

**NONCONFIDENTIAL**

2009-1509

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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ACCOLADE SYSTEMS LLC,

Plaintiff-Appellant,

v.

CITRIX SYSTEMS, INC.,

Defendant-Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TEXAS IN 6:07 CV 48  
JUDGE LEONARD DAVIS

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**NONCONFIDENTIAL**

BRIEF OF PLAINTIFF-APPELLANT ACCOLADE SYSTEMS LLC

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November 2, 2009

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Accolade Systems LLC v. Citrix Systems, Inc.

No. 2009-1509

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Accolade Systems LLC certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is: Accolade Systems LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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9/2/09 Date

Signature of counsel Martin J. Siegel Printed name of counsel

Please Note: All questions must be answered cc:

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## **CONFIDENTIAL MATERIAL OMITTED**

The material omitted from page 1 describes the terms of a confidential settlement agreement and the details of confidential settlement negotiations as contained in a declaration filed under seal.

The material omitted from page 2 describes the terms of a confidential settlement agreement.

The material omitted from page 6 describes the operation of Appellee's service and is contained in a declaration filed under seal.

The material omitted from page 7 describes the details of confidential settlement negotiations as contained in a declaration filed under seal.

The material omitted from pages 8-10 describes the terms of a confidential settlement agreement.

The material omitted from page 11 describes the terms of a confidential settlement agreement.

The material omitted from the first five lines of page 12 describes the terms of a confidential settlement agreement.

The material omitted from lines 6-8 of the second paragraph on page 12 describes the operation of Appellee's service and is contained in a declaration filed under seal.

The material omitted from the last five lines of page 12 describes the terms of a confidential settlement agreement.

The material omitted from the first paragraph on page 13 describes the terms of a confidential settlement agreement and the details of confidential settlement negotiations as contained in a declaration filed under seal.

The material omitted from the second paragraph on page 13 and from page 14 describe the operation of Appellee's service in relation to the patent in suit and were contained in a declaration filed under seal.

The material omitted from page 15 describes the terms of a confidential settlement agreement.

The material omitted from page 27 describes the terms of a confidential settlement agreement.

The material omitted from pages 34-35 describes the terms of a confidential settlement agreement and the details of confidential settlement negotiations as contained in a declaration filed under seal.

The material omitted from page 41 describes the details of confidential settlement negotiations and the operation of Appellee's service in relation to the patent in suit and were contained in declarations filed under seal.

The material omitted from pages 43-44 describes the terms of a confidential settlement agreement.

The material omitted from page 45 describes the terms of a confidential settlement agreement.

The material omitted from page 46 describes the terms of a confidential settlement agreement.

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## STATEMENT OF RELATED CASES

No appeal from this case was previously before this or any other appellate court. There is no case known to counsel for Appellant pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal.

## **PRELIMINARY STATEMENT**

This is an appeal from a decision of the United States District Court for the Eastern District of Texas (Davis, J.) granting summary judgment to the defendant, Citrix Systems, Inc. (“Citrix”), on the ground that a Settlement and License Agreement (“the Agreement”) entered into between plaintiff Accolade Systems LLC (“Accolade”) and Cisco Systems, Inc. (“Cisco”) also operated to release Citrix as an unnamed third party beneficiary. The district court reached this result even though:

- Accolade had been actively litigating its patent infringement claims against Citrix for over two years, and the parties were finally on the eve of trial;

This harsh, unintended result is not required by the Agreement. In the first place, the release provision relied on by the lower court expressly covers only claims for “acts, including without limitation any claim of infringement of the [patent in suit], that happened *prior to* the Effective Date” of the release. Ignoring this language, the court dismissed Accolade’s claims against Citrix for infringement *after* the effective date of the Agreement as well. This was obvious error requiring reversal by this Court.

The district court also refused to consider extrinsic evidence offered by Accolade in opposition to Citrix’s motion because it decided the Agreement is unambiguous on its face. This evidence established that Accolade and Cisco did not intend the Agreement to release Citrix. California, which supplies the governing law in this case, has an especially liberal parol evidence rule, and a clear line of cases specifically requires courts to consider extrinsic evidence to determine whether litigants intend third parties to be beneficiaries of their settlement agreements. Parol evidence should also be considered when it is relevant to an interpretation of the contract proposed by one side in order to determine whether the contract is reasonably susceptible to that interpretation,

regardless of whether the court first finds the document to be clear on its face. Finally, extrinsic evidence must be considered when the contract is internally inconsistent and therefore ambiguous. All of these circumstances are present here, and the district court consequently erred in refusing to consider Accolade's parol evidence. This Court should reverse and remand so the trial court can consider that proof in the first instance and determine the meaning of the Agreement taking into account the intent of Accolade and Cisco.

At the argument below, Citrix's counsel acknowledged that, in some circumstances at least, applying the Agreement to an unnamed third party like Citrix would amount to a "gotcha" or "get out jail free card." That is an apt description of the decision below, which this Court should now reverse.

### **JURISDICTIONAL STATEMENT**

In its complaint, Accolade alleged that the defendants infringed its patent, U.S. Patent No. 7,130,888 ("the '888 patent"). A. 61.<sup>1</sup> The district court had jurisdiction over this claim pursuant to 28 U.S.C. §§ 1331 and 1338. The district court's judgment dismissing the case is final and disposed of all remaining parties' claims. Add. 1-10.<sup>2</sup> This Court has jurisdiction over this

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<sup>1</sup> Citations to "A \_\_\_" refer to the specified page(s) in the Appendix.

<sup>2</sup> Citations to "Add \_\_\_" refer to the specified page(s) in the district court's Memorandum Opinion and Order contained in the Addendum to this brief. *See* Fed. Cir. R. 28(a)(12).

appeal pursuant to 28 U.S.C. § 1295(a)(1). The district court entered judgment on May 29, 2009, and Accolade noticed the appeal on June 26, 2009. A. 59-60.

### STATEMENT OF THE ISSUES

1. Whether the district court erred in construing a release Accolade gave Citrix's co-defendant to bar Accolade's claims against Citrix for infringement occurring *after* the effective date of the release, when the release expressly covers only claims for infringement "that happened *prior to* the Effective Date" of the release.
2. Whether the district court erred in refusing to consider extrinsic evidence offered by Accolade despite California law clearly requiring such consideration in three particular circumstances present here: (i) when a third party claims to be a beneficiary of a settlement agreement, (ii) when the evidence is relevant to show the agreement is reasonably susceptible to one party's construction, and (iii) when the contract is ambiguous on its face.

### STATEMENT OF THE CASE

Accolade filed the instant suit on January 30, 2007, naming Citrix, Webex Communications Inc. ("Webex"), and Laplink Software Inc. ("Laplink") as defendants. A. 61. The complaint alleged that the defendants infringed Accolade's '888 patent. A. 61-62. Webex and Laplink were

dismissed as the case proceeded. A. 44 (Docket Entry No. 49), A. 55 (Docket Entry No. 171). On May 29, 2009, the district court entered summary judgment dismissing the remaining claims in the case against Citrix. Add. 1-10. The district court granted Citrix's motion for summary judgment on the ground that Accolade's settlement agreement dismissing Webex also operated to release claims against Citrix, a non-signatory to the settlement agreement, as a third party beneficiary. *Id.* This appeal followed.

## STATEMENT OF THE FACTS

### I. Accolade's '888 Patent

The '888 patent, entitled "Method and Apparatus for Controlling a Computer Over a TCP/IP Protocol Network," was issued to Accolade on October 31, 2006. A. 375. The patented invention "permits virtually the entire functionality of a computer system to be made accessible over a network such as the Internet or an Intranet. More particularly, the present invention permits a computer system to be run as a 'virtual machine' through a web page provided at a web site on the World Wide Web (WWW)." *Id.* Multiple computers called "client computers" arranged in a "wide area network (WAN) such as the Internet or an Intranet" may interact with a host computer system that may be viewed and/or controlled by the client computers. *Id.* "Once the connection has been made between the host computer and one or more client computers,

the web page is bypassed, *i.e.*, the two or more computer systems communicate through the Internet without necessarily going through the web site supporting the ‘advertising’ web page.” *Id.*

## **II. Accolade’s Suit to Enforce the ‘888 Patent**

Accolade’s complaint alleged that Citrix, Webex and Laplink infringed the ‘888 patent by “incorporat[ing] Accolade’s patented technology in... products, systems or services which provide for secure remote control of computers over the Internet.” A. 62. Specifically, Accolade alleged that Citrix’s GoToAssist, GoToMyPC, GoToMeeting, and GoToMeeting with GoToWebinar services (collectively the “GoTo Services”) infringe the ‘888 patent. Add. 1.

The complaint alleged that Citrix’s infringement was ongoing and sought injunctive relief as well as compensatory damages. A. 63-64.

The parties intensively litigated this case in the district court for more than two years, conducting voluminous fact and expert discovery, making the pretrial disclosures required by the specialized rules governing patent cases in the Eastern District of Texas, proceeding through a hearing on claim construction, and engaging in typical discovery-related and summary judgment

motion practice. A. 41-60. The district court set trial of the case for June 8, 2009, and scheduled a pretrial conference for May 21, 2009. A. 340-41.

### **III. Accolade's Settlement with Cisco and Webex**

On April 6, 2009, Accolade entered into the Agreement resolving Accolade's claims against Webex. A. 97-120. Cisco negotiated and executed the agreement on Webex's behalf because Webex is a Cisco affiliate. A. 97, 347.

Accolade and

Cisco did not intend the Agreement to release Cisco customers whose products and services infringed Accolade's patents on their own, separate and apart from the customers' use of a Cisco product. *Id.*

The GoTo Services are clearly not “Licensed Products” under the Agreement since they are sold by Citrix, not Cisco. A. 71 (at ¶ 7).

MATERIAL SUBJECT TO  
PROTECTIVE ORDER DELETED

Finally, the Agreement contains a release:

3.1 Company Release. Company, on behalf of itself and its Affiliates, successors and assigns, hereby releases, acquits and forever discharges Cisco, its Affiliates, Authorized Third Parties, and all of their respective current and former predecessors, successors, officers, employees, agents, directors, shareholders, owners, users, customers, distributors, resellers (including value-added resellers), manufacturers (including original equipment or device manufacturers) assemblers, replicators, and integrators (collectively “*Cisco Released Parties*”) from any and all actions, causes of action, claims or demands, liabilities, losses, damages, attorneys’ fees, court costs, or any other form of claim or compensation for known and unknown acts, including without limitation any claim of infringement of the Licensed Patents, that happened prior to the Effective Date, and Company, on behalf of itself and its Affiliates, covenants not to sue or threaten to sue (or cooperate with, instruct, encourage, or aid a third party to sue or threaten to sue) any Cisco Released Party on account of any such claim.

A. 102-03 (emphasis in original). The effective date of the Agreement is April 6, 2009. A. 97.

Instead, it purports to release any Cisco customer of any kind from any claim of any kind for “known and unknown acts” of any kind “that happened prior to the Effective Date.” *Id.* Whether the customer combines its own product or service with the Cisco product is irrelevant.

**IV. Citrix's Motion for Summary Judgment and the District Court's Decision**

On May 11, 2009, ten days before the scheduled pretrial hearing and four weeks before trial, Citrix moved for summary judgment on the ground that it was a third party beneficiary of the Agreement and that the Agreement therefore released Accolade's claims of infringement of the '888 patent. A. 66-70. In the motion, Citrix asserted that it has purchased routers and switches costing millions of dollars from Cisco

As a customer and user of Cisco products, therefore, Citrix claimed that it is covered by the Release. A. 83-86. Citrix also claimed that its use of Cisco routers and switches in the provision of the GoTo Services qualify the services as "Combination Products" under the Agreement. A. 86-87. As such, Citrix argued, they are protected from Accolade's suit by the License, Covenant Not To Sue, and Limitation On Assertions. A. 87-91.

In its response, Accolade argued that Accolade and Cisco never intended to release Webex's co-defendant Citrix from liability through the Agreement.

A. 291.

Accolade further argued that, read as a whole, the Agreement unambiguously does not release infringement claims based on products or services that independently infringe. A. 296-300.

In light of the sudden and expedited nature of Citrix's eve-of-trial motion, Accolade also moved for leave to conduct discovery from Cisco regarding the negotiations that led to the Agreement. A. 302.

The Court heard argument on Citrix's motion on May 21, ten days after Citrix filed the motion and the date originally set aside for the pretrial hearing. A. 340. At the conclusion of the argument, the Court announced that it would grant Citrix's motion for summary judgment and that Accolade could "take it up on appeal if you wish and let the Fed Circuit take a look at it. If I am wrong, we will come back and try it again." A. 374.

In its written decision, issued on May 29, the district court held that the Release extinguished Accolade's claims against Citrix. Add. 5-8. The court applied California law pursuant to the Agreement's choice of law provision and the parties' agreement that California law governs. Add. 4, A. 109 (Agreement § 9.8). First, the court rejected Accolade's contention, discussed at oral argument, that the Release only applies to claims based on actions that occurred

prior to the effective date of the Agreement. Add. 7. The court then held that it was unnecessary to consider “Accolade and Citrix’s alleged intent to exclude Citrix as a benefiting party of the Agreement” because, in its view, the plain terms of the Release cover Citrix. *Id.* The court also decided that the Release’s “expansive language” allows no exclusion for products that infringe separate and apart from Cisco products. Add. 8. Although it held the Release to be unambiguous, the court did not address Accolade’s central argument in favor of ambiguity –

Lastly, the court denied Accolade’s request to present extrinsic evidence and conduct additional discovery. Add. 8. Because Accolade argued that the Agreement unambiguously excludes Citrix and the GoTo Services, the court refused to consider Accolade’s argument in the alternative that adoption of Citrix’s proposed construction would render the Agreement ambiguous and require consideration of Accolade’s parol evidence. *Id.* (“Either the Agreement is ambiguous or it is not”). Although there is voluminous California law governing when courts should consider extrinsic evidence, the district court did not cite a single California (or other) authority on the issue. *Id.*

## SUMMARY OF ARGUMENT

The district court committed reversible error in applying the Agreement to terminate Accolade's case against Citrix one month before trial. Initially, the court ignored the portion of the Release specifying that the only claims covered were those for "acts, including without limitation any claim of infringement of the Licensed Patents, *that happened prior to the Effective Date.*" Despite this clear language, the court barred Accolade's claims for infringement *postdating* the effective date of the Agreement. This holding stems from the fact that the Release "forever discharges" certain parties, but the perpetuity of the Release has nothing to do with what claims are released. There is nothing unusual or ineffective about an everlasting release of claims based only on acts that occurred prior to a specific date. The court also cited the fact that the Release covers "current and former" Cisco customers, but this is also irrelevant to what claims are surrendered. This Court should reverse this portion of the judgment and hold that Accolade may pursue claims based on Citrix's infringement after April 6, 2009 on remand. *See* Point II, *infra*.

The district court also erred by failing to consider the extrinsic evidence Accolade provided in opposition to Citrix's motion. First, California law requires courts to consider extrinsic evidence precisely to determine whether the parties to a settlement agreement intended to cover a claimed third party

beneficiary. Second, parol evidence must also be considered when it is relevant to one party's interpretation of the contract to enable that party to show the document is reasonably susceptible to its interpretation, regardless of whether the court deems the contract to be unambiguous on its face. Third, courts should consider extrinsic evidence when the contract's terms are ambiguous. Because all these circumstances are present here, this Court should reverse and remand for factual findings as to whether Accolade and Cisco intended Citrix to be a third party beneficiary of their Agreement, whether the Agreement was meant to immunize third parties other than those whose products and services do not independently infringe, and whether the GoTo Services infringe the '888 patent separate and apart from Cisco's products. *See* Point III, *infra*.

## ARGUMENT

### I. Standard of Review

"This court reviews the district court's grant or denial of summary judgment under the law of the regional circuit." *Bd. of Trustees of Leland Stanford Univ. v. Roche Molecular Sys.*, \_\_\_ F.3d \_\_\_, 2009 WL 3110809 at \*4 (Fed. Cir., September 30, 2009) (citation and quotation omitted). The Fifth Circuit, in turn, "reviews a district court's grant of summary judgment *de novo*, using the same standard as that applied by the district court [and]... views the evidence in the light most favorable to the nonmovant, drawing all reasonable

inferences in the nonmovant's favor.” *Sanders-Burns v. City of Plano*, 578 F.3d 279, 290 (5<sup>th</sup> Cir. 2009) (citations and quotations omitted).

This Court should also review the Agreement *de novo* applying applicable state contract law – here, the law of California. *See Howmedica Osteonics Corp. v. Wright Med. Tech., Inc.*, 540 F.3d 1337, 1347 (Fed. Cir. 2008); A. 109 (§ 9.8 providing California law governs Agreement). The *de novo* standard similarly governs review of the district court’s decision refusing to consider Accolade’s extrinsic evidence. When the Fifth Circuit reviews such decisions, it simply examines the applicable state’s parol evidence rule and analyzes whether that rule authorizes consideration of the proffered evidence, applying no deference to the lower court’s conclusion on the subject. *See, e.g., Innovative Sales LLC v. Northwood Mfg. Inc.*, 2008 WL 3244114 at \* 5 (5<sup>th</sup> Cir. 2008); *Condrey v. Suntrust Bank of GA.*, 429 F.3d 556, 562-64 (5<sup>th</sup> Cir. 2005); *Delta Serv. and Equip, Inc. v. Ryko Mfg. Co.*, 908 F.2d 7, 12 (5<sup>th</sup> Cir. 1990); *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 831 (5<sup>th</sup> Cir. 1990).<sup>3</sup>

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<sup>3</sup> In a recent decision reviewing a district court’s exclusion of parol evidence when granting summary judgment, this Court cited a Fifth Circuit decision for the proposition that the exclusion should stand unless the trial court abused its discretion or affected “a substantial right of the defendant.” *Transcore, LP v. Elec. Trans. Consultants Corp.*, 563 F.3d 1271, 1277 (Fed. Cir. 2009) (*quoting U.S. v. Saldana*, 427 F.3d 298, 306 (5<sup>th</sup> Cir. 2005)). *Saldana*, a criminal case, featured review of a district court’s evidentiary ruling at trial not involving parol evidence or construction of a contract. *See* 427 F.3d at 306. As the decisions cited above illustrate, however, the Fifth Circuit does

## II. The District Court Erred in Applying the Release to Citrix's Infringement After the Effective Date of the Agreement

The district court committed legal error in applying the Release to bar Accolade's claims based on Citrix's infringement of the '888 patent after the effective date of the Agreement, April 6, 2009. This Court should reverse the decision below in that regard and remand the case for trial of Accolade's claims of infringement post-dating April 6.

The Release states that Accolade "releases, acquits and forever discharges" various "Cisco Released Parties" (Cisco, Affiliates, Authorized Third Parties and others) from variously described claims (actions, causes of action, claims or demands, etc.) for "known and unknown acts, including without limitation any claim of infringement of the Licensed Patents, *that happened prior to the Effective Date.*" A. 103 (Agreement § 3.1) (emphasis added). Hence, the released claims are those based on acts, including infringement, "that happened prior to the effective date." *Id.* Claims not based on acts that happened prior to the effective date – but on acts that happened

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not apply this more stringent standard when reviewing lower court decisions refusing to consider parol evidence offered to oppose summary judgment, but simply decides the legal question *de novo* according to the state's parol evidence rule. Moreover, even in the context of evidentiary rulings at trial, the Fifth Circuit holds that, "where the admissibility determination necessarily involves a substantive legal decision, the court should review *de novo* the validity of the underlying legal analysis." *H&W Indus., Inc. v. Occidental Chem. Corp.*, 911 F.2d 1118, 1121 (5<sup>th</sup> Cir. 1990) (reviewing trial court's exclusion of parol evidence at trial *de novo*).

afterward – cannot be barred by the Release. Even Citrix appears to have acknowledged this in its brief to the district court, when it wrote:

Under the plain language of the Cisco Agreement, Accolade has clearly and unambiguously released Cisco, Authorized Third Parties, and all of their users and customers, “from any and all actions, causes of action, claims or demands “for known and unknown acts” *occurring prior to April 6, 2009*, including any claim of infringement of the ‘888 patent.

A. 84 (emphasis added).

The district court’s conclusion that the Release covers claims based on actions post-dating the effective date of the Agreement is based on the fact that the Release “forever discharges” the released parties, and that it covers “current and former” Cisco users and customers. Add. 7. Neither phrase serves to extend the Release to future claims.

The word “forever” as used in the Release is an adjective modifying “discharges.” A. 102. Its purpose, therefore, is to define the duration of the Release. Accolade does not dispute that the Release lasts “forever.” But the duration of the Release is irrelevant to the type of claims released. Put differently, inclusion of the phrase “forever discharges” answers the question, “how long does the Release operate?” But it has nothing to do with the question, “what claims are released?” Regardless of the time period during which the Release is in effect, it only covers certain specified claims, namely, those for “acts, including... infringement... that happened prior to the Effective

Date.” A. 103. In applying the word “forever” beyond the single word it modifies – “discharges” – to the later portion of the sentence describing the nature of claims released, the district court simply misread § 3.1.

The district court’s construction of the Release also violates the fundamental canon of interpretation requiring all words of a contract to be given effect. *See* CAL. CIV. CODE § 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable”); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 909 (Cal. 2005) (noting court’s mandate “to interpret contracts in such a manner as... to ‘give effect to every part’” (citations omitted)); *In re Marriage of Lund*, 94 Cal. Rptr. 3d 84, 95 (Cal. Ct. App. 2009) (reading one portion of contract to “undo” another “violates basic principles of contract interpretation,” including § 1641). The district court effectively read “that happened prior to the Effective Date” out of the Release altogether. Obviously, if use of the word “forever” was intended to release claims based on future conduct, there would have been no need to include “that happened prior to the Effective Date” in the Release. The district court’s construction improperly renders this phrase superfluous. *See, e.g., Bush v. Cal. Conserv. Corps*, 185 Cal. Rptr. 892, 897 (Cal. Ct. App. 1982) (disapproving proposed construction rendering contractual terms superfluous).

The district court's misapplication of "forever" in § 3.1 appears to stem from the notion that a perpetual release necessarily reaches future claims. But there is nothing anomalous or contradictory about a permanent release that only covers prior claims. Although a releasee who obtains everlasting immunity from liability for claims arising before the release became effective has not secured protection against suit for future violations, the perpetuity of the release still serves the valuable function of permanently setting past conduct off limits to legal scrutiny. It ensures that the releasing party cannot change its mind and, at some later date, attempt to revive claims based on pre-release conduct. Thus, despite the releasee's continued exposure to liability for misconduct committed after the release becomes effective, the word "forever" still has utility in the release. The "effective date" cut-off also allows the releasee to change its behavior and conform to the new restriction despite past violations. Hence, it is common for one party to "forever discharge" another for claims that arose before a particular date, such as the effective date of the settlement. *See, e.g., Howmedica Osteonics*, 540 F.3d at 1342 (Fed. Cir. 2008) (release "forever discharge[d] party from claims relating to acts "on or before the effective date of this Agreement"); *Simmons v. Small Bus. Ass'n*, 475 F.3d 1372, 1373 (Fed. Cir.) (same), *cert. denied*, 128 S. Ct. 361 (2007); *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 856 (Fed. Cir. 1999) (same).

The district court was equally mistaken in concluding that the Release bars claims based on acts after the effective date of the Agreement because it covers “current and former” Cisco customers. A. 27. The court observed that “the release provision never ceases to apply to current and former customers,” *id.*, but, again, who the Release protects says nothing about what claims are released. Indeed, if the district court is correct and Cisco and Accolade intended the Release to cover acts of infringement post-dating the effective date of the Agreement, one would expect § 3.1 to mention *future* users and customers of Cisco products, not merely current and past ones. As with the word “forever,” the court lifted a phrase relevant to another part of the Release – the definition of “Cisco Released Parties” – and applied it to the later portion demarcating those claims the parties agreed to release.

The district court’s plain misconstruction of the Release requires this Court to reverse the judgment below and remand Accolade’s claims against Citrix for infringement committed after April 6, 2009 for trial.

**III. The District Court Erred By Refusing to Consider Extrinsic Evidence Establishing That Accolade and Cisco Did Not Intend the Agreement to Terminate Accolade’s Claims Against Citrix**

Aside from the district court’s misreading of the Release, the court more generally erred in refusing to consider the extrinsic evidence Accolade offered in opposition to Citrix’s motion. That evidence demonstrates that Accolade and

Cisco did not intend for their Agreement to wipe out Accolade's ongoing lawsuit against Citrix, or immunize any third party whose products or services infringe independent of Cisco products. The Court should therefore remand the case to the district court so it can consider Accolade's parol evidence in the first instance, permit additional discovery as needed and as Accolade requested, and make the necessary factual determinations regarding whether (i) Accolade and Cisco intended to cover Citrix as an unnamed third party beneficiary of their Agreement; (ii) the Agreement only covers third parties whose products and services do not separately infringe, as Accolade contends; and (iii) the GoTo Services infringe the '888 patent separate and apart from Cisco's products.

A. **Accolade Was Permitted to Request Consideration of its Extrinsic Evidence as an Alternative Argument Below and May Advance Additional Grounds for that Result on Appeal**

Initially, the district court erred when it decided it would not consider the Hickman and Mayer-Patel declarations because Accolade argued that the Agreement was unambiguous in its favor and only asked for its parol evidence to be considered if the court adopted Citrix's proposed construction of the Agreement. A. 28. Accolade's approach was nothing more than garden-variety argument in the alternative, which courts deciding contract disputes consider routinely and neither disapprove nor refuse to entertain, as the district court did here. *See, e.g., Barnard Constr. Co., Inc. v. City of Lubbock*, 457 F.3d 425,

428-29 (5<sup>th</sup> Cir. 2006); *M.A. Motenson Co. v. Brownlee*, 363 F.3d 1203, 1205-06 (Fed. Cir. 2004). There were not simply two choices – unambiguous, regardless of the interpretation chosen and in which case parol evidence was *per se* irrelevant, or ambiguous – and it was not inconsistent or illogical for Accolade to maintain that one of the possible constructions would leave the Agreement’s terms at odds with one another and invite clarification of the incoherence through outside evidence.

On appeal, Accolade does advance two additional reasons why the district court should have considered its extrinsic evidence beyond simply the Agreement’s ambiguity when construed as Citrix requested: (i) it is specifically permitted under California law to determine whether Citrix was intended to be a third party beneficiary of the Agreement, and (ii) it is allowed to show the Agreement is reasonably susceptible to the interpretation put forth by Accolade regardless of its supposed facial clarity. Because these two rationales support the same result Accolade requested below – consideration of the extrinsic evidence if Citrix’s construction was adopted – they are properly urged in this Court. *See, e.g., Harris Corp. v. Ericsson, Inc.*, 417 F.3d 1241, 1251 (Fed. Cir. 2005) (permitting argument “on a different theory” than argued to the trial court because appellate theory shared “the same concept” and sought the same “ultimate conclusion”); *accord O2 Micro Int’l Ltd. v. Beyond Innovation Tech.*

*Co., Ltd.*, 521 F.3d 1351, 1359-60 (Fed. Cir. 2008) (“new or additional arguments” in support of same claim construction permitted on appeal) (quotation omitted); *Interactive Gift Express, Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1347 (Fed. Cir. 2001) (same).

Moreover, because Accolade placed the question whether to consider its parol evidence properly and squarely before the district court, that court was not free to ignore applicable California law, regardless of whether the parties specifically invoked it, and this Court may consequently consider that law on appeal. *See Kamen v. Kemper Fin. Serv. Inc.*, 500 U.S. 90, 99 (1991) (party that did not urge applicability of state law below not precluded from arguing it on appeal). “When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” *Id.*; *accord Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir.) (same, applying *Kamen*), *cert. denied* 537 U.S. 823 (2002). The district court, of course, had its own fundamental obligation to apply binding California law governing the consideration of extrinsic evidence – yet it failed to cite even one California decision on the subject.

Finally, even if Accolade might otherwise be precluded from arguing these alternate supporting grounds for the consideration of extrinsic evidence on

appeal, “an appellate court retains case-by-case discretion over whether to apply waiver.” *Harris*, 417 F.3d at 1251. This Court will consider arguments not made below when “the proper resolution is beyond any doubt” or “the issue involves a pure question of law and refusal to consider it would involve a miscarriage of justice.” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Harris*, 417 F.3d at 1252 n. 3; *Interactive Gift Express*, 256 F.3d at 1345; *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1531 (Fed. Cir. 1995). Both exceptions apply here.

As set forth in detail below, there is simply no question that California law required consideration of Accolade’s extrinsic evidence regardless of whether the court first read the Agreement and found it to be unambiguous. The district court’s contrary ruling was plain legal error. That error also wreaked a serious miscarriage of justice in this case. The district court abruptly short-circuited claims heavily litigated for years on the eve of trial.

With no apparent investigation into California law, the court effected this result based on a settlement agreement reached with another party that fails even to mention Citrix or the case being terminated. This unexpected outcome, which Citrix neither

bargained nor paid for, is harsh and unfair and should be compelled only if the law clearly allows no other result.<sup>4</sup>

In sum, the district court was wrong to refuse to entertain Accolade's request that it consider extrinsic evidence simply because Accolade argued the point in the alternative, and Accolade may present additional arguments in support of the consideration of that evidence on appeal.

**B. The District Court Should Have Considered the Extrinsic Evidence Accolade Offered to Determine Whether Citrix is a Third Party Beneficiary of the Agreement**

California law specifically permits the consideration of parol evidence to determine whether third parties were intended to be the beneficiaries of other

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<sup>4</sup> This Circuit's law governs Accolade's latitude to advance additional arguments supporting the consideration of extrinsic evidence on appeal. *See Harris*, 417 F.3d at 1250 (discussing choice of law); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1365 (Fed. Cir. 2001) (applying Federal Circuit law to ascertain whether party's settlement agreement waived later argument of patent invalidity). Here, as in *Harris* and *Flex-Foot*, the question is "intimately bound up with patent enforcement." *Harris*, 417 F.3d at 12. Indeed, the decision below completely forecloses Accolade's ability to enforce the '888 patent against Citrix and many others. To the degree Fifth Circuit law is relevant, that court applies a "plain error" standard to unpreserved error. *See Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123-24 (5<sup>th</sup> Cir. 1997). The district court's refusal to consider Accolade's parol evidence constitutes plain error. First, the court's misapplication of California law was, as is discussed *infra.*, "clear" or "obvious." *Id.* at 1125. The court's error also "affect[ed] the outcome of the proceeding," *id.*, because consideration of the Hickman and Mayer-Patel declarations would have at least created a fact issue about the settling parties' intent and precluded summary judgment. Finally, the court's mistake "seriously affect[ed] the fairness" of this case. *Id.* at 1128. As noted above, the decision and its surprise result are grossly unfair to Accolade.

parties' settlement agreements. The district court's refusal to consider the Hickman declaration for this purpose constitutes clear reversible error.

In *Hess v. Ford Motor Co.*, 41 P.3d 46 (Cal. 2002), the plaintiff, seriously injured in a rollover accident, settled with the driver of the other vehicle but intended to pursue a claim against Ford, the maker of his own truck. *See id.* at 49. Despite this plan, his settlement agreement with the other driver released "all other... corporations... from any and all claims" due to the accident. *Id.* Ford therefore sought dismissal of the plaintiff's suit as a third party beneficiary of his agreement with the other driver. *See id.* at 49-51. In opposition, the plaintiff introduced evidence from his attorney and the other driver's insurance adjuster that they had not intended to release Ford.

The California Supreme Court held that the plaintiff's extrinsic evidence negated the plain language of the settlement agreement. It began by noting that "a putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit it." *Id.* at 51 (quotation and citation omitted). "Thus, the circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement." *Id.* (quotation and citation omitted). Language resulting from mistake, or which inadequately expresses the parties' intentions, may be

disregarded or reformed by the court, and the plaintiff need not specifically ask for “reformation” but must only establish the parties’ true purpose. *Id.* at 52.

In light of these principles, the *Hess* court held that the plaintiff’s parol evidence was properly admitted to show that inclusion of the language releasing Ford and other third parties had been an error: “Extrinsic evidence is necessary because the court must divine the true intentions of the contracting parties and determine whether the written agreement accurately represents those intentions.” *Id.* Because the evidence indicated that the settling parties had no wish to release Ford, but had simply used a boilerplate term without considering its effect on later cases, the court rejected Ford’s defense “despite the contractual language.” *Id.* at 53-54, 54-55. Notably, it did so though it recognized the plaintiff was likely “guilty of ordinary negligence” in executing a release expressly extinguishing claims against other tortfeasors. *Id.* at 55.

*Hess* is not alone in endorsing the consideration of extrinsic evidence in order to determine whether settlement agreements are intended to cover claimed third party beneficiaries. In *Neverkovec v. Fredericks*, 87 Cal. Rptr. 2d 856 (Cal. Ct. App. 1999), the plaintiff executed a release similar to that in *Hess*. *Id.* at 860. Nonetheless, the court held that, “[b]ecause the court must consider the circumstances of the contracting parties’ negotiations to determine whether a third party not named in the release was an intended beneficiary, it will seldom

be sufficient for the third party simply to rely on a literal application of the terms of the release.” *Id.* at 865. The court cited CAL. CODE CIV. P. §§ 1856(g) and 1860, which permit consideration of extrinsic evidence relevant to “the circumstances under which the agreement was made,” and concluded:

Our Supreme Court has held that “[i]n determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the surrounding circumstances and negotiations of the parties in making the contract is both relevant and admissible. And, in ‘[i]n the absence of grounds for estoppel, the contracting parties should be allowed to testify as to their actual intention.’”

*Id.* at 866-67 (quoting *Garcia v. Truck Ins. Exch.*, 682 P.2d 1100, 1105 (Cal. 1984)). The court reversed summary judgment for the defendant. *See id.* at 868-70.

In *Appleton v. Waessil*, 32 Cal. Rptr. 2d 676 (Cal. App. Ct.), *rev. denied* (1994), the trial court dismissed claims against one defendant based on a release of “all other persons” plaintiff executed with other defendants, but the court of appeals reversed, holding that the plaintiff’s extrinsic evidence required a trial on the question of third party beneficiary status. *Id.* at 677-69. That evidence included plaintiff’s counsel’s declaration that he advised one of the settling defendant’s counsel that the plaintiff would be proceeding against the remaining co-defendant, and the fact only the settling defendants, and not the non-settling co-defendant, was initially dismissed from the case. *Id.* at 679.

Similarly, in *Asare v. Hartford Fire Ins. Co.*, 2 Cal. Rptr. 2d 452 (Cal. Ct. App. 1991), *rev. denied* (1992), the plaintiff filed a discrimination suit against Hartford and others but, in a parallel workers compensation proceeding, signed a release arguably covering Hartford's co-defendants. *See id.* at 453. The plaintiff's counsel testified that the release was not meant to bar the discrimination suit, though Hartford's counsel had no memory of the negotiation. *See id.* at 454. Reversing summary judgment, the court of appeals held that the plaintiff's extrinsic evidence gave rise to an issue of fact regarding the reach of the release. *See id.* at 455-56.

Finally, in *Lexington Ins. Co. v. Sentry Select Ins. Co.*, \_\_\_ F. Supp. 2d \_\_\_, 2009 WL 1586938 (E.D. Cal., June 5, 2009), a tort defendant's primary insurer invoked its release agreement with the defendant in an attempt to bar subrogation claims asserted by an excess carrier. *See id.* at \*\*8-9. Citing *Hess* and *Garcia*, the court noted that evidence of the parties' negotiations was admissible and relevant, and that the literal terms of the release would not be enforced to extend it to cover the excess carrier. *See id.* at \* 10. Because the circumstances surrounding the release did not clearly indicate that the primary insurer and the defendant intended to bar the subrogation claims, the court denied summary judgment. *See id.* at \*\* 10-11.

Even in cases where California courts hold that a settlement agreement releases third parties, they look to see whether parol evidence indicates that the settling litigants actually intended that result. Thus, in one case, the court specifically noted the absence of “declarations or other evidence tendered to show” the release was not meant to reach the third party, leaving the court without “direct evidence of the parties’ intentions.” *Gen. Motors Corp. v. Sup. Ct.*, 15 Cal Rptr. 2d 622, 626-27 (Cal. Ct. App. 1993). “We must assume,” the court concluded, “that, *in the absence of any evidence to the contrary*, the parties intended what is expressed in the writing, *i.e.*, to release” other entities. *Id.* at 627 (emphasis added). Other cases feature a similar void of evidence of the settling parties’ intentions, *see, e.g., Steve Schmidt & Co. v. Berry*, 228 Cal. Rptr. 689, 697 (Cal. Ct. App.), *rev. denied* (1986); or evidence bearing only on one settling party’s “undisclosed intent” concerning third party beneficiaries, *see, e.g., Brinton v. Bankers Pension Serv., Inc.*, 90 Cal. Rptr. 2d 469, 476 (Cal. Ct. App. 1999); or both. *See, e.g., Winet v. Price*, 6 Cal. Rptr. 2d 554, 558-59 (Cal. Ct. App. 1992).

In this case, the extrinsic evidence Accolade submitted with its opposition to Citrix’s motion establishes that Accolade and Cisco did not intend Citrix to be a third party beneficiary of the Agreement and to thereby terminate the case against Citrix, which was then fewer than two months from trial after

years of active litigation. A. 311-13.

Moreover, the circumstances surrounding the negotiation and consummation of the Agreement could hardly be more at odds with the notion that Citrix was an intended third party beneficiary.

The extrinsic evidence and circumstances present here are exactly the sort that California courts hold preclude summary judgment on the question of third party beneficiary status. As in *Hess*, *Neverkovec*, *Appleton* and *Asare*,

*See Hess*, 41 P.3d at 53-54; *Neverkovec*, 87 Cal. Rptr. 2d at 869; *Appleton*, 32 Cal. Rptr. 2d at 678, *Asare*, 2 Cal. Rptr. 2d at 454.

*See*

*Hess*, 41 P.3d at 54 (“The contracting parties openly discussed Hess’s intention to sue Ford”); *Appleton*, 32 Cal. Rptr. 2d at 679 (citing plaintiff’s counsel’s declaration that he told settling counsel “that appellant would be proceeding against respondent”); *Asare*, 2 Cal. Rptr. 2d at 454 (“According to Levine, he and England had a conversation in which they both agreed the compromise and release would not be interpreted as a bar to Asare’s discrimination claim”).

Additionally, California decisions make clear that a release's failure to specifically mention the claimed third party beneficiary – as here – strongly weighs against any finding of beneficiary status. The *Appleton* court stated:

Under the facts presented in the instant case, the evidence offered by appellant raised an issue of the parties' intent as to whether respondent was to be included in the category of "all persons" in the release agreement. It bears repeating that respondent was not just a peripheral actor in this matter. As mentioned, he was the cause of the accident and was a named party defendant. If it was the intent of the parties to release respondent, one has to wonder why such an important player in the cast of characters was not specifically named in the document. The simple fact that respondent was not named created an apparent ambiguity. The extrinsic evidence provided by appellant tended to show that the intent of the parties was not to include respondent in the settlement.

*Appleton*, 32 Cal. Rptr. 2d at 678. Other California decisions give similar weight to a settlement agreement's failure to specifically name the putative third party beneficiary. *See, e.g., Hess*, 41 P.3d at 54 ("The failure of the Release to specifically name Ford even though the signatories to the Release had counsel and were aware of Hess's claims against Ford also suggests that the release did not cover those claims"); *Asare*, 2 Cal. Rptr. 2d at 455-56; *Lexington Ins. Co.*, \_\_ F. Supp. 2d. \_\_, 2009 WL 1586938 at \* 11.

Furthermore, here, as in *Lexington*, the fact that there is "no discernible motive" for Accolade to have released Citrix from claims regarding its entire portfolio, with no payment from Citrix, through a contract with another

company that does not mention Citrix, also obviously indicates that the Agreement was not intended by the parties to cover Citrix. See \_\_\_ F. Supp. 2d \_\_\_, 2009 WL 1586938 at \* 11. So does the fact that only Webex was dismissed following the settlement, and not Citrix. See *Appleton*, 32 Cal. Rptr. 2d at 679.

At the argument before the district court, Citrix's counsel essentially acknowledged the unlikelihood of the parties' intent to release Citrix, though he contended that result was required anyway because of the literal terms of the release and other provisions:

We submit to you, Your Honor, that they may wish they had written this differently...

They may not have intended this result, but that is – hornbook contract law says the agreement is unambiguous, which they have essentially admitted, then they have to be bound by the clear and unambiguous terms of the agreement.

A. 372. Citrix is wrong in subordinating Accolade's and Cisco's intent to its own reading of their contract. The core principle by which contracts are interpreted and enforced in California requires that they be construed "to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." CAL. CIV. CODE § 1636. More specifically, the California case law set forth above requires the consideration of extrinsic evidence on the question of whether settling litigants intended to benefit third parties, regardless of the perceived clarity of the terms

of the release. The district court's failure to review and take account of the parol evidence provided by Accolade as well as the surrounding circumstances leading to the Agreement was therefore error requiring reversal and remand.

**C. The District Court Should Have Considered Accolade's Extrinsic Evidence Because it is Relevant to Accolade's Proposed Reading of the Agreement**

In granting Citrix's motion, the district court held: "The Agreement release provision is unambiguous; thus, extrinsic evidence is not necessary to interpret it." Add. 9. This conclusion contravenes California law. Actually, the district court was required to consider the extrinsic evidence *to determine ambiguity*, even if it found the document to be clear on its face. The evidence should have been considered simply because it was relevant to show the Agreement is reasonably susceptible to the interpretation put forth by Accolade, namely, that it only immunizes infringement by Cisco customers whose products and services do not infringe independent of their Cisco products.

California courts do not only consider parol evidence to clarify or resolve ambiguity determined to exist in advance, before the evidence is examined. Rather, "[i]n contrast to many other states, California has a liberal parol evidence rule: It permits consideration of extrinsic evidence to explain the meaning of the terms of a contract even when the meaning appears unambiguous." *Foad Consulting Grp., Inc. v. Musil Givan Azzalino*, 270 F.3d

821, 826 (9<sup>th</sup> Cir. 2001). As one panel of the Ninth Circuit commented, California may not have “expressly abolish[ed] the parol evidence rule,” but it has “cut the life out of it by permitting the introduction of extrinsic evidence to demonstrate the existence of an ambiguity even when the language of a contract is perfectly clear.” *Wilson Arlington Co. v. Prudential Ins. Co. of Am.*, 912 F.2d 366, 370 (9<sup>th</sup> Cir. 1990).

The seminal decision enunciating California’s current parol evidence rule is *Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (1968). In that decision, the California Supreme Court held:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

*Id.* at 644. Trial courts should undertake “at least a preliminary consideration of all credible evidence offered to prove the intention of the parties,” including “testimony as to the circumstances surrounding the making of the agreement including the object, nature and subject matter of the writing so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.” *Id.* at 645 (quotations and internal ellipses omitted). California decisions since *Pacific Gas and Elec.* have adhered to its teaching. *See, e.g., Garcia*, 682 P.2d at 1103-05.

In light of this approach to extrinsic evidence, California courts apply “a two-step process” governing its consideration. *ASP Prop. Grp. v. Fard, Inc.*, 35 Cal. Rptr. 3d 343, 350 (Cal. Ct. App. 2005). “First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine ‘ambiguity,’ *i.e.*, whether the language is ‘reasonably susceptible’ to the interpretation urged by a party.” *Id.* (quoting *Winet*, 6 Cal. Rptr. 2d at 557); *accord Fremont Indem. Co. v. Fremont Gen. Corp.*, 55 Cal Rptr. 3d 621, 633 (Cal. Ct. App. 2007). “If in light of the extrinsic evidence the court decides the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step – interpreting the contract.” *Id.* (quotations omitted); *accord Fremont Indem.*, 55 Cal Rptr. 3d at 633; *Transcore*, 563 F.3d at 1277 n. 2.

Above all, “it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court’s own conclusion that the language of the contract appears to be clear and unambiguous on its face.” *Wolf v. Sup. Ct.*, 8 Cal. Rptr. 3d 649, 655-56 (Cal. Ct. App.), *rev. denied* (2004); *accord Fremont Indemnity*, 55 Cal Rptr. 3d at 633 (“A court cannot determine based on only the four corners of the document, without provisionally considering any extrinsic evidence offered by the parties, that the meaning of the document is clear and unambiguous”).

The district court in this case did the very thing the California court in *Wolf* described as “reversible error”: it read the Agreement, decided the terms were clear on their face, and declined for that reason to consider Accolade’s parol evidence. 8 Cal. Rptr. 3d at 655. It was not necessary for Accolade’s evidence to resolve or even create an ambiguity in the Agreement. The district court was required to consider the evidence as long as it was *relevant to* Accolade’s proposed construction. See *Pacific Gas and Elec.*, 442 P.2d at 644; *Garcia*, 682 P. 2d at 1103-04. Only after reviewing and analyzing the evidence could the court then determine whether an ambiguity exists, “*i.e.*, whether the language is ‘reasonably susceptible’ to the interpretation urged by” Accolade. *ASP Prop.*, 35 Cal. Rptr. 3d at 350 (quoting *Winet*, 6 Cal. Rptr. 2d at 557).

There can be no doubt that the Hickman and Mayer-Patel declarations are at least relevant to Accolade’s proposed construction of the Agreement.

By any measure, this testimony relates to Accolade’s position that the Agreement was not intended to immunize the separately infringing products of third parties. It therefore should have been considered by

the court below.<sup>5</sup> Whether, after evaluating the evidence, that court would or should have gone farther and admitted it for the purpose of ultimately construing the Agreement is a separate question. As set forth below, basic canons of contract interpretation dictate that Accolade's view of the Agreement is the more sensible one, and that the Agreement is at the very least "reasonably susceptible" to Accolade's construction. *See* pp. 47-49, *supra*. Regardless, however, the second step of admissibility was not reached below and is a question for the district court on remand, since the court omitted step one and ignored Accolade's evidence altogether. Irrespective of eventual admissibility and the final decision on the meaning of the Agreement, it was clear error not to consider the Hickman and Mayer-Patel declarations for the preliminary purpose of determining whether the Agreement is ambiguous to begin with.

**D. The District Court Should Have Considered Accolade's Extrinsic Evidence to Resolve the Ambiguity Present in the Agreement**

Even if California law only permitted courts to consider extrinsic evidence after determining beforehand that the contract is ambiguous, as the district court erroneously held, that court was wrong to conclude that the

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<sup>5</sup> In addition, Accolade sought the opportunity to conduct further discovery on the question of the parties' intent, given that only ten days elapsed between Citrix's motion and the date when the trial court conducted oral argument and announced its decision from the bench. Add. 8. The court erroneously determined that such discovery was unnecessary since the Agreement struck the court as clear on its face. *Id.*

Agreement unambiguously releases Accolade's claims against Citrix. In fact, the Agreement is internally inconsistent and therefore ambiguous as to the nature of the claims against third parties that are covered.

1. **The Agreement is Internally Inconsistent**

*See Syverson v. I.B.M. Corp.*, 461 F.3d 1147, 1158-60 (9<sup>th</sup> Cir. 2006) ( ; “the technical distinction between these terms is sometimes more apparent than real”); *Transcore*, 563 F.3d at 1275 (“a non-exclusive patent license is equivalent to ”). Citrix itself described these four provisions as “belt and suspenders.” A. 365.

Despite sharing the same purpose, these terms differ sharply in scope.

Finally, the Release is broader still and purports to release any buyer of any Cisco product – whether it uses that product to form a Combination Product or not – from any claim based on any act of any kind that happened prior to April 6, 2009. A. 102-03 (Agreement § 3.1). As Citrix’s counsel put it at the hearing below, “the release is as broad as it can be. There is not these definitions. There is not this combination product. There is not this other stuff in the release.” A. 372. Still, even Citrix acknowledged the problem inherent in reading the Release literally:

And, Your Honor, I agree that this could be – you know, if we were trying to argue in some way that because, you know, we had bought some copiers from Cisco that we are a customer of Cisco and, therefore, we are entitled to this relief, if we had gone out after we found out about this release and bought something from them and said oh, looky, looky, we have a get-out-of-jail-free card, you might likely look at that as a hyper-technical, “gotcha” sort of thing.

A. 354. Yet Citrix’s and the district court’s construction of the Release would permit exactly this sort of “gotcha” result, and one not permitted by

These four provisions – identical in purpose but so different in scope – cannot coherently be reconciled. They render the Agreement internally inconsistent and, therefore, ambiguous. Their variances raise the question: Did

Cisco and Accolade intend to release (i) any purchaser of any Cisco product for  
MATERIAL SUBJECT TO  
PROTECTIVE ORDER DELETED

