

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No.	CV 12-01365 BRO (RNBx)	Date	November 27, 2013
Title	NQUEUE INC. V. CONTROL SYSTEMS (USA) INC.		

Present: The Honorable **BEVERLY REID O’CONNELL, United States District Judge**

Renee A. Fisher

Not Present

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS)
ORDER DENYING DEFENDANT’S MOTION FOR PARTIAL
SUMMARY JUDGMENT [43]

I. INTRODUCTION

Pending before the Court is Defendant Control Systems (USA) Inc.’s motion for partial summary judgment against Plaintiff nQueue Inc. (Dkt. No. 43.) This lawsuit involves allegations of patent infringement. Nevertheless, the instant motion for summary judgment does not require an infringement analysis. Instead, the matter currently before the Court involves contract interpretation. In essence, in this action, Plaintiff accuses Defendant of infringing its patent, which Defendant denies. Yet, Defendant also argues, that, even if its product does fall within the scope of Plaintiff’s patent, Defendant is protected by a license provision contained in a 2012 settlement agreement. Basically, the settlement agreement, which was entered into by Plaintiff and an entity that now indirectly owns Defendant, provides that Defendant is protected by the license provision if it can prove three things: (1) Defendant is an entity acquired by a party to the settlement agreement; (2) Defendant’s products are not materially different than licensed products under the agreement; and (3) the license provision contemplates protecting an acquired entity such as Defendant.

For the following reasons, Defendant’s motion is DENIED.

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II. FACTUAL BACKGROUND

A. Defendant's Software Product

Defendant Control Systems (USA) Inc. is a software developer. One of the products it has developed is named Copittrak, which is software designed for multi-function photocopy machines, or Multi-Function Devices¹ (“MFDs”). (Opp’n 3.) In essence, the Copittrak software is embedded into an MFD, and when the MFD is used Copittrak maintains an accounting of that use. (See Mot. 3.) One possible application for Copittrak is in a law firm, where an attorney may wish to keep an accounting of the number of photocopies it makes for a client. (Mot. 3.) Then, the law firm can bill its client for the photocopies made in connection its legal representation of that particular client.

Copittrak is not the only software of its kind. Plaintiff nQueue also develops software that is similar to Copittrak, and a company named Equitrac Corporation apparently does as well. In fact, in 2011, Plaintiff sued Equitrac Corporation for patent infringement, in *nQueue Inc. v. Equitrac Corp.*, No. 11-04244 (C.D. Cal.). (See Boehm Decl. Ex. E, at 63.) On July 19, 2012, Plaintiff and Equitrac Corporation settled their dispute, and executed a settlement agreement, wherein Plaintiff granted a license to Equitrac Corporation. Of particular importance to this current lawsuit are three provisions of that settlement agreement: sections 1.2, 1.4, and 2.4. (Boehm Decl. Ex. E, at 63–65.)

B. The Settlement Agreement

Section 1.4 defines “Licensed Products” as “any products made, furnished, used, sold, offered for sale, imported, leased, or otherwise transferred or obtained by or for Equitrac or an Affiliate of Equitrac falling within the scope of any claims of the Patents-in-Suit.” (Boehm Decl. Ex. E, at 63.) Additionally, Section 1.4 provides that “‘Licensed Products’ shall also include products of *any entity acquired by a Party or Affiliate.*”

¹ A Multi-Function Device is a photocopy machine that may also function as a scanner, printer, or fax machine, among other things.

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(Boehm Decl. Ex. E, at 63 (emphasis added).) Nevertheless, products of an “entity acquired by a Party or Affiliate” are not “Licensed Products” if “the other Party [Plaintiff nQueue] can demonstrate that the acquired products are materially different than the Licensed Products existing as of the date of such acquisition.” (Boehm Decl. Ex. E, at 63.)

Section 1.2 defines an Affiliate as any entity “that controls, or is controlled by, or is under common control with that Party (either directly or indirectly) *as of the Effective Date of the Agreement.*” (Boehm Decl. Ex. E, at 63 (emphasis added).)

Section 2.4 is a license provision. In Section 2.4, nQueue “grants to Equitrac and its Affiliates, officers, employees, customers (direct and indirect) of Licensed Products of Equitrac, and suppliers, a fully paid-up, royalty-free, non-exclusive, worldwide, perpetual, non-terminable and irrevocable license under the Patents-in-Suit for Licensed Products.” (Boehm Decl. Ex. E, at 64.) Also relevant to the instant motion, the license in Section 2.4 includes the right to “convey to any customer of Equitrac or its Affiliate (whether direct or indirect purchasers and users), rights to use and resell Licensed Products.” (*Id.*)

C. Defendant’s Acquisition by Equitrac

On August 22, 2012, following the settlement agreement between Plaintiff and Equitrac, Plaintiff sued Defendant for patent infringement, asserting the same patents it had asserted against Equitrac. (Dkt. No. 1.) In December 2012, a few months after Plaintiff initiated this lawsuit, Defendant’s parent corporation was acquired by an entity named 0956899 B.C. Unlimited Liability Company, which had recently been acquired by Equitrac, to become an indirect wholly-owned subsidiary of Equitrac. Accordingly, Defendant contends that at that time it became an “entity acquired by a Party” to the settlement agreement, as specified in Section 1.4.²

² Defendant further contends its products are not “materially different” than “Licensed Products,” and therefore Defendant’s products are “Licensed Products,” as provided in Section 1.4. Moreover, Defendant argues that because its products are “Licensed Products,” then it must also be licensed to sell or resell its own products as “Licensed Products.”

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Therefore, on September 13, 2013, Defendant filed this instant motion, contending that subsequent to December 30, 2012, Defendant cannot be liable to Plaintiff for infringement because its products are “Licensed Products,” and it is an entity protected under the Section 2.4 license provision.

III. LEGAL STANDARD

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A disputed fact is material where its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.* A court may consider the pleadings, discovery and disclosure materials, and any affidavits on file. Fed. R. Civ. P. 56(c)(2). Where the moving party’s version of events differs from the non-moving party’s version, a court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party may satisfy that burden by showing “that there is an absence of evidence to support the non-moving party’s case.” *Id.* at 325.

Once the moving party has met its burden, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-moving party must go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 587. Only genuine disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (finding that the non-moving party must present specific evidence from which a reasonable jury could return a verdict in its favor). A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not

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significantly probative. *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Although a court may rely on materials in the record that neither party cited, it need only consider cited materials. Fed. R. Civ. P. 56(c)(3). Therefore, a court may properly rely on the non-moving party to specifically identify the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

Finally, the evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 253.

IV. DISCUSSION

In its motion, Defendant contends the Court should grant summary judgment on infringement as to all sales of its Copitrak software that occurred on or after December 31, 2012. (Mot. 1.) According to Defendant, on that date, it “received the immediate benefit of the license provision” included in a settlement agreement between Plaintiff, and Equitrac. (Mot. 1.) To support its position, Defendant makes two arguments: (1) Copitrak falls within the definition of a “licensed product,” (Mot. 12–14); and (2) Plaintiff cannot demonstrate that Copitrak is materially different than the Licensed Products, (Mot. 14–20). In opposition, Plaintiff asserts that (1) Defendant has failed to establish itself as an “entity acquired by a Party or Affiliate,” and therefore has failed to show Copitrak is a Licensed Product; (2) Copitrak is materially different than the Licensed Products; and (3) the settlement agreement’s license provision is inapplicable to Defendant because it is not Equitrac or one of its suppliers, nor is it a customer of Equitrac or one of its Affiliates. (Opp’n 1.) The Court agrees in part with Plaintiff.

As a preliminary matter, the Court notes that resolution of the parties’ dispute requires it to interpret terms of the settlement agreement entered into on July 19, 2012, between Plaintiff and Equitrac. Because a settlement agreement is in essence a contract,

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its terms should be construed according to “principles of local law which apply to interpretation of contracts generally.” *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Here, the settlement agreement provides that it “shall be construed, and the relationship between the parties determined, in accordance with the laws of California, notwithstanding any choice-of-law principle that might dictate a different governing law.” (Boehm Decl. Ex. E, at 68.) Accordingly, in construing the terms of the settlement agreement, the Court will apply California law.

Under California law, the fundamental goal of contract interpretation is to give effect to the mutual intention of the parties. *Cnty. of San Diego v. Ace Prop. & Cas. Ins. Co.*, 37 Cal. 4th 406, 415 (2005); *see* Cal. Civ. Code § 1636 (“A contract must be so interpreted so as 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.”). If possible, this intent is to be inferred solely from the written terms of the contract. *Ace Prop & Cas.*, 37 Cal. 4th at 415. And the terms are to be interpreted in their ordinary and popular sense. Cal. Civ. Code § 1644. Therefore, “[i]f contractual language is clear and explicit, it governs.” *Ace Prop. & Cas.*, 37 Cal. 4th at 415 (internal quotation marks omitted).

But where the parties disagree about the meaning of the contract, a court must construe it applying a two-step approach. *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1351 (2004). First, the court must determine as a matter of law whether the contract is ambiguous. *Id.* In making this determination, the court considers whether the contract’s language is reasonably susceptible to the interpretation urged by a party, and may properly consider any extrinsic evidence that would be relevant to this end. *See id.* If an ambiguity exists, the court moves to the second step in the analysis, and admits any extrinsic or parol evidence to assist in interpreting the contract. *Id.* If the parties do not present any parol evidence, or if the parol evidence is not in conflict, the court may resolve any ambiguities as a matter of law.³ *Id.*

Here, the parties have not submitted any extrinsic or parol evidence. Instead, Plaintiff relies on the plain language of the settlement agreement, (Opp’n 17–21), and

³ Otherwise, the parol evidence is submitted to the trier of fact, and the ambiguity is resolved as a matter of fact. *Wolf*, 114 Cal. App. 4th at 1351.

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Defendant points to alleged internal inconsistencies among its provisions, (Reply 3–5). Accordingly, the Court will determine whether there is an ambiguity based on the language of the contract itself.

The Court will begin its analysis by addressing Plaintiff’s first argument—whether Defendant’s products are “Licensed Products.”

A. Defendant’s Products are Licensed Products

In its motion, Defendant contends its products fall within the definition of “Licensed Products.” (Mot. 12–14.) In essence, Defendant argues it qualifies as “any entity acquired by a Party or Affiliate,” and therefore its products fall within the scope of “Licensed Products.”⁴ (See Mot. 12–14; Boehm Decl. Ex. E, at 63.) Plaintiff, however, disagrees.

As mentioned above, Section 1.4 of the settlement agreement defines “Licensed Product” in two ways. Essentially, a “Licensed Product” is any product made by or for Equitrac or one of its Affiliates that “fall[s] within the scope of any claims of the Patents-in-Suit.” (Boehm Decl. Ex. E, at 63.) But that is not all. “Licensed Products” also include “products of any entity acquired by [Equitrac or its Affiliates] unless [Plaintiff] can demonstrate that the acquired products are materially different than the Licensed Products existing as of the date of such acquisition.” (Boehm Decl. Ex. E, at 63.) Herein lies Plaintiff’s disagreement: it claims Defendant has not proven it is “an entity acquired by” Equitrac or its Affiliates. (See Opp’n 9, 21–23.) But the Court is not persuaded by Plaintiff.

In fact, Defendant has provided evidence that it is now an indirect, wholly-owned subsidiary of Equitrac Corporation.⁵ Therefore, it appears that Defendant is indeed “an

⁴ Of course, that is assuming they are not “materially different than the Licensed Products existing as of the date of such acquisition.” (Boehm Decl. Ex. E, at 63.)

⁵ At first, Defendant had failed to provide admissible evidence to prove this point: several key exhibits were not properly authenticated. “It is well established that unauthenticated documents cannot be considered on a motion for summary judgment. To be considered by the court, documents must be authenticated by and attached to an affidavit that meets the requirements of [Rule] 56(e) and *the affiant must be a person through whom the exhibits could be admitted* into evidence.” *Hal Roach Studios Inc. v. Richard Feiner and Co. Inc.*, 896 F.2d 1542, 1550–51 (9th Cir. 1989) (emphasis added) (internal

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entity acquired by a Party or Affiliate.” The connection is somewhat convoluted, but the evidence does create a chain linking the two entities. To simplify, the Court will present the connection in two steps. First, the Court will discuss Defendant’s evidence demonstrating that it is a wholly-owned subsidiary of an entity named Nuance Copittrak B.C. Unlimited Company. (Boehm Decl. Exs. K, N, P–R.) Second, the Court will discuss Defendant’s evidence showing that Nuance Copittrak B.C. Unlimited Corporation is a direct, wholly-owned subsidiary of Equitrac Corporation. (Boehm Decl. Exs. M, F, L, Q; Greenbaum Decl. ¶ 2; Pl.’s SGD ¶¶ 13–14.) Additionally, the charts below are an attempt to simplify the evidence.

Control Systems (USA) Inc. [Defendant] Is A Direct Wholly-Owned Subsidiary of Nuance Copittrak B.C. Unlimited Liability Company				
Entity	Relationship	Entity	Date	Exhibit
Control Systems (USA) Inc. [Defendant]	Owned By	Control Systems Inc.	21-Dec-84	K, R
Control Systems Inc.	Purchased By	0956899 B.C. Unlimited Liability Company	30-Dec-12	F
Control Systems Inc.	Changes Name To	0961278 B.C. LTD	30-Jan-13	N
0961278 B.C. LTD	Amalgamates With Other Entities To Become	0956899 B.C. Unlimited Liability Company	1-Feb-13	P
0956899 B.C. Unlimited Liability Company	Changes Name To	Nuance Copittrak B.C. Unlimited Liability Company	27-Mar-13	Q

Defendant presents Exhibits K and R. (Boehm Decl. Exs. K, R.) Exhibit K is a stock certificate indicating that an entity named Control Systems Inc. owns two-hundred common shares of Defendant, Control Systems (USA) Inc. (Boehm Decl. Ex. K.)

citations and quotation marks omitted). Therefore, “[a] document which lacks a proper foundation to authenticate it cannot be used to support a motion for summary judgment.” *Id.* at 1551. For this reason, the Court continued the original hearing date and permitted Defendant to submit supplemental declarations to properly authenticate the evidence upon which it was relying for summary judgment. (Dkt. No. 62.) Defendant did submit supplemental declarations, but those declarations yet failed to provide a proper foundation for several of the key exhibits. Accordingly, the Court ordered Mr. David Greenbaum to appear at the November 25, 2013 hearing. (Dkt. No. 67.) After a colloquy with Mr. Greenbaum, who was under oath at the time, the Court is satisfied that the pertinent exhibits are now properly authenticated, and therefore may be considered at this time.

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Whereas ownership of two-hundred shares is not significant by itself, Defendant also provides Exhibit R, which is a corporate document indicating that “200 shares[] compris[es] all of the outstanding shares . . . of Control Systems (USA) Inc.” (Boehm Decl. Ex. R.) Together, these two documents prove that Control Systems Inc. owns *all* of the outstanding shares of Defendant, Control Systems (USA) Inc., making Defendant a direct, wholly-owned subsidiary of Control Systems Inc.

Defendant also submits Exhibit F, a complex Stock and Asset Purchase Agreement between several entities. (Boehm Decl. Ex. F.) Most relevantly, however, the agreement involves Control Systems Inc. and 0956899 B.C. Unlimited Liability Company.⁶ (*See id.*) From this document, Defendant establishes that Control Systems Inc.—the parent of Defendant—was purchased by 0956899 B.C. Unlimited Liability Company. (*See id.* at 82.) Thus, by this transaction, Defendant became an indirect, wholly-owned subsidiary of 0956899 B.C. Unlimited Liability Company.

Next, Defendant provides Exhibits N, P, and Q. Exhibit N is a Certificate of Continuation issued by the Registrar of Companies of British Columbia, Canada. (Boehm Decl. Ex. N.) The certificate shows that Control Systems Inc., Defendant’s parent, changed its name to 0961278 B.C. Ltd. on January 30, 2013. (*See id.*) Exhibit P is a Certificate of Amalgamation, also issued by the Registrar of Companies of British Columbia, and indicates that 0961278 B.C. Ltd. amalgamated with several other companies to become one single entity, 0956899 B.C. Unlimited Liability Company—the entity that had purchased Control Systems Inc.—on February 1, 2013 (Boehm Decl. Ex. P.) Thus, this evidence establishes that as of February 1, 2013, Defendant was a direct, wholly-owned subsidiary of 0956899 B.C. Unlimited Liability Company. Exhibit Q is a Certificate of Change of Name. It shows that on March 27, 2013, 0956899 B.C. Unlimited Liability Company changed its name to Nuance Copittrak B.C. Unlimited Liability Company. (Boehm Decl. Ex. Q.)

Therefore, Defendant’s parent, Control Systems Inc., appears to have become Nuance Copittrak B.C. Unlimited Liability Company, making Defendant a direct, wholly-owned subsidiary of Nuance Copittrak B.C. Unlimited Liability Company.

⁶ Also of importance, Exhibit F indicates that Nuance Communications Inc. owns 0956899 B.C. Unlimited Liability Company as an indirect, wholly-owned subsidiary. (*See Greenbaum Decl. Ex. F.*)

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Plaintiff presents no countervailing evidence to rebut Defendant’s proof that establishes it is a wholly-owned subsidiary of Nuance Copittrak B.C. Unlimited Liability Company. Instead, Plaintiff merely attempts to point out insufficiencies in Defendant’s evidence. (Pl.’s SGD ¶ 12.) Plaintiff does this by contending Exhibit K of Mr. Boehm’s Declaration “only identifies Control Systems, Inc. as a shareholder of CS USA [Defendant] but does not provide the total shares that make up CS USA.” (Pl.’s SGD ¶ 12.) Nevertheless, as discussed above, Exhibit F of Mr. Boehm’s Declaration establishes that the number of shares owned by Control Systems Inc.—two-hundred—is the *entirety* of the outstanding shares of Control Systems (USA) Inc. Therefore, Plaintiff fails to create a material issue of fact as to whether Defendant is a wholly-owned subsidiary of Nuance Copittrak B.C. Unlimited Liability Company.

Defendant also presents evidence that Nuance Copittrak B.C. Unlimited Liability Company is a direct, wholly-owned subsidiary of Equitrac Corporation.

Nuance Copittrak B.C. Unlimited Liability Company Is A Direct Wholly-Owned Subsidiary of Equitrac Corp.				
Entity	Relationship	Entity	Date	Exhibit
Nuance Copittrak B.C. Unlimited Liability Company	Formerly Named	0956899 B.C. Unlimited Liability Company	27-Mar-13	Q
0956899 B.C. Unlimited Liability Company	Wholly-Owned Subsidiary of	Nuance Document Imaging Inc.	6-Dec-12	M, F
Nuance Document Imaging Inc.	Was Formerly Named	Equitrac Corporation	1-Oct-12	L
Equitrac Corporation	Wholly-Owned Subsidiary of	Nuance Communications Inc.	15-Jun-11	Greenbaum Decl. ¶ 2

As discussed above, Exhibit Q establishes that Nuance Copittrak B.C. Unlimited Liability Company is the same entity as 0956899 B.C. Unlimited Liability Company—it simply has a new name. (*See* Boehm Decl. Ex. Q.) Defendant also presents Exhibits M and F to show that 0956899 B.C. Unlimited Liability Company is a wholly-owned subsidiary of Nuance Document Imaging Inc. Exhibit M is a corporate document indicating that Nuance Document Imaging Inc. desired to form a new company in British Columbia, and that the name would be “_____ B.C. Unlimited Liability Company.”

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(Boehm Decl. Ex. M, at 224.) As discussed in further detail below, the blank space was to be filled in with “0956899.” Exhibit F supports this, as noted above in footnote 6, by indicating that 0956899 B.C. Unlimited Liability Company is “an *indirect* wholly owned subsidiary of Nuance Communications Inc.”⁷ (Boehm Decl. Ex. F, at 82 (emphasis added).)

Next, Defendant submits Exhibit L, which shows an amendment to the articles of incorporation of an entity named Equitrac Corporation. (Boehm Decl. L.) The amendment changes the name of Equitrac Corporation to Nuance Document Imaging Inc. (*Id.* at 221.) Thus, whereas 0956899 B.C. Unlimited Liability Company—who is now named Nuance Copitrak B.C. Unlimited Liability Company—is a direct, wholly-owned subsidiary of Nuance Document Imaging Inc., it is a subsidiary of the entity formerly named Equitrac Corporation.

In short, Defendant has presented evidence that it is an indirect, wholly-owned subsidiary of Equitrac Corporation. That is, Control Systems (USA) Inc. is a direct, wholly-owned subsidiary of Nuance Copitrak B.C. Unlimited Liability Company, which is a direct wholly-owned subsidiary of Equitrac Corporation. Thus, Defendant is consequently an *indirect* wholly-owned subsidiary of Equitrac Corporation. Therefore, although the relationship is indirect, the evidence presented shows that Defendant is indeed an “entity acquired by a Party or Affiliate.” (*See* Boehm Decl. Ex. E, at 63.)

Again, Plaintiff presents no evidence to rebut the relationship between Defendant and Equitrac Corporation. Plaintiff does, however, attempt to point to insufficiencies in Defendant’s evidence. Plaintiff contends Exhibit M of Mr. Boehm’s Declaration does not list 0956899 B.C. Unlimited Liability Company, and therefore the evidence does not support the assertion that is a wholly-owned subsidiary of Nuance Document Imaging Inc. (Pl.’s SGD ¶ 15.) In fact, upon reviewing Exhibit M, the Court acknowledges that 0956899 B.C. Unlimited Liability Company does not appear anywhere on the document. (*See* Boehm Decl. Ex. M, at 224.) Instead, the document indicates that Nuance Document Imaging Inc. will form a company, and “[t]he name of the Company will be “_____ B.C. Unlimited Liability Company.” (Boehm Decl. Ex. M, at 224.)

⁷ As will be discussed shortly, Nuance Document Imaging Inc. is an indirect, wholly-owned subsidiary of Nuance Communications Inc.

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Therefore, evidently something was intended to go into that empty space, but it wasn't completed. Nevertheless, this is not fatal to Defendant's claim.

In his original declaration, Mr. Greenbaum affirms that “[o]n or around December 6, 2012, a wholly-owned Canadian subsidiary of Nuance Document Imaging, Inc. was incorporated. This entity was originally assigned the name 0956899 B.C. UNLIMITED LIABILITY COMPANY.” (Greenbaum Decl. ¶ 4.) The date on Exhibit M is December 5, 2012, which is one day *before* the entity was even formed. Additionally, from Exhibit F of Mr. Boehm's Declaration, it is evident 0956899 B.C. Unlimited Liability Company is an indirect, wholly-owned subsidiary of Nuance Communications Inc. (Boehm Decl. Ex. F, at 82.) On June 15, 2011, Nuance Communications Inc. acquired Equitrac Corporation, now named Nuance Document Imaging Inc. (Greenbaum Decl. ¶ 2.) Therefore, if 0956899 B.C. Unlimited Liability Company is an *indirect*, wholly-owned subsidiary of Nuance Communications Inc., and Nuance Document Imaging Inc. is a *direct*, wholly-owned subsidiary of Nuance Communications Inc. Given Mr. Greenbaum's declaration, the only reasonable inference is that 0956899 B.C. Unlimited Liability Company is a direct, wholly-owned subsidiary of Nuance Document Imaging Inc.

Accordingly, the undisputed evidence presented by Defendant supports its contention that Defendant is a direct, wholly-owned subsidiary of 0956899 B.C. Unlimited Liability Company. Additionally, it shows that 0956899 B.C. Unlimited Liability Company is a direct, wholly-owned subsidiary of Equitrac. Therefore, the transitive relationship of the parties supports the assertion that Defendant is an indirect, wholly-owned subsidiary of Equitrac Corporation. As such, the evidence further supports Defendant's assertion that it is an “entity acquired by a Party” to the settlement agreement, and therefore Defendant's products are “Licensed Products” as defined by Section 1.4 of that agreement.⁸ (*See* Boehm Decl. Ex. E, at 63.)

⁸ Again, the Court cautions that Defendant's products are only “Licensed Products” so long as they are not materially different than the licensed products existing at the time of the acquisition of Defendant and its parent.

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B. The License Provision Does Not Apply to Defendant

In Defendant’s view, because its products are “Licensed Products,” as defined by Section 1.4 of the settlement agreement, Defendant necessarily must fall within the license provision in Section 2.4. But merely establishing that Defendant’s products are “Licensed Products” does not carry the day for Defendant.

In Section 2.4 of the settlement agreement, Plaintiff “nQueue . . . grant[ed] to Equitrac and its Affiliates, officers, employees, customers (direct and indirect) of Licensed Products of Equitrac, and suppliers, a . . . non-terminable and irrevocable license under the Patents-in-Suit for Licensed Products.” (Boehm Decl. Ex. E.) Defendant clearly is not Equitrac, nor is it an officer or employee. Thus, according to the plain words of the agreement, Defendant received the benefit of the license only if it is an Affiliate of Equitrac, or a customer or supplier. (*See* Boehm Decl. Ex. E.)

Section 1.2 defines an “Affiliate of a Party” as “any corporation, firm, partnership, or entity that controls, is controlled by, or is under common control with that Party (either directly or indirectly) as of the Effective Date of the Agreement.” (Boehm Decl. Ex. E.) The effective date of the settlement agreement is July 19, 2012, the date the agreement was signed by Plaintiff and Equitrac. (Boehm Decl. Ex. E.) Yet, as Defendant admits in the first page of the motion, its parent corporation was not acquired by Equitrac until December 31, 2012. (Mot. 1.) Thus, according to the plain meaning of Section 1.2, Defendant cannot be an Affiliate of Equitrac or Nuance because it was not under the control of either “*as of the Effective Date of the Agreement.*” (Boehm Decl. Ex. E (emphasis added).) Thus, Defendant may properly claim protection under the license granted in Section 2.4 only if it is a “customer[] . . . of Licensed Products of Equitrac,” or a supplier. (*See* Boehm Decl. Ex. E.)

Unsurprisingly, Defendant claims to be a “customer[] . . . of Licensed Products of Equitrac.” (*See* Reply 5.) According to Defendant, because it is a reseller of “Licensed Products” “acquired from Equitrac’s acquired subsidiary, [it] is also at least an indirect ‘customer’ of Licensed Products.” (Reply 5.) In a footnote, Defendant explains that “[t]he redundancies are not unreasonable, but rather provide adequate assurance, given that (1) the relevant products are embedded applications, not physical widgets, and (2)

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CS USA resells licenses to the Accused Products from its parent corporation.” (Reply 5 n.2.) The declaration of Mr. Greenbaum supports this assertion, when he affirms that “[s]ince at least 2006, . . . Control Systems (USA), Inc. resells licenses to the Accused Products from its parent corporation to end customers in the United States. Presently, Control Systems (USA), Inc.’s parent entity is Nuance Copittrak B.C. Unlimited Liability Company.” (Greenbaum Decl. ¶ 6.)

Nevertheless, Plaintiff apparently believes—and the Court agrees—that Defendant’s claim to be a “customer” unreasonably stretches the intended meaning of the term. (Opp’n 18.) Contract terms should be interpreted in their ordinary and popular sense. Cal. Civ. Code § 1644. Additionally, “[i]nterpretation of a contract must be fair and reasonable, not leading to absurd conclusions.” *ASP Properties Grp. v. Fard Inc.*, 133 Cal. App. 4th 1257, 1269 (2005) (internal quotation marks omitted). In the Court’s view, the notion that “customer” includes a subsidiary who resells licenses of its parent corporation is simply not the ordinary and popular sense of “customer,” nor is such an interpretation reasonable. This is especially true because Section 2.4 of the settlement agreement specifically mentions a “right[] to use *and resell* Licensed Products.” (See Boehm Decl. Ex. E, at 64 (emphasis added).) It states in relevant part, “The licenses granted herein are licenses . . . (iii) to convey to any customer of Equitrac or its Affiliate (whether direct or indirect purchasers and users), rights to use *and resell* Licensed Products.” (*Id.* (emphasis added).) This is exactly what Defendant is arguing: “By virtue of being a *reseller*—*i.e.* a *customer* and a seller—of Licensed Products . . . [Defendant] is also at least an indirect “customer” of Licensed Products.” (Reply 5 (emphasis added).) Nevertheless, the right to resell is restricted to “any customer *of Equitrac or its Affiliate.*” (*Id.* (emphasis added).) Thus, even were Defendant deemed to be a customer of “Licensed Products,” this would not be sufficient: Defendant is not a “customer of Equitrac or its Affiliate.” In Defendant’s own words, it is a customer “of Licensed Products, acquired from Equitrac’s *acquired subsidiary*,” which acquired subsidiary evidently is Defendant’s parent corporation. (Reply 5; *see id.* n.2.) As noted above, Defendant admits in the first page of its motion that its parent corporation was not acquired until December 31, 2012—well beyond the effective date of the Settlement Agreement. (Mot. 1.) Accordingly, Defendant’s parent does not qualify as an “Affiliate,” and Defendant cannot be a “customer of Equitrac or its Affiliate.” (Mot. 1.) As such, Defendant was not granted a right to resell “Licensed Products” by Section 2.4.

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Furthermore, to interpret the settlement agreement in a way that allows Defendant to fall within the license provision would nullify the express definition of “Affiliate” in Section 1.2. (*See* Boehm Decl. Ex. E.) Defendant would have been deemed an “Affiliate”—and therefore a licensee—but for the date restriction on the definition of “Affiliate” in Section 1.2. To be an “Affiliate,” Defendant must have been under the control of Equitrac “as of the Effective Date of the [Settlement] Agreement.” (Boehm Decl. Ex. E.) But the parties specifically chose to limit the definition of “Affiliate” to any entity under Equitrac’s control as of the effective date of the Agreement, thereby excluding entities acquired afterward—excluding entities such as Defendant. To allow Defendant to fall within the protection of the license provision by stretching the definition of “customer” would betray the definition of “Affiliate” as provided in Section 1.2. This the Court is unwilling to do.

And although Defendant argues that “[t]he scope of section 2.4 must be commensurate with the scope of Section 1.4,” the Court does not agree. (Reply 3.) Defendant contends that “[a]s the express language of the contract—and common sense—confirms, it cannot have been the intent of the parties to make the scope of the license provision in Section 2.4 less than the scope of ‘Licensed Products’ as defined in Section 1.4.” (Reply 4.) Later, Defendant queries, “Why would Section 1.4 expressly refer to acquisition of an entity and its products if that entity could not continue selling its products?” (Reply 4.) But the Court does not agree that “common sense” requires it to interpret the settlement agreement to bring Defendant within the license provision in Section 2.4. It would not be unreasonable for the parties to have intended for Defendant—whose products are indeed “Licensed Products”—to cease selling its own products, but allow Equitrac to begin selling them. Indeed, it would appear that, by this arrangement, Plaintiff could control how many and which players remained in the market. After all, Plaintiff did grant the license in exchange for certain consideration. It is reasonable that Plaintiff would have intended to limit the number of entities that could sell products that would otherwise infringe its patents. If Equitrac were able to acquire an indefinite number of competitors, and all could continue selling products that infringed Plaintiff’s patents, in competition with Plaintiff, Plaintiff may have required more in exchange for the licenses. Accordingly, Defendant has not persuaded the Court that its interpretation, which precludes a license for Defendant, is absurd or unreasonable. *See ASP Properties Group*, 133 Cal. App. 4th 1257, 1269 (2005).

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In sum, the Court holds that according to the plain language of the settlement agreement, Defendant does not qualify as a licensee. In other words, Section 2.4 does not apply to Defendant. The Court arrives at this holding notwithstanding Defendant’s products may qualify as “Licensed Products” under Section 1.4. To ultimately determine whether Defendant’s products qualify as Licensed Products under Section 1.4, the Court would have to determine whether they are materially different from other “Licensed Products” at the time Defendant was acquired by Equitrac. Nevertheless, because the Court holds that the license provision in Section 2.4 does not even apply to Defendant, it need not reach this issue. Accordingly, Defendant’s motion is DENIED.

V. CONCLUSION

For the foregoing reasons, Defendant’s motion for summary judgment is DENIED.

IT IS SO ORDERED.

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