**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

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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.

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The material omitted from page 48-49 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,

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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.[1] 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.[2] This Court has jurisdiction over this

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[1] Citations to "A __" refer to the specified page(s) in the Appendix.

[2] 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

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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

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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).

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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.

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## 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.

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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.

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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

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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.*

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## 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 (5th 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 (5th Cir. 2008); *Condrey v. Suntrust Bank of GA.*, 429 F.3d 556, 562-64 (5th Cir. 2005); *Delta Serv. and Equip, Inc. v. Ryko Mfg. Co.*, 908 F.2d 7, 12 (5th Cir. 1990); *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 831 (5th Cir. 1990).[3]

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[3] 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 (5th 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 (5th Cir. 1990) (reviewing trial court's exclusion of parol evidence at trial *de novo*).