your buyer has already paid*.

(Doc. 34-7 Ex. B) (emphasis added). Were there enforceable contracts here, Plaintiffs could not show that Defendants breached those contracts, as the language of the User Agreement specifically allows Defendants to do what they did: cancel transactions where they ran out of the product.[18] With no material

[17] The text of the policy indicates a broad interpretation of a seller's right to cancel a sale. The text "for example" indicates that the listed reasons for cancellation are a just a few, nonexclusive reasons why a seller might cancel an order.

[18] Moreover, if there were an offer and acceptance here under Plaintiffs' theory that Defendants listing constituted an offer, the hypothetical offerors (Defendants) would have the power to, in

breach of terms, Plaintiffs cannot, as a matter of law, maintain a claim for breach of contract.

Finally, the Court is not persuaded that Plaintiffs have alleged any measurable damages that the law recognizes. As Defendants repeatedly note, and Plaintiffs do not dispute, Defendants provided Plaintiffs with full refunds plus an additional $20 and a surprise gift. (Mot. To Dismiss at 17.) Thus, Plaintiffs were made whole, and have not adequately alleged that they suffered any cognizable damages. For this reason, too, Plaintiffs' breach of contract claim fails. Count I is **DISMISSED**.

iii. Implied Duty of Good Faith and Fair Dealing

The Court now turns to Count II. Defendants argue that Plaintiffs' good faith and fair dealing claim cannot stand because the relevant state law does not provide independent causes of action for good faith and fair dealing claims, and certainly not without viable contract claims in support.[19] (Mot. To Dismiss at 19.) Plaintiffs allege that Defendants acted in bad faith by failing to provide timely notice of cancellation and by unreasonably withholding Plaintiffs' funds (Pl. Resp. at 18-19.) Plaintiffs do not address Defendants' argument that their good

offering, reserve the right to terminate the sale due to lack of inventory if they informed the offeree of this reservation prior to acceptance. Corbin, *supra*, § 2.19. It is undisputed that Defendants informed Plaintiffs of the limited stock of the special edition game both in the announcement and the official listing. (SAC, Ex. 3, Pl. Resp. at 12.) There is no basis for Plaintiffs' argument that a buyer has to "consent" to a cancellation under the circumstances.

[19] Except for Arizona and New Jersey, which do allow for independent causes of action; however, Defendants claim that Plaintiffs' good faith and fair dealing claims still do not meet the requirements of these states.

faith and fair dealing claim fails in the event that there is no breach of contract claim.

Neither the U.C.C. nor Rhode Island law recognizes an independent cause of action for duty of good faith and fair dealing. R.I. Gen. Laws § 6A-1-304, cmt. 2 (noting that, although every contract under the U.C.C. imposes an obligation of good faith, "the doctrine of good faith merely directs a court toward interpreting contracts within the commercial context within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached."); *McNulty v. Chip*, 116 A.3d 173, 185 (R.I. 2015) ("[W]e have explained that a claim for breach of the implied covenant of good faith and fair dealing does not create an independent cause of action separate and apart from a claim for breach of contract"). Because the applicable law does not provide an independent cause of action, the Court determines that Plaintiffs cannot make out a claim for breach of good faith and fair dealing.[20] Count II is **DISMISSED**.

B. Negligence (Count III)

The Court next addresses Plaintiff's negligence claims. As the choice of law rules for tort claims are different than for contract claims, the Court must conduct a separate analysis as to Plaintiffs' negligence claim.

[20] Plaintiffs have argued for the application of Georgia law. Under Georgia law, "in contracts governed by the U.C.C., the failure to act in good faith in performing a contract does not create an independent cause of action." *Thakker v. Bay Point Capital Partners, LP*, No. 15-58440-WLH, 2018 WL 400728, at *3 (Bankr. N.D. Ga. 2018) (citing *Greenwald v. Columbus Bank & Tr.*, 492 S.E.2d 248 (Ga. Ct. App. 1997)). Likewise, "the common law requirement of good faith and fair dealing in the performance of a contract does *not* create an independent cause of action apart from breach of contract." *Id.*

i. Choice of Law

The Court's jurisdiction in this matter is based on diversity of citizenship; thus, the Court must apply the choice-of-law rules of Georgia. *U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 550 F.3d 1031, 1033 (11th Cir. 2008) (citing *Klaxon Co. v. Stento Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941)). Per Georgia rules, "[u]nder the rule of *lex loci delicti*, tort cases are governed by the substantive law of the state where the tort was committed." *Federated Rural Elec. Ins. Exchange v. R.D. Moody & Associates, Inc.,* 468 F.3d 1322, 1325 (11th Cir. 2006) (citing *Fed. Ins. Co. v. Nat'l Distrib. Co., Inc.,* 417 S.E.2d 671, 673 (Ga. Ct. App. 1992)). A tort is committed "where the last event occurred necessary to make an actor liable for the alleged tort." *In re Stand 'n Seal, Prod. Liab. Litig.,* 1:07 MD1804-TWT, 2009 WL 2998003, at *1 (N.D. Ga. Sept. 15, 2009). Under the *lex loci delecti* rule, "the last event necessary to make an actor liable for a tort is usually an injury." *Id.* Here, though not specifically pled, each Plaintiff was assumedly injured in the state where he or she resides and ordered the special edition game.

"Although the rule in Georgia is *lex loci delecti*, there are exceptions," such as for the application of common law. *Id.* Under this exception, "[f]oreign law does not apply if 'no foreign statutes are involved.'" *Id.* (internal citations omitted); *see also, Frank Briscoe Co., Inc. v. Georgia Sprinkler Co., Inc.*, 713 F.2d 1500, 1503 (11th Cir. 1983) ("When no statute is involved, Georgia courts apply the common law as developed in Georgia rather than foreign case law."); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, n. 6 (11th Cir. 1987). The

Parties have not identified any foreign statutes for purposes of Plaintiffs' negligence claim. Accordingly, the Court will apply Georgia law to Plaintiffs' negligence claim. *In re Stand 'n Seal, Prod. Liab. Litig.,* 2009 WL 2998003, at *2 (N.D. Ga. Sept. 15, 2009) ("If the parties do not identify any foreign statutes in their pleadings, it is presumed that no foreign statutes are involved.")

ii. Economic Loss Rule

In pursuit of dismissal, Defendants argue that Plaintiffs' negligence claim fails under the economic loss doctrine because Plaintiffs allege losses stemming exclusively from breach of contract, foreclosing any claim in tort. (Mot. to Dismiss at 23.) Plaintiffs respond that they have asserted a claim for negligent misrepresentation, which is not precluded by the economic loss rule. (Pl. Resp. at 20.)

In Georgia, the economic loss rule generally provides that "a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort." *General Elec. Co. v. Lowe's Home Centers, Inc.*, 608 S.E.2d 636, 637 (Ga. 2005). Under this rule, "a plaintiff can recover in tort only those economic losses resulting from injury to his person or damages to his property." *Id.* Plaintiffs do not allege any damages to their persons or property. (*See generally*, SAC.) With respect to their negligence claim, Plaintiffs allege only that "as a direct and proximate result of Defendants' negligence, Plaintiffs, and those similarly situated, incurred damages and are entitled to recover damages in an

amount to be determined by a jury." (SAC. ¶ 109.)[21] Plaintiffs also do not contend in their briefing that they have suffered damage to their persons or property. Instead, they rely on Georgia's "negligent misrepresentation exception" to the economic loss rule.[22]

The Georgia Supreme Court adopted the negligent misrepresentation exception in *Roberts & Co. Assoc. v. Rhodes-Haverty Partnership*, 250 Ga. 680 (1983). Under this exception,

> [O]ne who supplies information during the course of his business, professions, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly.

Id. at 681. The elements of a claim for negligent misrepresentation include: (1) the negligent supply of false information to foreseeable persons, known or known; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance. *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 267 Ga. 424, 479 (1997). "Therefore, a claim of negligent misrepresentation requires 'a plaintiff [to] establish that the defendant made false representations on which the plaintiff justifiably relied.'" *Murray v. ILG Technologies, LLC*, 378 F.Supp.3d 1227, 1250

[21] With respect to their contract claims, Plaintiffs allege that they were "denied the benefit of their bargain," and that they seek to recover "damages in an amount equal to the fair market value of the WSME at the time of Defendants' breach." (SAC ¶¶ 76, 78.)

[22] Plaintiffs have not outwardly cast their claim for negligence as a "negligent misrepresentation" claim in the Second Amended Complaint.

(S.D. Ga. Mar. 28, 2019) (citing *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1289 (11th Cir. 2007)). The first element specifically "requires a showing of an **affirmative misrepresentation**." *Murray*, 378 F.Supp.3d at 1250 (emphasis added).

Upon review, the Court finds that the Plaintiffs have not alleged facts to support a specific false representation on the part of Defendants. While the Second Amended Complaint alleges generally that Defendants "sent Plaintiffs written misrepresentations stating that they had a confirmed purchase" (SAC ¶ 104), the actual emails confirming Plaintiffs' *order* and confirming that payment had been sent to the seller, which Plaintiffs themselves attached to the Second Amended Complaint, are sent by eBay and PayPal, not Defendants. (SAC ¶¶ 66-67, Ex. 4,5.) Nowhere in the Second Amended Complaint, attached documents, or even in their briefing do Plaintiffs provide any particular facts alleging a false statement or representation by Defendants or the actual content of such a misrepresentation. *Twombly*, 550 U.S. at 555. ("[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").[23]

As discussed *supra*, Plaintiffs cannot rely on a theory that either eBay or PayPal served as an agent of Defendants sufficient to impute any alleged misrepresentation to them. Without a specific statement attributable to

[23] With respect to the second element of the claim, the Court notes that, without a specific assertion of a false representation, it is unable to evaluate whether Plaintiffs' reliance on any purported false statement was reasonable or not.

Defendants, Plaintiffs cannot support a negligent misrepresentation claim. *See e.g. Murray*, 378 F.Supp.3d at 1251 (holding that plaintiffs could not maintain negligent misrepresentation claim where the communication they received was from a third party–not defendants) ("A misrepresentation cannot be 'affirmative' if it is never communicated at all."); *Ali v. Fleet Finance, Inc.*, 500 S.E.2d 914, 915 (Ga Ct. App. 1998) (holding that a plaintiff could not set forth elements of negligent misrepresentation claim where there were no facts to find that defendant had made any representation).

The authority upon which Plaintiffs rely cannot remedy this flaw and in fact only highlights additional barriers to their negligence claim. For example, in *Atlantic Geoscience, Inc. v. Phoenix Development and Land Investment, LLC*, 799 S.E.2d 242 (Ga. Ct. App. 2017), a land developer alleged that a business hired to perform an environmental study made fraudulent misrepresentations relating to the existence of a landfill on the property. The court determined that the economic loss doctrine did not apply because the plaintiff alleged misrepresentations by the defendant in the specific context of a *professional* relationship. *Id.* at 245-246. The *Atlantic Geoscience* Court explained that the rule that the economic loss doctrine does not bar a negligent misrepresentation claim "can apply to claims of *professional* malpractice in cases asserting that a *professional* made a misrepresentation in the breach of his or her *professional* duties." *Id.* at 245. (emphasis added).

Further, "this rule also can apply to a claim brought by a plaintiff in contractual privity with a defendant." *Id.* at 246. Here, not only have Plaintiffs failed to allege any misrepresentations on the part of Defendants, but as discussed extensively *supra*, no contracts were formed between Plaintiffs and Defendants and thus Plaintiffs were not "in contractual privity" with Defendants. Plaintiffs' negligence claim sits atop a house of cards; without valid contracts, it collapses.[24]

In addition, the Court finds that Plaintiffs have not alleged economic injury proximately resulting from their purported reliance on any false representation by Defendants; they have only generally alleged damages as a result of Defendants' negligence. (SAC ¶ 109.) Moreover, as the *Atlantic Geoscience* Court explained, "Our Supreme Court has explained that this type of loss is measured by an 'out-of-pocket' standard, not a 'benefit-of-the-bargain' standard." 799 S.E.2d at 246 (citing *BDO Seidman, LLP v. Mindis Acquisition Corp.*, 276 Ga. 311, 312-313(1) (2003)). It is undisputed that Plaintiffs received full refunds for their attempted purchases and therefore experienced no "out-of-pocket" losses. This failing further forecloses Plaintiffs' ability to state a claim for negligent misrepresentation.

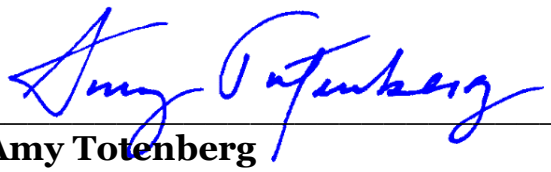
[24] Plaintiffs also cite to *ASC Const. Equipment USA, Inc. v. City Commercial Real Estate, Inc.*, 693 S.E.2d 559 (Ga. Ct. App. 2010). In that case, the court found that the economic loss rule did not bar plaintiff's claim *for fraud*, a claim which Plaintiffs do not allege here. *Tri-Professional Realty, Inc., v. Hillenburg*, 669 N.E.2d 1064 (Ind. Ct. App. 1996) applies the law of Indiana, which is inapplicable here.

In sum, because Plaintiffs have not stated a claim for negligent misrepresentation against Defendants, Plaintiffs cannot avail themselves of the negligent misrepresentation exception to the economic loss rule, which serves to bar their claims for negligence. Accordingly, Count III is **DISMISSED**.

V. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss [Doc. 34] is **GRANTED**, and Plaintiffs' Second Amended Complaint [Doc. 32] is **DISMISSED WITH PREJUDICE**. Defendants' Motion for Oral Argument [Doc. 35] is **DENIED AS MOOT**.

IT IS SO ORDERED this 11th day of December, 2020.



Amy Totenberg
United States District Judge