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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6
7 IN RE ZAPPOS, INC., SECURITY BREACH
8 LITIGATION

3:12-cv-00325-RCJ-VPC

ORDER

9 Pending before the Court are Plaintiffs' Motion to Enforce Settlement (ECF No. 207) and
10 Motions to Extend Time (ECF Nos. 220, 223), Defendant's Motion Request for Oral Argument
11 (ECF No. 214) as well as a Motion to Seal filed by each party. (ECF Nos. 206, 210).

12 **I. FACTS AND PROCEDURAL HISTORY**

13 This litigation arises from the security breach suffered by Defendant Zappos, Inc. The
14 Plaintiffs are Zappos customers who allege that their sensitive information was compromised as
15 a result of the breach. The parties have been litigating this case for about two years. On June 18,
16 2014, the parties jointly stipulated to stay the proceedings pending the outcome of mediation
17 efforts. (ECF No. 192). The parties engaged in mediation on July 30, 2014, and while progress
18 was reportedly made, no settlement was reached. (ECF No. 195).

19 Negotiations continued outside of mediation and on August 6, 2014, the parties again
20 stipulated to a stay of the case until the settlement could be finalized, representing to the Court
21 that substantial progress had been made toward settlement. (ECF No. 196). Another stay was
22 jointly requested on September 17, 2014, which the Court granted, as the parties indicated that
23 they were very close to settlement. (ECF No. 201). The stipulation also stated that the parties
24 were scheduled to participate in another mediation session on November 12, 2014. (*Id.*). Based

1 on this representation, the Court denied without prejudice Zappos's motion to dismiss the case.
2 The case was then stayed until January 30, 2015. (ECF No. 205).

3 Prior to the November 12, 2014 mediation, the parties reached an agreement on
4 class-wide relief but sought an additional mediation session to negotiate the amount of attorneys'
5 fees and other expenses that Plaintiffs' counsel would request from the Court. The terms of the
6 class-wide relief, as well as other substantive provisions, were reduced to writing in a
7 Memorandum of Understanding ("MOU"). Multiple drafts of the MOU were exchanged
8 between the parties. On November 3, 2014, Zappos's attorneys sent Plaintiffs' counsel a revised
9 copy of the MOU, which included completed provisions governing class-wide relief, but which
10 left blank the amounts that would be sought as attorneys' fees. (Draft MOU 6, ECF No. 209-1,
11 Ex. F). Plaintiffs' counsel reviewed the proposed MOU and made some minor changes. First, in
12 the space for attorneys' fees they input "TBD," and second, as part of the heading for the
13 relevant section, they included the phrase "TO BE DETERMINED AND INSERTED UPON
14 AGREEMENT AT MEDIATION." (Pls.' MOU 6, ECF No. 208-1). Other grammatical changes
15 were also made. On November 5, 2014, Plaintiffs' counsel signed the MOU and returned it to
16 Zappos's counsel, who did not sign the document.

17 Once the signed MOU was received, Zappos's counsel requested a demand for attorneys'
18 fees from Plaintiffs' counsel in preparation for the November 12, 2014 mediation. (Strickland
19 Decl. ¶ 17, ECF No. 209-1, Ex. 1). The request was renewed on November 7, 2014 when
20 Zappos's counsel asked the mediator to determine what the fee demand would be. (Counsel's
21 Email, ECF No. 209-1, Ex. G). On November 10, 2014, the mediator obtained and conveyed the
22 requested fee amount to Zappos's counsel. (Strickland Decl. ¶ 18). Zappos's counsel found that
23 the amount of fees sought was "extravagant" and determined that the scheduled mediation would
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1 be unproductive based on how far apart the parties were on the issue of fees and costs. (*Id.* ¶ 19;
2 *see also* Counsel Communication, ECF No. 209-1, Ex. H). Word was sent via the mediator that
3 if Plaintiffs’ counsel did not reduce the initial fee demand, Zappos’s counsel would not attend the
4 mediation session. Although telephonic appearances were made, no fee agreement was reached.

5 Zappos’s counsel engaged in at least one additional mediation caucus with the mediator,
6 through telephonic appearance, but further progress was not made on the fee demand cap that
7 would be included in the settlement agreement. Thereafter, the mediator informed Plaintiffs’
8 counsel that mediation was concluded and that “Zappos intends to litigate this case.” (Mediator
9 Communication, ECF No. 209-1, Ex. J). On January 30, 2015, Zappos’s filed a renewed motion
10 to dismiss the second amended complaint. (ECF No. 217). Plaintiffs then requested that the
11 Court grant an extension to the deadline for responding to that motion and Zappos’s motion to
12 strike until the Court ruled on the present Motion.

13 **II. DISCUSSION**

14 Under Nevada law, a settlement agreement is a contract that is governed by the principles
15 of contract law. *Mack v. Estate of Mack*, 206 P.3d 98, 108 (Nev. 2009). “Basic contract
16 principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and
17 consideration.” *May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005). An enforceable contract is
18 formed “when the parties have agreed to the material terms, even though the contract’s exact
19 language is not finalized until later.” *Id.*

20 However, “[a] contract cannot exist when material terms are lacking or are insufficiently
21 certain and definite.” *Id.* Rather, there must be a meeting of the minds, which “exists when the
22 parties have agreed upon the contract’s essential terms.” *Certified Fire Prot. Inc. v. Precision*
23 *Constr.*, 283 P.3d 250, 255 (Nev. 2012). What constitutes an “essential term” of an agreement
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1 “varies with the nature and complexity of the case and must, therefore, be determined on a case-
2 by-case basis.” *May*, 119 P.3d at 1258. Further, “[w]hich terms are essential ‘depends on the
3 agreement and its context and also on the subsequent conduct of the parties, including the dispute
4 which arises and the remedy sought.’” *Certified Fire Prot. Inc.*, 283 P.3d at 255.

5 In this case, the Court finds that the MOU does not embody a binding settlement contract
6 because the parties failed to have a “meeting of the minds” on an essential term of the
7 agreement—attorneys’ fees. The facts here persuade the Court that the amount of Plaintiffs’ fee
8 demand was a material and essential term of the agreement. First, the parties exchanged multiple
9 draft copies of the MOU and Zappos rejected earlier versions of the document that failed to
10 include language that set a cap at the amount of fees that Plaintiffs would request. (*See* Oct. 6,
11 2014 Draft 6, ECF No. 209-1, Ex. D). The various versions of the MOU make it clear that
12 Zappos would not move forward with the settlement until a cap was placed on the amount of fees
13 sought. (*See* Nov. 5, 2014 Draft 6, ECF No. 209-1, Ex. F (substituting the language “not to
14 exceed” for “subject to a cap of”).

15 Second, Zappos’s counsel requested Plaintiffs’ fee demand multiple times throughout the
16 course of the settlement negotiations and communicated that the fee demand issue was an
17 important topic that needed to be resolved. (Strickland Decl. ¶¶ 3, 4, 6, 7, 9, 10, 17; *see also*
18 Sept. 8, 2014 Email, ECF No. 209-1, Ex. B). And third, despite having the terms of the
19 class-wide relief resolved, the parties still found it necessary to schedule a separate mediation
20 session to negotiate the fee demand. The purpose of the November 12, 2014 mediation is
21 reflected in Plaintiffs’ signed copy of the MOU in which Plaintiffs’ counsel altered the heading
22 of the relevant section, stating that the amount of attorneys’ fees was “TO BE DETERMINED
23 AND INSERTED UPON AGREEMENT AT MEDIATON.” (Pls.’ MOU 6, ECF No. 208-1).

1 Indeed, the Court finds it unlikely that Plaintiffs’ counsel would schedule a mediation session
2 and then travel from all across the country to personally attend that session unless the subject of
3 the mediation was material to the settlement agreement.

4 Furthermore, neither Zappos nor its counsel signed the version of the MOU that was sent
5 to Plaintiffs and to which Plaintiffs’ counsel subsequently made certain changes. Although the
6 changes were not necessarily significant, it would be unfair to hold Zappos to an agreement that
7 was unsigned where the document clearly appears to not be a final draft, given that the amounts
8 of attorneys’ fee and costs were not included. Surely Zappos was not giving Plaintiffs a “blank
9 check” to fill in any fee cap that Plaintiffs’ counsel thought justified. The fact that Zappos’s
10 counsel left the lines blank for “attorneys’ fees, litigation expenses and costs” as well as for the
11 “incentive award” screams that the MOU was still in draft form and not a finalized agreement
12 representing a meeting of the minds on all essential terms. *See May*, 119 P.3d at 1257.

13 The Court cannot compel compliance with a settlement agreement when the “material
14 terms are left uncertain.” *Id.* Therefore, the Court finds that the MOU does not constitute an
15 enforceable settlement document because it omits caps on the amount of attorneys’ fees
16 Plaintiffs are entitled to seek, which appears from the record to be an important element to the
17 settlement in this particular class-action lawsuit. *See id.* at 1258 (stating that terms are material if
18 “[t]hey are an important reason why a party enters into a settlement agreement”). Plaintiffs’
19 Motion to Enforce Settlement is DENIED.

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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that Plaintiffs' Motion to Enforce Settlement (ECF No. 207)
3 is DENIED.

4 IT IS FURTHER ORDERED that Plaintiffs' Motion to Seal (ECF No. 206) is
5 GRANTED.

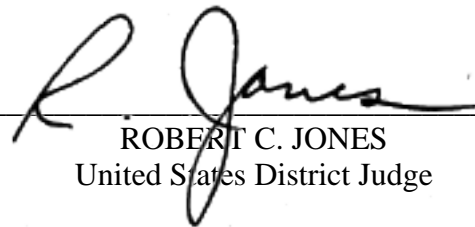
6 IT IS FURTHER ORDERED that Zappos's Motion to Seal (ECF No. 210) is
7 GRANTED.

8 IT IS FURTHER ORDERED that Zappos's Motion Request for Oral Argument (ECF
9 No. 214) is DENIED as moot.

10 IT IS FURTHER ORDERED that Plaintiffs' Motions for Extension of Time (ECF No.
11 220, 223) are GRANTED. Plaintiffs' responses to Zappos's Motion to Dismiss (ECF No. 217)
12 and Motion to Strike (ECF No. 219) are due thirty (30) days from the entry of this Order.

13 IT IS SO ORDERED.

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15 Dated: March 27, 2015 _____

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18 ROBERT C. JONES
19 United States District Judge
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