Nos. 05-55374, 05-55421

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WARNER BROS. INTERNATIONAL TELEVISION DISTRIBUTION, a division of TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Plaintiff and Appellee,

vs.

GOLDEN CHANNELS & CO.,

Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. CV 02-9326-MMM
HON. MARGARET M. MORROW, JUDGE

APPELLEE'S BRIEF

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Statutes

Rules

Miscellaneous

CORPORATE DISCLOSURE STATEMENT

Plaintiff and Appellee Warner Bros. International Television Distribution Inc. is owned by Burbank Television Enterprises Inc., which is in turn owned by Warner Bros. Entertainment Inc. Warner Bros. Entertainment Inc.'s parent is Time Warner Inc., publicly traded on the New York Stock Exchange under the symbol TWX.

Dated: October 24, 2005

HORVITZ & LEVY LLP
BARRY R. LEVY
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By: ______________________________
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APPELLEE'S BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Warner Bros. International Television Distribution (Warner) filed this breach of contract action against Golden Channels & Co. (Golden), an Israeli cable company, after Golden fell seriously behind in its obligation to pay Warner license fees for television programs Golden licensed from Warner. Golden ultimately refused to make any further payments unless Warner forfeited certain rights under the parties' License Agreement. Following a bench trial, the district court concluded that, by refusing to continue performing its contract obligations unless Warner relinquished certain rights, Golden had repudiated the License Agreement and committed a total breach. The district court, therefore, ruled Golden was liable for all unpaid license fees, past and future, that Warner would have earned under the License Agreement, less the fees Warner could make up by licensing its programs to other broadcasters.

The district court's conclusion that Golden repudiated the License Agreement is based on its resolution of disputed issues of fact, and its resolution of those factual issues is subject to a highly deferential standard of review. As we demonstrate below, the record fully supports the district court's findings.

First, the record supports the conclusion that Golden repudiated its obligations under the License Agreement. The district court found that when Golden began experiencing cash flow problems, it urged Warner to renegotiate the License Agreement to reduce Golden's financial obligations. Warner said it would be willing to participate in such negotiations, on one condition: under the License Agreement, Golden was required to provide a $5 million letter of credit to secure its obligations for the first two and one-half years of the agreement and to provide some form of security thereafter; as a condition to participating in negotiations to amend the agreement, Warner insisted Golden agree to keep the letter of credit in place for the full five-year term of the License Agreement. Golden raised no objections to this requirement and entered into a year-long round of negotiations with Warner, during which time its debt continued to grow. Consistent with Warner's condition for negotiations, when the letter of credit was about to expire after the initial two and one-half year term, Golden extended it for another year. Based on these facts, the court concluded that (1) Golden was estopped from denying that it had agreed to keep the letter of credit in place for the full five-year term of the License Agreement and (2) Golden, by allowing the letter of credit to be extended, entered into an implied-in-fact agreement to keep the letter of credit in place for another year. In either case, the district court concluded Golden breached the License Agreement by refusing to pay any past or future license fees unless Warner gave up the letter of credit. The court's conclusions are fully supported by the record and should be affirmed.

The second principal issue in the appeal concerns the scope of Warner's damages for Golden's breach. The law in California is well established that when a party has repudiated its contract obligations by imposing an improper condition on performance, the injured party is entitled to "benefit of the bargain" damages equal to the benefits the non-breaching party would have received had the contract been performed. In this case, those benefits include the license fees Golden was contractually obligated to pay over the life of the License Agreement, less the fees Warner could recoup by licensing programs to other broadcasters. Golden's contention it did not have notice Warner was seeking benefit of the bargain damages based on a "repudiation" or "anticipatory breach" theory is belied by the numerous pre-trial pleadings that addressed that specific issue and that cited the very cases upon which the district court based its award of future damages.

JURISDICTIONAL STATEMENT

Warner agrees with Golden's Jurisdictional Statement.

STATEMENT OF ISSUES

1. Does the record support the district court's factual conclusion that Golden breached the License Agreement by refusing to pay past due or future license fees unless Warner gave up the letter of credit that secured Golden's ongoing financial obligations?

2. Did the district court correctly rule that Golden repudiated the License Agreement and was therefore liable for "benefit of the bargain" damages that included future license fees it owed Warner under the agreement?

STATEMENT OF FACTS

A. Prior to 1999, Golden, acting through a purchasing cartel, licenses a select number of television programs from Warner through a series of short-term agreements.

Warner Bros. International Television Distribution Inc. (Warner) is one of the largest distributors of entertainment programming in the international market, licensing television programs and feature films in more than 100 countries. (ER 210; SER 17.) Golden Channels & Co. (Golden) is an Israeli cable company. (*Id.*) In 1989, Golden, acting in concert with two other Israeli cable companies, Tevel and Matav, created Israel Cable Programming Ltd. (ICP) to jointly operate two broadcast channels that each cable company independently made available to subscribers – Channel 3, known as "The Family Channel," and Channel 4, known as "The Movie Channel." (*Id.*)

At the time they created ICP, Golden, Tevel, and Matav were the sole providers of multi-channel television in Israel. (ER 210.) With no competition from other multi-channel providers, ICP had considerable leverage in choosing the programs it wished to license and the prices it wished to pay. (SER 44.) Between 1989 and 1999, ICP, acting with cartel-like powers, entered into a series of one-year contracts with Warner for a select number of shows of their own choosing, at relatively low license fees. (SER 17, 44-44A.)

B. In 1999, after the Israeli television cartel is broken, Warner negotiates a long term "output" agreement with Golden, which includes a requirement that Golden post a letter of credit as security.

In January 1999, Israel issued a license to DBS Satellite Services that allowed DBS to begin broadcasting multi-channel television via satellite. (ER 210.) DBS immediately began negotiating with several studios, including Warner, for the exclusive right to broadcast television programs that Golden had previously been licensing under short term agreements. (*Id.*; SER 195A.) DBS offered to pay higher fees than those the cable stations had been paying. (SER 46.) In June 1999, Warner was on the verge of concluding a license deal with the satellite company. (SER 45-46.)

The entry of DBS into the Israeli television market abruptly ended ICP's ability to operate as a purchasing cartel. Concerned about losing the right to broadcast

Warner's programs, Golden began to aggressively pursue entering into its own exclusive long-term license agreement with Warner. (SER 64, 195A.) Golden and DBS went back and forth submitting progressively higher license fee proposals to Warner. (SER 18.) By mid-July 1999, Golden finally outbid the satellite company, and Warner's and Golden's negotiators sat down to memorialize their new agreement. (*Id*.) The agreement, captioned "Basic Subscription License Agreement" and signed on July 13, 1999, differed materially from the parties' previous agreements in numerous respects, including the following:

(1) <u>The agreement was for multiple years</u>: In contrast to prior license agreements between Golden and Warner, which were one-year deals, the initial term of the new agreement was 30 months (two and one-half years), from December 1, 1999 to May 31, 2002. (ER 211, 493.) In addition, the agreement gave Warner the unilateral option to extend the agreement for an additional 30 months, from June 1, 2002 to November 30, 2004. (ER 496.)

(2) <u>The agreement specified the minimum number of hours of programming Golden was obligated to license each year</u>: In contrast to Golden's previous agreements with Warner, in which Golden was able to cherry-pick a select number of programs for each broadcast season (SER 44), the License Agreement prescribed a set minimum number of hours of programming that Golden was obligated to

purchase each year, in five separate categories: New Series, Renewal Series, Library Series, Re-Run Series, and Special Programs. (ER 487-90.) In addition, the agreement required Golden to license from Warner *all* New Series for which Warner controlled the rights, and *all* subsequent series of shows previously licensed. (ER 487, 506.) As to New and Renewal series, the License Agreement was therefore an "output" agreement, meaning one in which the client "secures all of the production of the Warner company so that we don't take it onto the market and offer it to other companies." (SER 117-18.) Warner's lineup included some of the premier shows on television, including "Friends," "ER," "The West Wing," and "Sopranos." (SER 36.)

(3) <u>The agreement specified the minimum payments Golden was required to make each year</u>. In addition to agreeing to license a minimum number of hours of programming each year, Golden also agreed to license enough programs to satisfy the agreement's "Minimum Spend Commitment[s]," which broke down as follows: Year 1 – $5 million; Year 2 – $5.5 million; Year 3 – $6 million; Year 4 – $7 million; Year 5 – $7.5 million. (ER 494, 496.) It agreed to pay these license fees on a quarterly basis on December 1, March 1, June 1, and September 1. (ER 495.) The agreement also required that Golden pay a $1.5 million "Initial Fee," and a $500,000 "Extension Option Fee" if Warner exercised its option to extend the agreement's term. (ER 496.)

(4) <u>The agreement imposed "Life of Series" commitments for New Series</u>: Paragraph 3.1.1 of the License Agreement provided that Golden "shall license all New Series licensed hereunder on a 'life of series' basis." (ER 487.) This meant that, with respect to each New Series it licensed, Golden was required to license all subsequent seasons and episodes of the show, even if the episodes were produced after the term of the License Agreement had expired. (SER 140, 142, 155-56, 197A, 237.)

(5) <u>Golden was obligated to share fees it received from satellite</u>: The parties recognized that the Israeli government was considering regulations mandating that certain channels be made available to satellite television providers. (ER 212.) They agreed that, if Golden was required to license Channel 3 for re-broadcast by satellite, Golden would pay Warner 12% of the gross license fees it received from the satellite company, and account to Warner for such revenue on a quarterly basis. (*Id*.; ER 491.)

(6) <u>Golden's obligation to provide a letter of credit to secure its financial obligations</u>: The payment terms outlined above imposed financial obligations on Golden far in excess of those imposed on Golden by the parties' previous one-year contracts. The agreement also exposed Warner to greater financial risk: in the Israeli market, Warner was agreeing to make all of its new and renewal programs available to Golden on an exclusive basis. (SER 118.)

To ensure that Golden was able to satisfy its increased financial obligations, Warner insisted that Golden secure its payment obligations by providing Warner with a standby letter of credit. (SER 65-66.) A "letter of credit" is an undertaking by a bank on behalf of a customer to make payments the customer would otherwise be required to make. (SER 188.) A "standby" letter of credit means the letter of credit is not intended to pay current bills (as would be the case with a "payment" letter of credit), but is instead intended to be available only in the event of a default. (SER 120-21, 136-37, 175-76.)

During the negotiations, Warner made clear that a standby letter of credit was an essential element of any agreement. (SER 47, 48, 49, 65-66.) It wanted the letter of credit to be in effect for the full five-year term. (SER 49.) Golden, by contrast, wanted the letter of credit to be as small as possible and for as short a term as possible. (ER 692.) If Golden had a "'good paying history'" and "everything's working well," Golden asked Warner to consider alternative security arrangements. (SER 48.)

In the final agreement, the parties reached a compromise. For the first two and one-half year term of the agreement, Golden agreed to provide a $5 million standby letter of credit in a form similar to that of an exemplar attached to the agreement. (ER 494-95, 509.) If Warner did not exercise its option, the agreement would come to an end. If Warner *did* exercise its option and extended the agreement for a second two and one-half year term, "Licensee [Golden] agrees to discuss with Licensor [Warner] appropriate security to be given in respect of License Fees due in Years 3B-5." (ER 495.) Pursuant to this provision, Golden agreed to provide *some* form of security in the event Warner exercised the extension option (ER 296-97), and Warner agreed to enter into good faith negotiations to discuss whether the security could be something other than a letter of credit (ER 297; SER 48). The obligation to initiate discussions regarding the appropriate security for phase two of the agreement rested on Golden. (ER 297, 495.)

Pursuant to the above provisions, on July 19, 1999, Golden obtained a $5 million standby letter of credit from the Tel Aviv branch of Bank Leumi. (ER 213; SER 7-14.) In accordance with the exemplar attached to the License Agreement (ER 509), the letter of credit had a one-year term and provided it would automatically be extended each year for another one-year term unless Golden gave the issuing bank sixty days' notice that it wished to terminate the security. (ER 213; SER 8.)

C. Warner exercises its option to extend the License Agreement, unaware that Golden was suffering financial problems and had determined to renegotiate the Agreement.

During the first year of the License Agreement (December 1, 1999 through November 30, 2000), the parties' arrangement worked smoothly. The only exception was that Golden failed to account to or pay Warner its 12% share of the revenue Golden had begun receiving for the broadcast of Channel 3 on satellite. (*See* ER 213 [DBS Satellite purchased the right to broadcast Channel 3 in mid-2000].) Warner's unpaid share of satellite revenue came to $106,920. (ER 300.) Warner sent Golden a letter pointing out this omission and requesting payment. (SER 30-32.)

Golden's small underpayment of satellite fees, however, was only a harbinger of larger problems to come. In 2001, Golden began suffering escalating economic losses as a result of three factors: competition from satellite for customers, investment in digital technology, and the high cost of programming fees as it cut its prices to compete with satellite. (ER 213; SER 19, 193-94.) In May 2001, half way through Year 2 of the License Agreement, Golden decided to address the last of these problems by attempting to renegotiate the License Agreement with Warner in order to lower its fees and reduce its minimum purchase commitments for Library Series and Re-Runs. (SER 84-86, 225-25A, 227.)

In June 2001, Warner, which was not yet aware of Golden's financial problems and its decision to renegotiate the agreement, exercised its option as licensor to extend the License Agreement for another 30 months. (ER 213.)

D. At Golden's request, Warner agrees not to declare the License Agreement in default and draw down on the letter of credit. Instead, it agrees to participate in negotiations to reduce Golden's financial obligations, but only if Golden agrees to allow the letter of credit to remain in effect for the full five-year term of the existing License Agreement.

In August 2001, two months after Warner exercised its option to extend the License Agreement, Golden disclosed for the first time that it was experiencing what it described as "temporary cash flow problems" and said it would not be able to timely make its next quarterly payment in the amount of $1,375,000, which was due September 1. (ER 495, 543.) Without Warner's consent, in what amounted to a serious breach of the agreement, Golden failed to make this payment, and it thereafter committed continuing breaches by unilaterally reducing the amounts it was paying Warner to below what the agreement required. (SER 21, 52-53, 70.) As a result of these ongoing defaults, Warner had the right under the License Agreement to issue a notice of default, terminate the agreement, draw down the letter of credit, and begin licensing its programs to other broadcasters. (ER 500; *see* SER 70.)

At Golden's request, however, Warner refrained from taking such actions. Instead, in the fall of 2001, Warner agreed to Golden's proposal that the parties enter into negotiations to lower the price and volume of programs Golden was obligated to license, and in exchange allow Warner to extend the license period for certain programs beyond the five-year term of the existing License Agreement. (ER 669-70; SER 53, 67, 70, 229-30.) However, Warner imposed an explicit condition on its willingness to enter into such negotiations and forbear from immediately terminating the agreement: the condition was that Golden agree that the $5 million letter of credit that secured Golden's obligations during the first phase of the agreement would be kept in place to secure Golden's financial obligations for the *remaining* term of the agreement, including any extension periods. (SER 68.)

Thus, Stuart Baxter, Warner's Vice-President of Business Development and its lead negotiator for both the 1999 License Agreement and subsequent renegotiations (*see* SER 63, 116-17), testified as follows:

> We said the only basis on which Warner would *contemplate renegotiating the deal* would be in the circumstances that we would not review the letter of credit and it would remain in situ throughout *not just the 5-year term per the agreement but also any extended term as a result of the renegotiation.*

(SER 68, emphasis added; *see also* SER 70-71 [Warner chose not to declare a default based on Golden's agreement to negotiate in good faith and "on a commitment . . . [i]t would keep the LC [letter of credit] in place . . . . It was on the basis of those terms Warner was prepared not to pursue legal recourse but to try and conclude a renegotiation]"], 166A [asked what Warner's position was with respect to the "conditions for the renegotiation," Warner executive Alistair McKenzie testified "[t]hat a letter of credit would be a fundamental part of that" and that the term of the extended letter would be "for the five years plus whatever extension option there was"].)

Golden did not object to the condition Baxter imposed on Warner participating in negotiations to amend the agreement. (SER 68.) Golden simply began negotiating with Warner, and it continued to participate in such negotiations for the next year. (*See* ER 714 [negotiations begin November 2001]; SER 147 [negotiations still ongoing in November 2002], 232.) Mid-way through the negotiations, on May 21, 2002, Golden allowed the letter of credit to be extended for another one-year period, from July 2002 through July 2003.[1/] (SER 178-78A, 189-90.) Warner believed Golden renewed the letter of credit to comply with the conditions Warner had imposed on the negotiations. (SER 55-56.)

Relying on Golden's agreement to keep the letter of credit in place beyond the initial two and one-half year term, Warner refrained from declaring a default and drawing down the letter of credit, permitted Golden to pay for programs on a monthly basis instead of a quarterly basis, allowed it to pay reduced license fees equivalent to those it would have paid under a proposed amended agreement, suspended Golden's obligation to pay the $500,000 renewal option fee, suspended its obligation to pay satellite carriage fees, and continued to deliver the full complement of programs called for by the existing License Agreement. (SER 54, 69, 121-22, 166B-66C.) Warner expressly reserved its right to demand full payment if the negotiations failed. (SER 1-6, 15, 165; ER 579, 585.) Although Golden's past-due balance continued to grow, Warner felt secure it was not at risk because the value of the letter of credit exceeded the past-due balance. (SER 119-21[the letter of credit "gave us an umbrella

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1/ According to its express terms, the letter of credit renewed automatically each year unless Golden instructed the issuing bank to the contrary at least sixty days before the renewal date. (SER 191; ER 534.) Golden issued no such instructions. (SER 29.) Golden was aware that the letter of credit had been renewed from July 2002 through July 2003 since it incurred a $50,000 fee as a result of the renewal, and tied up $5 million on its line of credit for an additional year. (SER 178B; ER 699-700.)

of security that in the event there was a breakdown in discussion[s] . . . we weren't really exposed to the full amount of the arrearages"]; *see* SER 137A, 184, 191A-91B [during the negotiations, Warner carefully monitored the past due balance to make sure it did not exceed the value of the letter of credit].)

E. From the outset of the negotiations, Warner insists that a letter of credit be part of any amended License Agreement.

Negotiations to amend the License Agreement began in earnest in December 2001. (SER 53.) From the outset, Warner made clear that, whatever other accommodations it might be willing to make with respect to reducing price and volume requirements, Warner would *not* agree to an amendment that eliminated the $5 million letter of credit that currently secured Golden's debt, which at the time was approaching $1 million (*see* SER 41)[2/]:

2/ Warner's position that it would not agree to an alternative form of security made sense. In 1999, during the parties' negotiations for the original License Agreement, Golden asked Warner to consider alternate security for the second phase of the agreement if Golden had a "'good paying history'" and "everything's working well." (SER 48.) Those conditions obviously had not been satisfied. Golden was having cash flow problems, had missed payment deadlines, and was paying Warner less than what it owed.

- In a December 17, 2001 e-mail to Golden, Warner's lead negotiator Stuart Baxter stated that an "absolutely critical" point in the renegotiation was that "[t]he LC remains in situ throughout the term of the deal (incl. option if extended) with the final year being a draw-down on that LC." (ER 544.)

- In a February 21, 2002 draft amendment that Warner sent to Golden following negotiations between the parties (ER 547), Warner included a provision that "Warner and Licensee have agreed that Licensee shall continue to supply Warner with a Letter of Credit through the duration of the Output Term (as it may be extended) in accordance with clause 13.4 of the License Agreement" (ER 551).

- A March 27, 2002 draft that Warner stated was "the final draft . . . although subject to internal review," included the same provision. (ER 556, 560.) The draft substantially reduced Golden's future financial commitment (*see* ER 560) but was subject to the condition precedent that Golden pay all sums due and outstanding under the original agreement upon execution of the amendment (ER 557).

When it received these draft amendments, Golden did not object to the letter of credit provision or to any of the other proposed provisions. (SER 54, 161-62, 234.) It thereafter allowed the letter of credit to be extended and paid the $50,000 extension fee. (SER 178-78A, 178B, 190-91.) Warner believed the amended agreement was close to being final. (SER 162.) Golden apparently thought so too: Gal Shalom, one of Golden's principal negotiators (SER 173; see ER 305 ¶ 84), acting on the assumption that Golden was about to sign the draft, instructed the company to begin making payments in accordance with the payment schedule in the draft agreement (SER 185-85A). Golden did so. (SER 53-54.)

F. As Golden's unpaid balance threatens to exceed the $5 million letter of credit, Warner insists the parties either resolve their remaining differences, or that Golden remit full payment under the existing License Agreement. Instead of resolving the open issues, Golden back-pedals on a number of deal points, including the letter of credit.

Although it appeared that both parties believed they were close to concluding an amended agreement in March 2002, progress on the negotiations began to slow. (SER 58.) Amir Maori, CEO of ICP, the cable consortium run by Golden and the two other cable entities, was then substituted into the negotiations. (SER 199.) Following a London meeting he attended in May (*id.*), Maori began formulating his own position on the issues (SER 201; *see* ER 580-82).

As the months passed without final agreement, Warner became concerned by Golden's growing past-due balance. (ER 581.) On June 25, three months after Warner sent Golden what it believed was the "final draft" of an amended agreement (ER 556), Baxter wrote to Ram Belinkov, Golden's CEO (SER 211), and explained that financial considerations imposed limits on how long Warner could negotiate. While Warner had continued to provide programming "even when significant sums are outstanding . . . . we are now at a position where the outstanding sums are sufficiently significant that we need your response on the few remaining open points to determine if we are to amend the agreement or to continue per the existing contract and its terms – including payments, volume and consents required." (ER 574; *see* SER 206.) In a handwritten fax two days later, Baxter repeated that "it really is essential we meet to resolve matters together with the Administrator (Mr. Yochman) ASAP." (ER 575.)

If Baxter hoped his correspondence with Belinkov would lead to a speedy resolution of the negotiations, he was mistaken. To the contrary, Golden was intent on re-opening fundamental issues that Warner understood had already been fully resolved.

The first indication that Golden was not prepared to conclude the negotiations any time soon occurred when Belinkov asked Baxter to prepare a memo summarizing the points to which the parties agreed, and the points that were still outstanding. (SER 207.) Although Warner believed the parties had already agreed on the main points four months earlier (Warner described the draft it had sent to Golden in March 2002 as the "final draft" (ER 556; *see also* SER 162 [in March, Warner believed the deal was close to being final])), Baxter complied with Belinkov's request. In a July 23, 2002 memo, he summarized the points that he understood the parties had agreed upon and the handful of relatively minor points still outstanding. (ER 576-77.) Among the agreed upon points were that Golden, as a precondition to entering into an amended agreement, would pay all past due payments through the end of Year 2 (i.e., November 30, 2001) (ER 493 ¶ 9.1), and that the existing letter of credit would remain in place "throughout the term of the deal including the option period if exercised by [Warner] . . . ." (ER 576.) A week later, Baxter pressed Golden for a "'last and final' round of negotiation" and again stated "[t]ime is of the essence . . . ." (ER 578; *see* SER 207.)

On August 27, 2002, Golden's Maori responded to Baxter's memo with a different list of issues "that have yet to be resolved." (ER 580-82.) Notable among these was that "[c]able companies will be able to provide L/C [letter of credit] for movies and series contracts *only after the completion of the merger between them. . . . The amount in the L/C will be reduced according to the new contract* *prices*." (ER 581.) This was the first time since the negotiations began nine months earlier that Golden raised any question about the letter of credit provision that had been included in every draft since December 2001, at which time Warner described the letter of credit as "absolutely critical." (SER 54, 234; ER 544.)

Baxter responded to Maori's letter in two emails, both of which urged Golden to provide comments on the March draft. (ER 583, 588.) The first stated Warner is "keen to conclude the process" (ER 583), and the second stated "time is now of the essence . . . ." (ER 588; *see* SER 203.) Warner said it would "provide a full and complete response" after it received Golden's comments. (ER 588.)

On September 30, Warner finally received Golden's comments on the March draft, and was stunned by their content. For nine months, Golden had been paying license fees that were substantially lower than those called for by the License Agreement. (*See* SER 39 [past-due balance equaled $1,653,762 at end of Year 3].) Yet Golden claimed it was "not aware of any sums that are due and outstanding." (ER 589.) In addition, Golden asserted that Warner had waived its right to satellite fees for the first two years of the License Agreement. (*Id.*) In fact, Warner had twice demanded payment of such fees (*see* SER 33-34), and the March draft conditioned execution of an amendment upon payment of *all* past-due amounts for the first two years (ER 557).

Finally, and most importantly, Golden retreated even further from the position it took in its August 27 letter, in which it stated it would provide a letter of credit after the cable companies merged. Golden now asserted it was "obliged to give Lc's [*sic*] until 31 May 2002 only and thereafter the appropriate security to be given was open for further discussions. Please advise us what kind of security you ask for in the future and note that we also need to get an appropriate security which will assure that we will receive the Programs." (ER 589-90.)

The positions Golden took in its September 30 correspondence caught Alistair McKenzie, Warner's Senior Counsel (SER 67, 159-59A), by surprise. He believed all of the points Golden addressed in its letter had already been resolved. (SER 161-62, 171-71A.) Simon Kenny, the company's Senior Vice-President, concluded that Golden was just "stringing us along . . . ." (SER 124; *see, e.g.*, SER 125 [Golden's request that *Warner* provide security was "a really extraordinary observation when . . . [Warner was] totally in compliance with the agreement, and it was Golden who were in default"].) Kenny felt the parties needed to clarify the issues that were actually outstanding, and do so quickly, before Golden's past due balance exceeded the $5 million letter of credit. (SER 125-26.)

To that end, on October 2, 2002, Warner circulated a marked up copy of the March draft, with a few minor adjustments in price and volume terms. (SER 75-83.)

It included the same letter of credit provision as the earlier draft, including that the letter of credit could not be for less than $5 million. (SER 79.) The new draft recited that all steps necessary to adopt the agreement must be completed by December 1, 2002, the date on which Year 4 of the License Agreement commenced and the first quarter fees for that year would be due. (SER 75, *see* ER 495-96.) Baxter contacted Maori and reiterated that the negotiations had be to be concluded and the amendment signed before the December 1, 2002 deadline. (SER 25; ER 496 ¶ 14.3.)

Maori's response did not inspire confidence that Golden shared Warner's urgency to conclude the negotiations, or that the parties were even close to reaching an agreement. Maori stated that the draft, which largely was the same as the one circulated seven months earlier, would have to be reviewed by "a number of people in Tevel and Golden Channels, including legal counselors." (ER 604.) Moreover, he cautioned that he could provide no assurance that the points raised in his previous correspondence "are going to be the last subjects raised." (*Id.*)

Ian Giles, one of Warner's representatives (SER 230A), told Maori that Warner was "extremely concerned" by his response. (ER 620; SER 209A.) "From the surface it looks like Tevel and Golden are intending to find ways to ensure that there is always going to be outstanding points brought to the table in order [to] delay the finali[zing] of this deal. It is just impossible for us to negotiate this way . . . . I will ask just once more for your final set of points . . . ." (*Id.*)

When Golden finally responded to Warner's request for comments on the draft, its response brought the parties no closer to agreement. Golden simply repeated its earlier positions that it was "not aware of any sums that are due and outstanding" (ER 609) and that "only the Merged Cable Company shall be able to issue and provide the L/C [letter of credit]" (ER 610). As before, Warner found the assertion that Golden was unaware it had a past due balance "incredulous . . . because obviously we have a license agreement which they haven't paid their full license fees on." (SER 127.) Concerning the letter of credit, Warner had made clear ten months earlier it was an essential element of any amended agreement (ER 544), and Golden's insistence that only a *merged* cable entity could provide the letter was unacceptable. As Kenny explained, a merger between the cable companies was "an event I couldn't control."[3/] (SER 127.)

On November 3, 2002, Baxter wrote Maori to convey Warner's "grave concern" about Golden's approach to the negotiations. (ER 614.) Focusing on the "key issues," Baxter stated "it is essential to recognize that arrears are calculated on

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3/ At the time of trial, the cable companies had yet to merge (SER 208), and *still* have not merged.

the basis of the existing agreement." (*Id.*) With respect to the security issue, he stated that a letter of credit remained an essential part of the deal: "[G]iven the context of these negotiations and existing arrears, security is absolutely paramount to us. I believe we have consistently conveyed this position both verbally and in all correspondence to date." (*Id.*) Unless Golden could confirm it agreed with Warner on these and several other key issues, "we will not be able to conclude a revised deal and must remain with the existing agreement." (*Id.*)

Hoping to break the impasse, the parties held a final negotiating session in London on November 14, 2002. (SER 61, 128.) Warner's deadline for concluding the agreement was only two weeks away, and it hoped to conclude the negotiations before then. (SER 128.) The London meeting proved unproductive, however, because Golden's representatives were not authorized to resolve the key deal points. (SER 72, 129.) Warner indicated that, absent an agreement, it might be compelled to draw down the letter of credit to pay Golden's past due balance. (SER 72.) At Golden's urging, Warner agreed to defer doing so (ER 623; SER 72, 130), and the parties scheduled a phone conference for November 19 (SER 61).

G. Warner issues a default notice and triggers a final two-week deadline to conclude an agreement.

In November 2002, Warner's finance department records indicated that Golden's past-due balance had risen to $2,809,790. (ER 626-27; *see* SER 163A.) On December 1, 2002, when Year 4 of the License Agreement began, Golden would owe another $2,811,961.50, the first quarterly installment on the Year 4 license fees. (ER 627.) At that point, Golden's debt would exceed the $5 million letter of credit. (SER 71, 123.) Warner was not willing to allow Golden's debt to exceed its security. (SER 58, 123, 148.)

The License Agreement required that Warner give two weeks notice before terminating the agreement for late payments. (ER 500.) If Golden failed to cure its default within that two-week period, Warner had the right to terminate the agreement and draw down the letter of credit to the extent of any unpaid sums. (*Id.*; ER 509, 532.) With Warner's deadline for concluding the negotiations two weeks away, Warner decided to issue Golden the two-week default notice authorized by the agreement. Doing so, it reasoned, would impose a final two week deadline during which Golden could either agree upon the terms of an amended agreement, or make full payment to Warner of all past due sums under the terms of the existing License

Agreement. (SER 26 ¶ 33, 57, 72-73, 130.) If Golden refused to *either* amend the contract or comply with its financial obligations under the existing agreement, then, by issuing the two-week notice, Warner would be in a position when the deadline for negotiations expired to terminate the contract and make itself whole from the existing letter of credit. (SER 57, 131.)

In accordance with the foregoing strategy, Warner issued a formal notice of default to Golden on November 15, 2002. (ER 626-27.) The notice tallied up Golden's past due payments, which came to $2,809,790, and reminded Golden that its next quarterly payment of $2,811,961.50 would be due December 1. (ER 627.) Concurrent with sending this notice, Baxter sent an e-mail to Maori that explained Warner had issued the notice merely to set the "14 day clock running," and he reaffirmed Warner's hope that "we will have successfully concluded negotiations prior to the end of this period and as such no further action on this would be required . . . ." (ER 623.)

H. Golden refuses to participate in any further negotiations and demands that the letter of credit be returned before it pays the past due balance or future fees. Warner terminates the License Agreement, draws down the letter of credit, and the present litigation ensues.

Contrary to its agreement, Golden refused to participate in the planned November 19 conference call, or in any further negotiations. (SER 62, 73, 149A.) On November 26, Golden formally responded to Warner's default notice by offering to write a check to Warner for $83,301, and promising to pay an additional $5 million it acknowledged it owed, but *only* if Warner *first* returned the $5 million letter of credit. (ER 630.) Golden took the position that paragraph 13.7 of the License Agreement required that it keep the letter of credit in place only until May 31, 2002, and that it prolonged that period on the assumption the agreement would be amended. Since it was now clear the agreement would not be amended, "we hereby request Warner to return the L/C to us immediately." (*Id.*) The following day, it sent Warner the $83,301 check.[4/] (ER 214.)

4/ Golden's assertion that it kept the letter of credit in place only because it believed it would be part of the amended agreement is ironic given that one of the (continued...)

On December 4, at which time Golden owed more than $5 million, Warner declined Golden's demand that the letter of credit be returned. "We are under no obligation to return the Letter of Credit to you, which Letter of Credit you unilaterally renewed to provide Warner with the security it is entitled to beyond May 31, 2002. We therefore see no reason to return the Letter of Credit to you . . . ." (ER 640.) Because Golden had not yet cured its default, "Warner expressly reserves the right . . . to draw down on the Letter of Credit . . . [and] terminate the License Agreement . . . ." (ER 641.)

Five days later, more than three weeks after it gave Golden a two-week deadline to either consummate an amendment or cure its default under the existing License Agreement, Golden still had done neither. (ER 644.) Warner therefore terminated the License Agreement (*id.*), drew down the entire amount of the letter of credit (SER 151), and filed suit against Golden for breach of contract (ER 1). On January 31, 2003, Golden, asserting that Warner, not Golden, had breached the agreement, notified Warner that it too "elect[ed] . . . to terminate the [License] Agreement effective immediately . . . ." (ER 651.)

4/(...continued)
principal reasons the negotiations failed was Golden's refusal to provide a letter of credit.

I. The district court awards Warner past and future damages totaling $19,315,960.

Following a seven-day bench trial, the district court issued an 87-page Findings of Fact and Conclusions of Law that exhaustively analyzed each of the factual and legal issues in the case. (ER 282-368.) The court concluded that by the end of Year 3 Golden owed $2,681,429 for unpaid option, license, and satellite carriage fees, and would owe an additional $2,872,478 the next day when Year 4 commenced. (ER 345.) Warner was accordingly entitled to issue a default notice that gave Golden fourteen days to cure its default. (ER 334.) Golden's November 26 payment offer was invalid because it was improperly conditioned upon Warner returning the letter of credit. (ER 344.)

The court concluded there were two reasons Golden could not demand that the letter of credit be returned. First, Warner had made renewal of the letter of credit for the full five-year contract term a condition precedent to entering into negotiations to amend the agreement. (ER 306, 317.) By entering into negotiations without objecting to this condition, and by allowing the letter of credit to be renewed *during* the negotiations, Golden was estopped from denying that the renewed letter of credit constituted the "appropriate security" called for by paragraph 13.7 of the agreement.

(ER 337 & n.274.) In addition, the same facts supported the conclusion that Golden had entered into an implied-in-fact agreement to provide the letter of credit at least through May 3, 2003, the date to which the letter of credit had been extended. (ER 339-41.) Since Golden's offer to cure its default was subject to a condition that Golden was not entitled to impose on Warner, Warner was entitled to reject the offer, terminate the agreement, and draw down the full $5 million in the letter of credit because Golden's debt exceeded that amount. (ER 340, 344-45.)

Second, by conditioning its *future* payment of fees on Warner returning the letter of credit, the court ruled Golden had repudiated the agreement in its entirety and was therefore liable not only for past fees, but also for the fees Warner could have earned during the remainder of the term (i.e., benefit of the bargain damages), less the fees Warner could earn by licensing its programs to other broadcasters. (ER 359-61.) After reducing Golden's debt by $9,325,450 in mitigation, the court ruled Warner's total damages amounted to $19,315,960. (ER 366.) Following adjustments made during post-trial motions, including attorney's fees and costs, the total judgment became $21,737,262.94. (ER 471-72.)

LEGAL ANALYSIS

I.

THE RECORD SUPPORTS THE DISTRICT COURT'S FACTUAL CONCLUSION THAT GOLDEN BREACHED THE LICENSE AGREEMENT BY REFUSING TO PAY PAST OR FUTURE LICENSE FEES UNLESS WARNER RETURNED THE LETTER OF CREDIT.

A. Golden is estopped from denying that it agreed to keep the letter of credit in place for the full term of the License Agreement.

When Golden defaulted on its agreement by failing to make its $1,375,000 quarterly payment on September 1, 2000, Warner had the right to terminate the License Agreement and draw down the letter of credit. At Golden's urging, Warner refrained from taking this action and agreed to enter into negotiations to amend the agreement, but only if Golden agreed to keep the letter of credit in place for the full five-year term of the existing agreement. As we now demonstrate, the district court was entitled to conclude that, by negotiating for a year with knowledge of this condition, and permitting the letter of credit to renew during the course of the negotiations, Golden was estopped from demanding that the letter of credit be returned when the negotiations came to an unsuccessful end.

1. The elements of equitable estoppel.

"'[E]stoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts.'" *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout, III, Ltd.*, 30 Cal. App. 4th 54, 59 (1994). The elements of estoppel are: "'(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) [the other party] must rely upon the conduct to his injury.'" *Robinson v. Fair Employment & Housing Comm'n*, 2 Cal. 4th 226, 244 (1992); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 707 (9th Cir. 1989).

The existence of estoppel is a question of fact. *State Comp. Ins. Fund v. Workers Comp. Appeals Bd.,* 40 Cal. 3d 5, 16 (1985); *Adams*, 876 F.2d at p. 707 (the estoppel issue is "factually intensive"). As with other factual issues, substantial deference is owed to the district court's findings. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 843 (9th Cir. 2004) ("Following a bench trial, the judge's findings of fact are reviewed for clear error. '"This standard is significantly deferential, and we will accept the lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed."'" (citation omitted).)

2. The record supports the district court's conclusion that all elements of the estoppel doctrine are met.

(i) Golden knew about the conditions Warner imposed on negotiations to amend the License Agreement: Baxter, who led Warner's negotiating team, told his counterpart at Golden that "the only basis on which Warner would *contemplate renegotiating the deal* would be in the circumstances that we would not review the letter of credit and it would remain in situ throughout *not just the 5-year term per the agreement but also any extended term as a result of the renegotiation*." (SER 68, emphasis added; *see also* SER 70-71 [Baxter testifies that Warner's decision "not to pursue legal recourse but to try and conclude a renegotiation" was based on Golden's commitment to "keep the LC in place"].) McKenzie, another Warner executive, testified that a five-year letter of credit was a "fundamental part" of the "conditions for the renegotiation." (SER 166A.) As the District Court observed, "Golden produced no witnesses who testified to the contrary." (ER 338.)

Based on this evidence, the District Court was entitled to conclude that "Golden knew that Warner had conditioned its willingness to renegotiate . . . and forbear from demanding immediate payment of past due amounts on Golden's agreement to maintain the letter of credit in place throughout the extension option terms (and any additional term of an amended agreement)." (*Id.*) Because this finding turns on the court's "determination regarding the credibility of witnesses [, it] is entitled to special deference." *Husain v. Olympic Airways*, 316 F.3d 829, 840 (9th Cir. 2002).

(ii) <u>Golden led Warner to rely on its conduct</u>. Golden raised no objection to the conditions Baxter laid down for the negotiations. (SER 68.) To the contrary, in November 2001, without commenting on the ground rules Baxter had laid down, it began participating in negotiations to reduce its contract obligations. (SER 230, 232.) Golden continued to participate in those negotiations for the next year. (*See* SER 147). In May 2002, six months after the negotiations began, Golden allowed the letter of credit to be renewed for another annual period, through and including May 2003. (SER 178-78A, 190-91A.)

Since Golden was aware of the conditions that Warner imposed on the negotiations, and since it chose to participate in the negotiations and keep the letter of credit in place throughout the negotiations, the district court was entitled to conclude that "Warner 'reasonably could [have] believe[d] that [Golden] intended [its] conduct to be acted upon.'" (ER 338.)

(iii) Warner was unaware Golden would demand the letter of credit be returned if negotiations failed. As noted above, Golden raised no objections to the conditions Warner imposed on the negotiations. It was not until September 30, 2002, ten months after the negotiations began, that Golden first claimed it had no obligation to keep the letter of credit in place for the full term of the agreement. (ER 589-90.) These facts support the district court's factual conclusion that "Warner was unaware" Golden would take the position that it was not required to keep the letter of credit in place during the second two and one-half year term of the agreement. (ER 339.)

(iv) Warner detrimentally relied on Golden's conduct. In December 2001, when Golden committed a serious breach by failing to make its quarterly payment, Warner refrained from declaring a default. Instead, based on Golden's apparent agreement to keep the letter of credit in place, Warner participated in a year-long round of negotiations, during which time Golden's past-due debt continued to grow. (SER 35, 144-45, 180-81.) In November 2002, when the negotiations collapsed, Golden refused to pay unless Warner returned the letter of credit. Only then did Warner declare a default. By waiting a year to declare Golden in default, Warner was prejudiced in three ways:

First, by November 2002, Golden's financial condition had worsened and it no longer had the financial means to pay Warner everything it owed.[5/] (SER 240.) In 2002, it had a net loss of $48 million, negative cash flow of $20 million (SER 243), a negative net worth of $34 million (SER 243A), and it ended the year with only $200-300,000 in cash and credit (SER 242). In short, the company was insolvent. (SER 243-43A.) Even had Warner returned the letter of credit, it was unlikely Golden's bank would have loaned Golden the money to pay its debt to Warner. (SER 245-46.) While Golden claimed it could have asked its cable partners Matav and Tevel for assistance in paying Warner (SER 215-15A; ER 703), these companies too were in dire financial straits and could not have assisted Golden (SER 220-20A, 224A, 243, 247, 249-50). Furthermore, while Golden asserted that its cable partners would have provided it with the needed cash, the evidence established that Golden

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5/ Because it concluded Golden's tender of payment was invalid for other reasons, the district court did not resolve the question whether Golden had the financial ability to pay Warner. (ER 344 n.281.) However, a district court's judgment may be affirmed on any ground supported by the record, even if the court did not rely on the ground. *U.S. ex. rel Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004).

never asked its partners for assistance. (SER 223, 224A.) The fact that Golden's debt grew significantly during the year of fruitless negotiations, that by December 1 its debt exceeded the letter of credit, and that Golden could not pay the debt, all represent harm to Warner caused by Warner's delay in enforcing its rights.

Second, assuming arguendo Golden had the financial means to pay Warner if Warner had agreed to return the letter of credit, Warner's one-year delay in enforcing its rights would still have been prejudicial. The reason is that Warner would have been left without any security for the duration of the agreement, security that was in place a year earlier when Warner was first entitled to issue a default notice. Contrary to Golden's contention (AOB 44), this was of great concern to Warner (ER 674 [Kenny testifies "what we were seeking was a cure of the default and for the letter of credit to stay in place"]). The loss of that security constitutes additional harm caused by Warner's forbearance.

Third, the District Court ruled that paragraph 13.7 of the License Agreement required Golden to provide *some* security for the second 30-month term, although the precise nature of that security was a matter for the parties to negotiate. (ER 495 [Golden agrees to discuss with Warner "appropriate security *to be given* in respect of License Fees due in Years 3B-5"], 297 n.72[the agreement "clearly contemplates that *some* form of security will 'be given'"].) Before the second phase began in

May 2002, it can be inferred that Warner did not press Golden to enter into negotiations about the appropriate form of security because it believed Golden had *already agreed* to Warner's demand that the existing $5 million letter of credit function as security for the second phase. (*See* ER 337; SER 54, 71.) Having lulled Warner into believing the parties had already negotiated "appropriate security," and that the $5 million letter of credit would be left in place, Golden is estopped from arguing that Warner forfeited its right to such security through Warner's inaction. As the District Court observed, "[h]ad Golden told Warner in May 2002 that, despite its renewal, the Letter of Credit was not the 'appropriate security for Years 3B-5,' Warner would have issued a notice of default . . . [t]hus, Warner acted – or forbore from acting – to its detriment." (ER 339.) *See Tresway Aero, Inc. v. Superior Court*, 5 Cal. 3d 431, 437-38 (1971) ("Th[e] doctrine [of estoppel] affirms that 'a person may not lull another into a false sense of security by conduct causing the latter to forbear to do something which he otherwise would have done and then take advantage of the inaction caused by his own conduct.'").

3. The district court was entitled to reject Golden's contention that the parties discussed extending the letter of credit only in connection with an amended License Agreement, not in connection with the existing License Agreement.

Golden argues the district court's estoppel ruling is in error because it rests on an incorrect factual assumption. Specifically, Golden argues that "[n]othing in the record suggests there was ever any understanding that the parties had agreed to maintain the Letter of Credit in place *under the original License Agreement* if negotiations for an amended agreement failed. This issue was never even discussed . . . ." (AOB 41-42, emphasis added.)

In so arguing, Golden asks this Court to ignore Baxter's testimony that in October 2001, before he agreed to Warner even *participating* in negotiations to amend the agreement, he insisted, as a condition to Warner's participation, that Golden agree to keep the letter of credit in place for the full five-year term of the agreement. The district court found Baxter's testimony credible (ER 303, 306, 337, 340), and the court's resolution of that factual issue is entitled to great deference.[6/]

6/ Indeed, the district court observed in connection with its summary judgment ruling that "[t]he evidence regarding Warner's demand that the Letter of Credit be (continued...)

Golden attempts to put a different spin on Baxter's testimony. Based on his subsequent December 17, 2001 e-mail, Golden characterizes Baxter's prior statement about the letter of credit as a mere "proposal." (AOB 37.) But the proper interpretation to put on a witness's testimony is up to the district court, and deference is owed to the district court's interpretation unless it is utterly implausible. *Husain*, 316 F.3d at 835. Here, the district court's interpretation of Baxter's testimony and his subsequent December 17 e-mail is both plausible and correct. The e-mail was drafted well after the parties had begun their negotiations (*see* ER 714; SER 232), and it describes the terms Warner wanted included in the *amended* agreement. (ER 544 [referring to the points in the memo as "part of the solution"].) The e-mail does not address the ground rules Baxter laid down months earlier as a condition to Warner entering into the negotiations. The district court specifically so found, determining in its findings of fact that the e-mail "memorialize[d] Warner's position regarding an *amended* agreement." (ER 304.)

6/(...continued)
renewed as a condition to commencing negotiations is *undisputed*." (ER 246, emphasis added.) The only disputed issue was whether Warner insisted as a condition to the negotiations that the letter of credit be kept in place only during the negotiations themselves, or for the five-year life of the agreement. (*Id.*) After trial, the court adopted the latter position.

Finally, Golden recounts in detail the history of the parties' negotiations. (AOB 37-41.) This extended discussion is apparently designed to create the impression that Golden objected to keeping the letter of credit in place as a condition to Warner participating in the negotiations. But the disagreements about the letter of credit that Golden recounts were disagreements that arose at the eleventh hour over whether a letter of credit would be part of an *amended* agreement, not disagreements about the conditions Warner had imposed on participating in the negotiations in the first place. By August 2002, the first time Golden objected to including a letter of credit provision in the draft amendment (*see supra* pp. 22-23), the parties had already been negotiating for ten months, Golden had already allowed the existing letter of credit to renew, and Golden had paid the $50,000 renewal fee. The relevant time to object to the conditions Warner imposed on the negotiations would have been before the negotiations began. Golden raised no such objections, and was estopped from doing so when the negotiations broke down.

In short, the record fully supports the district court's factual conclusion that Golden was estopped from demanding Warner return the letter of credit before Golden would agree to pay any further license fees.

B. Golden entered into an implied-in-fact contract to keep the letter of credit in place through at least May 2003.

An offer can be accepted by performance. Cal. Civ. Code § 1584 (West 1982); *Logoluso v. Logoluso,* 233 Cal. App. 2d 523, 529 (1965); 1 Corbin on Contracts, Formation of Contracts § 3.8 at 340-49 (1993). "'If the offer calls simply for the doing of an act, performance will be a sufficient acceptance, and it is ordinarily not necessary for the offeree first to notify the offeror that he intends to accept and perform.'" *Gilbert v. Superior Court*, 169 Cal. App. 3d 148, 156 (1985).

In legal effect, the acceptance of a contract by performance is no different from an express verbal acceptance. "'The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct.'" Cal. Civ. Code § 1621 (West 1985) ("An implied contract is one, the existence and terms of which are manifested by conduct."); *Chandler v. Roach*, 156 Cal. App. 2d 435, 440 (1957) (quoting *Silva v. Providence Hosp. of Oakland*, 14 Cal. 2d 762, 773 (1939)).

Here, the district court concluded that the same facts that supported application of the estoppel doctrine also supported the conclusion that Golden entered into an implied-in-fact agreement to keep the $5 million letter of credit in place through at least May 2003. Those facts are: (1) Baxter told Golden in no uncertain terms that Warner would not agree to renegotiate the License Agreement unless Golden agreed to leave the letter of credit in place during the extension term of the agreement; (2) Golden raised no objection to this condition, entered into negotiations, permitted the letter of credit to renew for an additional year (through May 2003) and paid the $50,000 renewal fee; and (3) Warner in fact entered into renegotiations with Golden and did not declare the License Agreement to be in default. (ER 340.)

Based on these facts, the court concluded that Golden had impliedly agreed to keep the letter of credit in place at least through May 2003, the termination date of the renewed letter of credit. (ER 340-41; see ER 342 [explaining why agreement to extend letter of credit did not have to be in writing].) The district court's conclusion that an implied-in-fact contract arose under these circumstances, like its ruling on the estoppel issue, constitutes a factual determination that is entitled to substantial deference. *Moreau v. Air France*, 356 F.3d 942, 954 (9th Cir. 2004) (whether an implied contract exists is an issue of fact); *Grimes v. New Century Mortgage Corp.*, 340 F.3d 1007, 1010 (9th Cir. 2003) [summary judgment should be denied where "[m]aterial issues of fact [exist] as to the existence and terms of the contract"]; *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 798, 818 (1999)

("'Generally, the existence of an implied-in-fact contract requiring good cause for termination is a question for the trier of fact'").

Golden argues there could not have been an agreement because "[t]he district court could not even consistently describe what Golden and Warner had impliedly agreed to . . . ." (AOB 35, heading modified.) It points out that the court sometimes states Golden agreed to keep the letter of credit in place for "'a portion of Years 3B-5'" or "'through at least May 2003,'" and at other times that it agreed to keep it in effect "for the balance of the contract term." (*Id.*)

But there is a reason for these different descriptions. Under the estoppel doctrine, Golden is barred from disputing that it agreed to the terms Warner demanded, and those terms were that the letter of credit be in place for the full contract term. Under the implied-in-fact contract doctrine, by contrast, Golden's *actions* define the scope of the implied agreement, and its action was to allow the letter of credit to be renewed until May 2003. As the court explained, "[t]he portion of Year 4 addressed by the parties' implied agreement was December 1, 2002, to May 3, 2003, the next annual renewal date . . . ." (ER 339 n.276.)

The distinction between these dates, however, is immaterial. Whether Golden is estopped from denying that it agreed to keep the letter of credit in place for five full years, or whether it impliedly agreed to keep it in place until May 3, 2003, the fact remains it had no right to demand the letter of credit be returned in December 2002 before it would comply with its obligations under the License Agreement. By imposing what the district court found to be an unwarranted condition on its performance, Golden breached the License Agreement, and Warner was entitled to terminate the agreement and pursue its remedies for breach.

II.

GOLDEN'S OFFER TO PAY WARNER WAS NOT EQUIVALENT TO PERFORMING THE AGREEMENT BECAUSE GOLDEN LACKED THE FINANCIAL MEANS TO PAY ITS PAST AND PRESENT LICENSE FEES.

Civil Code section 1495 provides that "[a]n offer of performance is of no effect if the person making it is not able and willing to perform." Cal. Civ. Code § 1495 (West 1982). "Simply put, if the offeror '. . . is without the money necessary to make the offer good and knows it . . .' the tender is without legal force or effect." *Karlsen v. American Sav. & Loan Ass'n.*, 15 Cal. App. 3d 112, 118 (1971).

As shown above, in December 2002, Golden was insolvent and did not have the financial means to pay, or even to borrow, the $5,083,000 it had offered to pay

Warner. (*See supra* pp. 39-40.) For this independent reason, Golden's tender was invalid and its failure to pay Warner constituted a breach that entitled Warner to terminate the agreement and recover its resulting damages.

III.

BECAUSE GOLDEN REPUDIATED ITS OBLIGATIONS UNDER THE LICENSE AGREEMENT, THE DISTRICT COURT WAS ENTITLED TO AWARD WARNER THE LICENSE FEES IT COULD HAVE EARNED FOR THE DURATION OF THE AGREEMENT, LESS THE FEES WARNER RECOUPED BY LICENSING PROGRAMS TO OTHER BROADCASTERS.

A. When a party repudiates a contract, the non-breaching party is entitled to the benefits it would have received had the contract been fully performed.

It is a black letter law in California that "the party injured by breach [of contract] should receive as nearly as possible the equivalent of the benefits of performance." 1 Witkin, Summary of California Law, *Contracts* § 813, at 732

(9th ed. 1987). The measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code § 3300 (West 1997). The objective is to "approximate the agreed-upon performance." *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.*, 7 Cal. 4th 503, 515 (1994), including "future profits the breach prevented the nonbreaching party from earning . . . ." *Postal Instant Press, Inc. v. Sue Sealy*, 43 Cal. App. 4th 1704, 1709 (1996). In other words, the nonbreaching party is entitled to the "benefit of the bargain." *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified School Dist.*, 34 Cal. 4th 960, 967-68 (2004) ("[T]he plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's contractual bargain").

Where, as here, a party *repudiates* its obligations under the contract, or attaches an unwarranted condition on an offer to perform, the courts hold the nonbreaching party is entitled to recover damages for a total breach, and such damages include all benefits the nonbreaching party would have derived over the lifetime of the contract. In *Gold Mining & Water Co. v. Swinerton*, 23 Cal. 2d 19 (1943), for example, the plaintiff leased a mine to the defendant, who agreed to pay royalties on the value of all minerals extracted. *Id.* at 23. Defendant repudiated its obligations under the lease by imposing an impermissible condition on its performance. The court ruled that "immediately after the repudiation," plaintiff could bring an action to recover "all past and prospective damages suffered . . . ." *Id.* at 29. Those damages consisted of all royalties plaintiff would have received if defendant had fully performed under the lease, less the royalties plaintiff could earn by leasing the mine to another operator. *Id.* at 42.

The principle that the nonbreaching party may recover anticipated future benefits (i.e., benefit of the bargain damages) when the breaching party repudiates a contract is firmly established in California law and has been applied in a variety of contexts. For example:

- In *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal. 2d 784 (1955), the defendant repudiated its obligation to purchase milk from the plaintiff. Plaintiff was able to sell the milk to a third party, but for less than the contract price. The Supreme Court ruled the plaintiff was entitled to damages equal to "the difference between the price [the third party] paid and that specified in the contract . . . ." *Id.* at 793. The difference between these prices represented the damages "caused by defendant's refusal to accept the milk." *Id.* at 791.

- In *Hollywood Cleaning & P. Co. v. Hollywood Laundry Serv.*, 217 Cal. 131 (1932), the defendant repudiated its contract to send all of its dry cleaning business to plaintiff for ten years. *Id.* at 133. The Supreme Court ruled plaintiff was entitled to treat the breach as terminating the contract and sue for the losses it would incur "for the balance of the contract period . . . ." *Id.* at 134.

- In *Solano v. Vallejo Redevelopment Agency*, 75 Cal. App. 4th 1262 (1999), the defendant agency spent funds intended for County improvements for other purposes, rendering the agency incapable of fulfilling its contract obligations. The Court of Appeal ruled that, where a party anticipatorily breaches a contract by refusing to perform, or takes an action that renders it incapable of performing, the nonbreaching party is entitled to "recover damages immediately for a total breach of contract . . . ." *Id.* at 1276. "While an actual breach of contract cannot occur until the time for performance has arrived, an anticipatory repudiation of the contract, or anticipatory breach, occurs before performance is due under the contract and results in a total breach." *Id.* at 1275-76.

- In *Pacific Coast Eng'g Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889 (9th Cir. 1969), this court, applying California law, affirmed the district court's conclusion that a subcontractor anticipatorily breached its contract by demanding more money than it was entitled to as a condition to performing. "'If one who is bound to perform a contract annexes an unwarranted condition to his offer of performance, there is, in effect, a refusal to perform.'" *Id.* at 895 (quoting *Loop Bldg. Co. v. De Coo*, 97 Cal. App. 354, 364 (1929)). The subcontractor's repudiation of its contract obligations entitled the plaintiff to treat the contract as canceled, hire a replacement subcontractor, and recover damages for the increased cost of doing so. *Id*. at 893, 896.

As this court recognized in *Pacific Coast Eng'g*, 411 F.2d at p. 894, the question whether an anticipatory breach has occurred raises on issue of fact.

B. The record supports the district court's factual conclusion that Golden repudiated its obligations under the License Agreement by demanding the letter of credit be returned before it would comply with its obligations.

On November 26, 2002, Golden informed Warner that it would not pay past due Year 3 license fees, the $500,000 extension option fee, or more than $2 million in first quarter Year 4 license fees unless Warner agreed to return the letter of credit. (ER 628-30.) For the reasons discussed in Argument I, *ante*, Golden was contractually obligated to keep the letter of credit in place through at least May 2003, and it was estopped from demanding its return for the full five-year term. Because Golden refused to comply with its contractual obligation to pay license fees "unless Warner agreed to a significant modification of its contractual rights," the district court was entitled to conclude that Golden had repudiated its obligations under the agreement. (ER 358.)

In challenging the district court's ruling, Golden relies on an exception to the anticipatory breach doctrine that arises when there is a good faith dispute about a party's obligations under an agreement. (AOB 52-56.) It cites *Pacific Coast Engineering Co. v. Merritt-Chapman & Scott Corp.*, which held:

> If the offer appears to be made in the good faith belief that the offeror's interpretation is correct, that will be evidence of his continued adherence to the agreement. If the offer is not asserting a good faith interpretation of the contract terms, that fact may be evidence that he is repudiating the agreement.

Pacific Coast Eng'g Co., 411 F.2d at 894 (citations omitted).

Whether a party is asserting a good faith belief is an issue of fact. *Swayze v. U.S.*, 785 F.2d 715, 719 (9th Cir. 1986); *Bryant v. Bakshandeh*, 226 Cal. App. 3d 1241, 1247 (1991). As such, the district court's findings on the issue are reviewed for "clear error." *Husain*, 316 F.3d at 835. "[I]f the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse, even if it is convinced it would have found differently." *Id*.

The district court concluded that Golden could *not* have believed in good faith that it could demand Warner return the letter of credit before Golden would agree to perform its obligations. (ER 359.) This finding, which is entitled to substantial deference, is supported by several factors.

First, the conclusion Golden was not acting in good faith is supported by the district court's previous conclusion that Golden entered into an implied-in-fact agreement to keep the letter of credit in place through at least May 2003. An implied-in-fact agreement is an actual agreement. It arises from a meeting of the minds in which the parties' agreement is manifested by conduct, not words. *Desny v. Wilder*, 46 Cal. 2d 715, 735 (1956). Since the record supports the court's conclusion that Golden agreed to keep the letter of credit in place at least through May 2003, it also supports the conclusion that Golden could not have entertained a good faith belief that it was entitled to demand the letter of credit be returned in December 2002.

Second, in connection with the estoppel issue, the district court concluded that "Golden knew that Warner had conditioned its willingness to renegotiate . . . on Golden's agreement to maintain the Letter of Credit in place throughout the extension option term" (ER 338), and that "by its silence, [Golden] misled Warner into believing that it had agreed to maintain the Letter of Credit in place for the balance of the contract term." (ER 337.) Since the record supports the conclusion that Golden misled Warner into believing the letter of credit would be kept in place, it likewise supports the conclusion that Golden could not honestly have believed it had a right to demand the letter of credit be returned after the negotiations proved unsuccessful.

Third, paragraph 13.7 of the License Agreement provided that, if Warner exercised its option to extend the agreement for a second 30-month term, Golden "agrees to discuss with [Warner] appropriate security *to be given* in respect of License Fees due in Years 3B-5." (ER 495, emphasis added.) The district court ruled this provision, particularly the italicized phrase, "contemplated that there was to be *some* form of security past Year 3A if Warner exercised the extension option." (ER 296, 297 n.72.) In light of this provision, the court was entitled to conclude, as it did, that Golden acted in bad faith when it demanded the letter of credit be returned without offering any security in its place. Golden "could not have had a good faith belief that it was not required to provide *any* security for the license fees due in those years." (ER 359.)

Finally, the district court ruled that paragraph 13.7 required that Golden initiate discussion with Warner if it wished to replace the letter of credit with alternate security. (*Id.*) The court concluded Golden acted in bad faith by shirking this contractual duty. (*Id.*)

Golden claims it did approach Warner about providing security during the second phase of the contract. To support this claim, Golden cites Maori's

September 30 letter, which asked about "what kind of security you ask for in the future." (AOB 54.) But the record makes clear that Maori was being disingenuous when he asked this question. Maori wrote his September 30 letter after the parties had completed ten months of negotiations. From the outset of those negotiations, Warner had informed Golden that a letter of credit was "absolutely critical" to an amended License Agreement. (ER 544.) Warner reiterated that position throughout the negotiations, and Golden had raised no objection. (*See supra* pp. 18-20.) When, on September 30, 2002, Golden asked Warner what kind of security Warner preferred, it already knew the answer. Therefore, it can easily be inferred Golden was not raising that question in good faith, particularly given Maori's simultaneous and baseless demand for "appropriate security which will assure that we will receive the Programs." (ER 589-90.) Simon Kenny, Warner's Senior Vice-President, drew precisely that conclusion and testified Golden was just "stringing us along . . . ." (SER 124.) The district court was entitled to draw the same conclusion.

In short, whether Golden was acting in good faith is a factual issue that should be affirmed unless the district court's findings are clearly erroneous. Based on the facts outlined above and discussed in the court's opinion, the court was entitled to conclude Golden was not acting in good faith when it demanded the letter of credit be returned, and that by making the demand, Golden had repudiated its obligations under the License Agreement.

C. There is no merit to Golden's contentions that the same legal principles that resulted in the district court invalidating the forfeiture provision of the License Agreement also render *any* award of future damages invalid.

Paragraph 17 of the License Agreement's "Additional Terms and Conditions" (ER 517) provides that if Golden defaults on its license fee payments and does not cure the default within 10 days, then "any and all sums payable under this Agreement remaining unpaid shall forthwith become due and payable to Warner regardless of the due date thereof. Warner shall be entitled to suspend the delivery of any Program and . . . terminate this Agreement" (ER 524).

In its summary judgment order, the district ruled paragraph 17 constituted an unlawful penalty because it entitled Warner to recover from Golden *all* license fees due over the life of the contract, and also suspend delivery of programs. (ER 261.) If Golden paid everything it owed for the programs, the court reasoned it should have the right to broadcast the programs. (*Id.*) To permit Warner to collect all its fees and also keep the programs amounted to a double recovery. (*Id.*) Accordingly, if Warner wanted to pursue its rights under paragraph 17, it had to make an election: recover all fees for the life of the contract and continue delivering programs, or refuse to deliver programs and recover only past due fees. (*Id.*)

Golden argues the same logic that led the court to invalidate paragraph 17 as an unlawful penalty also bars Warner from recovering *any* future license fees for programs Golden will not be receiving. (AOB 47-50.) In so arguing, Golden reads too much into the court's summary judgment order. As the court itself explained in its order, the court was not analyzing whether Warner was entitled to future damages under a common law "benefit of the bargain" theory, but only whether the specific language in paragraph 17 of the contract permitted a double recovery:

> The court does not decide, in this order, whether Warner is entitled to fees due during the remainder of the five-year term of the agreement, minus mitigation, under a benefit of the bargain theory. It addresses only Golden Channels' argument that paragraph 17 constitutes a forfeiture.

(ER 262 n.133.)

Nor is the logic of the court's order invalidating paragraph 17 at odds with the damages it ended up awarding to Warner. The court ruled Paragraph 17 was an unlawful penalty because it required Golden to pay Warner "all sums payable under this Agreement" (ER 524), and also permitted Warner to re-license the programs to others. Under paragraph 17, Warner was made more than whole – it recovered *all* the fees it was owed under the agreement, and it could also recover *additional* fees by re-licensing programs to third parties. *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1274-75 (11th Cir. 1999), cited by Golden (AOB 47), struck down a damage clause because it too gave the licensor a double recovery – all license fees owed under the contract plus additional damages for copyright infringement.

The judgment the court entered against Golden does not suffer from this defect. The court's judgment requires Golden to pay Warner the future license fees it would have owed Warner under the agreement, *less* $9,325,450, the amount the court believed Warner could recoup by licensing the programming to other broadcasters.[7/] Unlike paragraph 17, the judgment does not require Golden to pay *all* license fees that would have been owed under the agreement, and it does not result in a double recovery. It simply makes Warner whole, which is the proper measure of contract damages.

7/ Warner in many cases could not re-license the programs for the same prices Golden agreed to pay because programs lose value when they change networks. (SER 133, 153A.) In addition, broadcasters commit to a lineup of programs years in advance and are not in a position to fit new programs into their schedules. (SER 133, 156-57.) Warner had to re-license many of the programs Golden had committed to license for prices well below what Golden had agreed to pay under the License Agreement. (SER 39-41.)

D. Golden's reliance on cases involving the termination of franchise agreements to support its contention that future damages are not available to Warner is misplaced because none of those cases involved anticipatory breaches.

As an alternative ground for challenging Warner's future-damages award, Golden cites a line of cases that hold a franchiser cannot recover future franchise fees when it has foreclosed payment of those fees by its own decision to terminate the contract. (AOB 50-51.) In *Postal Instant Press, Inc.* , 43 Cal. App. 4th 1704, for example, the defendant franchisee fell behind in its monthly royalty payments during the thirteenth year of a twenty-year contract. *Id*. at 1707. Plaintiff PIP declared the overdue payments a material breach and terminated the contract. *Id*. The trial court awarded PIP unpaid past royalties as well as future royalties that would have been owed over the remaining seven and one-half years of the contract. *Id*. at 1708.

The Court of Appeal reversed the future damages award on the ground the defendant's failure to pay past royalties did not cause PIP to lose future royalty payments:

> No, it was the franchiser's own decision to terminate the franchise agreement that deprived it of its entitlement to those future royalty payments. At worst, if the franchiser had not terminated the franchise agreement it might have been required to sue again or perhaps again and again to compel the franchisee to pay . . . .

Id. at 1711.

There is a crucial distinction between *Sealy* and the present case. In *Sealy* and each of the other franchise cases Golden cites at pp. 50-51 of its brief, the franchisee's only breach was falling behind on royalty payments; there was no repudiation of the franchisee's obligation to make future royalty payments. In this case, by contrast, Golden not only fell behind on its license fee payments, it repudiated its obligation to comply with its *future* obligation to provide security for the duration of the agreement's term. As *Sealy* itself recognized, where a party repudiates its obligations under a contract, governing Supreme Court authority authorizes the plaintiff "to recover its lost future profits . . . ." 43 Cal. App. 4th at 1712.

E. Golden had notice the "anticipatory breach" doctrine was at issue.

Golden's final challenge to the future damages award is that it allegedly did not have notice Warner was seeking future damages on an anticipatory breach theory.

(AOB 56-64.) Golden has the burden of showing it was taken by surprise by the issue. *Washington State Bowling Proprietors Ass'n. v. Pac. Lanes, Inc.*, 356 F.2d 371, 378 (9th Cir. 1966). Contrary to Golden's position, it could *not* have been taken by surprise because the anticipatory breach doctrine was placed at issue by a variety of pleadings, including the Pretrial Conference Order. Furthermore, the factual basis for applying the theory – that Golden breached the License Agreement by refusing to pay past or future license fees unless the letter of credit was returned – was the central factual dispute at trial. Golden's contention it was not prepared to address that issue is not credible.

As a preliminary matter, Warner pleaded a breach of contract action and prayed for "compensatory damages for Golden's breach of the License Agreement, in an amount according to proof but no less than $16,000,000." (ER 9.) This allegation was sufficient to invoke all of Warner's contract remedies, including its right to recover future damages based on anticipatory breach. As the court observed, a complaint "'is not required to state the statutory or constitutional basis for [a plaintiff's] claim, only the facts underlying it.'" (ER 355 n.303, quoting language now appearing at *McCalden v. Cal. Library Ass'n.*, 955 F.2d 1214, 1223 (9th Cir. 1990).) The prayer in Warner's complaint for future damages "fairly encompass an allegation that Golden anticipatorily breached its future obligations under the License Agreement." (ER 355 n.303.)

The following additional pleadings and orders also placed Golden on notice that Warner was seeking future damages based on Golden's repudiation of its contract obligations:

- The Pretrial Conference Order states that "[a]s a matter of contract or by operation of law, Warner was entitled to its expectancy under the terms of the License Agreement . . . ." (ER 179.) The only basis on which Warner could recover future license fees (i.e., its "expectancy") by "operation of law" was under an anticipatory breach theory. As the Court of Appeal ruled in *Sealy*, 43 Cal. App. 4th 1704, a party who is merely late in paying license fees is liable only for past fees, not future fees. An obligation to pay future license fees arises "by operation of law" only if the licensee repudiates the contract. The Pretrial Conference Order therefore placed Golden on notice that Warner was invoking the anticipatory breach theory.

- Consistent with the Pretrial Conference Order, Warner's trial brief, which it filed only a day after the district court signed the Pretrial Conference Order, stated it was seeking "benefit of the bargain" damages equal to "the value of the performance Warner would have received under the License Agreement but for Golden's breach," less what Warner received by licensing programs to other broadcasters, which is the precise measure of damages the court ultimately awarded. (ER 142.) To support its claim to license fees for "the entire term of the contract" (ER 144-45, emphasis omitted), Warner cited a series of cases that applied the "anticipatory breach" theory as a basis for awarding future damages. (*Id.*) Among these, Warner's brief argued that *Gold Mining and Water Co. v. Swinerton* is "[p]articularly instructive . . . . In *Swinerton*, lessees of a gold mine *repudiated a lease* of several years. The California Supreme Court held that the lessor was entitled to the royalties he would have earned over the course of the lease had the lessee extracted minerals from the property." (ER 145, emphasis added.)

After discussing the repudiation theory endorsed in *Swinerton*, the brief concludes:

> Based on the principles set forth above, Warner is entitled to the balance of Golden's payments for the term of the License Agreement, less the amount at which Warner is able to relicense the programming in question. Anything less deprives Warner of the benefit of its bargain.

(ER 146.)

Warner's brief further elaborated on this point, asserting that "Golden's statement that it would not continue to perform unless Warner surrendered its security . . . constituted an anticipatory breach of an important contractual provision and could be treated by Warner [as] a repudiation of the License Agreement." (ER 140 n.128.) In support of this assertion, Warner again cited *Swinerton*.

In applying the anticipatory breach doctrine, the district court cited and applied the same cases Warner cited in its trial brief. (*Compare* ER 144-45 *with* ER 353-54.)

- Even prior to filing its Trial Brief, in its opposition to Golden's motion for summary judgment, Warner had invoked *Swinerton* and argued Golden "anticipatorily repudiated the License Agreement when it announced that it would not pay the coming due Year 4 payments unless Warner surrendered the Letter of Credit . . . ." (SER 109.) Furthermore, the court's summary judgment ruling invalidated the accelerated damages clause, leaving repudiation as the only viable basis for future damages.

- At the conclusion of Warner's case, before presenting its defense, Golden filed a motion for judgment on partial findings in which it argued (as it does in this appeal) that Warner had elected its remedy by canceling the agreement, and was barred from recovering future license fees. (SER 91-92.) In its opposition papers, Warner once again cited cases that endorse the anticipatory breach theory (SER 108), and argued it was entitled to future license fees because Golden "anticipatorily repudiated the License Agreement when it announced that it would not pay the coming due Year 4 payments unless Warner surrendered the Letter of Credit . . ." (SER 109).

There is accordingly no merit to Golden's contention that it did not have advance notice that Warner was relying on the "anticipatory breach" theory as a basis for recovering future contract damages.

Finally, Golden's position that the Pretrial Conference Order should have been clearer about the legal basis for Warner's claim is not well taken. Even assuming, contrary to fact, that anticipatory repudiation was not adequately addressed, Pretrial Conference Orders are not immutable. Where the facts relevant to an issue have been litigated at trial, "the pretrial order may be deemed to have been amended by consent of the parties." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 n.9 (9th Cir. 1985); *Rogers v. Union Pac. Ry. Co.*, 145 F.2d 119, 123 (9th Cir. 1944) (Where evidence is introduced without objection and the issue is tried by implied consent of the parties, the court of appeals is "required to treat it as if raised by the pleadings."). As the court ruled in *Mechmetals Corp. v. Telex Computer Products, Inc.*, 709 F.2d 1287, 1294 (9th Cir. 1983), "A pretrial order is not an inexorable decree and may, under proper circumstances, be modified, even after trial . . . . [I]t is proper for a district court to amend the pretrial order in a de facto fashion, without formal amendment, simply by entering findings."

Here, the facts relevant to the anticipatory breach issue were placed at issue by the pre-trial pleadings and fully litigated at trial:

- In the Pretrial Conference Order, Warner stated it would prove that, by conditioning payment of license fees on Warner relinquishing the letter of credit, Golden was imposing "an unwarranted condition" on Golden's tender of performance. (ER 180.)

- In its Contentions of Fact and Law, Warner asserted Golden violated its agreement with Warner when it stated it would pay Warner "only upon the condition that Warner return the Letter of Credit." (ER 94.)

- In its Trial Brief, Warner stated "Golden's demand that Warner relinquish [the letter of credit] is unwarranted and, as such, the tender [of payment] was invalid." (ER 151.)

- In its *own* Trial Brief, Golden argued at length that it did not enter into an implied-in-fact agreement to keep the letter of credit in place, and was not estopped from demanding that the letter of credit be returned. (SER 86A-86D.)

Since the question whether Golden repudiated its License Agreement by imposing an impermissible condition on its performance was front and center from the outset of the case, and was fully litigated at trial, Golden has no basis to argue it was surprised by the issue. Its due process challenge to the award should therefore be rejected.

CONCLUSION

For the foregoing reasons, the district court's conclusion that Golden breached its contract obligations and is liable for past due and future license fees should be affirmed.

Dated: October 24, 2005

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STATEMENT OF RELATED CASES – CIRCUIT RULE 28-2.6

Warner Bros. is not aware of any other cases pending in this Court related to this appeal. Warner Bros. filed a cross-appeal, No. 05-55421, but it has elected not to pursue the cross-appeal

Dated: October 24, 2005

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED. R. APP. 32(a)(7)(C)] CASE NUMBERS 05-55374, 05-55421

__X__ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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