In Re Zappos.Com, Inc., Customer Data Security Breach Litigation

893 F.Supp.2d 1058 (D.Nev.,2012)

**Order**

R. JONES, District Judge

This Multidistrict Litigation ("MDL") proceeding arises out of a security breach of servers belong to Defendants Amazon.com, Inc. (“Amazon"), doing business as Zappos.com, and Zappos.co, Inc. ("Zappos") in January 2012. Now pending is Defendant Zappos' Motion to Compel Arbitration and Stay action (#3).

**I. Relevant Factual Background**

Zappos is an online retailer of apparel, shoes, handbags, home furnishing, beauty products, and accessories. Plaintiffs are Zappos customers who gave personal information to Zappos in order to purchase goods via Zappos.com and/or 6PM.com. In mid-January 2012, a computer hacker attacked Zappos.com and attempted to download files containing customer information such as names and addresses from a Zappos server (the "Security Breach"). Plaintiffs allege that on January 16, 2012, Zappos notified Plaintiffs via email that their personal customer account information had been compromised by hackers. Plaintiffs have filed complaints in federal district courts across the country seeking relief pursuant to state and federal statutory and common law for damages resulting from the Security Breach.

**II. Procedural Background**

. . . The Court held a hearing on the motion and heard the parties' oral arguments on September 19, 2012.

**III. Legal Standard**

The Federal Arbitration Act ("FAA") provides that contractual arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [9 U.S.C. § 2](http://www.bloomberglaw.com/ms/document/XEH1F4003?jcsearch=9%20U.S.C.%20%202&amp;summary=yes#jcite) . . .

**IV. Discussion**

The arbitration agreement at issue, founds in the Disputes section of the Terms of Use of the Zappos.com website, provides as follows:

Any dispute relating in any way to your visit to the Site or to the products you purchase through the Site shall be submitted to confidential arbitration in Las Vegas, Nevada, except that to the extent you have in any manner violated or threatened to violate our intellectual property rights, we may seek injunctive or other appropriate relief in any state or federal court in the State of Nevada. You hereby consent to, and waive all defense of lack of personal jurisdiction and forum non conveniens with respect to venue and jurisdiction in the state and federal courts of Nevada. Arbitration under these Terms of Use shall be conducted pursuant to the Commercial Arbitration Rules then prevailing at the American Arbitration Association. The arbitrator's award shall be final and binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class action proceedings or otherwise. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of, related to or connected with the use of the Site or this Agreement must be filed within one (1) year after such claim or cause of action arose or be forever banned.

Additionally, the first paragraph of the Terms of Use provides in relevant part: "We reserve the right to change this Site and these terms and conditions at any time. **ACCESSING, BROWSING OR OTHERWISE USING THE SITE INDICATES YOUR AGREEMENT TOALL THE TERMS AND CONDITIONS IN THIS AGREEMENT, SO PLEASE READ THISAGREEMENT CAREFULLY BEFORE PROCEEDING."**

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**B. The Terms of Use Constitutes an Illusory Contract**

The Priera Plaintiffs argue that because the Terms of Use grants Zappos the unilateral right to revise the Arbitration Clause, the contract is illusory and therefore unenforceable. In other words, Plaintiffs argue that the Arbitration Clause is illusory because Zappos can avoid the promise to arbitrate simply by amending the provision, while Zappos.com users are simultaneously bound to arbitration.

Most federal courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory and unenforceable, especially where there is no obligation to receive consent from, or even notify, the other parties to the contract . . .

Here, the Terms of Use gives Zappos the right to change the Terms of Use, including the Arbitration Clause, at any time without notice to the consumer. On one side, the Terms of Use purportedly binds any user of the Zappos.com website to mandatory arbitration. However, if a consumer sought to invoke arbitration pursuant to the Terms of Use, nothing would prevent Zappos from unilaterally changing the Terms and making those changes applicable to that pending dispute if it determined that arbitration was no longer in its interest. In effect, the agreement allows Zappos to hold its customers and users to the promise to arbitrate while reserving its own escape hatch. By the terms of the Terms of Use, Zappos is free at any time to require a consumer to arbitrate and/or litigate anywhere it sees fit, while consumers are required to submit to arbitration in Las Vegas, Nevada. Because the Terms of Use binds consumers to arbitration while leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of obligation. We join those other federal courts that find such arbitration agreements illusory and therefore unenforceable.

. . .

**V. Conclusion**

A court cannot compel a party to arbitrate where that party has not previously agreed to arbitrate. The arbitration provision found in the Zappos.com Terms of Use purportedly binds all users of the website by virtue of their browsing. However, the advent of the Internet has not changed the basic requirements of a contract, . . . even if Plaintiffs could be said to have consented to the terms, the Terms of Use constitutes an illusory contract because it allows Zappos to avoid arbitration by unilaterally changing the Terms at any time, while binding any consumer to mandatory arbitration in Las Vegas, Nevada . . .