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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re)
DPP ASSOCIATES - VISALIA, LLC.,)
a California limited liability company,)
Debtor.)

WEINGART FOUNDATION,)
Plaintiff/Counterdefendant,)
vs.)
DPP ASSOCIATES - VISALIA, LLC.,)
a California limited liability company,)
Defendant/Counterclaimant.)

Case No. LA 03-10977 EC
Adversary No.: 03-01107 EC
Chapter 11

MEMORANDUM OF DECISION AFTER TRIAL OF ADVERSARY PROCEEDING

DATE: January 26, 2004
TIME: 1:00PM
PLACE: Courtroom 1675

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These findings of fact and conclusions of law are rendered in this contested matter pursuant to Federal Rule of Civil Procedure 52, as incorporated by Federal Rules of Bankruptcy Procedure 7052. Evidence was taken pursuant to Federal Rule of Civil Procedure 43(e), as incorporated by Federal Rule of Bankruptcy Procedure 9017.

INTRODUCTION

In essence, this is a dispute between DPP Associates - Visalia, LLC ("debtor" or "DPP"), as the developer of a commercial property located in Visalia, California, and Weingart Foundation ("Weingart"), who agreed to loan DPP a certain sum of monies in exchange for the right to purchase the property for a stated price. The main issue between the parties is whether

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1 the option period in which Weingart could have exercised its right to purchase the Visalia
2 property expired in 2002 or 2003.

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4 FINDINGS OF FACT

5 The Court adopts the Admitted Facts from the Joint Pretrial Order entered on October 23,
6 2003. Therefore, the undisputed facts recited in Section A of the Pretrial Order are hereby
7 adopted as the Court's findings of fact, which the Court will not recite herein since they are
8 already filed in the court records. As to disputed facts in the Pretrial Order, not all are material to
9 the issues to be decided. To the extent that the Court does not comment on any of them, their
10 resolution is deemed as unnecessary to a ruling on the relevant issues. Having read all the
11 exhibits in evidence, reviewed the trial notes, and listened to some of the testimony again on the
12 tapes, the Court makes the following findings with regard to the disputed matters and facts
13 ascertained from the oral testimonies as well as the exhibits in evidence.

14
15 Taking into account the exhibits presented, the credibility of the witnesses, and the most
16 rational interpretation of the undisputed facts, it is clear that the transaction at issue was
17 essentially a staged purchase of the Visalia building that is the subject of this dispute. There was
18 a financing arrangement and an option agreement, but the intent of both parties and the course of
19 dealing evidenced throughout was that Weingart would own the building at the agreed upon
20 option price at the end of the day. It was originally contemplated that the purchase would happen
21 in mid-2002, but the renegotiated lease of the tenant, CIGNA, and the additional developments
22 related to the expansion of the building at the site caused the parties to subsequently transform
23 their understanding of the purchase period.

24 Examining the exhibits in chronological order and comparing them to the testimony of
25 what each party felt was happening at the time when the various emails and letters were written
26 and agreements signed, the Court has no doubt both from the provisions of the agreements and
27 the course of dealing among the parties that the transaction was intended to weave elements of a
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1 sale with a loan, and the two cannot be separated. The loan funding was nearly the purchase
2 price. The interest rate charged by Weingart was much higher than the usual commercial rate for
3 such a loan, and it was higher than the rates contemplated by the two other lenders with whom
4 DPP had initial borrowing discussions. This reflected the parties' understanding that this was not
5 simply a financing arrangement with a purchase option clause, but a true intent to make a
6 property sale. DPP was a developer and the financial arrangement with Weingart was its exit
7 plan after the property had been fully developed. Weingart was not usually a lender, but decided
8 to function as one in this transaction as part of its goal to purchase the property. The financing
9 arrangement leading to a purchase was in the interest of both parties.

12 CONCLUSIONS OF LAW

13 Weingart, as the Plaintiff, concedes that it has the burden of proof by a preponderance of
14 evidence as to whether there is an enforceable contract for a 2003 option expiration date. Pac.
15 Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 546 (9th Cir. 1949).
16 Weingart has met that burden in a number of ways.

18 The Advance Date

19 First, the Court determines that the Advance Date has not occurred. Although the
20 Advance Date is defined in the Amended and Restated Mortgage Loan Commitment and Option
21 Agreement ("Restated Loan Agreement," Ex. 22), the parties subsequently redefined the
22 Advance Date by executing the Modification of Short Form of Option, Guaranty, Commitment,
23 and Undertaking Agreement ("Short Form Agreement," Ex. 29). The Restated Loan Agreement
24 was intended to control the loan, and the Short Form Agreement was designed to address the
25 purchase option. Since the Advance Date relates to tolling of the option exercise period, the
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1 Court finds that the Short Form Agreement controls the definition of the Advance Date.

2
3 Section M-2(B) of the Short Form Agreement defines the Advance Date as "the date on
4 which the Building Two Tenant Improvement Advance or the Building Two Completion
5 Advance (each as defined in the Restated Loan Agreement) shall be funded by Lender to or for
6 the benefit of Borrower, whichever is later." (Ex. 29 at 5.) Because the Advance Date is the later
7 of the two funding dates, it requires that both the Building Two Tenant Improvement Advance
8 ("TI Advance") and the Building Two Completion Advance ("Completion Advance") be funded
9 before the Advance Date can occur. Weingart disbursed neither the TI Advance nor the
10 Completion Advance. It follows that since Weingart did not fund the TI Advance or the
11 Completion Advance, the Advance Date could not have occurred.

12
13 Nevertheless, DPP argues that "funding" of the two Advances occurred when Weingart
14 reserved the two Advance amounts for DPP's benefit. DPP, citing the American Heritage
15 Dictionary, argues that "fund" means "a sum of money or other resources set aside for a specific
16 purpose" and that the Advances were funded when Weingart liquidated investments to make
17 monies available to fund the Advances. While DPP may be correct in the definition of "fund," it
18 is incorrect in equating making sure monies are *available* for funding the Advances and the
19 *actual* funding of those Advances. Weingart's actions in making sure that it had the monies
20 available to fund the Advances, when and if DPP satisfied the conditions required for funding, do
21 not constitute the funding of those Advances.

22
23 There was no evidence introduced that the final expansion advance had been set aside or
24 put in any escrow account. Weingart was required to provide the money only if the conditions of
25 the loan agreement were met. What accounts Weingart paid the money from is irrelevant. The
26 Short Form Agreement also dropped the segregated accounts language present in the earlier
27 Restated Loan Agreement, indicating further that this was no longer the arrangement.

1 DPP claims that the Short Form Agreement merely defines the Advance Date and does
2 nothing to eliminate the other provisions of the Restated Loan Agreement. It then points to
3 Section 1.03 of the Restated Loan Agreement, which states in pertinent part that:

4 Subject to satisfaction of the Advance Conditions and the other terms and
5 conditions of this Restated Commitment, Lender shall advance all of the
6 Expansion Advance to Borrower on the Advance Date. Notwithstanding
7 the foregoing, at Lender's option, a portion of the proceeds of the
8 Expansion Advance may be held by Lender in one or more interest-bearing
9 reserves or escrows for later dispersal to Borrower upon satisfaction of
10 additional conditions such as payment of the Tenant Improvement
11 Allowance (as defined in the Lease) for the Expansion Addition following
12 completion of the tenant improvements. All such escrowed loan proceeds
13 shall be deemed funded as of the Advance Date.

14 (Ex. 22 at 2.) It argues that since "Lender shall advance all of the Expansion Advance to
15 Borrower on the Advance Date," the Advance Date occurred when Weingart funded the
16 Expansion Advance on or about November 16, 2001. Moreover, the TI and Completion
17 Advances were, in essence, held in "escrow" by Weingart. Thus, the Advances are "escrowed
18 loan proceeds" that are "deemed funded as of the Advance Date" or the date on which the loan
19 proceeds were funded.

20 While the Short Form Agreement allows for a consistent reading of the related provisions
21 in the Restated Loan Agreement, it does not allow for the Advance Date to be defined as the date
22 on which the Expansion Advance was funded. Even if the Advances are properly considered
23 "escrowed loan proceeds," the Restated Loan Agreement must be read in conjunction with the
24 definition of Advance Date in the Short Form Agreement. Thus, the pertinent part of Section
25 1.03 of the Restated Loan Agreement would read "All such escrowed loan proceeds shall be
26 deemed funded as of the Advance Date, *which is the date on which the TI Advance or the*
27 *Completion Advance (each as defined in the Restated Loan Agreement) shall be funded by*
28 *Lender to or for the benefit of Borrower, whichever is later.*" Consequently, when read in
conjunction with the definition of Advance Date, as set forth in and controlled by the Short Form

1 Agreement, Section 1.03 of the Restated Loan Agreement does not support DPP's contention that
2 the Advance Date has occurred because it is the date on which the Expansion loan proceeds were
3 funded.

4
5 **Facility Fee**

6 John Morrow ("Morrow") testified that he believed the loan had funded and was being
7 held in reserve by Weingart and that was why DPP was paying a facility fee. However, a review
8 of the definition of the Facility Fee in the Restated Loan and Security Agreement, dated Nov. 16,
9 2001 (Ex. 33 at 11) supports Weingart's interpretation of the Advance Date. The Facility Fee
10 accrues on unfunded amounts of the advance and ceases to accrue upon full funding of the
11 advance. The advance date concept contemplates that part of the expansion loan will be paid but
12 that the Advance Date is not completed until all amounts are paid.
13

14 Contrary to DPP's contention that this interpretation of the Advance Date causes the
15 option to be an unreasonable restraint on alienation in violation of California law, the ability of
16 Weingart to control the funding, and therefore, the Advance Date, is not an unreasonable
17 restraint. As discussed below, the lending agreements provided for certain documents,
18 assurances and building construction items. Weingart had a right to either enforce the bargain
19 the parties struck or waive its rights. If it had added provisions not provided for in the contract or
20 had been objectively unreasonable, the restraint on alienation question would be valid. Given
21 that the Court finds Weingart's insistence on certain preconditions is not unreasonable, this
22 argument against the Advance Date fails.

23 For these same reasons, the Advance Date does not violate the rule against perpetuities.
24 The Advance Date could have easily occurred sooner and was equally in the power of DPP to
25 control if it had satisfied the requisite preconditions as set forth in the agreements.
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1 parties struck. Weingart got a lower purchase price because DPP would pay a part of any sales
2 profits to CIGNA pursuant to the profit participation. Even though the payment remained DPP's
3 responsibility, Weingart still had an interest in the issue so that it would not start out its
4 ownership of the building with a poor relationship with a very important tenant, or worse,
5 becoming involved in litigation over the issue.

6 Whether this dynamic meant that the option exercise date would be delayed is less clear.
7 However, it is obvious to the Court that it was significant to DPP's analysis of how profitable the
8 transaction would be in the end for them.

9 Option Date

10 The understanding of when the parties intended to have the building purchased by
11 Weingart (whether through the exercise of the put or the call) makes it puzzling why the 2002
12 option exercise dates were not changed to 2003 from the point the Restated Loan Agreement was
13 signed. What appears to have happened is that the parties focused nearly exclusively on the
14 financing aspect of the transaction during the entire course of their dealings. The option
15 language was drafted in the original loan documents, and the understanding was in place that the
16 option period would not start until after the financing was completed. In the meantime, everyone
17 was working on the complexities of the expansion construction and financing, which were much
18 more immediate and contentious.

19 Both parties proceeded with a different focus on what parts of the transaction were
20 significant at any given time in a long course of dealing. It does not appear that anyone really
21 thought about the question of the option date or got their respective attorneys involved in this
22 issue after the original option arrangement was worked out until the Morrow-Wolfe phone call
23 discussing the option in June of 2002. The parties mutually seemed to operate as though they all
24 understood when the option would kick in, but did not focus on the details because it was
25 premature. Each of the businessmen involved testified that they left the exact details of the
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1 agreement documents to the attorneys, and the business people worried about the business
2 transaction. Consequently, there was a significant lack of clarity on this important detail, but
3 that does not clearly indicate a mutual misunderstanding.
4

5 Morrow's memos to Verdugo Bank (Exs. 1106 and 1169) do arguably evidence his belief
6 that the option expired in mid-2003. The problem with reading those memos as a clear
7 indication of his understanding is that Morrow essentially admitted that he was willing to shade
8 precise facts as necessary to induce the financing he sought. Thus, the memos could also be read
9 as consistent with the existing written option agreement.
10

11 Whether or not Laurence Wolfe ("Wolfe") believed the option language in the
12 agreements read 2003 is also unclear. While Wolfe's memo to Fred Ali indicates a belief in a
13 2003 option date, many of his activities in the first half of 2002 are also consistent with a
14 possible plan to exercise a purchase option in 2002. It may also be that Weingart's
15 understanding of the Advance Date led it to be unconcerned about the 2002 expiration since they
16 did not plan to exercise the option until all issues on the building had been worked out through
17 the financing process. In fact, Wolfe's original memo to the Board of Directors refers to the
18 benefits of such an arrangement. (Ex. 2016).

19 No Mutual Mistake

20 All the individuals involved here were very sophisticated and knowledgeable individuals.
21 Morrow was mainly involved in negotiating the loan and had extensive and impressive
22 experience with large development projects and large commercial loans, both as a loan officer
23 and as a developer. Wolfe had overseen Weingart's investments for over 25 years and was
24 involved in the investment oversight of over \$100 million. Mark Knapp's ("Knapp") experience
25 was similarly impressive. He had an MBA in Real Estate Finance and a lengthy career in
26 investment advising and large commercial real estate management. Both sides were well
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1 represented by highly qualified legal counsel. Weingart sought out the Sidley & Austin team
2 because of their experience with commercial real estate work and large institutional lenders.
3 John Wells was a former partner from Gibson & Dunn and was the only attorney for DPP
4 throughout this transaction.

5
6 While it is certainly possible that a drafting mistake was made and none of these
7 individuals noticed that the option date should have read 2003 instead of 2002, the Court finds
8 that Weingart has not carried its burden of proof on this issue. The likelihood is small that this
9 many people with this level of experience and awareness of the significance of such a clause in a
10 contract would have missed this date through numerous drafts of the agreement. Secondly, some
11 of the parties' actions are also consistent with a 2002 option exercise date. Both sides originally
12 intended to have all the preconditions and financing done by mid-2002. Wolfe stated that
13 Weingart would have preferred to have the option exercised earlier if possible because life would
14 be simpler if it could deal with the tenant directly and not have to use DPP as an intermediary on
15 every issue. It is equally likely that there was some confusion or indecision over the question and
16 no one went back to the agreements to check on the precise language until June 2002 when it
17 became apparent that the preconditions and financing had not proceeded as expected.

18
19 Regardless, the evidence presented is insufficient to persuade the Court by a
20 preponderance of evidence that there has been a mutual mistake.

21
22 **Borrower's Certificate**

23 Whether the Advance Date occurred and whether there was a mutual mistake in the
24 earlier agreements became inconsequential once the parties decided to enter into the Second
25 Modification to Short Form Amended and Restated Option Agreement ("Second Modification
26 Agreement," Ex. 1201) and the Borrower's Certificate ("Borrower's Certificate," Ex. 1205).

1 These agreements explicitly extend the option agreement to September of 2003. (Ex. 1201 at 2;
2 Ex. 1205 at 5.) The parties both signed it, and they are bound by it.

3 The facts are undisputed that Morrow called Wolfe in June of 2002 to ask for a change to
4 the 2002 option expiration date. While Morrow testified that Wolfe said he would get back to
5 him, Wolfe testified that he agreed right away because that is what he thought the deal was.
6 Despite the conflicting testimony, the Court finds the credible testimony to be that there was an
7 oral agreement in that phone call to change the expiration date, whether because of prior mistake
8 or confusion or because it was in the interest of both parties at that time to change the date.

9 The evidence indicates that Weingart did not mind taking longer to exercise its purchase,
10 because it appeared they needed longer to be definite that DPP would follow through on the
11 outstanding issues related to the building. Once the final Expansion Advance monies were
12 funded, Weingart had very little leverage to require the preconditions to be met, and they would
13 be left in a position of exercising an option on a property that still had some significant
14 outstanding problems. The subsequent actions of the parties indicate that they both believed that
15 the phone conversation was an agreement to change the option expiration date to September of
16 2003. Weingart then relied on this agreement and did not exercise the option before September
17 30, 2002, even though its attorney had the deadline calendared under the original agreement.

18 DPP and Weingart then both entered into the additional written agreements confirming
19 the oral agreement effective August 5, 2002, believing that they would be fully carried out by
20 both sides. This was a last ditch effort to save an important transaction that had run into
21 unexpected trouble.
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24 **Defenses raised by DPP**

25 DPP raises a number of defenses to the effectiveness of the Borrower's Certificate, all
26 factually interrelated. It is undisputed that DPP carries the burden of proof by a preponderance of
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1 evidence as to each of these defenses. Gallardo v. DiCarlo, 203 F. Supp 1160, 1169 (C.D. Cal.
2 2002). The factual basis for most of DPP's arguments against the controlling nature of the
3 Borrower's Certificate is that it did meet the loan preconditions, and that Weingart was
4 unreasonable in its approach to these preconditions.

5 The problem is that the very testimonies of DPP's principals belie this argument. During
6 the testimony, Morrow had a lack of recollection on key issues once the Borrower's Certificate
7 and the loan preconditions came into question. Furthermore, he appeared not to be overly
8 concerned with the accuracy of his representations to lenders, testifying that financial statements
9 needed to be truthful but not other representations. In addition, Knapp's insistence that he had
10 diligently met all preconditions was not borne out by either the contemporaneous
11 communications between the parties or the stringent provisions that were in the loan agreements.
12

13 For instance, Morrow's assurances to Weingart that DPP was not involved in any
14 material litigation was one example of the failure of DPP to take seriously its commitments
15 under the agreements. Morrow admits he "could have known" about the Lee & Associates
16 lawsuit at the time he signed the agreements, which provided that there were no material changes
17 with respect to the "no litigation" status of DPP. (See, e.g., Restated Loan and Security
18 Agreement, Ex. 33 at 18.) Moreover, Gallely made a unilateral decision that the Lee &
19 Associates litigation was not material to Weingart. Yet, the facts indicate that this litigation
20 potentially could have been something any lender, including Weingart, would want to know
21 about. Weingart justifiably would wanted to independently evaluate such a claim to see if it
22 might adversely affect either their financing arrangement or the exercise of their option. Thus,
23 Weingart's concern about its concealment was understandable and justified.
24

25 In addition, the DPP partners also did not appear to be overly concerned about any change
26 in the ownership of DPP itself. Although Weingart sought loan guarantees from all the owners
27 of DPP and it was the owners that Weingart was relying on for repayment of a multimillion
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1 dollar loan in case of default by DPP, none of the DPP partners thought a change in ownership
2 was material enough to notify Weingart.

3 Furthermore, Weingart's concerns about the mechanic's liens against the property were
4 also reasonable in light of the fact that these matters were routinely handled by DPP and
5 Weingart was not aware of any issues regarding the nonpayments to contractors during the initial
6 financing phase. When Weingart became aware of the mechanics lien's, it realized that DPP
7 might not have the reserves to pay off these various outstanding expenses without the final
8 advance from Weingart.

9 Likewise, Weingart's other concerns were also not unreasonable. CIGNA notified
10 Weingart that DPP was not adequately addressing its concerns about possible roof damage. It
11 seems sensible to the Court that Weingart should certainly care about the conditions of the
12 property which it intends to purchase. Weingart was also reasonable in seeking assurances that
13 the insurance on the building was completely adequate and in proper form. They understandably
14 carefully reviewed this insurance policy once they noticed that DPP had not paid attention in the
15 original policy to such key issues as the total square footage and whether the building was one
16 story or two stories. Weingart was reasonably relying on a report from a reputable insurance
17 broker in determining whether the insurance was adequate. (Ex. 1261.)

18 The property tax lien placed on the property by the City of Visalia also concerned
19 Weingart, and rightfully so. Morrow claims in his testimony not to have been aware of it at the
20 time he signed the Borrower's Certificate because Galletly did not advise him of it. As to this
21 and other issues, there were either poor systems in place to communicate between the DPP
22 partners or a lack of concern for ensuring that loan conditions were fully met. Either way, DPP
23 did not make a sufficient effort to comply with all material terms of the borrowing agreements.
24 They seemed to think that many warranties and preconditions were just paperwork that should be
25 just left to the lawyers.
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1 In the reported cases, e.g. Sabo v. Fasano, 154 Cal.App.3d 502 (1984) and Forbes v.
2 Board of Missions, 17 Cal.2d 332 (1941), usually one party has waived the lapse of time defense
3 by accepting the offer or performing acts as if there were a valid contract. Obviously, there is no
4 waiver here, but the fundamental question here is whether Weingart's signature is necessary for
5 DPP to conclude that the Borrower's Certificate was accepted. In other words, were DPP's
6 words and deeds after execution of the Certificate consistent with the belief that the Certificate
7 was valid and binding.

8 DPP consistently intended Weingart to exercise the option at the price originally agreed
9 to throughout the transaction. Morrow testified that there was no reason not to sell the Visalia
10 property at the price in the option agreement and they were not trying to get a better price from
11 Weingart. DPP appears to have only changed its intent once it realized it would have to fund a
12 larger shortfall in costs than planned, and that Weingart was requiring strict adherence to the
13 preconditions of the loan closing and was not willing to share the unexpected additional costs to
14 DPP

15 Weingart's attorneys drafted the Borrower's Certificate, and several drafts and emails
16 were exchanged between the attorneys for both sides before the final draft was offered to DPP for
17 signature. The Borrower's Certificate was a culmination of ongoing negotiations between two
18 sophisticated parties as well as written confirmation of the oral agreement between Morrow and
19 Wolfe on the option date. This is not a case where DPP unilaterally put out a signed offer of
20 terms and then Weingart made no response. First, Weingart's counsel drafted the contract.
21 Second, counsel for both DPP and Weingart reviewed and made changes to several drafts of the
22 contract prior to execution. "Silence coupled with conduct or with expectations reasonably
23 engendered by a prior relationship can reasonably be understood by the offeror as an acceptance."
24 Perillo, supra, § 318 at 406. Weingart's actions are consistent with acceptance in this regard.
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1 DPP states that the "usual course of dealing" between the parties was that no action was
2 ever taken until the relevant documents were signed by both parties. This may be true in terms of
3 when the funding occurred each time, but the purpose and intent of the Borrower's Certificate
4 was simply to reconfirm the necessary acts to get the loan funded and for DPP to confirm that
5 they had met the conditions precedent. Based on the fact that the language regarding the option
6 exercise period was not in the earlier drafts, the option agreement was added on here as an
7 afterthought because none of the parties believed the option would be exercised anyway until
8 after the financing was completed. Given DPP's lack of diligence in resolving the disputes with
9 CIGNA and its failure to satisfy the preconditions, Weingart kept the Borrower's Certificate
10 while awaiting the completion of the loan conditions as spelled out in the document. Weingart
11 had already evidenced their intent to abide by it because they continued seeking to close the loan
12 despite the many delays.
13

14 DPP claims it would never have signed the Borrower's Certificate if it did not believe
15 Weingart was about to fund. The credible evidence is that Weingart always intended to fund and
16 was carefully preparing to fund but that they never felt comfortable funding the final amounts
17 because DPP never met conditions precedent that were important to Weingart. In fact, it appears
18 that Weingart would have funded even after the notice of default was filed if DPP had complied
19 with the conditions precedent to the loan. DPP has no cause to complain when the very delay in
20 funding was caused by its own lack of diligence in satisfying the conditions precedent to the loan.
21

22 Good Faith and Fair Dealing

23 The Court concludes that Weingart was intending to honor its funding commitments
24 under the lending agreements, and that its insistence on certain conditions precedent was
25 permitted under the lending agreement and objectively reasonable. As such, Weingart did not
26 violate the covenant of good faith and fair dealing.
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1 As late as September 19, 2002, Wolfe was still attempting to work out the insurance
2 requirements with Knapp. (See, e.g., Ex. 1281.) The attorneys were also spending a lot of time
3 getting final details in place. For example, a letter from Kathryn McCarthy, Weingart's counsel
4 at Sidley & Austin, to Chicago Title shows that Weingart was still progressing toward getting the
5 title insurance and mechanics liens settled as late as October 4, 2002. (Ex. 2242.)

6 The loan and option transactions were indeed interconnected and the documents must be
7 read in their entirety, but there is nothing in the written agreements that causes the option
8 agreement to be invalid simply because Weingart delayed funding of the Expansion Advances
9 longer than the parties originally contemplated.

10 The fact that the option extension was not recorded until after Wells had sent a request
11 not to record does not change this analysis. Weingart had signed and mailed the agreement
12 before Wells' request was sent (see Ex. 1202) and the parties had both previously agreed to the
13 new dates.
14

15 Repudiation

16 DPP next contends that Weingart repudiated the Borrower's Certificate before they
17 signed it. Rather than as acts of repudiation, the Court sees Weingart's words and deeds as
18 consistent with the existence of an extension of the option period. Weingart persistently pursued
19 DPP to fulfill its obligations under the agreement and to make the necessary repairs to the
20 property or to supply the needed documentation before Weingart would exercise its option.
21 During the summer and early fall of 2002, both parties diligently worked towards satisfying the
22 conditions to release the funding, and those actions are inconsistent with the DPP's position that
23 Weingart repudiated the agreement. If it were so, Weingart would have had no incentive to
24 constantly urge DPP to satisfy the loan conditions. Weingart was within its rights under the loan
25 agreement to take the very actions that DPP alleged as a repudiation.
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1 Similarly, the Notice of Default also cannot be seen as a repudiation. If the Court accepts
2 DPP's assertion, then every lender with an option to purchase would have no recourse if the
3 borrower fails to make the requisite payments.

4 Weingart was precisely carrying out the terms of the Borrower's Certificate - trying to
5 carefully make sure each of the preconditions to funding the advance were satisfied. Weingart's
6 demands are well within its contractual rights, and not objectively unreasonable given that this
7 was Weingart's last opportunity to ensure that its \$20 million investment was sound and not
8 riddled with a lack of title insurance, unexpected mechanic's liens or a leaking roof. Looking at
9 the Final Borrower's Certificate as in integrated whole leaves the Court to conclude that DPP and
10 Weingart both understood the option period was changed to 2003 in the Certificate, and they
11 assented to such a change.

12
13 DPP cites to Pac. Coast Eng'g Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889, 896
14 (9th Cir. 1969), as support for its assertion that Weingart's alleged unwarranted conditions on
15 DPP established repudiation by Weingart is readily distinguishable. Unlike Pac. Coast Eng'g,
16 the conditions which Weingart demanded of DPP were conditions precedent expressly stated in
17 the loan agreement, not new unexpected demands. The fact that Knapp found Weingart's
18 demands unreasonable did not make the demands themselves unwarranted.

19 Statute of Frauds

20 Finding that the Borrower's Certificate is validly executed, enforceable and controlling,
21 the statute of frauds defense by DPP is without merit. "The law has long been established that
22 the Statute of Frauds has no application to an executed agreement." Bonaccorso v. Kaplan, 218
23 Cal.App.2d 63, 72-73 (1963).

24 The statute of frauds is designed to prevent fraud by requiring certain agreements to be in
25 writing. In this case, there is a detailed, executed writing resulting from negotiations between
26 counsel for both parties, and therefore, the statute of frauds is inapplicable.
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