

COPY

NO. 12C0247-102

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2012 MAR 13 PM 2: 29

BILLY FOX
DISTRICT CLERK BOWIE CO TX

CAROL BETH DAVIS,

Plaintiff

v.

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

Defendants

IN THE DISTRICT COURT _____ DEPUTY

OF

BOWIE COUNTY, TEXAS

FIRST AMENDED PETITION FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff, CAROL BETH DAVIS, by and through her attorneys, and for her First Amended 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 certain 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.

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 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. Pleading further, Plaintiff specifically disclaims any cause of action arising under the Electronic Communication Privacy Act (“ECPA”), which is codified as 18 U.S.C. §§ 2510 and following. ECPA prohibits the intentional intercepting and/or use of the “contents” of electronic communications. ECPA defines “contents” as “information concerning the substance, purport, or meaning of the electronic communication.” 18 U.S.C. § 2510(8). Plaintiff does not allege Google intercepted her electronic communications or used their “contents”.¹ Plaintiff does not seek a declaration related to the “contents” of her electronic communications. Plaintiff is concerned in this case about data *other than* the “contents” of her electronic communications, which Plaintiff herein identifies as “Plaintiff’s data” or “data”.

9. 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

10. Google operates a webmail service known as “Gmail.”

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

¹ In fact, there is a nationwide class-action styled as *Dunbar, et al. v. Google, Inc.* pending in the Eastern District of Texas (Texarkana Division), as Case No. 5:10CV00194 before Judge Folsom that seeks to remedy Google’s ongoing ECPA violations related to Gmail. This case deals with a class of data that is not protected by ECPA because it is not “contents” as ECPA defines that word.

12. In addition to what a lay person would consider the contents or the body of an email, Plaintiff's email has additional data associated with it—the so-called meta-data; it is the ownership of this data about which Plaintiff seeks a declaration. Emails have two parts: the “envelope” and the “content” of the envelope. The “content” of the envelope of an email comprises two parts: the header fields and the body. This case deals with data in the “envelope” and in the header fields of Plaintiff's emails. This data is not in the body of Plaintiff's emails, nor does it indicate the “contents” of her emails.

13. Data associated with Plaintiff's emails are included in the “envelope” of Plaintiff's emails, such as the following:

- a. Plaintiff's Internet Protocol Address, which (i) identifies the computer from which Plaintiff sent her email and (ii) implies the geographical location of that computer (and, hence, Plaintiff),
- b. an originator address,
- c. one or more recipient addresses,
- d. Plaintiff's domain name, which identifies Plaintiff's host (i.e., the computer system that is attached to the Internet), and
- e. various state tables and buffers.

14. Plaintiff's data can also be found in the header fields of her emails, which are either completed by Plaintiff or are generated by the computer system she used to generate and send the email. This data is not in the body of Plaintiff's emails, nor does it indicate the “contents” of her emails. Most users in fact rarely see the majority of this type of data. This data nevertheless belongs to Plaintiff. This data is in the header fields of Plaintiff's emails, which could be labeled as follows:

- a. trace,
- b. resent-date,
- c. resent-from,
- d. resent-sender,
- e. resent-to,
- f. resent-cc,
- g. resent-bcc,
- h. resent-msg-id,
- i. orig-date,
- j. from,
- k. sender,
- l. reply-to,
- m. to,
- n. cc,
- o. bcc,
- p. message-id,
- q. in-reply-to,
- r. references,
- s. subject,
- t. comments,
- u. keywords, and/or
- v. optional-field.

15. Google uses Plaintiff's data in these header fields in connection with various activities, all of which have as their goal generating additional revenue for Google.

16. 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 (emphasis supplied).

17. Google is not a party to Plaintiff's emails sent to Gmail users.

18. Google has exercised control and will continue to exercise control over Plaintiff's data by deriving revenue from Plaintiff's data.

19. The data associated with Plaintiff's emails, such as the data in envelope and the header fields and other data, amount 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 deriving revenue from that data for Google.

22. Prior to receiving 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 data. 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 property 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 header fields, prior to the receipt 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 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. 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 for any other service offered 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

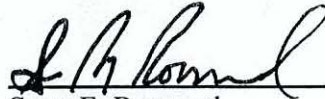
iv. That Amazon.com, Inc., provide credit monitoring plans for Plaintiff for a reasonable period of time.

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,



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ATTORNEYS FOR PLAINTIFF

CITATION-PERSONAL SERVICE
THE STATE OF TEXAS
12C0247-102
CAROL BETH DAVIS
VS.
GOOGLE INC ET AL

TO: GOOGLE INC BY SERVING;
CORPORATION SERVICE COMPANY
D/B/A CSC LAWYERS INCORPORATING SERVICE CO
211 E 7TH STREET SUITE 620
AUSTIN TX 78701

DEFENDANT in the above styled and numbered cause:

YOU HAVE BEEN SUED. You may employ an attorney. If you do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the AMENDED PETITION in the above styled and numbered cause, which was filed on March 13, 2012 in the 102nd District Court of Bowie County, New Boston, Texas. This instrument describes the claim against you.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, ON THIS THE 13TH DAY OF MARCH, 2012.

ATTY FOR PETITIONER OR PETITIONER

SEAN F ROMMEL
2311 MOORES LANE
TEXARKANA TX 75503



BILLY FOX
BOWIE COUNTY DISTRICT CLERK
710 JAMES BOWIE DRIVE
NEW BOSTON, TX 75570

BY:

Carlynn Williams
DEPUTY

OFFICER'S RETURN

Came to hand on the _____ day of _____, _____, at _____ o'clock _____ M.
EXECUTED at _____, within the County of _____, at _____ o'clock _____ M. on
the _____ day of _____, _____, by delivering to the within named _____, in person a true
copy of such petition to such copy of citation and endorsed on such copy of citation the date of delivery.

NOT EXECUTED, the diligence used to execute being _____; for the following reason _____, the
defendant may be found _____.

FEE FOR SERVING CITATION: \$ _____

TO CERTIFY WHICH WITNESS MY HAND OFFICIALLY.

SHERIFF/CONSTABLE

COUNTY, TEXAS
BY: _____
DEPUTY

COMPLETE IF YOU ARE A PERSON OTHER THAN A SHERIFF, CONSTABLE OR CLERK OF THE COURT

In accordance with Rule 107: The officer or authorized person who serves, or attempts to serve, a citation shall sign the return. The return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is _____, my date of birth is _____, and my address is
(First, Middle, Last) _____ (Street, City, State, Zip)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FORGOING IS TRUE AND CORRECT.

Executed in _____ County, State of _____, on the _____ day of _____, 20 _____.

Declarant/Authorized Process Server

(ID # & Expiration of Certification)

CITATION-PERSONAL SERVICE
THE STATE OF TEXAS
12C0247-102
CAROL BETH DAVIS
VS.
GOOGLE INC ET AL

SHERIFF'S RETURN

TO: GOOGLE INC BY SERVING;
CORPORATION SERVICE COMPANY
D/B/A CSC LAWYERS INCORPORATING SERVICE CO
211 E 7TH STREET SUITE 620
AUSTIN TX 78701

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ATTY FOR PETITIONER OR PETITIONER

SEAN F ROMMEL
2311 MOORES LANE
TEXARKANA TX 75503



BILLY FOX
BOWIE COUNTY DISTRICT CLERK
710 JAMES BOWIE DRIVE
NEW BOSTON, TX 75570

BY: Carolyn Williams
DEPUTY

OFFICER'S RETURN

Came to hand on the _____ day of _____, _____, at _____ o'clock ____ .M.
EXECUTED at _____, within the County of _____, at _____ o'clock ____ .M. on
the _____ day of _____, _____, by delivering to the within named _____, in person a true
copy of such petition to such copy of citation and endorsed on such copy of citation the date of delivery.

NOT EXECUTED, the diligence used to execute being _____; for the following reason _____, the
defendant may be found _____.

FEE FOR SERVING CITATION: \$ _____ TO CERTIFY WHICH WITNESS MY HAND OFFICIALLY.

SHERIFF/CONSTABLE

COUNTY, TEXAS
BY: _____
DEPUTY

COMPLETE IF YOU ARE A PERSON OTHER THAN A SHERIFF, CONSTABLE OR CLERK OF THE COURT

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"My name is _____, my date of birth is _____, and my address is
(First, Middle, Last) _____
(Street, City, State, Zip)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FORGOING IS TRUE AND CORRECT.

Executed in _____ County, State of _____, on the _____ day of _____, 20 ____.

Declarant/Authorized Process Server

(ID # & Expiration of Certification)