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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

15 ORACLE CORPORATION, a Delaware
16 Corporation,

17 Plaintiff,

18 v.

19 WARRANTY CORPORATION OF AMERICA, a
20 Georgia Corporation,

21 Defendant.

Case No.: C 03-3146 PJH

22 **NOTICE OF MOTION AND MOTION OF PLAINTIFF ORACLE CORPORATION FOR**
23 **SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN**
24 **SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

25 DATE: January 26, 2005
26 TIME: 9:00 a.m.
27 COURTROOM 3

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on January 26, 2005 at 9:00 a.m. or as soon thereafter as
3 counsel may be heard in the Courtroom of the Honorable Phyllis J. Hamilton, 17th Floor, 450 Golden
4 Gate Avenue, San Francisco, California 94102, Plaintiff Oracle Corporation will and hereby does move
5 for summary judgment. The basis for this motion is that there is no genuine issue as to any material fact
6 and Oracle is entitled to judgment as a matter of law.

7 The motion is based on this Notice and the accompanying Memorandum of Points and
8 Authorities, the Declaration of Frank O’Dowd, the Declaration of Andy Rodriguez, the Declaration of
9 Terry Elam, the Declaration of Martin Sweetman, the Declaration of James A. Hughes, the Appendix of
10 Exhibits, the pleadings and papers on file, and such other matter as the Court may consider.

11
12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 Plaintiff Oracle Corporation (“Oracle”) sued Warranty Corporation of America
15 (“WaCA”) to recover the amount WaCA owes under a written contract to license business software
16 from Oracle (the “Licensing Agreement”). Oracle moves for summary judgment because no genuine
17 dispute of material fact exists that (1) WaCA is liable to Oracle for breach of contract; (2) Oracle is
18 entitled to recover \$1,131,188.64 through January 31, 2005; and (3) Oracle is not liable on WaCA’s
19 counterclaim for rescission.

20 In an attempt to avoid paying, WaCA belatedly concocted a story that just seconds before
21 execution of the Licensing Agreement—and after lawyers and management for both sides had reviewed
22 and approved the final contract language—an Oracle salesman said that if WaCA did not obtain
23 satisfactory financing for the purchase, “we’ll rip it [i.e., the contract] up.” This inherently implausible
24 scenario is belied by WaCA’s failure to raise it until almost a year after this action was filed, despite
25 numerous earlier opportunities to offer excuses for its failure to pay. More important, WaCA’s story is
26 legally irrelevant, because the contract is fully integrated. The purported statement that WaCA could
27 “rip up the contract” if it did not get financing flatly contradicts the contract provisions that WaCA’s
28 payment obligation was binding and noncancellable. This motion presents a classic case for application

1 of the parol evidence rule, which bars consideration of undocumented promises that would nullify the
2 terms of an integrated agreement.

3 WaCA's affirmative defenses also fail to present any disputed issue of material fact as to
4 WaCA's contractual liability. Oracle's motion therefore should be granted.¹

5 **II. STATEMENT OF FACTS**

6 **A. WaCA Thoroughly Evaluated Oracle's Software**

7 In 2002, WaCA decided to acquire a new software platform for its business operations.
8 WaCA contacted various suppliers of software and services, including Oracle. Affidavit of Douglas G.
9 Merriman ("Merriman Aff.") ¶5 (Exhibit 8); Deposition of Douglas G. Merriman ("Merriman Depo.")
10 32:18 to 33:15; 39:15 to 40:18 (Exhibit 10).² During WaCA's due diligence, a technology consultant
11 with whom WaCA was working introduced WaCA to Frank O'Dowd, an Oracle Applications sales
12 manager. Deposition of Bryant Willis ("Willis Depo.") 15:3-20 (Exhibit 11). In September, October,
13 and November, 2002, Oracle conducted an in-depth review of WaCA's business processes and
14 information flow, proposed a software solution for WaCA's needs, evaluated the data conversion that
15 would be required if WaCA shifted software platforms, proposed a data migration approach, and
16 prepared demonstrations to show how Oracle's software would function. Declaration of Frank O'Dowd
17 ("O'Dowd Decl.") ¶2.

18 **B. Contract Negotiations**

19 On November 14, 2002, two weeks before the parties executed the contract, O'Dowd
20 forwarded a draft of the Licensing Agreement to Bryant Willis, WaCA's Chief Technology Officer, for
21

22 ¹ Oracle's motion focuses on its right to judgment as a matter of law on its first count for breach of
23 contract. The same undisputed facts establish Oracle's common counts for account stated (Second
24 Count), book account (Third Count), and goods sold and delivered (Fourth Count). Farmers Insurance
25 Exchange v. Zerlin, 53 Cal.App.4th 445, 460 (1997) ("The only essential allegations of a common count
26 are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done,
27 etc., and (3) nonpayment.'").

28 ² The exhibits supporting Oracle's motion are numbered consecutively and each exhibit is attached to its
authenticating declaration. Documents that were marked as deposition exhibits have been renumbered
for this motion to avoid numbering gaps. For example, Exhibit 13 in support of Oracle's summary
judgment motion was authenticated as Deposition Exhibit 96. For the Court's convenience, Oracle also
submits an Appendix of all of the exhibits cited in this memorandum, cross-referenced to each exhibit's
authenticating declaration.

1 his review and comment. O’Dowd Decl. ¶3 and Exhibit 1. O’Dowd sent a follow-up e-mail on
2 November 20, 2002 to both Willis and Todd Campbell, WaCA’s lawyer, asking whether they had any
3 “questions or areas of concern regarding the licensing agreement.” *Id.* ¶4 and Exhibit 2. In response,
4 Campbell e-mailed that he would review the draft and provide comments to Willis. *Id.* On November
5 25, 2002, O’Dowd again e-mailed Campbell and Willis, soliciting their comments or concerns regarding
6 the Licensing Agreement, and offering to arrange for them to speak to Elissa Huff, Oracle’s in-house
7 lawyer for the transaction. *Id.* ¶5 and Exhibit 3. Campbell responded to O’Dowd the same day,
8 confirming that he would review the contract with WaCA’s executive team that afternoon. *Id.* WaCA’s
9 senior executives, including its Chairman, President and founder, Glen Hammer, reviewed the draft
10 Licensing Agreement and provided comments. Deposition of Glen Hammer (“Hammer Depo.”) 153-54
11 (Exhibit 12); see also Exhibit 13 (e-mail from Glen Hammer dated November 27, 2002). O’Dowd
12 arranged and participated in a conference call with Campbell and Huff, during which Campbell sought
13 changes in certain terms and clarification of others. Although the contract was amended in certain
14 respects at WaCA’s request, WaCA never requested a third-party financing condition. O’Dowd Decl.
15 ¶¶6, 7; Deposition of Todd Campbell (“Campbell Depo.”) 25:4 to 26:10 (Exhibit 18).

16 **C. WaCA Obtains Financing from Solarcom**

17 On November 26, 2002—the day *before* it signed the Licensing Agreement—WaCA
18 obtained what it believed to be a financing commitment from a company called Solarcom, and accepted
19 Solarcom’s proposal. Affidavit of A. Randall Barkowitz (“Barkowitz Aff.”) ¶¶8-11 (Exhibit 9). At the
20 inception of this lawsuit, WaCA contended that it “relied upon *Solarcom’s* representations regarding
21 financing when it executed the Ordering Document between WaCA and Oracle.” *Id.* ¶13 (emphasis
22 added). WaCA claimed that on December 3, 2002, *Solarcom* reneged on its financing commitment.
23 *Id.* ¶12.

24 **D. The Terms of the Licensing Agreement**

25 On November 27, 2002, WaCA executed the Licensing Agreement with Oracle.
26 O’Dowd Decl. ¶9. The contract consists of two documents: (1) the Oracle Licensing and Services
27 Agreement (“OLSA”), which sets forth the general terms and conditions of the agreement, and (2) the
28 Ordering Document (“OD”), which identifies the specific products Oracle licensed to WaCA and the

1 fees WaCA agreed to pay.³ O’Dowd Decl. ¶9 and Exhibit 4. The Licensing Agreement contains the
2 following language confirming the parties’ intent that it be the final and complete expression of their
3 agreement:

4 **Entire Agreement**

5 You agree that *this agreement and the information which is expressly*
6 *incorporated into this agreement, together with the applicable order, are*
7 *the complete agreement for the programs, technical support, and other*
8 *services ordered by you, and this agreement supersedes all prior or*
9 *contemporaneous agreements or representations regarding such*
10 *programs and/or services. If any term of this agreement is found to be*
11 *invalid or unenforceable, the remaining provisions will remain effective.*
12 *If this agreement and any non-Oracle ordering document are inconsistent*
13 *in any manner, the terms of this agreement shall prevail. **This agreement***
14 *may not be modified except in a writing signed or accepted online*
15 *through the Oracle Store by authorized representatives of you and*
16 *Oracle and any notice required under this agreement shall be provided to*
17 *the other party in writing.*

18 Exhibit 4, OLSA at 3 (emphasis supplied). Immediately above the signature line, the Licensing
19 Agreement states that it “becomes binding upon execution by you and acceptance by Oracle.” *Id.*, OD
20 at 6. As for payment, it provides that “All fees payable to Oracle are due within 30 days from the
21 invoice date” (*id.*, OLSA at 2), and all amounts due from WaCA “shall be *non-cancellable and the*
22 *sums paid nonrefundable*, except as provided in the agreement.” *Id.*, OD ¶B.2 at 3 (emphasis
23 supplied). Hammer signed the Licensing Agreement in two places, and initialed all other pages.
24 O’Dowd Decl. ¶9; see also Exhibit 4.

25 **E. Oracle’s Performance**

26 Immediately after the parties signed the Licensing Agreement, Oracle shipped the
27 licensed software to WaCA. Declaration of Martin Sweetman (Sweetman Decl.) ¶3 and Exhibit 7. On
28 November 27, 2002, Oracle invoiced WaCA for the license fees and taxes due under the Licensing
Agreement, which totaled \$822,682.65. Declaration of Terry Elam ¶3 and Exhibit 6. The invoice,
consistent with the Licensing Agreement, provided payment terms of “Net Due in 30 days,” meaning

³ The first paragraph of the OLSA incorporates by reference the OD by stating that “This license and services agreement (“agreement”) includes the terms and the order you previously completed.” Exhibit 4, OLSA at 1. In construing the Licensing Agreement, the OLSA and the OD accordingly should be treated as a single document.

1 full payment was due on or before December 27, 2002.⁴

2 **F. WaCA's Failure to Pay**

3 WaCA failed to pay within 30 days as required under the contract. Elam Decl. ¶4. The
4 amount due for the software licenses, plus finance charges through January, 2005 totals \$1,131,188.64.
5 Elam Decl. ¶5.⁵

6 **G. The Parol Evidence Offered By WaCA**

7 Hammer, WaCA's founder, Chairman and President, testified at his deposition that on
8 November 27, 2002, moments before he signed the contract, he asked O'Dowd what would happen if
9 the Solarcom financing did not close, and that O'Dowd responded "Well, we'll just rip it up." Hammer
10 Depo. 136:2 to 137:4 (Exhibit 12). Hammer testified that he then asked, "Well, does it say it in the
11 contract?" and that O'Dowd replied: "Absolutely." *Id.* WaCA pins its defense on Hammer's account,
12 to which there are no other witnesses.

13 Hammer's parol testimony must be placed in context. He is a sophisticated, experienced
14 businessman. In addition to starting WaCA, he was the founder of Automobile Protection Corporation,
15 which became one of the industry's most prominent automobile service companies, went public in 1988,
16 and was sold to Ford Motor Company in 1999. Hammer Depo. 7-13 (Exhibit 12). He has experience in
17 mergers and acquisitions, and has been a signatory to complex acquisition documents that included
18 integration clauses drafted by his lawyers. *Id.* 18:3 to 19:24, 22:6-23, 30:17 to 31:23, 220:17 to 221:19;
19 see also Exhibit 14 at B-30 (stock purchase agreement among Paladyne Corp., Glen H. Hammer, A.
20 Randall Barkowitz, and WAG Holdings, LLC). Under Hammer's direction, WaCA helped produce a
21

22 ⁴ Exhibit 6, Oracle's November 27, 2002 invoice, includes \$776,115.70 for license fees and \$46,566.95
23 for applicable taxes. Under the Licensing Agreement, WaCA was responsible for taxes imposed on the
24 transaction. See Exhibit 4, OLSA at 2 ("you [WaCA] also agree to pay any sales, value-added or other
25 similar taxes"). Oracle will remit the taxes to the appropriate taxing authority.

26 ⁵ In its complaint, Oracle also sought recovery on two additional invoices, nos. 1687274 and 99999780,
27 in the amounts \$182,892.70 and \$89,750, respectively. These additional invoices represented the
28 applicable charges for first-year technical support (no. 1687274) and for education and training (no.
99999780). For summary judgment purposes only, Oracle is willing to waive recovery on invoices
1687274 and 99999780. If the Court grants summary judgment for the amount of software license fees
and taxes due under the Licensing Agreement, Oracle agrees that a final judgment may be rendered for
that amount, and such judgment will dispose of all of Oracle's claims.

1 motion picture, Hammer Depo. 35:10-16, and in 2002 acquired a corporate jet for well in excess of \$1
2 million. Id. 39:24 to 40:25. Hammer acknowledges that it would be accurate to describe him as having
3 "20 years of broad entrepreneurial experience in the development and growth of both privately held and
4 publicly traded entities." Id. 14:4-12. He helped form and owns a two-thirds interest in a corporation
5 that borrowed \$4 million in 2003 for the purchase of a golf course, called "Hammer's Glen." Id. 65:5 to
6 66:25.

7 Any claim that Hammer placed reliance on a last-second comment made by O'Dowd is
8 belied not just by his own extensive business experience, but by the contract negotiation process. As
9 stated above, O'Dowd was careful to ensure that WaCA's management and lawyer had full opportunity
10 to review the contract terms and to request changes. One of the reasons O'Dowd took these steps was
11 because, as he informed WaCA, Oracle requires that any proposed change to the contract language be
12 reviewed and approved by more senior Oracle management—a policy that was followed in this case.
13 O'Dowd Decl. ¶8; Campbell Depo. 13:22 to 14:3 (Exhibit 18). At the signing, Hammer looked at every
14 page of the Licensing Agreement, as shown by the fact that each page bears either his signature or his
15 initials. O'Dowd Decl. ¶9; see also Exhibit 4.

16 WaCA's contemporaneous statements and actions are strikingly at odds with Hammer's
17 current story. On February 21, 2003, after WaCA failed to pay according to the contract terms, Oracle
18 made written demand for payment. O'Dowd Decl. ¶11; see also Exhibit 5 (demand letter dated
19 February 21, 2003). WaCA's Chief Operating Officer, Doug Merriman, responded to Oracle's demand
20 by letter dated February 27, 2003, which said nothing about a promise that WaCA could "rip up the
21 contract." Rather, Merriman wrote only that "[d]ue to circumstances beyond our control, we are unable
22 to proceed with implementation" Merriman Depo. 111:2 to 118:4 (Exhibit 10); see also Exhibit 15
23 (Merriman letter dated February 27, 2003).⁶ The next day, February 28, 2003, Merriman met with Jim
24 Vienneau, who was then an Oracle Regional Manager and O'Dowd's immediate supervisor. The
25 subject of the meeting was WaCA's obligation to pay Oracle, which Vienneau explained was

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27 ⁶ Before drafting his response to Oracle, Merriman forwarded a copy of Oracle's demand letter to
28 WaCA's outside law firm. Merriman Depo. 113:13 to 114:22 (Exhibit 10); see also Exhibit 16
(handwritten fax from Merriman to Brett Lockwood dated February 26, 2003).

1 noncancellable. During the meeting, Vienneau and Merriman placed a call to Tony Perrigan, the Oracle
2 Regional Vice President to whom Vienneau reported, to discuss WaCA’s failure to pay. Vienneau and
3 Perrigan made clear that if WaCA did not pay, the matter would be referred to Oracle’s legal department
4 for further action. Vienneau even reminded Merriman of Hammer’s having said that he would simply
5 “stroke a check” himself for the amount due—a statement wholly at odds with Hammer’s current story.
6 It is undisputed that—despite this opportunity to speak to the two Oracle managers directly responsible
7 for O’Dowd’s conduct—Merriman said *nothing* to Vienneau or Perrigan about any O’Dowd promise
8 that Oracle would “rip up the contract” if WaCA did not obtain financing. Merriman Depo. 122:8 to
9 130:24; see also Exhibit 17 (Merriman e-mail dated March 3, 2003).⁷

10 WaCA’s answer, filed on August 19, 2003, did not allege that O’Dowd promised that
11 “we’ll rip up the contract” absent financing, or that WaCA relied on any such promise. Hughes Decl.
12 ¶13 and Exhibit 19. When WaCA moved to transfer venue to Georgia, it submitted declarations of
13 Merriman and Randall Barkowitz, its Chief Financial Officer. Those declarations similarly claimed that
14 WaCA had relied on financing from Solarcom to pay Oracle and that Oracle was aware of the Solarcom
15 financing—but neither says a word about any promise by O’Dowd to “rip up the contract” if WaCA did
16 not receive funding. See Exhibits 8 and 9. Indeed, Hammer’s “rip up the contract” story never surfaced
17 until WaCA served its response to interrogatories in June, **2004**.⁸

18 **III. ARGUMENT**

19 **A. Standard on Summary Judgment**

20 Oracle’s motion should be granted if there is no genuine issue as to any material fact and
21 Oracle is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56 (c). In opposing the motion,
22
23

24 ⁷ Nor did any of WaCA’s management team ever tell Willis (who was still WaCA’s chief technology
25 officer when this action was filed and until he left the company on September 10, 2003) about any
26 O’Dowd promise to “rip up the contract” if the Solarcom financing fell through. Willis Depo. 7:8-9,
106:11-15 (Exhibit 11). More broadly, Willis never heard that WaCA’s obligation to pay Oracle was
conditioned on financing. *Id.* 111:11 to 112:5.

27 ⁸ See WaCA’s Response to Interrogatory No 1, which required WaCA to identify all communications
28 allegedly containing an Oracle representation regarding third-party financing. Hughes Decl. ¶14 and
Exhibit 20.

1 WaCA must “do more than simply show that there is some metaphysical doubt as to the material facts.”
2 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The motion should be
3 granted if WaCA fails to introduce significant probative evidence tending to support its legal theory.
4 Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979).

5 **B. WaCA is Liable Under the Licensing Agreement as a Matter of Law**

6 WaCA indisputably failed to pay as required by the terms of the Licensing Agreement. It
7 has no excuse for nonpayment, because the parol evidence rule bars Hammer’s “rip up the contract”
8 testimony. Oracle is therefore entitled to judgment as a matter of law.

9 **1. WaCA Breached the Contract by Failing to Pay**

10 The record conclusively establishes the elements of Oracle’s breach of contract claim:

11 (a) Oracle and WaCA entered into a contract; (b) Oracle performed its obligations under the contract;
12 (c) WaCA breached the contract by failing to pay the amount due thereunder; and (d) Oracle has been
13 damaged thereby. 4 B. Witkin, California Procedure, Pleading §476 at 570 (4th ed. 1997) (setting forth
14 elements of breach of contract).

15 (a) Existence of contract: WaCA has admitted execution of the Licensing Agreement.
16 See WaCA Answer at 4, ¶9 (Exhibit 19).

17 (b) Oracle fully performed its obligations: Immediately after executing the Licensing
18 Agreement, Oracle shipped the licensed software to WaCA. Sweetman Decl. ¶3. On November 27,
19 2002, Oracle invoiced WaCA for the software license fees due. Elam Decl. ¶3 and Exhibit 6. Under the
20 Licensing Agreement, no further performance was required of Oracle, and payment of the invoiced
21 amounts was due 30 days after the date of the invoice. OLSA at 2 (“All fees payable to Oracle are due
22 within 30 days from the invoice date”) (Exhibit 4).

23 (c) WaCA failed to pay: WaCA has never paid any amount of the license fees due and
24 owing under the contract. Elam Decl. ¶4; WaCA Answer at 6, ¶16 (Exhibit 19).

25 (d) Oracle has been damaged: Oracle’s damages total \$1,131,188.64, composed of
26 \$822,685.65 in license fees and applicable tax (Exhibit 6), plus \$308,505.99 in finance charges that have
27 accrued since January, 2003, when the license fees became due. Elam Decl. ¶¶3, 5.

28 ///

1 **2. The Written Licensing Agreement Does Not Contain a Financing**
2 **Condition**

3 WaCA’s principal defense is that its payment obligation was conditioned on obtaining
4 third-party financing. However, the Licensing Agreement contains no such term, nor any language that
5 reasonably could be construed as establishing a third-party financing condition. To the contrary: the
6 contract provides that the Licensing Agreement is binding and that payment of fees is noncancellable
7 and due within 30 days.

8 **3. The Parol Evidence Rule Bars WaCA’s Attempt to Add a Financing**
9 **Condition by Oral Modification**

10 WaCA argues that an oral third-party financing condition was created when O’Dowd
11 allegedly assured Hammer that, if WaCA did not obtain a loan for the purchase, “we’ll rip it up.” But
12 California’s parol evidence rule bars Hammer’s attempt to contradict the License Agreement.⁹

13 In applying the parol evidence rule, California law requires consideration of the
14 following questions: “(1) whether the written agreement appears to state a complete agreement;
15 (2) whether the alleged oral agreement directly contradicts the writing; (3) whether the oral agreement
16 might naturally be made as a separate agreement; (4) whether the jury might be misled by the
17 introduction of the parol testimony.” Malmstrom v. Kaiser Aluminum & Chemical Corp., 187
18 Cal.App.3d 299, 314 (1986) (quoting Brawthen v. H & R Block, Inc. 52 Cal.App.3d 139, 146 (1975).

19 **a. The Licensing Agreement is Fully Integrated**

20 Whether the parties to a contract intended it to be the final, complete expression of their
21 agreement is a legal question for the Court. Code of Civil Procedure §1856(d) (“The court shall
22 determine whether the writing is intended by the parties as a final expression of their agreement with
23 respect to such terms as are included therein and whether the writing is intended also as a complete and
24 exclusive statement of the terms of the agreement.”); Banco Do Brasil, S. A. v. Latian, Inc., 234 Cal.
25 App. 3d 973, 1001 (1991), cert. denied 504 U.S. 986 (1992) (“The resolution of the issue of whether the
26

27 ⁹ The parties agreed in the Licensing Agreement that California law applies. Exhibit 4, OLSA at 3
28 (“General: This agreement is governed by the substantive and procedural laws of California . . .”).

1 rule applies so as to exclude any collateral oral agreement is one of law to be determined by the court.”).

2 In this case, the Licensing Agreement expressly states that it represents the parties’
3 “**Entire Agreement**” and that it “supersedes all prior or contemporaneous agreements or
4 representations.” A merger clause of this kind is conclusive on the question whether the parties’ intent
5 was to create an integration. 2 B. Witkin, California Evidence, Documentary Evidence §70 at 190 (4th
6 ed. 2000) (“This type of clause has been held conclusive on the issue of integration, so that parol
7 evidence to show that the parties did not intend the writing to constitute the sole agreement will be
8 excluded.”).

9 **b. The Licensing Agreement is *Not* Reasonably Susceptible to the**
10 **Interpretation Urged by WaCA**

11 Where, as here, a contract is intended to be the final and complete expression of the
12 parties’ agreement, parol evidence concerning its terms may be considered *only* to the extent that such
13 evidence is offered to prove a meaning to which the language of the integrated contract is “reasonably
14 susceptible.” Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37
15 (1968). Whether the written contract is “reasonably susceptible” to WaCA’s interpretation is also a
16 question of law for the court. Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272,
17 277 (9th Cir. 1992), cert. denied, 507 U.S. 914 (1993) (“Whether the written contract is reasonably
18 susceptible of a proffered meaning is a matter of law that is reviewed de novo.”). In applying these
19 rules, California courts reject any attempt to use extrinsic evidence to vary or contradict the terms of a
20 fully integrated agreement. Code of Civil Procedure §1856(a) (“Terms set forth in a writing intended by
21 the parties as a final expression of their agreement with respect to such terms as are included therein
22 may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.”).
23 WaCA’s claim that Oracle orally promised to “rip up the contract” falls squarely within the statutory
24 prohibition as construed by California courts.

25 Directly on point is Bank of America v. Lamb Finance Co., 179 Cal.App.2d 498 (1960),
26 in which the bank sought to recover on defendant’s guarantee of a loan to her wholly-owned
27 corporation. In testimony similar to Hammer’s, defendant Lamb claimed that immediately before
28 signing, she told the bank’s representative “if I am guaranteeing with any of my personal property, I sign

1 nothing,” and that the bank’s representative replied that she was “not liable, it was only a corporate
2 note.” 179 Cal. App. 2d at 501. In fact, the language of the guarantee unambiguously set forth
3 defendant’s “promise to pay the note,” and gave the bank the right to “proceed against the undersigned
4 directly and independently of the maker.” *Id.* The Court of Appeal upheld the trial court’s decision to
5 strike Lamb’s testimony contradicting the guarantee:

6 It is obvious from the face of the record that the stricken portion of
7 defendant Poyet's testimony directly contradicts the written guarantee
8 signed by her; and that such testimony, falling squarely within the parol
 evidence rule, is clearly inadmissible to vary the terms of the instrument
 sued upon.

9 *Id.* See also, *Shyvers v. Mitchell*, 133 Cal. App. 2d 569 (1955) (holding that parol evidence rule barred
10 alleged promise that bank would not seek to recover on guarantee).

11 Similarly, in *Banco Do Brasil, S. A. v. Latian, Inc.*, 234 Cal. App. 3d 973 (1991), a bank
12 sued to collect on personal guarantees that defendants provided in connection with their acquisition of
13 an unrelated company’s inventory and their assumption of the unrelated company’s debt. The
14 guarantors cross-complained for fraud and breach of contract, alleging that their guarantees had been
15 conditioned on the bank’s extending a *new* \$2 million credit line after the acquisition closed, which the
16 bank failed to do. At trial, the guarantors testified over a parol evidence objection that the bank orally
17 promised the new line of credit during negotiations and that they relied on that promise in entering into
18 the guarantees. The jury, plainly relying on defendants’ testimony, found against the bank on its
19 guarantee claim, and awarded defendants more than \$27 million on their cross-complaint. The Court of
20 Appeal reversed and directed that judgment be entered in the bank’s favor, holding that the parol
21 evidence rule barred the defendants’ claim that their guarantees were conditional:

22 [I]t is obviously the position of respondents that the granting of the line of
23 credit was a condition of their entire obligation. This is, however, entirely
24 and directly inconsistent with an express term of the integrated written
25 agreement: "Latian and Sarbaz each acknowledge their joint and several
26 obligations under the Guaranty [the original Guaranty agreement executed
27 in favor of Banco on August 25, 1982] to pay the Indebtedness and agree
28 that such obligations are absolute and *unconditional*." (Italics added.) It is
 simply not possible to reconcile the respondents' claim of an oral condition
 on which their liability to Banco depends with their expressed written
 commitment that there are no conditions to such liability.

28 234 Cal. App. 3d at 1005. See also, *Alling v Universal Manufacturing Corporation*, 5 Cal.App.4th 1412,

1 1435 (1992) (breach of contract and fraud judgment for plaintiff reversed because plaintiff’s testimony
2 that defendant had agreed to fund business according to terms of plaintiff’s business plan should have
3 been excluded by the parol evidence rule, as it contradicted the parties’ express, integrated agreement,
4 which stated that defendant “reserves the sole right to determine any amounts of capital resources which
5 it may invest”); Blumenfeld v. R. H. Macy & Co., 92 Cal.App.3d 38 (1979) (contract clause by which
6 plaintiff lessee explicitly assigned to the lessor “all claims against third parties (including loans)”
7 relating to a shopping center could not reasonably be construed to exclude claims against one tenant).

8 Federal courts apply the parol evidence rule in a manner consistent with California law.
9 See, e.g., Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272 (9th Cir. 1992)
10 (parol evidence rule precluded subcontractor from contradicting contractual language requiring that it
11 "erect complete" a pollution control system) (applying California law); Pace v. Honolulu Disposal Serv.,
12 Inc., 227 F.3d 1150, 1157 (9th Cir. 2000) (when “[f]aced with clear, unambiguous written agreements
13 containing integration clauses and no-oral-modification clauses,” parol evidence rule bars evidence of
14 any inconsistent oral representation) (applying federal law). As the Ninth Circuit has noted, application
15 of the parol evidence rule is particularly appropriate where, as here, an integrated contract was reviewed
16 by sophisticated business executives and counsel who had the opportunity to seek amendments to the
17 integrated contract but did not request any changes in the contractual terms at issue. See, e.g., Sullivan
18 v. Massachusetts Mutual Life Ins. Co., 611 F.2d 261, 265 (9th Cir. 1979) (barring parol evidence offered
19 to show that employment agreement required good cause for termination where experienced party failed
20 to object to terms of integrated agreement that stated that employment was terminable at will).

21 WaCA may offer evidence that it discussed financing with Oracle and, in fact, Oracle
22 Financing Division did make an offer to finance the transaction, which WaCA rejected. Declaration of
23 Andy Rodriguez ¶¶2-3. But exploration of payment options is the norm in business, and has no bearing
24 on the contract terms to which the parties agreed, especially where the contract is integrated. Banco Do
25 Brasil, 234 Cal. App. 3d at 1007 (“that there may have been some prior, or even pending, discussions
26 regarding a possible extension of a line of credit in the future is of no help in avoiding a conclusion of
27 integration. If a prior binding commitment had been made, as opposed to incomplete negotiations, it
28 would seem obvious, if not compelling, that the terms of such a credit arrangement would have been

1 included in the very written agreement which purported to fully describe the entire relationship of the
2 parties.”); Brinderson-Newberg Joint Venture, 971 F.2d at 278 (even if evidence of pre-contract
3 discussions inconsistent with meaning of integrated contract is accepted as true, the integration negates
4 any claim of an oral agreement based on such discussions).

5 **c. A Third-Party Financing Condition Would Have Been**
6 **Included in the Integrated Contract**

7 Malmstrom v. Kaiser Aluminum & Chemical Corp., 187 Cal.App.3d 299 (1986) states
8 that a third consideration in determining application of the parol evidence rule is whether the oral
9 agreement might naturally be made as a separate agreement. 187 Cal.App.3d at 314. Here, it is
10 inconceivable that two experienced businesses, each represented by able lawyers, would state such a
11 fundamental term as a third-party financing condition in an oral side agreement. Such a condition would
12 make the written agreement ephemeral until and unless the condition were satisfied. See Banco Do
13 Brasil, 234 Cal. App. 3d at 1007 (“That a bank, which has gone to such lengths to document an entire
14 debt relationship, would make a cavalier oral commitment, such as is described in respondents’
15 testimony, to provide further open-ended credit is an incredible proposition”); Sanguinetti v. Viewlogic
16 Systems, Inc., 1996 WL 33967, *15, [1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,206
17 (N.D.Cal.1996) (“it seems incredible that such an important provision would not have been more
18 specifically and explicitly covered in the document governing the relationship between the parties”). As
19 the court noted in Banco Do Brasil, “the very claim that their obligation . . . was conditional is one of the
20 major contradictions between the claimed oral agreement and the express provisions of the [integrated
21 agreement].” 234 Cal.App.3d at 1003 n. 43.

22 **d. A Jury Could be Misled By the Extrinsic Evidence**

23 Finally, Malmstrom holds that the court should consider whether admission of the
24 extrinsic evidence might mislead the jury. The answer here is obviously yes. Hammer’s “rip up the
25 contract” testimony unavoidably diverts attention from the written terms of the Licensing Agreement,
26 which the parties intended as the full and final statement of their agreement. Permitting evidence of an
27 alleged oral agreement contradicting the integrated contract’s absolute payment obligation invites
28 mischief and risks a decision based on faulty reasoning. Banco Do Brasil, 234 Cal.App.3d at 1008 (“It

1 a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the
2 defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement
3 of the contract would be unconscionable.” 26 Cal. 4th at 282. WaCA cannot satisfy any one of these
4 requirements, much less all four.

5 The first element requires that the mistake relate to a “basic assumption” regarding the
6 contract terms. Thus, in Donovan, the mistake involved the price of the car. Similarly, in the examples
7 cited in Donovan involving errors made by subcontractors in bids submitted to general contractors, the
8 mistakes also dealt directly with the price term contained in the contract that the mistaken party sought
9 to rescind. Here, WaCA’s alleged mistake had nothing to do with any of the terms of the Licensing
10 Agreement; rather, the “mistake” involved only its own ability to obtain financing from Solarcom.
11 WaCA’s mistake about its financial ability to consummate the transaction does *not* satisfy the first
12 requirement. See Restatement (Second) of Contracts §152, comment b (“mistakes as to market
13 conditions or financial ability do not justify avoidance under the rules governing mistake”).¹⁰

14 WaCA cannot prove the second element either. WaCA’s mistaken belief that Solarcom
15 would provide financing had no impact on the agreed exchange of performances between Oracle and
16 WaCA. Oracle was still obligated to license the same software and to provide the same technical
17 support to WaCA, and WaCA was obligated to pay the same amount in license and support fees. The
18 parties’ bargain had not changed. “It is not enough for [WaCA] to prove that [it] would not have made
19 the contract had it not been for the mistake.” Restatement (Second) of Contracts, §152, comment c.
20 WaCA simply is not in the same position as the car dealer in Donovan, where the mistake dramatically
21 altered the consideration exchanged, resulting in a \$12,000 windfall to the customer and costing the
22 dealer more than 30% of the price that it needed to receive to cover its costs.

23 The third Donovan element also weighs against WaCA. The Supreme Court concluded
24

25 ¹⁰ Nor can WaCA base a mistake defense on Hammer’s supposed failure to read the contract, because it
26 “must acknowledge the general rule that one who assents to a contract is bound by its provisions and
27 cannot complain of unfamiliarity with the language of the instrument.” Madden v. Kaiser Foundation
28 Hospitals, 17 Cal.3d 699, 710 (1976). Any such argument is clearly meritless where, as here, the
defendant is sophisticated, experienced, and was represented by counsel who reviewed and negotiated
contract revisions and approved the final contract language.

1 that there was no justification for placing the risk of the newspaper’s proofreading mistake on the car
2 dealer, because the dealer neither had knowledge of nor the ability to control the newspaper’s mistake.
3 In contrast, here WaCA was in the best position to know the status of its effort to obtain financing,
4 whether it had a firm financing commitment, and whether it should enter into the Licensing Agreement
5 without such a commitment. In these circumstances, which amount to conscious ignorance, WaCA
6 must bear the risk of its own mistake. See, e.g., Restatement (Second) of Contracts §154 (providing that
7 a party should bear the risk of his mistake if “he is aware, at the time the contract is made, that he has
8 only limited knowledge with respect to the facts to which the mistake relates but treats his limited
9 knowledge as sufficient, or . . . the risk is allocated to him by the court on the ground that it is reasonable
10 in the circumstances to do so”), *cited with approval* in Donovan, 26 Cal.4th at 283.

11 Finally, there is nothing unconscionable about enforcing WaCA’s contractual obligations
12 in this case. The unconscionability element, as explained in Donovan, relates to one contracting party’s
13 obtaining an unfair advantage over the other in the values exchanged under the contract. 26 Cal.4th at
14 291-292. In Donovan, the unfair advantage was obvious, as the customer would have obtained a
15 windfall and the dealer would have taken an unintended, significant loss on the transaction. In this case,
16 however, the parties simply receive *exactly* the exchange for which they bargained. It does not “shock
17 the conscience” to require WaCA to perform its obligations under the License Agreement. Jones v.
18 Wells Fargo Bank, 112 Cal.App.4th 1527, 1540 (2003) (“To be substantively unconscionable, a
19 contractual provision must shock the conscience.”).

20 Mischaracterizing the alleged mistake as mutual would not change the result because the
21 same considerations apply. First, as in the case of a unilateral mistake, a mutual mistake must concern
22 an essential element of the contract; mutual mistake as to a collateral matter is insufficient. Wood v.
23 Kalbaugh, 39 Cal. App. 3d 926, 932 (1974) (“mistake must relate to basic or material fact, not a
24 collateral matter”). As already explained, WaCA's use of a third party funding source cannot be
25 considered an essential element of the Licensing Agreement. Second, whether unilateral or mutual, a
26 mistake must have a material effect upon the agreed exchange of performances adverse to the defendant.
27 WaCA “must show that the resulting imbalance *in the agreed exchange* is so severe that [it] cannot
28 fairly be required to carry it out.” Restatement (Second) of Contracts §152, comment c. But here, the

1 supposed mistake would have no effect at all on the parties' bargained-for exchange. Third, WaCA
2 cannot rely on a "mistake" that stems solely from Hammer's supposed failure to read the contract. See
3 note 10, supra. In any event, there was no mistake: WaCA knew what was and was not in the Licensing
4 Agreement because its management and lawyer reviewed and approved the contract terms.

5 WaCA's counterclaim, whether based on mutual or unilateral mistake, presents no triable
6 issues.

7 **5. WaCA's Affirmative Defenses Fail as a Matter of Law**

8 WaCA has pleaded nine affirmative defenses. Most of these defenses need not be
9 separately addressed as they are either duplicative of matters already discussed¹¹ or are meritless on their
10 face.¹² Oracle focuses on two of the defenses: waiver and estoppel (Third Defense) and fraud (Fifth
11 Defense and Seventh Defense).

12 **a. Waiver and Estoppel**

13 "Waiver is the intentional relinquishment of a known right." 11 B. Witkin, Summary of
14 California Law, Equity (9th ed. 1990) §178 at 860. There is no evidence that Oracle intentionally
15 relinquished any of its rights under the Licensing Agreement. To the contrary, Oracle has consistently
16 and unequivocally insisted on its right to payment.

17 Nor can Oracle be "estopped" from asserting its contractual rights. To invoke estoppel,
18 WaCA must prove that Oracle said or did something on which WaCA reasonably relied, and as a result
19 WaCA changed its position to its detriment. California School Employees Assn. v. Jefferson
20 Elementary School Dist. 45 Cal. App. 3d 683, 692 (1975) ("estoppel lies only where someone by his
21 words or conduct wilfully causes another to believe the existence of a certain state of things and induces
22 him to act on that belief so as to alter his own previous position"). But WaCA does not even *allege* that
23

24 ¹¹ WaCA's defenses of failure of condition (First Defense), failure of financing condition (Sixth
25 Defense), and rescission (Fourth Defense and Seventh Defense to the extent based on a financing
condition or mistake) have been discussed above.

26 ¹² WaCA's lack of consideration defense (Second Defense) fails because the mutual promises in the
27 Licensing Agreement are sufficient consideration. WaCA's venue "defense" (Eighth Defense) does not
28 go to the merits, and in any event has already been overruled by the Court. WaCA's Ninth Defense is
nothing more than its denial of Oracle's allegations and thus does not constitute affirmative matter that
Oracle need address.

1 it relied on anything that Oracle said or did. Instead, WaCA pleads that *Solarcom*, a third-party
2 financing source, led WaCA to believe that financing was available, that WaCA entered into the
3 Licensing Agreement in reliance on *Solarcom*'s financing commitment, and that *Solarcom* later refuse to
4 provide financing. See WaCA Counterclaim, ¶¶7, 9; Barkowitz Aff. ¶¶6-13 (Hughes Decl. Exhibit 8).
5 Oracle cannot be estopped by the actions of an independent third party.¹³

6 **b. Fraud and Misrepresentation**

7 WaCA's fifth affirmative defense alleges in wholly conclusory fashion that Oracle is
8 barred from recovery due to its "fraudulent representations or negligent representations." WaCA
9 Answer at 2. But WaCA does not set forth, in either its answer or its counterclaim, specific information
10 about any supposedly false representation by Oracle. Indeed, the only representation about financing
11 that WaCA's pleadings identify came not from Oracle but from a third party, Solarcom. The allegations
12 of WaCA's fifth affirmative defense do not even come close to satisfying the particularity requirement
13 applicable to allegations of fraud and therefore should be ignored. Fed. Rule Civ. Proc. 9(b) ("In all
14 averments of fraud or mistake, the circumstances constituting fraud or mistake shall be pleaded with
15 particularity"); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) ("The proper route
16 is to *disregard* averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has
17 been stated.") (emphasis in original). As a result, WaCA's fraud defense fails on its face.¹⁴

18 Moreover, to the extent that WaCA tries to base a fraud or misrepresentation claim on the
19 supposed "rip up the contract" promise, such claim is barred by the parol evidence rule. The California
20 Supreme Court held, in *Bank of America v. Pendergrass*, 4 Cal.2d 258 (1935), that extrinsic evidence of
21 fraud as a defense to a contract action

22 must tend to establish some *independent fact or representation*, some
23 fraud in the procurement of the instrument, or some breach of confidence

24 ¹³ If WaCA argues that Oracle is estopped by the alleged promise to "rip up the contract" in the absence
25 of financing, such argument fails for the reasons discussed above in connection with mistake and below
in the context of WaCA's affirmative defense of fraud.

26 ¹⁴ The pleadings define the issues that must be addressed in a summary judgment motion. WaCA cannot
27 oppose summary judgment based upon defenses or legal theories that it failed to plead or pleaded
28 inadequately, especially where, as here, discovery is closed. *Coleman v. Quaker Oats Company*, 232
F.3d 1271, 1291-93 (9th Cir. 2000), *cert. denied* 533 U.S. 950 (2001).

1 concerning its use, and *not a promise directly at variance with the promise*
2 *of the writing.*

3 4 Cal.2d at 263 (emphasis added). The Supreme Court has not retreated from its holding in Pendergrass,
4 which remains good law, and, as such, has repeatedly been cited as requiring rejection of any attempt to
5 prove fraud through oral statements contradicting the language of an integrated contract. See, e.g.,
6 Banco Do Brasil, 234 Cal.App.3d at 1009-10 (fraud exception to parol evidence rule does not apply
7 “where, as here, parol evidence is offered to show a fraudulent promise directly at variance with the
8 terms of the written agreement”); Bank of America v. Lamb, 179 Cal.App.2d at 881 (based on
9 Pendergrass, evidence of a promise contradicting an integration “can neither be received nor counted
10 upon to support a finding of fraud”); Brinderson-Newberg Joint Venture, 971 F.2d at 280-81 (“Under
11 California law, parol evidence cannot be introduced to show fraud or misrepresentation if the parol
12 evidence contradicts the language of an integrated contract”).

13 Brinderson-Newberg involved allegations similar to those made by WaCA. The dispute
14 turned on whether the defendant was required to “erect complete” a Flue Gas System for pollution
15 control, as the contract stated, or only to complete structural and miscellaneous steel work and provide
16 “pick and sets” for the remaining components. Defendant contended that it executed the contract only
17 because Brinderson-Newberg assured it, during review of the agreement’s terms, that “erect complete”
18 did not require that it weld and permanently install all components, but only that it provide “pick and
19 sets” to be used for later installation. After determining that the contract was not reasonably susceptible
20 to defendant’s interpretation, the Ninth Circuit held that the District Court should have excluded the
21 parol evidence offered to support defendant’s contract interpretation, and further, that plaintiff’s
22 interpretation of the contract was correct as a matter of law. Turning to defendant’s fraud counterclaim,
23 the Ninth Circuit again concluded that the extrinsic evidence should not have been considered:

24 Because the integrated contract itself is not reasonably susceptible of such
25 an interpretation, [defendant’s] parol evidence contradicts the plain
26 language of the contract. Thus, [defendant’s] signing of the contract
precludes a fraud claim based on the alleged promise to interpret the
contract in a way that contradicts the plain language of the contract.

27 971 F.2d at 281. Even if defendant’s allegations were true, the Ninth Circuit held, “California law holds
28 parties responsible for signing integrated contracts,” id., and defendant “should have insisted that

1 [plaintiff's] promises and representations were put into the contract before it was signed." Id. Having
2 failed to do so, the integrated contract governed.¹⁵

3 WaCA's attempt to state a fraud defense fails under the foregoing case law. A promise to
4 "rip up the contract" if WaCA did not obtain financing contradicts the language of the Licensing
5 Agreement, and under Pendergrass cannot provide grounds for fraud. As the Ninth Circuit stated in
6 Brinderson-Newberg, WaCA was responsible for signing the integrated Licensing Agreement, and if it
7 intended to rely on any supposed oral promises, it should have demanded that those promises be written
8 into the contract.

9 **c. Rescission for Fraud**

10 WaCA's seventh affirmative defense alleges rescission on the ground of "failed
11 conditions, mistake, and/or fraudulent representations or negligent misrepresentations made by
12 Plaintiff." Failed conditions and mistake have been fully discussed above. With respect to rescission
13 based on fraud or negligent misrepresentations, such claims fail because WaCA has not pleaded any
14 misrepresentation by Oracle and, to the extent it alleges a fraud based on a representation that the
15 Licensing Agreement would be conditioned on the availability of third-party financing, such claim is
16 barred by the parol evidence rule.

17 **C. Oracle is Entitled to Recover \$1,131,188.64**

18 WaCA agreed to pay \$776,115.70 in software license fees. In addition, WaCA owes
19 Oracle \$46,566.95 in taxes imposed on the software license sale. Exhibit 4, OLSA at 2 ("you also agree
20 to pay any sales, value-added, or other similar taxes imposed by applicable law"). The total principal
21

22 ¹⁵ Pacific State Bank v. Greene, 110 Cal.App.4th 375 (3rd Dist. 2003) does not justify a different result.
23 In Greene, the court held that a guarantor should have been permitted to testify that the bank told her,
24 prior to signing, that her guarantee covered only a single \$27,000 corporate loan, rather than all
25 indebtedness of the corporation. Such evidence, the court stated, could not be considered to alter the
26 terms of the guaranty, but only to prove fraud. The viability of Greene is questionable, because its
27 holding is contrary to the California Supreme Court's Pendergrass decision, as well as Lamb, Banco Do
28 Brasil, and the Ninth Circuit's Brinderson-Newberg holding. In any event, Greene is of no help to
WaCA, because the result turned on crucial facts not present here: (1) the language of the guarantee was
internally inconsistent as to its scope (which by itself should have justified admitting extrinsic evidence
to resolve the ambiguity); (2) the guarantor was not sophisticated and had not had a lawyer review the
guarantee language; and (3) the guarantor *reasonably* relied on the bank's alleged representation
concerning the scope of the guarantee, given the document's confusing language.

1 amount that WaCA owes Oracle, including tax, is \$822,682.65.

2 On November 27, 2002, Oracle sent an invoice to WaCA for the license fees and tax.
3 Exhibit 6. Under the OLSA, WaCA's payment was due 30 days after the invoice date. Exhibit 4,
4 OLSA at 2 ("All fees payable to Oracle are due within 30 days from the invoice date"). Oracle's invoice
5 provides that any past due amount shall incur a finance charge of 1.5 percent per month. Exhibit 6. To
6 simplify calculation of the finance charge, Oracle will agree that it began to accrue on January 1, 2003.
7 The total finance charge through the end of January, 2005 (a period of 25 months) is \$308,505.99, and
8 finance charges continue to accrue in the amount \$12,340.24 per month. Elam Decl. ¶5.

9 Oracle is entitled to recover, up to and including January 31, 2005, the sum of
10 \$822,682.65 (representing licensing fees and taxes), plus finance charges of \$308,505.99, for a total of
11 \$1,131,188.64.

12 IV. CONCLUSION

13 This is a straightforward collection case that should be decided on summary judgment.
14 The contract terms are unambiguous and unconditional in spelling out WaCA's payment obligation.
15 That WaCA's plan to finance its purchase of software licenses fell through is not Oracle's fault, and
16 WaCA's after-the-fact excuse—that the purchase was conditioned on obtaining financing—is barred
17 under the parol evidence rule. Oracle is entitled to recover the license fees that are due and owing under
18 the Licensing Agreement, as well as the finance charge on the past due amounts. Summary judgment
19 should be entered in Oracle's favor in the amount \$1,131,188.64.

20 DATED: December 17, 2004

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