

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN RE ZAPPOS.COM, INC., CUSTOMER) 3:12-cv-00325-RCJ-VPC
DATA SECURITY BREACH LITIGATION,) MDL No. 2357

Order

) 3:12-cv-00072-RCJ-WGC
) 2:12-cv-00182-RCJ-VCF
) 2:12-cv-00232-RCJ-VCF
) 3:12-cv-00337-RCJ-VPC
) 3:12-cv-00338-RCJ-VPC
) 3:12-cv-00339-RCJ-VPC
) 3:12-cv-00340-RCJ-VPC
) 3:12-cv-00341-RCJ-VPC
) 3:12-cv-00355-RCJ-VPC
) 3:12-cv-00392-RCJ-VPC
) (Member Cases)

This Order applies to all actions

This Multidistrict Litigation ("MDL") proceeding arises out of a security breach of servers belong to Defendants Amazon.com, Inc. ("Amazon")¹, doing business as Zappos.com, and Zappos.com, 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. (Rajan Decl. ¶ 3 (#3-

¹ Plaintiffs have named both Amazon and Zappos as Defendants. Defendants, however, contend that Amazon does not do business as Zappos.com and is therefore incorrectly named.

27
28

1 1.) Plaintiffs are Zappos customers who gave personal information to
2 Zappos in order to purchase goods via Zappos.com and/or 6PM.com. (Id.
3 ¶¶ 4-7; Rajan Second Supp'l Decl. ¶¶ 3-13 (#13-1).) In mid-January
4 2012, a computer hacker attacked Zappos.com and attempted to download
5 files containing customer information such as names and addresses from
6 a Zappos server (the "Security Breach"). (Defs.' Mot. Compel at 1
7 (#3); Pls.' Opp'n at 4 (#10).) Plaintiffs allege that on January 16,
8 2012, Zappos notified Plaintiffs via email that their personal
9 customer account information had been compromised by hackers. (Def.'s
10 Mot. Compel at 6 (#3); Steven Pls.' Opp'n at 1 (#9); Pls.' Opp'n at 4
11 (#10).) Plaintiffs have filed complains in federal district courts
12 across the country seeking relief pursuant to state and federal
13 statutory and common law for damages resulting from the Security
14 Breach.

15 16 II. Procedural Background

17 On June 14, 2012, the United States Judicial Panel on
18 Multidistrict Litigation (the "MDL Panel") transferred nine pending
19 actions² to the District of Nevada for coordinated or consolidated

20
21 ² In its original Transfer Order (#1), the MDL Panel transferred
22 the following nine cases to this Court, which were consolidated under
In re Zappos.com, Inc., Customer Data Security Breach Litigation,
23 3:12-cv-00325-RCJ-VPC:

- 24 1. Josh Richards v. Amazon.com, Inc., 6:12-cv-00212 (M.D. Fl.)
- 25 2. Sylvia St. Lawrence v. Zappos.com, Inc., 0:12-cv-60133 (S.D. Fl.)
- 26 3. Theresa D. Stevens v. Amazon.com, Inc., 3:12-cv-00032 (W.D. Ky.)
- 27 4. Stacy Penson v. Amazon.com, Inc., 3:12-cv-00036 (W.D. Ky.)
5. Tara J. Elliot, et al. v. Amazon.com, Inc., 3:12-cv-00037 (W.D. Ky.)
6. Dahlia Habashy v. Amazon.com, Inc., 1:12-cv-10145 (D. Mass.)
7. Stephanie Prieria v. Zappos.com, Inc., 2:12-cv-00182 (D. Nev.)
8. Shari Simon, et al. v. Amazon.com, Inc., 2:12-cv-232 (D. Nev.)

1 pretrial proceedings. (Transfer Order (#1).) On July 16, 2012, the
2 MDL Panel transferred an additional case into this action.³

3 Also on June 14, 2012, Defendants' Motion to Compel Arbitration
4 and Stay Action (#3) was filed in this Court.⁴ On August 30, 2012,
5 Plaintiffs Theresa D. Stevens, Stacy Penson, Tara J. Elliot, Brooke
6 C. Brown, and Christa Seal (the "Stevens Plaintiffs") filed their
7 Opposition (#9). Plaintiffs Stephanie Prieria, Patti Hasner, Robert
8 Ree, Shari Simon, and Kathryn Vorhoff (the "Prieria Plaintiffs") also
9 filed their Opposition (#10) on August 30, 2012. Plaintiffs Dahlia
10 Habashy and Josh Richards each submitted their respective Joinder
11 (##11, 12) to the Prieria Opposition (#10) on August 30, 2012.
12 Defendants submitted a Joinder of Additional Plaintiffs (#14) to
13 their Motion to Compel Arbitration and Stay Action (#3) on August
14 30, 2012. Defendants filed their Reply (#16) on September 6, 2012.
15 The Court held a hearing on the motion and heard the parties' oral
16 arguments on September 19, 2012.

17
18 III. Legal Standard

19 The Federal Arbitration Act ("FAA") provides that contractual
20 arbitration agreements "shall be valid, irrevocable, and
21 enforceable, save upon such grounds as exist at law or in equity for
22 the revocation of any contract." 9 U.S.C. § 2. Arbitration

23
24 9. Robert Ree v. Amazon.com, Inc. dba Zappos.com, 3:12-cv-00072 (D. Nev.)

25 ³ The additional case is Zetha Nobles v. Zappos.com, Inc., 3:12-
26 cv-03131 (N.D. Cal.)

27 ⁴ The Motion was originally filed on April 6, 2012 as Document
28 No. 26 in District of Nevada case 3:12-cv-00182.

1 agreements are enforced under sections 3 and 4 of the FAA, which
2 provide "two parallel devices for enforcing an arbitration
3 agreement." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460
4 U.S. 1, 22 (1983). Section 3 gives courts the power to provides "a
5 stay of litigation in any case raising a dispute referable to
6 arbitration," while section 4 empowers courts to provide "an
7 affirmative order to engage in arbitration." Id.; 9 U.S.C. §§ 3-4.

8 The FAA "is a congressional declaration of a liberal federal
9 policy favoring arbitration agreements, notwithstanding any state
10 substantive or procedural policies to the contrary." Moses H. Cone
11 Mem'l Hosp., 460 U.S. at 24; see also Southland Corp. v. Keating,
12 465 U.S. 1, 2 (1984) (finding that the FAA "declared a national
13 policy favoring arbitration"); Perry v. Thomas, 482 U.S. 483, 489
14 (1987) (stating that the FAA "embodies a clear federal policy
15 requiring arbitration" when there is a written arbitration agreement
16 relating to interstate commerce). Thus, "an order to arbitrate [a]
17 particular grievance should not be denied unless it may be said with
18 positive assurance that the arbitration clause is not susceptible of
19 an interpretation that covers the asserted dispute." United
20 Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574,
21 582-83 (1960).

22 Despite this strong federal policy in favor of arbitration,
23 arbitration is a "matter of contract," and no party may be required
24 to submit to arbitration "any dispute which he has not agreed so to
25 submit." Howsam v. Dean Witter Reynolders, Inc., 537 U.S. 79, 79
26 (2002) (quoting United Steelworkers, 363 U.S. at 582); see also Volt

27

28

1 Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.,
2 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to
3 arbitrate when they have not agreed to do so."). A court's
4 discretion for compelling arbitration is thus limited to a two-step
5 process of "determining (1) whether a valid agreement to arbitrate
6 exists, and if it does; (2) whether the agreement encompasses the
7 dispute at issue." Chiron Corp. v. Ortho Diagnostics Sys., Inc.,
8 207 F.3d 1126, 1130 (9th Cir. 2000). A party cannot be ordered to
9 arbitration unless there is "an express, unequivocal agreement to
10 that effect." Samson v. NAMA Holdings, LLC, 637 F.3d 915, 923 (9th
11 Cir. 2010) (quoting Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.,
12 Ltd., 636 F.2d 51, 54 (3d Cir. 1980)).

13 With regard to the determination of whether there is a valid
14 agreement to arbitrate between the parties, "the liberal federal
15 policy regarding the scope of arbitrable issues is inapposite."
16 Comer v. Micor, Inc., 436 F.3d 1098, 1104 n.11 (9th Cir. 2006).
17 Instead, federal courts "should apply ordinary state-law principles
18 that govern the formation of contracts." First Options of Chicago,
19 Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Under Nevada law,⁵
20 "[b]asic contract principles require, for an enforceable contract,
21 an offer and acceptance, meeting of the minds, and consideration."
22 May v. Anderson, 119 P.3d 1254, 1257 (Nev. 2005) (citing Keddie v.
23 Beneficial Ins., Inc. 580 P.2d 955, 956 (Nev. 1978) (Baltjer, C.J.,

24
25

26 ⁵ While which state's law should apply is not entirely clear
27 given the plethora of states from which these cases arise, the parties
28 apply Nevada law in their respective filings, and the Court will do
the same.

1 concurring)). Put differently, an enforceable contract "requires a
2 manifestation of mutual assent in the form of an offer by one party
3 and acceptance thereof by the other . . . [and] agreement or meeting
4 of the minds of the parties as to all essential elements." (Keddie,
5 580 P.2d at 957 (citations omitted).

6
7 IV. Discussion

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

11 Any dispute relating in any way to your visit to the Site
12 or to the products you purchase through the Site shall be
13 submitted to confidential arbitration in Las Vegas,
14 Nevada, except that to the extent you have in any manner
15 violated or threatened to violate our intellectual
16 property rights, we may seek injunctive or other
17 appropriate relief in any state or federal court in the
18 State of Nevada. You hereby consent to, and waive all
19 defense of lack of personal jurisdiction and forum non
20 conveniens with respect to venue and jurisdiction in the
21 state and federal courts of Nevada. Arbitration under
22 these Terms of Use shall be conducted pursuant to the
23 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.

24 (Carton Decl. Ex. 8 (#10-16).) Additionally, the first paragraph of
25 the Terms of Use provides in relevant part: "We reserve the right to
26 change this Site and these terms and conditions at any time.

1 ACCESSING, BROWSING OR OTHERWISE USING THE SITE INDICATES YOUR
2 AGREEMENT TO ALL THE TERMS AND CONDITIONS IN THIS AGREEMENT, SO
3 PLEASE READ THIS AGREEMENT CAREFULLY BEFORE PROCEEDING." (Id.
4 (emphasis in original).)

5 A. Plaintiffs Did Not Agree to the Terms of Use

6 The Court's first step when presented with a motion to compel
7 arbitration is to determine whether a valid agreement to arbitrate
8 exists. Chiron Corp., 207 F.3d at 1130.

9 It is undisputed that Zappos' Terms of Use constitutes what
10 federal courts have deigned a "browsewrap" agreement. With a
11 browsewrap agreement, a website owner seeks to bind website users to
12 terms and conditions by posting the terms somewhere on the website,
13 usually accessible through a hyperlink located somewhere on the
14 website; in contrast, a "clickwrap" agreement requires users to
15 expressly manifest assent to the terms by, for example, clicking an
16 "I accept" button. Specht v. Netscape Commc'ns Corp., 306 F.3d 17,
17 22 n.4 (2d Cir. 2002) (J. Sotomayor). "Because no affirmative
18 action is required by the website user to agree to the terms of a
19 contract other than his or her use of the website, the determination
20 of the validity of a browsewrap contract depends on whether the user
21 has actual or constructive knowledge of a website's terms and
22 conditions." Van Tassell v. United Mktg. Grp., 795 F.Supp.2d 770,
23 790 (N.D. Ill. 2011) (citing Pollstar v. Gigmania, Ltd., 170
24 F.Supp.2d 974, 981 (E.D. Cal. 2000)); see also Mark A. Lemley, *Terms*
25 *of Use*, 90 MINN. L. REV. 459, 477 (2006) ("Court may be willing to
26 overlook the utter absence of assent only when there are reasons to

27

28

1 believe that the [website user] is aware of the [website owner's]
2 terms."); Note, *Ticketmaster Corp. v. Tickers.com, Inc.: Preserving*
3 *Minimum Requirements of Contract on the Internet*, 19 BERKELEY TECH.
4 L.J. 495, 507 (2004) ("[S]o far courts have held browsewrap
5 agreements enforceable if the website provides sufficient notice of
6 the license."). Where, as here, there is no evidence that
7 plaintiffs had actual knowledge of the agreement, "the validity of a
8 browsewrap contract hinges on whether the website provides
9 reasonable notice of the terms of the contract." Van Tassel, 795
10 F.Supp.2d at 791 (citing Specht, 306 F.3d at 32).

11 Here, the Terms of Use hyperlink can be found on every Zappos
12 webpage, between the middle and bottom of each page, visible if a
13 user scrolls down. (Carton Decl. Ex. 1 (#10-9).) For example, when
14 the Zappos.com homepage is printed to hard copy, the link appears on
15 page 3 of 4. (Id.) The link is the same size, font, and color as
16 most other non-significant links. (Id.) The website does not
17 direct a user to the Terms of Use when creating an account, logging
18 in to an existing account, or making a purchase. (Id.; Carton Decl.
19 Ex. 2 (#10-10), Ex. 3 (#10-11), Ex. 4 (#10-12)., Ex. 5 (#10-13); Ex.
20 6 (#10-14), Ex. 7 (#10-15).) Without direct evidence that
21 Plaintiffs click on the Terms of Use, we cannot conclude that
22 Plaintiffs ever viewed, let alone manifested assent to, the Terms of
23 Use. The Terms of Use is inconspicuous, buried in the middle to
24 bottom of every Zappos.com webpage among many other links, and the
25 website never directs a user to the Terms of Use. No reasonable
26 user would have reason to click on the Terms of Use, even those

27

28

1 users who have alleged that they clicked and relied on statements
2 found in adjacent links, such as the site's "Privacy Policy." This
3 case is therefore factually similar to cases that have decline to
4 enforce arbitration clauses, such as Hines v. Overstock.com, wherein
5 the Court refused to enforce an arbitration provision because the
6 plaintiff "lacked notice of the Terms and Conditions because the
7 website did not prompt her to review the Terms and Conditions and
8 because the link to the Terms and Conditions was not prominently
9 displayed so as to provide reasonable notice of the Terms and
10 Conditions." 668 F.Supp.2d 362, 367 (E.D.N.Y. 2009) aff'd 380
11 F.App'x 22 (2d Cir. 2010); see also Specht, 306 F.3d at 32 ("[A]
12 reference to the existence of license terms on a submerged screen is
13 not sufficient to place consumers on inquiry or constructive notice
14 of those terms."); Van Tassell, 795 F.Supp.2d at 792 (declining to
15 enforce arbitration provision where "a user only encounters the
16 Conditions of Use after scrolling to the bottom of the home page and
17 clicking the 'Customer Service' link, and then scrolling to the
18 bottom of the Customer Service page or clicking the 'conditions of
19 Use, Notices & Disclaimers' link located near the end of a list of
20 links on the page."); Koch Indus., Inc. v. Does, No. 2:10CV1275DAK,
21 2011 WL 1775765, at *24-25 (D. Utah May 9, 2011) (finding there was
22 no manifested assent where the "Terms of Use . . . were available
23 only through a hyperlink at the bottom of the page, and there was no
24 prominent notice that a user would be bound by those terms.");
25 Cvent, Inc. v. Eventbrite, Inc., 739 F.Supp.2d 927, 936-37 (E.D. Va.
26 2010) (declining to enforce "Terms of Use" where "link only appears
27
28

1 on Cvent's website via a link buried at the bottom of the first
2 page" and "users of Cvent's website are not required to click on
3 that link, nor are they required to read or assent to the Terms of
4 Use in order to use the website or access any of its content."). We
5 therefore agree with the Hines court: "Very little is required to
6 form a contract nowadays - but this alone does not suffice." 668
7 F.Supp.2d 362, 367. Where, as here, there is no acceptance by
8 Plaintiffs, no meeting of the minds, and no manifestation of assent,
9 there is no contract pursuant to Nevada law.

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

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

18 Most federal courts that have considered this issue have held
19 that if a party retains the unilateral, unrestricted right to
20 terminate the arbitration agreement, it is illusory and
21 unenforceable, especially where there is no obligation to receive
22 consent from, or even notify, the other parties to the contract.
23 See Douglas v. Johnson Real Estate Investors, LLC, 470 F.App'x 823,
24 825 (11th Cir. 2012). ("Because the employee handbook allowed Johnson
25 to unilaterally modify the arbitration procedures without notifying
26 Douglas, the agreement to arbitrate was illusory and invalid.");

27

28

1 Morrison v. Amway Corp., 517 F.3d 248, 257-58 (finding arbitration
2 agreement illusory and unenforceable where defendant held unilateral
3 authority to amend or eliminate the arbitration program); Dumais v.
4 Am. Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002) ("We join other
5 circuits in holding that an arbitration agreement allowing one party
6 the unfettered right to alter the arbitration agreement's existence
7 or its scope is illusory."); Penn v. Ryan's Family Steak Houses,
8 Inc., 269 F.3d 753, 759-61 (7th Cir. 2001) (denying motion to compel
9 arbitration where agreement was illusory because one party had
10 "sole, unilateral discretion to modify or amend"); Floss v. Ryan's
11 Family Steak Houses, Inc., 211 F.3d 306, 315-316 (6th Cir. 2000)
12 (arbitration agreement was "fatally indefinite" and illusory because
13 employer "reserved the right to alter applicable rules and
14 procedures without any obligation to notify, much less receive
15 consent from," other parties); Hooters of Am., Inc. v. Phillips, 173
16 F.3d 933, 939 (4th Cir. 1999) (holding that employer's ability to
17 modify rules "in whole or in part" without notice to employee
18 renders arbitration agreement illusory); Grosvenor v. Qwest Corp., -
19 -- F.Supp.2d ---, 2012 WL 602655, at *12 (D. Colo. Feb. 23, 2012)
20 ("Because Qwest reserved an unfettered ability to modify the
21 existence, terms and scope of the arbitration clause, it is illusory
22 and unenforceable."); Harris v. Blockbuster, Inc., 622 F.Supp.2d
23 396, 398-99 (N.D. Tex. 2009) (arbitration clause in internet video
24 purchase agreement illusory because defendant reserved the right to
25 alter the terms of the agreement at any time by giving notice to the
26 consumer); Snow v. BE & K Constr. Co. 126 F.Supp.2d 5, 14-15 (D. Me.

27

28

1 2001) (holding arbitration agreement illusory and unenforceable
2 because employer "reserve[d] the right to modify or discontinue [the
3 arbitration] program at any time"); Trumbull v. Century Mktg. Corp.,
4 12 F.Supp.2d 683, 686 (N.D. Ohio 1998) (finding no binding
5 arbitration agreement where "the plaintiff would be bound by all the
6 terms of the handbook while defendant could simply revoke any term
7 (including the arbitration clause) whenever it desired. Without
8 mutuality of obligation, a contract cannot be enforced.").

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

27
28

1 C. Equitable Estoppel

2 "The equitable estoppel doctrine prevents a plaintiff signatory
3 to a contract that contains an arbitration provision from avoiding
4 the agreement to arbitrate if the plaintiff's claims rely on the
5 contract as the basis for relief." Ahlers v. Ryland Homes Nev.,
6 LLC, No. 52511, 2010 WL 3276221, at *2 (Nev. 2010) (citing MS Dealer
7 Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999); Hughes
8 Masonry v. Greater Clark Cty. Sch. Bldg., 659 F.2d 836, 838, 840-41
9 (7th Cir. 1981); Metalclad v. Ventana Evntl., 1 Cal.Rptr.3d 328, 34-
10 35 (Cal.Ct.App. 2003).

11 Defendants argue that Plaintiffs cannot assert breach of
12 contract actions against Zappos.com while seeking to avoid the
13 arbitration provision of the Terms of Use. However, Plaintiffs'
14 breach of contract claims do not rely upon the contract they seek to
15 avoid, the Terms of Use, which they never viewed, but on other
16 statements and guarantees found on the website. Furthermore, this
17 issue is more appropriate for individual litigation in each of the
18 member cases of the MDL actions as it depends on the allegations
19 found in each complaint. We therefore decline to apply the doctrine
20 of equitable estoppel here.

21

22

V. Conclusion

23 A court cannot compel a party to arbitrate where that party has
24 not previously agreed to arbitrate. The arbitration provision found
25 in the Zappos.com Terms of Use purportedly binds all users of the
26 website by virtue of their browsing. However, the advent of the

27

28

1 Internet has not changed the basic requirements of a contract, and
2 there is no agreement where there is no acceptance, no meeting of
3 the minds, and no manifestation of assent. A party cannot assent to
4 terms of which it has no knowledge or constructive notice, and a
5 highly inconspicuous hyperlink buried among a sea of links does not
6 provide such notice. Because Plaintiffs did not assent to the
7 terms, no contract exists, and they cannot be compelled to
8 arbitrate. In any event, even if Plaintiffs could be said to have
9 consented to the terms, the Terms of Use constitutes an illusory
10 contract because it allows Zappos to avoid arbitration by
11 unilaterally changing the Terms at any time, while binding any
12 consumer to mandatory arbitration in Las Vegas, Nevada. We
13 therefore decline to enforce the arbitration provision on two
14 grounds: there is no contract, and even if there was, it would be
15 illusory and therefore unenforceable.

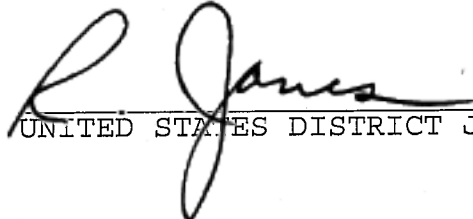
16
17

18 IT IS, THEREFORE, HEREBY ORDERED that Defendant Zappos.com,
19 Inc.'s Motion to Compel Arbitration and Stay Action (#3) is DENIED.

20
21
22

23 DATED: September 27, 2012.

24
25
26
27


UNITED STATES DISTRICT JUDGE

28