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11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13 AYSE SEN,  
14 Plaintiff,  
15 v.  
16 AMAZON.COM, INC.,  
17 Defendant.

Case No. 12CV02878 AJB (BGS)

**AMAZON.COM’S REPLY IN  
SUPPORT OF MOTION FOR  
ENFORCEMENT OF  
SETTLEMENT AGREEMENT**

Judge: Anthony J. Battaglila

Magistrate Judge: Bernard G. Skomal

18 The only argument offered by Ms. Sen is that she did not understand that the  
19 import of paragraphs 2, 7, and 8 in the Settlement was that her present suit against  
20 Amazon would be dismissed with prejudice, that she waived bringing in the future  
21 any claim arising from Amazon’s past conduct, and that she was not given a  
22 guarantee by Amazon that she could forever be able to use the Amazon.com  
23 platform. (Opp. at 2-3).

24 Ms. Sen states that it was her belief that through the Settlement she “would  
25 drop [her] claim for past damages” and in return Amazon (and Amazon’s  
26 customers) would “stop misusing the ‘Baiden’ keyword or trademark” and would  
27 “continue to . . . allow[] [her] to use the Amazon.com platform unless [she] violated  
28 a rule which Amazon normally considers to be something people get banned for.”  
(*Id.*)

1 To begin, when Ms. Sen signed the Settlement she affirmatively represented  
2 to this Court that she had “agreed” to the terms contained therein, and further  
3 represented that those terms were “binding and judicially enforceable.” Insofar as  
4 her subjective understanding of those terms, they are not relevant to Amazon’s  
5 motion nor serve as a basis to set aside the Settlement. A written agreement is  
6 construed in light of the *objective* manifestation of the parties’ intent – the words  
7 written down into the agreement. None of Ms. Sen’s subjective understandings are  
8 consistent with those objective manifestations.

9 In the end, nothing alters the fact that the parties entered into a valid and  
10 enforceable agreement with the assistance of Magistrate Skomal that contained  
11 objectively clear and unequivocal language. Accordingly, the Court should grant  
12 Amazon’s motion and enter an Order to enforce the settlement and dismiss this  
13 action with prejudice.

14 **I. THE AGREEMENT DOES NOT LACK MUTUAL CONSENT.**

15 Ms. Sen’s Opposition is in essence that there was not mutual consent to the  
16 Settlement because the parties (more specifically, herself) had a different  
17 understanding of that agreement’s terms. California law governs questions on the  
18 validity, enforceability, and formation of the Settlement (*see O’Neil v. Bunge*  
19 *Corp.*, 365 F.3d 820, 822 (9<sup>th</sup> Cir. 2004)), even if it involved the settlement of a  
20 federal cause of action. *Botefur v. City of Eagle Point*, 7 F.3d 152, 156 (9<sup>th</sup> Cir.  
21 1993). Under California law, “[w]here the parties have reduced their agreement to  
22 writing, their mutual intention is to be determined, whenever possible, from the  
23 language of the writing alone. Contract formation is governed by objective  
24 manifestations, not the subjective intent of any individual involved. The test is  
25 what the outward manifestations of consent would lead a reasonable person to  
26 believe.” *Allen v. Smith*, 94 Cal. App. 4<sup>th</sup> 1270, 1277 (2002); *see also Bustamante*  
27 *v. Intuit, Inc.*, 141 Cal. App. 4<sup>th</sup> 199, 208 (2006) (mutual assent is determined under  
28 an objective standard applied to the outward manifestations or expressions of the

1 parties, the reasonable meaning of their words, and not their undisclosed or  
2 unexpressed intentions or understandings). A parties' unexpressed subjective  
3 intention is not a source to be consulted. *Shaw v. Regents of University of*  
4 *California*, 58 Cal. App. 4<sup>th</sup> 44, 54-55 (1997) (the true intent of a contracting party  
5 is irrelevant if it remains unexpressed). Courts "are not concerned as much with  
6 what the parties might tell us they meant by the words they used as with how a  
7 reasonable person would interpret those words." *In re Quantification Settlement*  
8 *Agreement Cases*, 201 Cal. App. 4<sup>th</sup> 758 (2011).

9 **A. Paragraph 2:**

10 Paragraph 2 of the Settlement provided that there would be "[a] release of all  
11 claims, including C.C.P. § 1542 waiver, and a dismissal with prejudice of the above  
12 entitled action." Ms. Sen states she did not realize that through this language she  
13 "had agreed to just drop my suit and allow Amazon to just walk away." (Opp. at  
14 2).

15 But there is no other plausible reading of that language. "Release," "waiver,"  
16 and "dismissal" are not subject to alternative interpretations.

17 **B. Paragraph 7:**

18 Paragraph 7 of the Settlement provided that "if in the future" Ms. Sen  
19 discovered "any future issues related to the Baiden mitten" use on Amazon.com,  
20 she could work with Amazon staff and its counsel, Mr. Anderson. Ms. Sen argues  
21 that the parties had actually agreed that Amazon would "continue to . . . allow[ her]  
22 to use the Amazon.com platform unless [she] violated a rule which Amazon  
23 normally considers to be something people get banned for." (Opp. at 3).

24 Again, there is no plausible reading of this language that includes any  
25 assurance of a continued right to sell on Amazon. Paragraph 7 simply provides an  
26 alternative avenue of communication with Amazon. Ms. Baiden can take  
27 advantage of it or not.

28 If Ms. Sen's agreement to the Settlement was truly contingent upon an

1 assurance that Amazon would allow her to sell on Amazon indefinitely, then she  
 2 should have insisted that it was memorialized in the Settlement. Ms. Sen’s  
 3 subjective, undisclosed intentions and understandings are irrelevant. *E.g.*,  
 4 *Founding Members of the Newport Beach Country Club v. Newport Beach Country*  
 5 *Club, Inc.*, 109 Cal. App. 4<sup>th</sup> 944, 956 (2003).

6 **C. Paragraph 8:**

7 Paragraph 8 of the Settlement clarifies that should in the future Ms. Sen  
 8 “terminates” using the “Amazon.com” platform to sell her wares that she would  
 9 “provide written notice advising that no 3<sup>rd</sup> parties are selling the product” and in  
 10 return “Amazon.com will agree not to use ‘Baiden’ in text of sponsored links, nor  
 11 ‘Baiden’ keywords within 20 days of notice.” (Amazon Mot. Enforce, Decl. Allan  
 12 Anderson Ex. A). Ms. Sen complains that the parties had agreed that  
 13 “Amazon.com or other Amazon customers” would stop “misusing the ‘Baiden’  
 14 trademark,” but that paragraph 8 “does not enjoin any conduct [but] is just a vague  
 15 agreement by Amazon.com to stop doing what has caused me damages . . . with  
 16 absolutely no consequences should Amazon.com mess up again.” Opp. at 3.

17 Ms. Sen’s problem with paragraph 8 is not entirely clear. So long as Ms. Sen  
 18 is selling on Amazon, then she should have no complaint if Amazon uses “baiden.”  
 19 Amazon has agreed to stop using “baiden” if Ms. Sen stops selling on Amazon and  
 20 Ms. Sen desires that Amazon stop.<sup>1</sup> If Amazon were to refuse her request, then  
 21 Ms. Sen would in fact have remedies, both through contract law and trademark law.

22  
 23 **II. CONCLUSION**

24 The parties entered into a valid and enforceable Settlement, a term of which  
 25 was that Ms. Sen’s suit would be dismissed if the parties were unable to enter into a  
 26 long-form agreement. The parties were unable to come to a long-form agreement.

27  
 28 <sup>1</sup> This is not an illusory promise. In addition to Amazon’s use of “baiden” being completely lawful, when Ms. Sen  
 agreed to sell on Amazon, as part of the written seller agreement, Ms. Sen granted Amazon a perpetual license to use  
 her marks.

1 The Court should grant the motion and order the dismissal of Ms. Sen's action with  
2 prejudice, as agreed.

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4 Dated: November 13, 2013 **ARENT FOX LLP**

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AMAZON.COM, INC.

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