

FILED FOR RECORD

2012 FEB 13 PM 3:09

NO. 120247-102BILLY FOX
DISTRICT CLERK BOWIE CO TX

DEPUTY

CAROL BETH DAVIS,

Plaintiff

v.

GOOGLE, INC., and AMAZON.COM,
INC., d/b/a ZAPPOS.COM, INC.*Defendants*

IN THE DISTRICT COURT

OF

BOWIE COUNTY, TEXAS

PETITION FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff, CAROL BETH DAVIS, by and through her attorneys, and for her Petition for Declaratory Judgment would show the Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff intends to conduct discovery in this matter under Level 1 and affirmatively pleads that she seeks monetary relief aggregating \$50,000 or less, excluding costs, pre-judgment interest and attorneys' fees.
2. This Complaint for Declaratory Judgment is brought pursuant to Texas Civil Practice & Remedies Code 37.001, *et seq.*, to determine:
 - a. the rights and status of the parties with regard to Plaintiff's claim of proprietary ownership in all data of her electronic mail (hereinafter "email") prior to the receipt of the email by the recipients who are Gmail account holders of the Defendant, Google, Inc. (hereinafter "Google"); and
 - b. the rights and status of the parties with regard to Plaintiff's claims of proprietary ownership in all data of her Zappos.com, Inc., personal customer account information that was stolen by hackers gaining access to Zappos.com, Inc.'s, network.
3. Plaintiff is a resident of Bowie County, State of Texas.

EXHIBIT 1

4. Defendant, Google, Inc., is a Delaware corporation, whose principal place of business is at 1600 Amphitheatre Parkway, Mountain View, County of Santa Clara, State of California. Google may be served through its agent for service of process: CORPORATION SERVICE COMPANY, dba CSC—Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

5. Defendant Amazon.com, Inc., is a Delaware corporation with its principal place of business and corporate headquarters located at 410 Terry Avenue North, Seattle, Washington 98109-5210. Zappos.com, Inc., is an online shoe and apparel retailer headquartered in Henderson, Nevada. In 2009, Amazon.com, Inc., acquired Zappos.com, Inc. Upon information and belief, Zappos.com operates as an unincorporated division of Amazon.com, Inc. Amazon.com, Inc., does not maintain a registered agent for service of process in Texas. Amazon.com, Inc., may be served by mail via its registered agent for service of process in Washington State: Corporation Service Company, 300 Deschutes Way SW, Ste 304, Tumwater, Washington 98501. Defendant Amazon.com may herein be referred to as Defendant Amazon.com, Amazon.com, Defendant Zappos.com, or Zappos.com.

6. This Court has jurisdiction over this matter pursuant to Texas Civil Practice & Remedies Code §§ 37.001, *et seq.*, specifically § 37.003 and 37.004, in order to determine the property interests in personal property toward which Plaintiff asserts Google and Amazon.com have acted and continue to act adversely. Because Plaintiff seeks a declaration of property rights in her transmitted electronic data, suit is brought against both Defendants due to the same or similar legal issues. Should supplemental relief be sought pursuant to Texas Civil Practice & Remedies Code § 37.011, additional subject matter jurisdiction exists pursuant to supplemental causes of

action for conversion and violations of Texas law. Plaintiff expressly limits the value of her declaratory relief and any supplemental relief thereafter sought to less than \$75,000.

7. Plaintiff disclaims any cause of action arising under the United States Constitution, treaties or other laws of the United States, including any act or omission by any officer of the United States, or any agent or person acting on behalf of such individual.

8. Venue is proper in Bowie County pursuant to Texas Civil Practice & Remedies Code § 15.002, in that the proprietary interest was created in Bowie County, Texas, and Plaintiff resides in Bowie County, Texas.

FACTS

9. Google operates a webmail service known as "Gmail."

10. Plaintiff has and continues to send email to Gmail recipients.

11. Prior to the Gmail users ever receiving Plaintiff's email, Google takes data from Plaintiff's email, some of which Google identifies as "keywords."

12. Prior to the Gmail user ever receiving Plaintiff's email, Google uses Plaintiff's data in connection with various activities, one of which includes using Plaintiff's data to generate advertisements for subsequent display to the Gmail users when the Gmail user opens the email.

13. Google generates income from advertisers as a result of taking Plaintiff's data from Plaintiff's email and using Plaintiff's data to deliver advertisements to the Gmail user when the Gmail user opens the email.

14. Google disavows any ownership in the content (including text, data, information, images, photographs, music, sound, video, or other material) of Plaintiff's email to Gmail users.

15. Specifically, Google states in its Gmail Legal Notices to Gmail users:

Your Intellectual Property Rights

Google does not claim any ownership in any of the content, including text, data, information, images, photographs, music, sound video, or other material, that you upload, transmit or store in your Gmail account.

See http://www.google.com/mail/help/legal_notices.html.

16. Google is not a recipient of or a party to Plaintiff's emails sent to Gmail users.
17. Google's exercise of control of Plaintiff's data occurs prior to the Gmail user's receipt and review of the Plaintiff's email.
18. Google has exercised control and will continue to exercise control over Plaintiff's data by taking data from Plaintiff's email prior to those emails being received by Gmail users.
19. At the time Google exercises control of the data in Plaintiff's emails, the data contained in Plaintiff's email amounts to Plaintiff's personal property.
20. Any value associated with Plaintiff's data is Plaintiff's personal property.
21. Plaintiff has not authorized Google to in any way exercise control of Plaintiff's data for any purpose, but certainly not for the purpose of (1) taking data from Plaintiff's email or (2) generating revenue from the value Google derives from Plaintiff's data.
22. Prior to receiving and reviewing Plaintiff's emails, Gmail users are without authority to grant any person rights to, license to, use of, or any control over Plaintiff's property interest in the Plaintiff's data and value of that data contained therein.
23. Google has not and does not compensate Plaintiff for the exercise of control over Plaintiff's data; the use of any of Plaintiff's data; or the benefit of the value from Plaintiff's data.
24. Google has acted adversely to the property interests of Plaintiff.
25. Zappos.com, Inc., is an online shoe and apparel retailer. On or about January 16, 2012, Plaintiff received an email from Zappos.com notifying her that her personal account information had been stolen or compromised.

26. Zappos.com has admitted that Plaintiff's personal account information, including her name, account numbers, passwords, email addresses, billing and shipping addresses, phone numbers, and last four digits of her credit card numbers, was stolen by hackers. The hackers gained access to Zappos.com, Inc.'s internal network through its unprotected servers.

27. As a result of Zappos.com, Inc.'s failure to properly secure and safeguard its servers, the Plaintiff's personal property was invaded, compromised, intruded upon, and her proprietary and private information has been disclosed to unauthorized third-parties.

28. Zappos.com, Inc.'s wrongful actions or omissions directly and proximately caused the theft and dissemination of Plaintiff's proprietary and private information into the public domain without her knowledge, authorization, or consent.

29. Although Zappos.com, Inc., recommended that Plaintiff should reset her Zappos.com, Inc., password and change the passwords on any other web site where she uses the same or similar password, to date, Zappos.com, Inc., has not offered Plaintiff any identity protection program or credit monitoring program, any assurances that the incident will not reoccur, or any method to curb the continued unlawful use of Plaintiff's personal property. Additionally, Zappos.com, Inc., has not provided any information regarding the breach, including an explanation of what happened or an explanation of what Plaintiff do to further protect her identity with Zappos.com. Zappos.com, Inc., has offered nothing to Plaintiff to prevent future breaches and uses of the proprietary information stemming from the initial breach. As such, the harm caused by Zappos.com, Inc., is continuing for Plaintiff.

30. Zappos.com, Inc.'s actions above violated Plaintiff's proprietary rights in her personal account information.

CAUSE(S) OF ACTION

Count I: Declaration of Personal Property Interest

31. Pursuant to Texas Civil Practice and Remedies Code § 37.001, Google and Amazon.com are each a “person,” in that both are corporations of any character whatsoever.

32. Pursuant to Texas Civil Practice and Remedies Code § 37.003, Plaintiff seeks from this Court a declaration that (a) all data in Plaintiff’s email, prior to the receipt and review of that email by a Gmail user, is the sole personal property of Plaintiff, and (b) all data and content in Plaintiff’s Zappos.com, Inc, account are the personal property of Plaintiff, based in part, but not limited to:

- a. Common law;
- b. Legislative intent pursuant to Texas Penal Code § 31.01(5), “‘Property’ means: (A) real property; (B) tangible or intangible personal property including anything severed from land; or (C) a document, including money, that represents or embodies anything of value.
- c. Legislative intent pursuant to Texas Penal Code § 32.01(2), “‘Property’ means: (A) real property; (B) tangible or intangible personal property including anything severed from land; or (C) a document, including money, that represents or embodies anything of value
- d. Legislative intent pursuant to Texas Penal Code § 33.01(16), “‘Property’ means: (A) tangible or intangible personal property including a computer, computer system, computer network, computer software, or data; or (B) the use of a computer, computer system, computer network, computer software, or data.

33. Pursuant to Texas Civil Practice and Remedies Code § 37.003, Plaintiff seeks from this Court a declaration that Google has no ownership interest or property rights in Plaintiff’s data.

34. Pursuant to Texas Civil Practice and Remedies Code §§ 37.003 and 37.004, Plaintiff seeks from this Court a declaration that prior to receiving and reviewing Plaintiff’s emails, Gmail users are without authority to grant any person rights to, license to, use of, or any control over Plaintiff’s property interest in Plaintiff’s data.

35. Pursuant to Texas Civil Practice and Remedies Code § 37.003, Plaintiff seeks from this Court a declaration that Defendant Amazon.com, Inc., was and is a bailee of the Plaintiff's personal property.

Count II: Supplementary Relief

36. Pursuant to Texas Civil Practice & Remedies Code 37.011, should the Court find in favor of Plaintiff's requested declarations above, Plaintiff respectively asks the Court to order Google and Amazon.com to show cause why further relief should not be granted forthwith, to include a demonstration by Google as to why future acts adverse to Plaintiff's property interests would not amount to:

- a. conversion;
- b. violation of Texas Penal Code § 31.03;
- c. violation of Texas Penal Code §§ 32.21, *et seq.*;
- d. violation of Texas Penal Code § 33.02; and
- e. Any and all other basis to support a finding for future payments in association with unauthorized use of Plaintiff's property interests.
- f. In addition, Google should be required to provide and disclose to the Court and Plaintiff all uses it makes of Plaintiff's data for purposes of Gmail, and, after March 1, 2012, any other uses by Google.

Further, should the Court find in favor of Plaintiff's requested declarations above, Plaintiff respectively asks the Court to order Amazon.com to show cause:

- a. Why the following actions on the part of bailee Amazon.com, Inc., would not be necessary to demonstrate an exercise of due care in the handling of the bailed personal property of the Plaintiff:
 - i. That Amazon.com, Inc., provide any and all information on the Zappos.com website or to Plaintiff explaining the data breach occurrence, the steps being taken to prevent future breaches and to secure Plaintiff's property; and/or

ii. That Amazon.com, Inc., provide theft protection plans for Plaintiff for a reasonable period of time; and/or

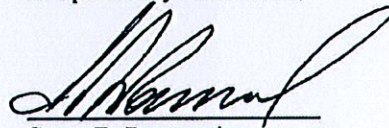
iv. That Amazon.com, Inc., provide credit monitoring plans for Plaintiff for a reasonable period of time.

b. Why other actions on the part of bailee Amazon.com, Inc., would not be necessary to demonstrate an exercise of due care in the handling of the bailed personal property of the Plaintiff;

c. Why actions on the part of Amazon.com contrary to the property interests of Plaintiff would not amount to conversion.

WHEREFORE PREMISES CONSIDERED, Plaintiff prays this Court find in favor of Plaintiff through the requested declarations of property interests against these Defendants, and grant and award Plaintiff all other relief to which she may prove herself entitled.

Respectfully submitted,



Sean F. Rommel
Texas Bar No. 24011612
srommel@wylyrommel.com
James C. Wylly
Texas Bar No. 22100050
jwylly@wylyrommel.com
WYLY~ROMMEL, PLLC
4004 Texas Boulevard
Texarkana, Texas 75503
(903) 334-8646 (Telephone)
(903) 334-8645 (Facsimile)

Kyle B. Davis
Texas Bar No. 24031995
LANGDON DAVIS
625 Sam Houston
P.O. Box 1221
New Boston, Texas 75570
(903) 628-5571 (Telephone)
(903) 628-5868 (Facsimile)

M. Chad Trammell
Texas Bar No. 20183750

chad@thetrammellfirm.com

THE TRAMMELL LAW FIRM, PLLC

418 North State Line Avenue

Texarkana, AR 71854

(870) 779-1860 (Telephone)

(870) 779-1861 (Facsimile)

Drake Mann

Texas Bar No. 12929510

mann@gill-law.com

GILL ELROD RAGON OWEN

& SHERMAN, P.A.

425 West Capitol Avenue, Suite 3801

Little Rock, Arkansas 72201

(501) 376-3800 (Telephone)

(501) 372-3359 (Facsimile)

ATTORNEYS FOR PLAINTIFF

CIVIL CASE INFORMATION SHEET

CAUSE NUMBER (FOR CLERK USE ONLY): _____ COURT (FOR CLERK USE ONLY): _____

STYLED CAROL BETH DAVIS V. GOOGLE, INC., and AMAZON.COM, INC., d/b/a ZAPPOS.COM, INC.
 (e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the Matter of the Estate of George Jackson)

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment motion for modification or enforcement is filed in a family law case. The information should be the best available at the time of filing. This sheet, approved by the Texas Judicial Council, is intended to collect information that will be used for statistical purposes only. It neither replaces nor supplements the filings or service of pleading or other documents as required by law or rule. The sheet does not constitute a discovery request, response, or supplementation, and it is not admissible at trial.

1. Contact information for person completing case information sheet:	Names of parties in case:	Person or entity completing sheet is:
Name: <u>SEAN F. ROMMEL</u> Email: <u>srommel@wylyrommel.com</u> Address: <u>4004 TEXAS BOULEVARD</u> Telephone: <u>(903) 334-8646</u> City/State/Zip: <u>TEXARKANA, TEXAS 75503</u> Fax: <u>(903)334-8645</u> Signature:  State Bar No.: <u>24011612</u>	Plaintiff(s)/Petitioner(s): <u>CAROL BETH DAVIS</u> Defendant(s)/Respondent(s): <u>GOOGLE, INC.</u> <u>AMAZON.COM, INC., d/b/a ZAPPOS.COM, INC.</u> (Attach additional page as necessary to list all parties)	<input checked="" type="checkbox"/> Attorney for Plaintiff/Petitioner <input type="checkbox"/> Pro Se Plaintiff/Petitioner <input type="checkbox"/> Title IV-D Agency <input type="checkbox"/> Other: _____ Additional Parties in Child Support Case: Custodial Parent: _____ Non-Custodial Parent: _____ Presumed Father: _____

2. Indicate case type, or identify the most important issue in the case (select only 1):

Civil		Family Law		
Contract <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Consumer/DTPA <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Other Debt/Contract: <input type="checkbox"/> Foreclosure <input type="checkbox"/> Home Equity—Expedited <input type="checkbox"/> Other Foreclosure <input type="checkbox"/> Franchise <input type="checkbox"/> Insurance <input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Non-Competition <input type="checkbox"/> Partnership <input type="checkbox"/> Other Contract: _____	Injury or Damage <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Construction <input type="checkbox"/> Defamation <input type="checkbox"/> Malpractice <input type="checkbox"/> Accounting <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional Liability: <input type="checkbox"/> Motor Vehicle Accident <input type="checkbox"/> Premises <input type="checkbox"/> Product Liability <input type="checkbox"/> Asbestos/Silica <input type="checkbox"/> Other Product Liability List Product: _____ <input type="checkbox"/> Other Injury or Damage: _____	Real Property <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Trespass to Try Title <input checked="" type="checkbox"/> Other Property: <u>PERSONAL PROPERTY</u> Related to Criminal Matters <input type="checkbox"/> Expunction <input type="checkbox"/> Judgment Nisi <input type="checkbox"/> Non-Disclosure <input type="checkbox"/> Seizure/Forfeiture <input type="checkbox"/> Writ of Habeas Corpus—Pre-indictment <input type="checkbox"/> Other: _____	Marriage Relationship <input type="checkbox"/> Annulment <input type="checkbox"/> Declare Marriage Void Divorce <input type="checkbox"/> With Children <input type="checkbox"/> No Children Other Family Law <input type="checkbox"/> Enforce Foreign Judgment <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Name Change <input type="checkbox"/> Protective Order <input type="checkbox"/> Removal of Disabilities of Minority <input type="checkbox"/> Other: _____	Post-Judgment/Actions (non-Title IV-D) <input type="checkbox"/> Enforcement <input type="checkbox"/> Modification—Custody <input type="checkbox"/> Modification—Other Title IV-D <input type="checkbox"/> Enforcement/Modification <input type="checkbox"/> Paternity <input type="checkbox"/> Reciprocals (UIFSA) <input type="checkbox"/> Support Order Parent-Child Relationship <input type="checkbox"/> Adoption/Adoption with Termination <input type="checkbox"/> Child Protection <input type="checkbox"/> Child Support <input type="checkbox"/> Custody or Visitation <input type="checkbox"/> Gestational Parenting <input type="checkbox"/> Grandparent Access <input type="checkbox"/> Parentage/Paternity <input type="checkbox"/> Termination of Parental Rights <input type="checkbox"/> Other Parent-Child: _____
Employment		Other Civil		
<input type="checkbox"/> Discrimination <input type="checkbox"/> Retaliation <input type="checkbox"/> Termination <input type="checkbox"/> Workers' Compensation <input type="checkbox"/> Other Employment: _____	<input type="checkbox"/> Administrative Appeal <input type="checkbox"/> Antitrust/Unfair Competition <input type="checkbox"/> Code Violations <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Intellectual Property	<input type="checkbox"/> Lawyer Discipline <input type="checkbox"/> Perpetuate Testimony <input type="checkbox"/> Securities/Stock <input type="checkbox"/> Tortious Interference <input type="checkbox"/> Other: _____		
Tax		Probate & Mental Health		
<input type="checkbox"/> Tax Appraisal <input type="checkbox"/> Tax Delinquency <input type="checkbox"/> Other Tax: _____	Probate/Wills/Intestate Administration <input type="checkbox"/> Dependent Administration <input type="checkbox"/> Independent Administration <input type="checkbox"/> Other Estate Proceedings: _____	<input type="checkbox"/> Guardianship—Adult <input type="checkbox"/> Guardianship—Minor <input type="checkbox"/> Mental Health <input type="checkbox"/> Other: _____		

3. Indicate procedure or remedy, if applicable (may select more than 1):

<input type="checkbox"/> Appeal from Municipal or Justice Court <input type="checkbox"/> Arbitration-related <input type="checkbox"/> Attachment <input type="checkbox"/> Bill of Review <input type="checkbox"/> Certiorari <input type="checkbox"/> Class Action	<input checked="" type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Garnishment <input type="checkbox"/> Interpleader <input type="checkbox"/> License <input type="checkbox"/> Mandamus <input type="checkbox"/> Post-judgment	<input type="checkbox"/> Prejudgment Remedy <input type="checkbox"/> Protective Order <input type="checkbox"/> Receiver <input type="checkbox"/> Sequestration <input type="checkbox"/> Temporary Restraining Order/Injunction <input type="checkbox"/> Turnover
---	--	---