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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CREDIT CARD SERVICES, INC.,

Plaintiff and Appellant,

v.

CDSCA, INC.,

Defendant and Respondent.

B237441

(Los Angeles County  
Super. Ct. No. BC375665)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

Park & Lim, S. Young Lim and Jessie Y. Kim for Plaintiff and Appellant.

Fitzgerald Abbott & Beardsley, Quin E. Marshall and Michael Ward for Defendant and Respondent.

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This appeal arises from the trial court's judgment enforcing a settlement agreement, pursuant to which appellant owes money to respondent. Appellant's theory is that it acquired a third party's right to indemnity *from* respondent for the very payments appellant is obligated to make *to* respondent. This theory is untenable. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **The Complaints<sup>1</sup>**

In August 2007, appellant Credit Card Services, Inc. sued respondent CDSCA, Inc. and others, alleging misappropriation of trade secrets. In February 2008, respondent cross-complained against appellant and others, including an individual named In Buem Eric Song (Song), also alleging misappropriation of trade secrets. At that time, Song was employed by appellant, having previously been employed by respondent. Song cross-complained against respondent for wage and hour violations. Appellant then terminated Song's employment and sued him, alleging various claims, including equitable indemnity for any liability appellant incurred as to respondent.

### **Respondent's Settlement with Song**

In late 2008, Song contacted respondent about settling their disputes against each other and doing contract work for respondent. Effective December 18, 2008, Song and respondent entered into a written "Settlement Agreement and Release" (the Song Settlement Agreement). At paragraph 2 entitled "INDEMNITY," the Song Settlement Agreement provides: "Except for any action that [respondent] may take to enforce this Agreement, [respondent] shall indemnify and hold harmless Song against all liability, claims, demands, losses, damages, costs, charges, and expenses, including reasonable attorneys' fees, that Song may in any way sustain, incur, or become liable for as a consequence of defending or prosecuting any suit, action, or other proceeding *brought in connection with the negotiation, drafting, and execution of this Agreement*. This

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<sup>1</sup> Appellant did not include any of the complaints in the record on appeal. While such an omission typically results in the appellate record being inadequate, we nevertheless reach the merits of the appeal. We are able to glean the bare essentials of the case from undisputed assertions in respondent's brief and other parts of the record.

indemnification shall include, but not be limited to, any actions or cross-complaints filed against Song by [appellant]. . . . [Respondent], at its own expense, shall reimburse, within 30 days of presentment by Song, the costs of defense, including reasonable attorney's fees, that Song may in any way sustain, incur, or become liable for as a consequence of defending or prosecuting any suit, action, or other proceeding ***brought in connection with the negotiation, drafting, and execution of this Agreement.***" (Italics & bold added.)

Appellant was aware of the Song Settlement Agreement no later than April 2009, when respondent filed a motion for an order determining the good faith of the settlement. In support of the good faith motion, Song submitted a declaration stating that the indemnity clause in the Song Settlement Agreement applied if he were "sued because of the settlement agreement."<sup>2</sup>

A year later, in August 2010, Song—who was still a party to the litigation due to appellant's claims against him—testified at his deposition that appellant had offered him a full release if he were to "say that [he] would take responsibility of everything."

#### **Appellant's Settlement with Respondent**

On July 21, 2011, nearly four years after the litigation began, appellant and respondent executed a written "Term Sheet" settlement agreement (Term Sheet). The Term Sheet required appellant to pay respondent \$490,000 by August 10, 2011, and to assign respondent the ongoing revenue stream from a defined set of merchants worth a minimum value of \$20,000 by August 1, 2011.

Appellant concedes in its opening brief that the Term Sheet includes broad releases. At paragraph 5 of the Term Sheet, appellant expressly released respondent and its "partners, heirs, employees, officers, directors, servants, attorneys, assigns, successors,

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<sup>2</sup> Around the same time, respondent and Song apparently entered into two other indemnity agreements. The agreements are in Korean, and it is not clear if they are both included in the record. According to appellant, one agreement states that respondent's president would indemnify Song for his testimony. The other agreement purportedly provides that if respondent sued appellant, respondent would pay Song 5 percent "of the amount of the lawsuit."

agents and representatives, past and present, and each of them . . . from any and all claims, demands, actions, causes of action, debts, liabilities, rights, contracts, obligations, duties, damages, costs, expenses or losses, of every kind and nature whatsoever, and *by whomever asserted, whether at this time known or suspected, or unknown or unsuspected, anticipated or unanticipated, direct or indirect, fixed or contingent or which may presently exist or which may hereafter arise or become known, in law or in equity*, in the nature of an administrative proceeding or otherwise, for or by reason of any event, transaction, matter or cause whatsoever, *with respect to, or in connection with or arising out of the Lawsuit.*” (Italics & bold added.)

At paragraph 11 of the Term Sheet, appellant expressly excluded from the settlement its then-pending claims against Song: “This Agreement shall not function in any way as a release of [appellant’s] claims against Song in the Lawsuit.”

### **Appellant’s Settlement with Song**

Four days after the Term Sheet was signed, on July 25, 2011, appellant and Song entered into a partial settlement agreement, pursuant to which Song assigned to appellant the Song Settlement Agreement, in exchange for appellant’s agreement not to enforce any judgment against Song personally.

### **The Song Trial**

The next day, on July 26, 2011, appellant informed the trial court that it had settled all of its claims against Song, except for its equitable indemnity claim, which proceeded to a bench trial.<sup>3</sup> Respondent, having settled with all parties, did not appear at the trial. Song admitted liability and presented no defense. Appellant submitted the Term Sheet as evidence of its damages.

The trial court found in appellant’s favor on its claim for equitable indemnity against Song, and entered judgment against Song for the \$490,000 plus the monthly

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<sup>3</sup> By the time of trial, Song was acting in propria persona. Earlier in July, Song had signed a substitution of attorney allowing his counsel to withdraw, and Song appeared in court several times without counsel before his trial commenced.

revenue stream of \$20,000 that appellant owes respondent under the Term Sheet, plus \$568,626.02 in attorney fees and costs.

### **Demand for Indemnity**

Three days after the Song trial, appellant's attorney informed respondent's attorney of the Song trial outcome and of Song's assignment to appellant of the Song Settlement Agreement. Appellant—as assignee of Song's indemnity rights—then demanded indemnity from respondent for the judgment appellant had obtained against Song, which constituted the same obligation appellant owed to respondent.

### **Motion to Enforce Term Sheet and Ruling**

On August 26, 2011, respondent filed a motion to enforce the Term Sheet pursuant to Code of Civil Procedure section 664.6 (section 664.6),<sup>4</sup> or in the alternative, to set the Term Sheet aside on the ground of fraud. Appellant opposed the motion, disputing respondent's interpretation of the release provision.

The trial court ordered the Term Sheet enforced pursuant to section 664.6, and specifically found: (1) “[Appellant] agreed to release all of its indemnity claims against [respondent] in connection with this lawsuit,” and (2) “The parties did not agree to waive their statutory rights under Civil Code [section] 1542 in the July 21, 2011 Term Sheet settlement agreement. However, because [appellant] knew or suspected the existence of the Song indemnity claims at the time of settling with [respondent], the Court finds that [appellant] agreed to release the Song indemnity claims it purchased on July 25, 2011, insofar as [appellant] relies on those claims to justify its refusal to perform under the settlement agreement.” The trial court entered judgment consistent with its order. This appeal followed.

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<sup>4</sup> Section 664.6 provides: “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.”

## DISCUSSION

### I. Standard of Review

A trial court's factual findings on a motion to enforce a settlement pursuant to section 664.6 will not be disturbed if supported by substantial evidence. (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) Where the trial court must interpret the settlement agreement in order to rule on a motion pursuant to section 664.6, that interpretation is subject to de novo review only if the contract language is unambiguous and all extrinsic evidence is undisputed, otherwise, the substantial evidence standard of review applies. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266–1267.)

### II. Appellant is Not Entitled to Indemnity

Appellant contends the trial court erred in finding that appellant released its indemnity claims in the Term Sheet, arguing that appellant “could not have released Song’s indemnification claims against Respondent by executing the Term Sheet Settlement Agreement since Appellant owned no such claims in order to release them until four days later when it signed the July 25 Settlement Agreement with Song.”<sup>5</sup> Appellant then concedes that the Term Agreement contains “broad releases,” and that appellant expressly agreed to release respondent from all claims, liabilities, etc., “by whomever asserted, whether at this time known or suspected, or unknown or unsuspected, anticipated or unanticipated, direct or indirect, fixed or contingent, or which may presently exist or which may hereafter arise,” as long as the claim was “in connection with or arising out of the Lawsuit.”

This contractual language makes clear that the “indirect” right to indemnity that appellant seeks to assert via Song (“by whomever asserted”), despite this right not having been assigned to appellant until after the Term Sheet was executed (“fixed or contingent, or which may presently exist or which may hereafter arise”), and that is indisputably “in

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<sup>5</sup> The July 25 Settlement Agreement expressly refers only to the written Song Settlement Agreement, and not to the other two agreements discussed in footnote 2, *ante*.

connection with or arising out of the Lawsuit,” plainly falls within the scope of the express release in the Term Sheet.

Appellant’s attempt to rely on paragraph 11 of the Term Sheet fails no better. This paragraph provides that the Term Sheet “shall not function in any way as a release of [appellant’s] claims against Song in the Lawsuit.” Appellant argues that because its claims against Song were expressly “carved out” from the Term Sheet, then “any and all claims flowing directly from the ‘[appellant] vs. Song’ lawsuit (i.e., Appellant’s right to seek indemnity against Respondent) are also carved out from the Term Sheet Settlement Agreement. By entering [into] the Term Sheet Settlement Agreement, Appellant and Respondent both understood that Appellant was not waiving the right to whatever it obtained from Song through trial.” Not only does appellant fail to cite any evidence in the record to support the parties’ understanding, but paragraph 11 says nothing about appellant’s rights toward respondent. Paragraph 11 says only that appellant is not releasing its claims against Song. Paragraph 11 is simply not amenable to appellant’s interpretation, especially in light of the broad release in paragraph 5, in which appellant expressly released all of its known and unknown claims against respondent.

Moreover, the indemnification right in the Song Settlement Agreement that Song assigned to appellant is expressly limited to indemnification for any claims, liability, etc. “brought in connection with the negotiation, drafting, and execution of this Agreement.” Appellant did not sue, nor obtain judgment from, Song for anything related to “the negotiation, drafting, and execution” of the Song Settlement Agreement.

Thus, contrary to appellant’s suggestion, appellant does not stand in the same shoes as Song with respect to indemnification rights. Appellant posits the hypothetical situation that if appellant and Song had not settled, appellant would have gone to trial against Song, obtained a judgment against him for the amount set forth in the Term Sheet, Song would have then sought indemnity from respondent for the amount of the judgment, and Song would pay this amount to appellant. According to appellant, the only difference the assignment makes is that appellant must go through Song to receive the “Settlement Amount.” But this hypothetical completely ignores the limited extent of

Song's indemnification right. Under the Song Settlement Agreement that Song assigned to appellant, Song has no contractual right to seek indemnity from respondent for any liability "arising out of the lawsuit." Song only had indemnity for liability arising out of "the negotiation, drafting, and execution" of the Song Settlement Agreement.

Additionally, appellant's hypothetical ignores that appellant's settlement with Song includes an agreement by appellant not to enforce its judgment against Song personally. Thus, Song has no actual liability for which respondent could indemnify him. Furthermore, as a "past" employee of respondent, Song was expressly included in the group of individuals released by appellant in paragraph 5 of the Term Sheet.

Finally, appellant's argument that the trial court "had to make an implicit finding that at the time the Term Sheet Settlement Agreement was signed, appellant knew or should have known that Song would assign the claim to appellant" is irrelevant. (Emphasis omitted.) Such a finding is neither necessary nor a prerequisite to the trial court's express finding that "[appellant] knew or suspected the existence of the Song indemnity claims at the time of settling with [respondent], . . . [appellant] agreed to release the Song indemnity claims it purchased on July 25, 2011, insofar as [appellant] relies on those claims to justify its refusal to perform under the settlement agreement." This is so because, regardless of whether any alleged "conspiracy" between appellant and Song existed, appellant expressly released its rights to any known or unknown, suspected or unsuspected claims against respondent arising out of the lawsuit, as stated in paragraph 5 of the Term Sheet.



**DISPOSITION**

The judgment is affirmed. Respondent is entitled to recover its costs on appeal.

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\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
CHAVEZ