UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 16-01774 JVS (JCGx)	Date	March 22, 2017
Title	Broadcom Corp., et al. v. Amazon.com Inc., et al.		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Granting in Part and Denying in Part Plaintiffs' Motion for Order and Plaintiffs' Motion for Judgment on the Pleadings, and Denying Defendants' Motion to Compel Arbitration**

On January 20, 2017, Plaintiffs, Broadcom Corporation ("Broadcom") and Avago Technologies General IP (Singapore) Pte, Ltd. ("Avago") (together, "Plaintiffs"), moved (1) for an order that they do not need to arbitrate their claims and (2) for judgment on the pleadings regarding two of Defendants', Amazon.com, Inc. ("Amazon.com"), and Amazon Web Services, Inc. ("AWS") (together, "Defendants"), defenses. (Pls. Mot., Docket No. 38.) On February 10, 2017, Defendants filed a combined notice to compel arbitration and opposition to Plaintiffs' motion. (Defs. Mot., Docket No. 47.) Plaintiffs replied. (Pls. Reply, Docket No. 53.) Defendants replied. (Defs. Reply, Docket No. 57.)

For the reasons discussed below, the Court **grants in part** and **denies in part** Plaintiffs' motion. The Court **denies** Defendants' motion.

I. BACKGROUND

Broadcom opened an account with AWS in February 2012. (Giglio Decl., Docket No. 47-1 ¶ 9.) When Broadcom created its account with AWS, Broadcom accepted the terms of the AWS Customer Agreement (the "2012 Agreement") by selecting the accepted box on the AWS website. (Id. ¶¶ 4, 5, 7.) The 2012 Agreement was a click-through agreement. (Id.)

In October 2013, Broadcom and AWS negotiated and agreed to "Amendment No. 1 to AWS Customer Agreement" ("the Amendment"). (Torres Decl. Ex. 1, Docket No. 50-1.) Significantly, the Amendment was a negotiated agreement that was not created by clicking on an "I Accept" button. The Amendment contains the following terms:

> This Amendment No. 1 (this "Amendment") to the AWS Customer Agreement *available at http://aws.amazon.com/agreement, (as updated from time to time, the "Agreement")* is effective as of October 24, 2013 (the "Amendment Effective Date") and is between Amazon Web Services, Inc. ("AWS", "we", "us" or "our") and Broadcom Corporation ("you"). . . .
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> . . . .
>
> 12.11 Governing Law; Venue. The laws of the State of New York, without reference to conflict of law rules, govern this Agreement and any dispute of any sort that might arise between the parties. Any dispute relating in any way to the Service Offerings or this Agreement will only be adjudicated in a state or federal court located in the borough of Manhattan, New York, New York. Each party consents to exclusive jurisdiction and venue in these courts. *Notwithstanding the foregoing, either party may seek injunctive relief in any state, federal or national court of competent jurisdiction for any actual or alleged infringement of such party's its Affiliates or any third party's intellectual property or other proprietary rights. . . .*
>
> . . . .
>
> 14. Entire Agreement; Conflict. Except as amended by this Amendment, the Agreement will remain in full force and effect. This Amendment, together with the Agreement as amended by this Amendment: (a) is intended by the parties as a final, complete and exclusive express of the terms of their agreement, and (b) supersedes all prior agreements and understandings between the parties with respect to the subject matter hereof. *If there is a conflict between the Agreement and this Amendment, the terms of this Amendment will control.*

(Torres Decl. Ex. 1, Docket No. 50-1 (italics supplied) (alteration to paragraph format).) The parties contemplated that the Amendment would have a prospective

effect because it would be applicable to the Agreement "as updated from time to time."

In July 2016 and September 2016, Broadcom again accepted the current AWS Customer Agreement (the "2016 Agreement") when it created two new accounts. (Id. ¶¶ 9–18.) The 2016 Agreement contains the following relevant terms:

> AWS Customer Agreement
>
> (http://aws.amazon.com/agreement)
>
> . . . .
>
> **13.12 Disputes. Any dispute or claim relating in any way to your use of the Service Offerings, or to any products or services sold or distributed by AWS will be resolved by binding arbitration, rather an in court**, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this Agreement. **There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of this Agreement as a court would.** . . .
>
> 13.13 Entire Agreement; English Language. This Agreement includes the Policies and is the entire agreement between you and us regarding the subject matter of this Agreement. This Agreement supersedes all prior or contemporaneous representations, understandings, agreements, or communications between you and us, whether written or verbal, regarding the subject matter of this Agreement. . . .

(Giglio Decl. Ex. I, Docket No. 47-1 (emphasis in original).)

On September 23, 2016, Plaintiffs filed a complaint against Defendants for patent infringement. (Compl., Docket No. 1.)

II. LEGAL STANDARD

A. Motion to Compel Arbitration

Under the Federal Arbitration Act (the "FAA"), a party to an arbitration agreement may bring a motion in federal district court to compel arbitration and stay the proceeding pending resolution of the arbitration. 9 U.S.C. §§ 3–4. Ambiguities as to the scope of the arbitration provision must be interpreted in favor of arbitration. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); see also AT&T Techs. Inc. v. Commc'n Workers of Am., 475 U.S. 643, 650 (1986). The FAA also requires "district courts to compel arbitration even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 698 (9th Cir. 1986).

A district court may not review the merits of the dispute when determining whether to compel arbitration. Cox v. Ocean View Hotel, Corp., 533 F.3d 1114, 1119 (9th Cir. 2008). Instead, the FAA limits the district court's role "to determining (1) whether a valid agreement to arbitrate exists and, if it does (2) whether the agreement encompasses the dispute at issue." Id. (internal citation and quotation omitted). If a valid arbitration agreement exists, the district court must enforce the arbitration agreements according to its terms. Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004).

B. Motion for Judgment on the Pleadings

Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." A motion for judgment on the pleadings should be granted only if "taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." McSherry v. City of Long Beach, 423 F.3d 1015, 1021 (9th Cir. 2005). A Rule 12(c) motion asserting a failure to state a claim is

governed by the same standard as a Rule 12(b)(6) motion to dismiss. United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011); Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012).

In resolving a 12(b)(6) motion, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Nor must the Court "accept as true a legal conclusion couched as a factual allegation." Id. at 678-80 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. The Terms Within the Amendment Conflict with the Terms Within the 2016 Agreement, so Broadcom Does Not Need to Arbitrate Its Claims.

The Court finds (1) that the Amendment applies to the 2016 Agreement, (2) that the terms of the Amendment and the terms of the 2016 Agreement conflict, and (3) that the terms of the Amendment supersede the conflicting terms of the 2016 Agreement. Therefore, the Court finds that Broadcom does not need to arbitrate its claims.

1. The Amendment Applies to the 2016 Agreement.

Defendants argue that a valid agreement to arbitrate exists and counts 2, 8, 10, and 11 are within the agreement's scope. (Defs. Mot., Docket No. 47 at 6.) According to Defendants, the 2012 Agreement and the 2016 Agreement are separate agreements, so the Amendment does not affect the 2016 Agreement, which contains the arbitration clause. (Id.) In addition, Defendants cite to the portion of the Amendment that states the Amendment "supersedes all prior or

contemporaneous representations," so the Amendment does not apply to subsequent agreements. (Defs. Reply, Docket No. 57 at 5 (quoting the Amendment).) Defendants also state that the Court cannot consider the Amendment when interpreting the 2016 Agreement because of the parole evidence rule. (Id. at 6.)

However, the Court finds that the Amendment applies to the 2016 Agreement. The Amendment states that "[t]his Amendment No. 1 . . . to the AWS Customer Agreement *available at http://aws.amazon.com/agreement, (as updated from time to time, the "Agreement")* is effective as of October 24, 2013 . . . ." (Torres Decl. Ex. 1, Docket No. 50-1 (italics supplied).) Importantly, the 2016 Agreement contains the same URL that is in the Amendment: http://aws.amazon.com/agreement. (Giglio Decl. Ex. I, Docket No. 47-1.) Based on this language, the Court finds that the parties intended for the Amendment to apply to all subsequent agreements. Furthermore, the 2016 Agreement simply amends the original agreement, so the 2012 Agreement and the 2016 Agreement are the same agreement. There is no indication that the parties intended for the 2016 Agreement to revoke the Amendment.[1] Therefore, the Amendment applies to the 2016 Agreement.

2. The Terms of the Amendment and the Terms of the 2016 Agreement Conflict.

The Court finds that the Amendment and the 2016 Agreement conflict. The Amendment states that the parties will resolve a dispute within a Court. (Torres Decl. Ex. 1, Docket No. 50-1.) Although the Amendment does require a party to file a case for damages in New York, a party can file an action for injunctive relief

[1] At the hearing, Defendants argued that (1) the 2016 Agreement supercedes all of the prior agreements and (2) that the 2016 Agreement's language explicitly revoked the Amendment. However, Defendants did not address the language in the Amendment that states "[t]his Amendment No. 1 . . . to the AWS Customer Agreement available at http://aws.amazon.com/agreement, (as updated from time to time, the 'Agreement')." (Torres Decl. Ex. 1, Docket No. 50-1.) If the Court adopted Defendants' interpretation, then it would have to ignore the words "as updated from time to time."

in any court.[2] (Id.) However, the 2016 Agreement states that the parties need to resolve a dispute through arbitration. Thus, the Court finds that the terms of the Amendment and the terms of the 2016 Agreement conflict.

3. The Terms of the Amendment Supersede the Conflicting Terms of the 2016 Agreement.

The parties intended for the Amendment to supersede any changes to the Agreement. Within the Amendment, the parties recognized that the Agreement would be "updated from time to time." (Torres Decl. Ex. 1, Docket No. 50-1.) Furthermore, Broadcom and AWS agreed that "[i]f there is a conflict between the Agreement and this Amendment, the terms of this Amendment will control." (Id.) Based on this language, the Court finds that Broadcom and AWS intended for the Amendment's terms to supersede any conflicting terms within the 2016 Agreement.

In conclusion, the Court finds that Broadcom is not required to arbitrate its claims against AWS.

B. The 2016 Agreement Does Not Apply to Avago or Amazon.com.

Even if the Court concluded that the arbitration clause in the 2016 Agreement was enforceable, Avago and Amazon.com would not be required to arbitrate. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Techs., 475 U.S. at 648. Avago and Broadcom belong to a corporate family of companies, but they are separate corporate entities. (Docket No. 5.) Similarly, Amazon.com and AWS belong to the same corporate family, but they are separate corporate entities. (Docket No. 24.) Because AWS and Broadcom are the only

[2] Defendants state that "if the amendment did control as Broadcom avers, Broadcom is then in breach of the venue provision in that amendment, which requires that any dispute relating in any way to AWS's services be brought in New York." (Defs Mot., Docket No. 47 at 7.) However, the only issue presently before the Court is whether Broadcom needs to arbitrate its claims. If a party disputes whether this Court is the proper court to hear this action, then that party can file a motion for appropriate relief.

parties who entered into the 2016 Agreement, AWS cannot force Avago or Amazon.com to arbitration.

In conclusion, the Court finds that Avago and Amazon.com are not required to arbitrate their claims.

C. The Court Strikes Defendants' Eleventh Defense, But It Does Not Strike Defendants' Tenth Defense.

Because the parties are not required to arbitrate their claims, the Court strikes Defendants' eleventh defense (arbitration).

However, Defendants have sufficiently pled their tenth defense (breach of contract). In their answer, Defendants state the following in support of their tenth defense:

> Broadcom is a customer of Amazon Web Services, Inc. ("AWS"). As a customer to AWS, Broadcom consented to the AWS Customer Agreement, and agreed, among other things, that "[d]uring and after the Term, you will not assert, nor will you authorize, assist, or encourage any third party to assert, against us or any of our affiliates, customers, vendors, business partners, or licensors, any patent infringement or other intellectual property infringement claim regarding any Service Offerings you have used." After consenting to the AWS Customer Agreement, Broadcom received access to AWS Service Offerings, including but not limited to EC2 and CloudFront.
>
> Broadcom received valuable consideration for its consent to the AWS Customer Agreement, including but not limited to the use of and access to AWS Service Offerings.
>
> Broadcom breached the AWS Customer Agreement by initiating the present action against one or more AWS Service Offerings that it has used.

> Broadcom's enforcement of its patents, including at least U.S. Patent Nos. 7,296,295, 6,501,480, 6,341,375, and 6,744,387, is barred in whole or in part against one or more of the products that Broadcom accuses of infringement in the Complaint due to Broadcom's consent to the AWS Customer Agreement.

(Answer, Docket No. 23 at 31.) Based on this language, Defendants cite to the specific agreement and terms at issue. (Id.) Furthermore, Defendants discuss how their breach of contract claim prevents them from being liable for patent infringement, and the facts alleged plausibly constitute a valid defense, i.e., Broadcom, through contract, agreed to not sue the Defendants for patent infringement. At this time, the Court needs to accept these well-pleaded statements as true.

In conclusion, the Court strikes Defendants' eleventh defense, but it does not strike Defendants' tenth defense.

IV. CONCLUSION

For the reasons discussed below, the Court **grants in part** and **denies in part** Plaintiffs' motion. The Court **denies** Defendants' motion.

IT IS SO ORDERED.

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