



1 **I. BACKGROUND**

2 **A. Factual and Procedural Background**

3 The instant case stems from an alleged infringement of Plaintiff’s trademark,  
4 “Baiden.”<sup>1</sup> Plaintiff, appearing pro se, initiated this lawsuit against Defendant on  
5 December 4, 2012 asserting claims for trademark infringement, unfair competition, and  
6 false advertising. (Doc. No. 1.) Defendant allegedly used Plaintiff’s mark in online pay-  
7 per-click campaigns and promotion on various search engines without Plaintiff’s express  
8 authorization. These campaigns diverted online traffic to a landing page on Amazon’s  
9 website with competitor products. Plaintiff alleged that this practice cost online traffic  
10 and sales. (Doc. No. 1, at 2).

11 After two attempts to compromise at Early Neutral Evaluation Conferences  
12 (“ENE”) held before Magistrate Judge Bernard G. Skomal, the parties reached a settle-  
13 ment on July 9, 2013 with the assistance of Judge Skomal. (Doc. No. 20.) The parties  
14 signed and executed the Settlement Memorandum of Understanding (“MOU”) that same  
15 day. (*See* Doc. No. 35, Ex. A, “MOU”.) As the MOU expressly contemplated, Defendant  
16 prepared and sent Plaintiff a long form agreement memorializing the terms of the MOU -  
17 on August 14, 2013. However, on August 17, 2013, Plaintiff sent an email to defense  
18 counsel, Mr. Allan Anderson, attempting to add certain terms which Plaintiff contends  
19 “takes into account what [was] discussed about at the recent settlement conference.” (*Id.*  
20 at Ex. C.) Defendants, through their counsel Mr. Anderson, replied that the items were  
21 “not agreed to at the settlement conference.” Defendant urged Plaintiff to sign the long  
22 form agreement to “put this case to bed.” (*Id.* at Ex. D.)

23 On September 9, 2013, Judge Skomal held a Settlement Disposition Conference.  
24 Regrettably, the parties were unable to agree to the terms of the original settlement MOU.  
25 (Doc. No. 29.) Defendant informed the Court of its wish to file a motion to enforce and  
26 did so on October 9, 2013. Plaintiff objects on grounds that the MOU is vague, confus-  
27 ing, and thus unenforceable. (Doc. No. 37 at 2.) Moreover, Plaintiff alleges the MOU is

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28 <sup>1</sup>Used in connection with Plaintiff’s product, the Baiden Mitten.

1 incomplete as it leaves out material terms agreed upon at the ENE. (*Id.* at 2-3.) The Court  
2 entertained oral arguments and allowed the parties to present their contentions and any  
3 supporting evidence.

#### 4 **B. The Settlement MOU**

5 The key provisions of the MOU are as follows:

- 6 1. Payment in the sum of NONE;
- 7 2. A release of all claims, including C.C.P. §1542 waiver, and a dismissal  
8 with prejudice of the above entitled action;
- 9 3. The Court to retain jurisdiction to enforce the settlement for a period of 1  
10 year; . . .
- 11 7. If in [the] future, plaintiff discovers any further issues related [to] the  
12 Baiden mitten with Amazon.com, you can work with Amazon.com directly  
13 through [copyright@amazon.com](mailto:copyright@amazon.com) with a cc to ...;
- 14 8. In the event you terminate with Amazon.com, you will provide written  
15 notice advising that no 3d parties are selling the product, that you have the  
16 valid mark and subject to good faith confirmation, Amazon.com will agree  
17 not to use “baiden” in text of sponsored links, no “Baiden” key words w/in  
18 20 days of notice;
- 19 9. Amazon to prepare long form agreement subject to mutual consent,  
20 *otherwise this agreement rules.*<sup>2</sup>

21 The last line provides that the undersigned “acknowledge and agree that this  
22 settlement was made before the Court and is binding and judicially enforceable.” Both  
23 parties signed the MOU dated July 9, 2013.

#### 24 **II. LEGAL STANDARDS**

25 “It is well settled that a district court has the equitable power to enforce summarily  
26 an agreement to settle a case pending before it. However, the district court may enforce  
27 only complete settlement agreements.” *Callie v. Near*, 892 F.2d 888, 890 (9th Cir. 1987)  
28 (emphasis and citations omitted). Thus, to be enforced, a settlement agreement must

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29 <sup>2</sup>Provisions seven through nine were handwritten, due to this fact, and the fact that the MOU was  
30 scanned then printed, the Court had some initial difficulty discerning some of the words. The Court  
31 identified those words with help from defense counsel Mr. Anderson. The Court finds counsel’s  
32 clarification is an accurate representation of the handwritten terms. When the Court discussed those  
33 handwritten provisions during the December 12, 2013 hearing, Plaintiff did not object to the Court’s  
34 reading. Therefore, the Court is satisfied that this order accurately reflects the terms of the MOU.

1 meet two requirements. First it must be a complete agreement. *Maynard v. City of San*  
2 *Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994). Second, both parties must have either agreed to  
3 the terms of the settlement or authorized their respective counsel to settle the dispute.  
4 *Harrop v. Western Airlines, Inc.*, 440 F.2d 1143, 1144-45 (9th Cir. 1977).

5 “The construction and enforcement of settlement agreements are governed by  
6 principles of local law which apply to interpretation of contracts generally.” *United*  
7 *Commercial Ins. Serv., v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). “Under  
8 California law, the intent of the parties determines the meaning of the contract. The  
9 relevant intent is ‘objective’ - that is, the intent manifested in the agreement and by  
10 surrounding conduct - rather than the subjective beliefs of the parties.” Thus, the true  
11 intent of the party is irrelevant if it is unexpressed. *Id.* Outward manifestation or  
12 expression of assent is controlling. *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832,  
13 851 (Cal. Ct. App. 1999). If there is a manifest intention that a formal agreement is not to  
14 be complete until reduced to a formal writing to be executed, there is no binding contract  
15 until that is done. *Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 315 (9th Cir. 1996).  
16 “Whether a writing constitutes a final agreement or merely an agreement to make an  
17 agreement depends primarily upon the intention of the parties. In the absence of ambigu-  
18 ity this must be determined by a construction of the instrument taken as a whole.” *Id.*  
19 Where material facts concerning the existence of terms of an agreement to settle are in  
20 dispute, the parties must be allowed an evidentiary hearing. *See Russell v. Puget Sound*  
21 *Tug & Barge Co.*, 737 F.2d 1510, 1511 (9th Cir. 1984).

### 22 **III. DISCUSSION**

23 It is now necessary for the Court to step in and “put this matter to bed.” Through-  
24 out her Opposition as well as during the evidentiary hearing, Plaintiff indicates that her  
25 subjective understanding of the MOU did not align with the actual terms. Moreover,  
26 Plaintiff argues the MOU is incomplete. (Doc. No. 37 at 2.) Plaintiff makes two specific  
27 objections to the MOU. First, she expected to have continued use of the Amazon  
28 platform for her product. (*Id.* at 3.) Second, she expected to have the power to “enjoin”

1 Amazon from misusing the Baiden mark. (*Id.*) Finally, Plaintiff contends that the  
2 proposed long form agreement lacks consideration. (*Id.* at 4.) However, given that this  
3 motion is to enforce the MOU, the Court construes Plaintiff’s argument to mean the  
4 MOU lacks valid consideration. Plaintiff’s objections to the MOU are unfounded as  
5 explained below.

6 The Court bears in mind the fact that Plaintiff appears pro se and has no special  
7 training in the law. (*Id.* at 2.) Because of this fact, the Court gives her the benefit of the  
8 doubt and will protect her where necessary. See *Karim-Panahi v. Los Angeles Police*  
9 *Dept.*, 839 F.2d 621, 623 (9th Cir. 1988). However, this does not mean the Court will  
10 provide an escape route for buyer’s remorse where Plaintiff knowingly entered into a  
11 complete and valid agreement.

12 **A. The MOU is a Complete and Unambiguous Agreement Intentionally**  
13 **Entered Into**

14 The parties reached an agreement, the terms of which are expressed in the MOU,  
15 after several hours of negotiation assisted by a highly competent, experienced, and fair-  
16 minded judicial officer. Thus, the Court is unpersuaded by Plaintiff’s contention that she  
17 felt “strong-armed” into signing a agreement that she purportedly “had no understanding  
18 of” and “relied on the ‘neutral evaluator’ and Amazon.com attorneys.” (*Id.* at 2.) Indeed,  
19 after reviewing her Complaint and briefs, the Court found Plaintiff to be very articulate  
20 and demonstrates an excellent understanding of not only trademark law but also contract  
21 law.

22 Although the MOU states that a “long form agreement” is to be prepared, under  
23 California law “[w]hen the parties intend that an agreement be binding, the fact that a  
24 more formal agreement must be prepared and executed does not alter the validity of the  
25 agreement. *Blix St. Records, Inc. v. Cassidy*, 191 Cal. App. 4th 39, 48 (Cal. Ct. App.  
26 2010). It is particularly important to note that Provision 9 of the MOU states that  
27 Amazon is to prepare a long form agreement, however if the parties cannot reach mutual  
28 consent, “this agreement [the MOU] rules.”

1 Plaintiff states that it was only until after the settlement conference and after  
2 signing the MOU that she learned she had just agreed to drop her lawsuit. (*Id.*) However,  
3 Provision 2 of the MOU specifically states the undersigned agrees to “[a] release of all  
4 claims, including a C.C.P. § 1542 wavier, and a dismissal with prejudice of the above  
5 entitled action.”<sup>3</sup> The last line of the MOU states “I acknowledge and agree that this  
6 settlement was made before the Court and is binding and judicially enforceable.” (*See*  
7 MOU.)

8 The fundamental goal of contract interpretation is to give effect to the mutual  
9 intention of the parties, which is determined by objective manifestations of the parties’  
10 intent, including the *words used in the agreement*, as well as extrinsic evidence of such  
11 objective matters as the *surrounding circumstances under which the parties negotiated or*  
12 *entered into the contract*, the object, nature, and subject matter of the contract and the  
13 subsequent conduct of the parties. *People v. Shelton*, 36 Cal. 4th 759, 767 (Cal. 2005).  
14 Here, the words of the MOU themselves are undeniable and dispositive. A reasonable  
15 person would understand “a release of all claims . . . and a dismissal of the above entitled  
16 action” to mean that the person is agreeing to just that, releasing their claims and  
17 dismissing the action. The language itself is not ambiguous, nor is it vague. Moreover,  
18 the settlement conference was conducted before Magistrate Judge Skomal who acted as  
19 an neutral evaluator and provided assistance to both parties. Plaintiff fully participated in  
20 the negotiation and Judge Skomal’s presence supports the view that the negotiations were  
21 conducted in an arms-length transaction.<sup>4</sup>

22 Furthermore, the language of the last line is evidently clear and understandable.  
23 The parties “acknowledge and agree that this settlement was made before the Court and is  
24 binding and judicially enforceable.” A reasonable person would understand this to mean

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26 <sup>3</sup> The above entitled action is *Sen v. Amazon*, 12cv2878 (BGS). This appears immediately after  
27 the caption “Settlement Memorandum of Understanding.”

28 <sup>4</sup> Plaintiff would have the Court call into question Judge Skomal’s neutrality. (*See* Doc. No. 37 at  
2.) However, any implication of such is completely unfounded and Plaintiff does not provide a shred of  
evidence to suggest Judge Skomal was anything but evenhanded and helpful to both parties.

1 that the agreement they sign is fully binding and may be enforced by the court. This  
2 language is not open to objective dispute or an alternative interpretation. During the  
3 evidentiary hearing, the Court asked Plaintiff whether she read through the MOU during  
4 the settlement conference. Plaintiff indicated that she did indeed.

5 While the Court is sympathetic to Plaintiff and the fact that she only consulted with  
6 an attorney after the fact. The Court does not provide relief for a party's cold feet.  
7 Based on the instrument, taken as a whole, the writing constitutes a final and complete  
8 agreement.<sup>5</sup> By reading through the MOU and signing on the dotted line, Plaintiff  
9 manifested an objective outward expression of assent to the terms of the MOU. More-  
10 over, the Court must protect the objective expectations of the other party to the agree-  
11 ment. To all parties involved, including the Magistrate Judge, Plaintiff outwardly projected  
12 the intent and willingness to be bound by the agreement.

13 **B. The MOU Contains all of the Material Terms and Plaintiff's Concerns**  
14 **are Unfounded.**

15 The instant motion arises from an attempt by Plaintiff to insert additional terms  
16 into the proposed long form agreement. In particular was a "damage calculator" that sets  
17 Plaintiff's recoverable damages if her product is no longer for sale on Amazon.com and  
18 Defendant continues the use of Baiden in the text of sponsored links. The damages  
19 would equal 60% of Plaintiff's total average of daily sales occurring during the three day  
20 period immediately before the violation. According to Plaintiff, this was necessary to  
21 ensure Amazon would not infringe again. Plaintiff also wanted to insert language that  
22 Amazon would allow her the continued use of Amazon's platform and not restrict or  
23 suspend her in any way for any reason. Even if she violated Amazon's policies that  
24 typically warrant a ban, Amazon's only recourse was to notify her of the violation and  
25 allow for 30 days to correct. (*See* Doc No. 35, Ex. C.)

26 As expected, Defendant objected to these additional terms and contend that all the  
27 material terms, including Plaintiff's remedy against any alleged trademark infringement,

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28 <sup>5</sup> Provision 9 expressly contemplates that in the event a long form agreement cannot be agreed upon, the MOU controls.

1 are contained within the MOU. (Doc. No. 35 at 4.) The Court agrees that Plaintiff  
2 cannot seek to add additional terms into an already valid and complete agreement. If  
3 Plaintiff wished to include such terms, they should have been discussed during negotiat-  
4 ions, and if they were absolutely necessary to Plaintiff, she should not have signed on the  
5 dotted line. The Court now turns to Plaintiff’s specific objections to the terms of the  
6 MOU: (1) it fails to include language she be allowed continued use of the Amazon  
7 platform and (2) it fails to “stop or enjoin Amazon.com or other Amazon customers from  
8 misusing the Baiden mark.” (Doc. No. 37 at 2-3.) Plaintiff’s specific objections are  
9 unfounded.

10 A review of the MOU does not support any of Plaintiff’s concern. First, Plaintiff is  
11 not prohibited from using the Amazon platform. Indeed, Provision 8 states “[i]n the  
12 event that you (Plaintiff) terminate with Amazon.com . . .” (See MOU.) This language  
13 clearly indicates that Plaintiff is allowed to continue her use of the Amazon platform to  
14 market and sell her product and she has the power to end that business relationship in the  
15 future.<sup>6</sup> Second, Amazon has indeed agreed to stop using her mark and the MOU gave  
16 Plaintiff the means to enforce. Provision 8 goes on to state that after Plaintiff terminates  
17 with Amazon.com, she “will provide written notice advising that no 3d parties are selling  
18 the product, that [she has] the valid mark and subject to good faith confirmation,  
19 Amazon.com will agree not to use ‘baiden’ in text of sponsored links, no ‘baiden’ words  
20 w/in 20 days of notice.” This is completely reasonable and addresses Plaintiff’s concern.  
21 It is obvious that if Plaintiff or any authorized third parties are selling the Baiden mitten  
22 on the Amazon platform, Amazon necessarily needs to be able to use the mark in the text  
23 of sponsored links and key word searches. How else will Plaintiff get traffic and sell her  
24 product? Moreover, once Plaintiff terminates use of Amazon’s platform, and if no  
25 authorized third party vendors are still selling the product, Amazon agrees to not use her  
26 mark within twenty days of receiving notice. Plaintiff appeared to be concerned with

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27  
28 <sup>6</sup> To the extent that Plaintiff subjectively believed that she was entitled to indefinite and  
unlimited use of Amazon’s platform no matter how many violations she incurred, this view is  
unreasonable and unsupported by the plain language of the MOU.



1 future infringements, but the MOU provides her with relief. Provision 3 states that the  
2 Court will retain jurisdiction to enforce the settlement for one year. Thus, Plaintiff can  
3 seek the Court’s authority to bind Defendant to their agreement to stop using the mark.  
4 In addition, if Amazon breaches the terms of the settlement, Plaintiff would have the  
5 option of filing a breach of contract claim and seek damages therein.

6 Although the MOU only provides for the Court’s jurisdiction to enforce for one  
7 year, this does not mean that subsequent to the expiration of the enforcement period,  
8 Plaintiff is left without legal recourse. Plaintiff has only agreed to drop the action *Sen v.*  
9 *Amazon*, 12-CV-2878-AJB-BGS and resolve the issues presented therein. She has not  
10 agreed to drop all legal claims that may arise from the party’s relationship or conduct  
11 going forward.

### 12 **C. The MOU is Supported by Valid Consideration**

13 As this motion is brought to enforce the MOU, the Court will construe Plaintiff’s  
14 contention in regards to the lack of consideration to apply to the MOU and not the  
15 proposed long form agreement. Plaintiff states that in exchange for her giving up her  
16 lawsuit and any claim to damages, “Amazon would be required to do nothing at all.”  
17 Therefore, the agreement lacks “good consideration” and unenforceable. (Doc. No. 37 at  
18 5.)

19 Courts will generally not inquire into the adequacy or relative value of the consid-  
20 eration provided by each party. 6 Cal. Jur. 189, Willison on Contracts (Rev. Ed.), § 115;  
21 *see also Schumm by Whyner v. Berg*, 37 Cal. 2d 174, 185 (Cal. 1951) (stating “the law  
22 will not enter into an inquiry as to the adequacy of the consideration.”) “A valuable  
23 consideration, however small or nominal, if given or stipulated for in good faith, is, in the  
24 absence of fraud, sufficient to support an action on any ... contracts.” *Lawrence v.*  
25 *McCalmont*, 43 U.S. 426, 452 (1844). However, where the disparity is so gross as to  
26 raise a presumption of fraud, the Court may inquire as to show unconscionability. *See*  
27 *Herbert v. Lankershim*, 9 Cal. 2d 409, 475 (Cal. 1937). Here, the parties did not indicate  
28

1 any suspicion of fraud or wrongdoing. Moreover, the Court does not find such gross  
2 disparity as to raise a presumption of fraud.

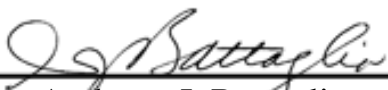
3 The terms of the MOU show a bargained for exchange supported by valid consid-  
4 eration. Valuable consideration for a contract may consist of some right, interest, profit,  
5 or benefit accruing to one party or some forbearance, detriment, loss, or responsibility  
6 given, suffered, or undertaken by the other. *See Peleg v. Neiman Marcus Group*, 204  
7 Cal. App. 4th 1425, 1450 (Cal. Ct. App. 2012). In the instant case, Plaintiff gave her up  
8 claims in exchange for an undertaking by Defendant that it was not legally obligated to  
9 do. Defendant agreed to provide Plaintiff an alternative method of resolving issues in  
10 regards to her mark. (*See* MOU Provision 7.) According to defense counsel, this is  
11 something not ordinarily provided for Amazon platform. Thus, the Court concludes that  
12 valid consideration for the MOU exists to support a valid agreement.

13 **IV. CONCLUSION**

14 For the reasons stated above, the Court GRANTS Defendant's Motion to Enforce  
15 the Settlement Agreement, as embodied by the Settlement MOU, and judgment for the  
16 defendant on the terms set forth in the MOU is ordered. The Clerk of Court is directed to  
17 enter judgment as provided herein and dismiss the case. As the parties have signed and  
18 filed their consent to the Magistrate Judge's jurisdiction (Doc. No. 42.), the Magistrate  
19 Judge assigned has the authority to enforce the settlement as stipulated by the terms of the  
20 MOU.

21 IT IS SO ORDERED.

22  
23 DATED: December 19, 2013

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25 \_\_\_\_\_  
26 Hon. Anthony J. Battaglia  
27 U.S. District Judge  
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## General Information

<b>Court</b>	United States District Court for the Southern District of California
<b>Nature of Suit</b>	Property Rights: Trademark
<b>Docket Number</b>	3:12-cv-02878