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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 AYSE SEN,

12
13 Plaintiff,

14 v.

15 AMAZON.COM,

16
17 Defendant.

Case No. CV-12-02878-AJB (BGS)

**DEFENDANT AMAZON.COM'S
NOTICE AND MOTION FOR
ENFORCEMENT OF
SETTLEMENT AGREEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*[Concurrently filed with Declaration of
Allan E. Anderson]*

Date: November 22, 2013
Time: 2:00 p.m.
Courtroom: 12

Judge: Anthony J. Battaglia
Magistrate: Bernard G. Skomal

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TO PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 22, 2013, at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable Anthony J. Battaglia in Courtroom 12 of the above-entitled Court, located at the Edward J. Schwartz United States Courthouse, 221 West Broadway, San Diego, California 92101, Amazon.com will and does move for the enforcement of the parties' settlement agreement.

Amazon bases its motion on this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the concurrently filed Declaration of Allan E. Anderson; all pleadings and records on file in this action; any matters of which the Court may take judicial notice; and such other evidence and/or argument as may be presented to this Court at the hearing on this Motion.

Dated: September 30, 2013

ARENT FOX LLP

By:



ALLAN E. ANDERSON
TIMOTHY L. SKELTON
Attorneys for Defendant
AMAZON.COM

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MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

More than two months ago, this Court adopted a judicially enforceable Settlement Agreement, requiring, among other things, that Ms. Sen dismiss her lawsuit with prejudice and that the parties would work on executing a long-form of their agreement but in its absence the Settlement Agreement would control.

Since that time, Amazon has worked tirelessly to enter into a mutually agreeable long-form agreement, but Ms. Sen’s insistence on adding terms going beyond those in the Settlement Agreement have led to a stalemate. And without a long-form agreement containing those additional terms, Ms. Sen has refused to dismiss her suit. Amazon therefore asks this Court to enforce the Settlement Agreement and order the dismissal of Ms. Sen’s Complaint with prejudice.

II.
FACTS

A. Ms. Sen’s Complaint and the Settlement Agreement

On December 4, 2012, Ms. Sen filed a complaint against Amazon claiming trademark infringement, unfair competition, and false advertising arising from Amazon’s use of the term “baiden” as a keyword for online pay-per-click promotions on various internet search engines. A Neutral Evaluation Conference took place on May 7, 2013. Although the initial Neutral Evaluation Conference was unsuccessful in settling the matter, the parties appeared for a second Neutral Evaluation Conference before the Court on July 9, 2013. With the assistance of the Court, the parties were able to successfully reach a settlement of the matter. The settlement is reflected in the minute entry following the conference:

Minute Entry for proceedings held before Magistrate Judge Bernard G. Skomal: Early Neutral Evaluation Conference held on 7/9/2013, Case Management Conference held on 7/9/2013. The case has settled. Written Order to follow. (Plaintiff Attorney Ayse Sen). (Amazon Attorney Allan Anderson). (All non-registered users

1 served via U.S. Mail Service)(no document attached) (mgo)
2 (Entered: 07/09/2013)

3 That same day, the parties signed and executed a Settlement Memorandum of
4 Understanding (“Settlement”), “agree[ing] to a settlement on the following material
5 terms and conditions, all of which [were] set forth” in the Settlement. (*See Decl.*
6 *Anderson* ¶ 2, Ex. A) Amongst the terms was Ms. Sen agreeing to “a release of all
7 claims, including C.C.P. § 1542 waiver, and a dismissal with prejudice of the above
8 entitled action.” (*Id.*) The parties also envisioned Amazon “prepar[ing a] long form
9 agreement subject to mutual consent,” but that entry into such a long-form
10 agreement was not necessary because the Settlement’s terms would still “rule[.]”
11 (*Id.*) The Settlement expressly provided that “the Court” “retain[ed] jurisdiction to
12 enforce the settlement for a period of 1 year.” (*Id.*) Finally, both parties
13 “acknowledge[d] and agree[d] that this settlement was made before the Court and is
14 binding and judicially enforceable.” (*Id.*)

15 **B. Amazon’s Unsuccessful Efforts to Enter a Long-Form Agreement**

16 On August 14, 2013, Amazon sent Ms. Sen a proposed long form agreement
17 . (*See Decl. Anderson* ¶ 3, Ex. B). On August 17, 2013, Ms. Sen submitted a
18 counter-proposal that included a damage calculator provision to apply to any
19 alleged future infringement, and included a provision prohibiting Amazon from
20 denying Ms. Sen’s use of its platform for any reason except a violation of its rules.
21 (*See Decl. Anderson* ¶ 4, Ex. C). On August 21, 2013, Amazon’s counsel
22 responded , that the counter-proposal went beyond what the parties had agreed to in
23 the Settlement, that the amendments were unacceptable, and that in the absence of a
24 long form, the terms of the Settlement would control. (*See Decl. Anderson* ¶ 5, Ex.
25 D) On August 22, 2013, Ms. Sen replied that the parties’ “understanding” of the
26 Settlement was “different” and insisted on a “long agreement” containing a
27 provision “that the same or similar violations will not be repeated by Amazon . . .
28 and does not give me security for the recovery of monetary damages that occurred .

1 . . . during the past 29 months.” (See Decl. Anderson ¶ 6, Ex. E).

2 On August 26, The Court conducted a Settlement Disposition Conference,
3 and on September 9, follow up conference . The minute entry for the last
4 Settlement Disposition Conference is reproduced below:

09/12/2013	9	Minute Entry for proceedings held before Magistrate Judge Bernard G. Skomal: Settlement Disposition Conference held on 9/9/2013. The parties could not agree to the terms of the settlement originally agreed to and signed in the settlement memorandum of understanding at the ENE. Defendant informed the Court that Defendant wished to file a Motion to Enforce the Settlement Agreement. Defendant shall file a Motion to Enforce the Settlement Agreement on or before 9/30/2013. (Defendant Attorney Allan Anderson). (All non-registered users served via U.S. Mail Service)(no document attached) (jpd) Modified on 9/12/2013 to correct the date of hearing(tml). (cge). (Entered: 09/12/2013)
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12 Amazon asks the Court for:

- 13 A. Entry of an Order dismissing Plaintiff’s Complaint with Prejudice; and
14 B. Entry of an Order requiring each party to bear their own costs.

15
16 **III.**
ARGUMENT

17 **A. This Court has the Power to Enforce the Settlement Agreement**

18 The Settlement Agreement, by its terms, is judicially enforceable. See Decl.
19 Anderson, Ex. A (“The Court to retain jurisdiction to enforce the settlement for a
20 period of 1 year”). The Court approved and adopted the Agreement in its entirety,
21 maintaining jurisdiction for enforcement purposes. Plainly, this Court has the
22 authority, as well as the obligation, to enforce the Agreement. See *Kokkonen v.*
23 *Guardian Life Ins. Co.*, 511 U.S. 375, 380-381 (1994)(observing that federal courts
24 have the power to enforce settlement agreements reached in federal proceedings “if
25 the parties’ obligation to comply with the terms of the settlement agreement” is
26 accomplished through a “retaining jurisdiction” provision “over the settlement
27 agreement”) ; cf. *Jones v. McDaniel*, 717 F.3d 1062, 1067 (9th Cir. 2013)(outlining
28 mechanics of federal court’s enforcement of settlements reached in proceedings

1 before it).

2 **B. Ms. Sen's Refusal to Enter Into Long-Form Agreement Mandates**
3 **Enforcement of Settlement's Terms**

4 The Settlement makes plain that if the parties could not enter into a mutually
5 agreeable long-form agreement that the terms of the Settlement would control. For
6 the past two months the parties have engaged in discussions over a long-form
7 agreement. Unfortunately those discussions have broken down after Ms. Sen's
8 insistence that the long-form agreement contain provisions going well-beyond those
9 recited in the Settlement.

10 Ms. Sen has termed her additional provisions as consistent with the
11 Settlement, but that is far from the case. There was *nothing* in the Settlement about
12 providing damage calculators for possible future violations or restrictions on
13 Amazon from ever being able to exercise its inherent authority to control who can
14 and cannot place items for sale on its own proprietary platform. The only items
15 mentioned in the Settlement beyond the dismissal of Ms. Sen's claims with
16 prejudice and each side bearing their own costs was (i) a resolution procedure to be
17 followed by both sides to expeditiously resolve any disputes should Ms. Sen, in the
18 future, claim any infringement of her mark and (ii) a notice period for Ms. Sen to
19 provide Amazon if she ever in the future decided to terminate her business with
20 Amazon.

21 Regardless, it has become clear that after two months the parties have been
22 unable to enter into a mutually agreeable long-form agreement. Ms. Sen has
23 admitted in her correspondence with defense counsel that the parties are at an
24 impasse on the long-form agreement due to each side having a "different"
25 "understanding" about the scope of the Settlement. In light of this impasse, the
26 Settlement mandates that its terms "rule," which would include the dismissal of Ms.
27 Sen's claims with prejudice and that each side bear their own costs.

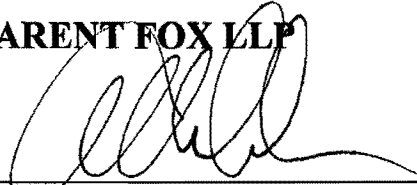
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IV.
CONCLUSION

The parties have a judicially enforceable settlement agreement. Amazon asks this Court to enforce the settlement, and order this case dismissed.

Dated: September 30, 2013

ARENT FOX LLP

By: 

ALLAN E. ANDERSON
TIMOTHY L. SKELTON
Attorneys for Defendant
AMAZON.COM