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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

|                               |   |   |
|-------------------------------|---|---|
| In re:                        | ) | BAP No. EC-10-1228-DHKi                 |
|                               | ) |   |
| ALEXANDRA M. SPIEGEL,         | ) | Bk. No. 08-29045                        |
|                               | ) |   |
| Debtor.                       | ) | Adv. Proc. No. 08-02364                 |
|                               | ) |   |
| <hr/>                         |   |   |
| ALEXANDRA SPIEGEL; STILLWATER | ) |   |
| RANCH DEVELOPMENT, LLC,       | ) |   |
|                               | ) |   |
| Appellants,                   | ) |   |
|                               | ) |   |
| v.                            | ) | <b>M E M O R A N D U M</b> <sup>1</sup> |
|                               | ) |   |
| WRIGHT GRANDCHILDREN, L.P.,;  | ) |   |
| MICHAEL WRIGHT,               | ) |   |
|                               | ) |   |
| Appellees.                    | ) |   |
|                               | ) |   |
| <hr/>                         |   |   |

Argued and Submitted on February 17, 2011  
at Sacramento, California

Filed - March 1, 2011

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable David Russell, Bankruptcy Judge, Presiding

Appearances: Matthew Emrick argued for the Appellants.  
Michael D. Senneff argued for the Appellees.

Before: DUNN, HOLLOWELL, and KIRSCHER, Bankruptcy Judges

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<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.



1 Stillwater, through Mr. Wallace on Ms. Spiegel's behalf, and  
2 Mr. Hung obtained an appraisal on the Unimproved Property and  
3 began searching for a loan to replace the initial financing. The  
4 appraisal, dated April 7, 2006, set the value of the Unimproved  
5 Property at \$3.1 million.

#### 6 The Loan

7 \_\_\_\_\_ Ultimately, Stillwater engaged the services of a mortgage  
8 broker, Scott Woods, to assist in finding a private money lender  
9 willing to loan \$1.7 million to Stillwater. Mr. Woods "shopped"  
10 the loan request to Darryl Bailey, who shopped it to yet a third  
11 mortgage broker, John Fillipa. Mr. Fillipa then contacted one of  
12 his long-standing clients, Michael Wright, who agreed to fund the  
13 loan through the Wright Grandchildren, L.P. ("WGLP"), of which he  
14 was a general partner.

15 Because the appraised value of the Unimproved Property would  
16 support a loan with a 50% loan to value ratio ("LTV") of only  
17 \$1.55 million, Mr. Wright insisted that Stillwater provide  
18 additional collateral with sufficient value to bring the LTV to  
19 not less than 50%. Ms. Spiegel agreed to grant a third position  
20 lien to WGLP on the Improved Property to facilitate the loan,  
21 provided that WGLP would agree to subordinate to a potential new  
22 loan on the Improved Property. At the time, the Improved  
23 Property was encumbered by a first deed of trust in the amount of  
24 \$275,000, and a second deed of trust (the "Ricci Interest") in  
25 the amount of \$950,000. While no appraisal had been performed  
26 with respect to the Improved Property, the parties ascribed to it  
27 the appraised value of the Unimproved Property: \$3.1 million. On  
28 May 16, 2006, Mr. Fillipa prepared a Letter of Understanding

1 which described the terms of the proposed loan. In the Letter of  
2 Understanding, WGLP "agree[d] to subordinate to a new 1st loan  
3 provided the combined LTV on both properties [did] not exceed  
4 50%. Value can be determined by mutual agreement of lender and  
5 borrower or by new appraisal on both properties 1 and 2 with  
6 [WGLP] approving the appraiser." Ms. Spiegel signed the Letter  
7 of Understanding on May 19, 2006.

8 Immediately thereafter, Mr. Fillipa ordered preparation of  
9 the loan documents from PLM Loan Processing Center, Inc. ("PLM").  
10 He directed that PLM include in the loan documents two provisions  
11 which related to the LTV issue. The first related to the  
12 subordination agreement requested by Ms. Spiegel, and provided:

13 [WGLP] agrees to subordinate to a new loan on [the  
14 Improved Property] provided the combined LTV does not  
15 exceed 50% of the existing loan amount. Value can be  
16 determined in 2 ways: 1) by mutual agreement of [WGLP]  
and Borrower or 2) by a new appraisal on both [the  
Unimproved Property and the Improved Property] with  
[WGLP] approving the appraiser to be used.

17 The second related to a release clause, also requested by  
18 Ms. Spiegel, and provided:

19 [WGLP] agrees to release [the Improved Property]  
20 provided the LTV does not exceed 50% of the existing  
21 loan amount. Value can be determined in 2 ways: 1) by  
22 mutual agreement of [WGLP] and Borrower or 2) by a new  
appraisal on the Unimproved Property with [WGLP]  
approving the appraiser to be used.

23 Mr. Hung, Mr. Wallace, and Ms. Spiegel all testified that  
24 they had little, if any, opportunity to review the loan documents  
25 until they went to the title company to sign them, and that no  
26 one explained the documents to them.<sup>3</sup> Mr. Wallace accompanied

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27  
28 <sup>3</sup> Mr. Hung testified he was surprised to find in the loan  
(continued...)

1 Ms. Spiegel to her signing appointment and reviewed the documents  
2 on her behalf. Because he was concerned about the release  
3 language in the documents as prepared at the direction of  
4 Mr. Fillipa, Mr. Wallace had his attorney, Robert Harris, come to  
5 the title company office to review the documents. Mr. Harris  
6 made changes to the release language, which were given to the  
7 title officer. Through the title officer, Ms. Spiegel and  
8 Mr. Wallace learned that the language changes had been approved.  
9 As changed, the release clause ("Release Clause") now provided:

10 [WGLP] agrees to release [the Improved Property]  
11 provided the [LTV] of [the Unimproved Property] does  
12 not exceed 50% of the existing loan balance. Value can  
13 be determined in one of two ways: 1) by mutual  
14 agreement of [WGLP] and Borrower or 2) by a new  
15 appraisal on the Unimproved Property with [WGLP]  
16 approving the appraiser to be used. If [the Improved  
17 Property] sells, the maximum dollar amount the Borrower  
18 has to pay is \$150,000, but in no event more than is  
19 required to reduce the [LTV] to less than 50% on [the  
20 Unimproved Property]. [WGLP] shall release [the  
21 Improved Property] within 10 days of the value being  
22 determined under the terms of this paragraph.

17 The testimony at trial was that Mr. Fillipa accepted the  
18 Release Clause without talking with Mr. Wright. In fact,  
19 Mr. Wright was not aware of a change to the Release Clause until  
20 the events which led to the litigation between the parties took  
21

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22 <sup>3</sup>(...continued)  
23 documents a personal guaranty that he was required to sign as a  
24 condition of the loan. He testified no guaranty had been  
25 requested prior to that time. Without the assistance of counsel  
26 or a full opportunity to review the guaranty, which contained a  
27 complete waiver of rights, Mr. Hung signed the guaranty. When  
28 judgment was entered in favor of WGLP, it included judgment  
against Mr. Hung in the amount of \$2,336,546.30. Mr. Hung filed  
a separate notice of appeal with respect to the judgment. That  
appeal, EC-10-1247, was dismissed on September 20, 2010, on the  
stipulation of the parties.

1 place. It is the language of the Release Clause that is the  
2 focus of the dispute between the parties.

3 Changes also were made to the subordination language at the  
4 request of Mr. Wallace and Mr. Harris, so that the final  
5 subordination clause provided:

6 [WGLP] agrees to subordinate to a new loan on [the  
7 Improved Property] provided the combined [LTV] does not  
8 exceed 50%. Value can be determined in one of two  
9 ways: 1) by mutual agreement of [WGLP] and Borrower or  
10 2) by a new appraisal on both properties encumbered  
under this loan with [WGLP] approving the appraiser to  
be used. The term of the new loan shall not be greater  
than 30 years and the interest charged on the new loan  
shall not exceed 15% per annum.

11 The loan ("WGLP Loan") closed and was funded on or about  
12 June 5, 2006. The WGLP Loan amount was \$1.7 million, and its  
13 term was three years. The WGLP Loan bore interest at 12% per  
14 annum. Interest only payments were to be made monthly in the  
15 amount of \$17,000 until loan maturity on June 2, 2009. From the  
16 proceeds of the WGLP Loan, an interest reserve in the amount of  
17 \$204,000 was created and escrowed at Mr. Fillipa's office to  
18 ensure the payment of the first twelve monthly interest payments.

19 The Final Closing Statement for the WGLP Loan reflects that  
20 from the loan proceeds, a loan origination fee in the amount of  
21 \$21,250 was paid to Sequoia Pacific Loans (Mr. Bailey), a broker  
22 fee in the amount of \$29,750 was paid to Mortgage Process Center  
23 dba Golden Lending (Mr. Woods), and a broker commission was paid  
24 to Pine Valley Mtg. & Inv. Co. (Mr. Fillipa). After various  
25 title, tax and escrow charges, the remaining WGLP Loan proceeds  
26 were applied to pay off the existing lien in the amount of  
27 \$806,577.49, and a balance of \$592,535.26 was released to the  
28

1 Borrowers.<sup>4</sup>

2 Performance Under the WGLP Loan

3 In May 2007, Ms. Speigel, through Mr. Wallace,<sup>5</sup> asked WGLP  
4 to subordinate its interest in the Improved Property to a further  
5 advance from the Ricci Interest in the amount of \$193,000. WGLP  
6 agreed, on the condition that \$102,000 of the advance be used to  
7 prepay six months of interest payments due under the WGLP loan,  
8 which would have ensured the source of interest payments through  
9 December 2007.

10 On November 7, 2007, prior to any loan default to WGLP,  
11 Mr. Wallace initiated contact with WGLP to advise that  
12 Ms. Spiegel likely would be unable to make the payment due on  
13 January 2, 2008. Mr. Wallace advised that Ms. Spiegel was trying  
14 to sell both the Unimproved Property for a price of \$2.5 million,  
15 and the Improved Property, which Mr. Wallace valued at \$3.5  
16 million.

17 On December 1, 2007, Mr. Fillipa and Mr. Wright drove to and  
18 walked both properties. They also met with the real estate agent  
19 with whom the properties were listed, who stated that because the  
20 market value of developable land had decreased, she believed the  
21

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22  
23 <sup>4</sup> At trial, Mr. Hung testified his investment into  
24 Stillwater was in the amount of \$300,000. Mr. Hung received  
25 \$200,000 of the loan proceeds disbursed to the Borrowers. Later,  
26 in February of 2007, Mr. Hung transferred all of his interests in  
27 Stillwater to Ms. Spiegel in return for a junior deed of trust in  
28 the amount of \$100,000 on the Unimproved Property. WGLP was not  
notified of this change in ownership of Stillwater.

<sup>5</sup> Mr. Wallace acted on Ms. Spiegel's behalf throughout  
the course of events hereafter.

1 Unimproved Property was worth no more than \$1.8 million. She  
2 further stated that she was concerned that the Unimproved  
3 Property might be limited to mitigation or green belt use in the  
4 future, which would further reduce its value to \$1.2 million.  
5 With respect to the Improved Property, the real estate agent  
6 stated that she believed its true value was closer to \$2 million  
7 than to the \$4 million which Mr. Wallace was trying to get in a  
8 sale.

9 On December 17, 2007, Mr. Wright received a Notice of  
10 Default and Election to Sell Under Deed of Trust from the Ricci  
11 Interest with respect to the Improved Property based on a payment  
12 default.

13 Ms. Spiegel and Stillwater did not make the January 2, 2008  
14 payment due under the WGLP Loan, and have made no payments since.  
15 On January 11, 2008, Mr. Wallace called Mr. Wright to request  
16 that WGLP take a deed in lieu of foreclosure on the Unimproved  
17 Property and release the Improved Property because nothing was  
18 happening with the attempts to sell the properties. Thereafter,  
19 on January 17, 2008, WGLP sent Stillwater and Ms. Spiegel a  
20 Notice of Default and Election to Sell ("WGLP NOD") on its trust  
21 deed. On January 18, 2008, WGLP sent letters to Stillwater,  
22 Ms. Spiegel, and Mr. Hung (1) to make sure that they were aware  
23 of WGLP's actions because all communications had been through  
24 Mr. Wallace, (2) to demand that all rents and profits from the  
25 properties be applied to payments as provided in the loan  
26 documents, and (3) to warn that selling dirt from the Unimproved  
27 Property as threatened by Mr. Wallace could diminish the value of  
28 the property. In response to the letter, on about January 24,

1 2008, Mr. Wallace called and left a message for Mr. Wright that  
2 he remained willing to provide a deed in lieu of foreclosure for  
3 the Unimproved Property only, and that if that was not acceptable  
4 he would hire an attorney to "fight it out." Because Mr. Wright  
5 was away from his office for an extended period, he instructed  
6 his son, Stephen Wright, to contact Mr. Wallace to communicate  
7 that WGLP would only accept a deed in lieu of foreclosure for  
8 both properties. On January 29, 2008, Stephen Wright sent an  
9 email to his father, stating that Mr. Wallace's response to the  
10 proposal was that WGLP could sue them and "end up with 80 acres  
11 with holes in the ground and incur significant out-of-pocket  
12 costs or accept a deed in lieu now."

13 In his communication with Stephen Wright, Mr. Wallace  
14 asserted that WGLP was in breach of the loan documents for  
15 failure to release the Improved Property for \$150,000 in  
16 connection with a proposed sale of the Improved Property in  
17 January 2007. Mr. Wright testified this was the first he learned  
18 of any proposed sale in January 2007.<sup>6</sup>

19 On February 12, 2008, Mr. Wright received a letter from  
20 Mr. Emrick on behalf of Mr. Wallace, advising that the Improved  
21 Property was in the process of being sold, and invoking the  
22 release clause with respect to the Improved Property, demanding a  
23 release of the WGLP security interest in the Improved Property  
24 upon payment to WGLP of \$150,000.

25 Thereafter the record reflects communications passed between  
26

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27 <sup>6</sup> No further information about this alleged proposed sale  
28 is reflected in the record.

1 Mr. Emrick, demanding a release of the Improved Property,<sup>7</sup> and  
2 Mr. Senneff, counsel for WGLP, requesting information to evaluate  
3 the proposed sale. Finally, on April 9, 2008, Mr. Wright  
4 received a copy of the signed purchase and sale agreement between  
5 Kristi Schaffner and Ms. Spiegel with respect to the Improved  
6 Property. The "sale" in fact was a proposal that Ms. Schaffner  
7 would operate the north half of the Improved Property with an  
8 ultimate purchase to take place at some point in the future. The  
9 sale did not contemplate immediate payment of funds to  
10 Ms. Spiegel. Further, the sale was not contingent upon a release  
11 of WGLP's interest in the Improved Property, as had been  
12 represented to WGLP.

13 On April 11, 2008, WGLP (1) sent a letter to the title  
14 company demanding full payment of the WGLP Loan in connection  
15 with the proposed sale of the Improved Property to Ms. Schaffner,  
16 and (2) filed a judicial foreclosure complaint, which resulted in  
17 a termination of the sale to Ms. Schaffner.

18 On July 3, 2008, Ms. Spiegel filed a chapter 11 bankruptcy,<sup>8</sup>  
19 and she removed the foreclosure proceedings, together with the  
20 cross claims she had filed against Mr. Wright, to bankruptcy  
21 court on July 14, 2008.

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23 <sup>7</sup> Although Appellants assert in their reply brief that  
24 they tendered the \$150,000 to Mr. Wright to obtain a release,  
25 there is no evidence in the record that any tender was in fact  
made. At most they made offers to tender the funds.

26 <sup>8</sup> The chapter 11 case was converted to chapter 7 after  
27 this appeal was filed. Mr. Wallace has since purchased the  
28 chapter 7 estate's interest in the debtor's cross-claims against  
Appellees.

1 In January 2010, the Ricci Interest foreclosed on the  
2 Improved Property, eliminating the WGLP security interest.

3 The bankruptcy court conducted a four day trial which began  
4 May 3, 2010. Oral findings of fact and conclusions of law were  
5 made on the record on May 6, 2010. Pivotal to the decision of  
6 the bankruptcy court was its interpretation of the Release  
7 Clause. The bankruptcy court found that Mr. Wright's intent was  
8 to maintain a 50% LTV at all times. The bankruptcy court also  
9 recognized that Ms. Spiegel's concerns related to obtaining a  
10 quick release of the Improved Property in the event of a sale.  
11 However, the Release Clause as drafted by Mr. Harris had the  
12 effect of allowing an immediate release upon payment of \$150,000  
13 (or less), only if the LTV in the Unimproved Property had  
14 increased by \$150,000 (or more). The bankruptcy court ruled  
15 that, to be effective to require an absolute release upon a sale,  
16 the Release Clause should have provided simply that the Improved  
17 Property "will be released upon the payment of \$150,000."  
18 Judgment was entered June 9, 2010. Ms. Spiegel timely filed her  
19 Notice of Appeal.

## 20 21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction under 28 U.S.C.  
23 §§ 1334 and 157(b)(2)(A) and (O). We have jurisdiction under  
24 28 U.S.C. § 158.

## 25 26 **III. ISSUE**

27 Whether the bankruptcy court erred in interpreting the  
28 Release Clause.

1 **IV. STANDARDS OF REVIEW**

2 A trial court's interpretation of contract provisions is  
3 reviewed de novo. United States v. 1,377 Acres of Land, 352 F.3d  
4 1259, 1264 (9th Cir. 2003); Simpson v. Burkart (In re Simpson),  
5 366 B.R. 64, 70-71 (9th Cir. BAP 2007), aff'd, 557 F.3d 1010  
6 (9th Cir. 2009). De novo review requires that we consider a  
7 matter anew, as if it had not been heard before, and as if no  
8 decision had been previously rendered. United States v.  
9 Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v.  
10 Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

11 However, when in interpreting a contract the trial court  
12 admitted extrinsic evidence on issues, such as intent, we review  
13 findings of fact for clear error while reviewing de novo  
14 principles of law applied to those facts. Tamen v. Alhambra  
15 World Inv., Inc. (In re Tamen), 22 F.3d 199, 203 (9th Cir. 1994);  
16 see also Estreito v. Citirealty Corp. (In re Estreito), 111 B.R.  
17 294, 295 (9th Cir. BAP 1990). Clear error will only be found if  
18 we are "left with the definite and firm conviction that a mistake  
19 has been committed." Easley v. Cromartie, 532 U.S. 234, 242  
20 (2001).

21  
22 **V. DISCUSSION**

23 This appeal turns on the meaning of the Release Clause,  
24 drafted by Mr. Harris, agreed to by Mr. Fillipa, and included in  
25 the Note and the Trust Deed for the WGLP Loan:

26 [WGLP] agrees to release [the Improved Property]  
27 provided the [LTV] of [the Unimproved Property] does  
28 not exceed 50% of the existing loan balance. Value can  
be determined in one of two ways: 1) by mutual  
agreement of [WGLP] and Borrower or 2) by a new

1 appraisal on the Unimproved Property with [WGLP]  
2 approving the appraiser to be used. If [the Improved  
3 Property] sells, the maximum dollar amount the Borrower  
4 has to pay is \$150,000, but in no event more than is  
5 required to reduce the [LTV] to less than 50% on [the  
6 Unimproved Property]. [WGLP] shall release [the  
7 Improved Property] within 10 days of the value being  
8 determined under the terms of this paragraph.

9 A. Mr. Wright and WGLP Are Bound By the Release Clause.

10 As a preliminary matter, we determine that there is no basis  
11 for Appellees' assertion that they are not bound by the Release  
12 Clause because Mr. Fillipa was the agent of Ms. Spiegel and  
13 Mr. Hung, not of Mr. Wright or WGLP. The facts clearly establish  
14 otherwise, notwithstanding the execution by Ms. Spiegel and  
15 Mr. Hung of an Agreement to Procure Lender.<sup>9</sup> Neither Ms. Spiegel  
16 nor Mr. Hung ever met with Mr. Fillipa during the transaction.  
17 Mr. Fillipa did not "find" a loan on behalf of the borrowers to  
18 the transaction. He found an investment opportunity for one of  
19 his long-standing clients, Mr. Wright. He presented the terms  
20 acceptable to Mr. Wright and WGLP, and negotiated with the  
21 borrowers' broker to obtain the additional security required by  
22 his client. Mr. Fillipa's email message to Mr. Wright on May 12,  
23 2006, clearly establishes that Mr. Fillipa was not advocating the  
24 interests of the borrowers in the transaction:

25 I have been told late today that the borrowers are not  
26 sure they want to cross collateralize. I told them to  
27 let me know for sure by Monday morning if they want to  
28 do business with us and we need a signed agreement to  
move forward. If they do not respond I will tell them  
our offer is off and see what happens.

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<sup>9</sup> The Agreement to Procure Lender was a part of the WGLP  
Loan documents; its purpose was to ensure that Mr. Fillipa would  
receive a commission.

1 When he submitted the document order worksheet to PLM to draft  
2 the loan documents, he identified himself as a broker acting as  
3 agent for the lender only.

4  
5 B. California Law Applies to Interpretation of the Release  
6 Clause.

7 The Deed of Trust provides that it is governed by the law of  
8 the jurisdiction in which the property is located. Thus we apply  
9 California contract law in interpreting the Release Clause.

10 1. Rules of Interpretation

11 In interpreting a contract we are charged "simply to  
12 ascertain and declare what is in terms or in substance contained  
13 therein, not to insert what has been omitted, or to omit what has  
14 been inserted; and where there are several provisions or  
15 particulars, such a construction is, if possible, to be adopted  
16 as will give effect to all." Cal. Civ. Proc. Code § 1858.

17 California Civil Code § 1636 provides that "[a] contract  
18 must be interpreted as to give effect to the mutual intention of  
19 the parties as it existed at the time of contracting, so far as  
20 the same is ascertainable and lawful." See also TRB  
21 Investments, Inc. v. Fireman's Fund Ins. Co., 145 P.3d 472,  
22 476-77 (Cal. 2006). As Appellees point out, California courts  
23 have recognized that release clauses in lending contracts  
24 constitute material provisions. White Point Co. v. Herrington,  
25 268 Cal. App. 2d 458, 466 (1968). Without question, the release  
26 language was material to Ms. Spiegel. However, "[p]articular  
27 clauses of a contract are subordinate to its general intent."  
28 Cal. Civ. Code § 1650.

1 It is a primary rule of interpretation that contracts  
2 must be construed from their four corners, and the  
3 intention of the parties must be collected from the  
4 entire instrument and not detached portions thereof, it  
5 being necessary to consider all of the parts to  
6 determine the meaning of any particular part as well as  
7 of the whole. Individual clauses and particular words  
8 must be considered in connection with the rest of the  
9 agreement, and all of the writing and every word of it  
10 will, if possible, be given effect.

11 Indenco, Inc. v. Evans, 201 Cal. App. 2d 369, 374 (1962).

12 Finally, "the language of a contract should be interpreted most  
13 strongly against the party who caused the uncertainty to exist."  
14 Cal. Civ. Code § 1654.

## 15 2. Application of the Rules of Interpretation

16 The record on appeal establishes that WGLP would not make  
17 the loan unless the LTV was not more than 50%. It was for this  
18 reason that the Improved Property was provided as additional  
19 collateral for the WGLP Loan in the first instance.

20 Mr. Fillipa, on behalf of Mr. Wright and WGLP, drafted the  
21 initial language to govern a possible future release of the  
22 Improved Property. However, Mr. Harris and Mr. Wallace, acting  
23 on behalf of the intended beneficiary of the release language,  
24 Ms. Spiegel, did not believe that the language proposed by  
25 Mr. Fillipa would allow Ms. Spiegel sufficient flexibility to  
26 obtain a release of the WGLP encumbrance on the Improved  
27 Property. Therefore, Mr. Harris revised the language, and his  
28 version of the Release Clause was substituted in the WGLP Loan  
documents for that proposed by Mr. Fillipa. As a consequence, to  
the extent the Release Clause created uncertainty as to its  
application, the Release Clause is to be interpreted most  
strongly against Ms. Spiegel.

1           We agree with the bankruptcy court that the Release Clause  
2 drafted by Mr. Harris is "ambiguous at best." If Ms. Spiegel  
3 wanted an absolute right to obtain a release of WGLP's security  
4 interest in the Improved Property in exchange for the payment of  
5 \$150,000, the Release Clause could have been written as suggested  
6 by the bankruptcy court: "[the Improved Property] will be  
7 released upon the payment of \$150,000." Instead, the Release  
8 Clause as written is conditional. "[WGLP] agrees to release [the  
9 Improved Property] provided the [LTV] of [the Unimproved  
10 Property] does not exceed 50% of the existing loan  
11 balance. . . ." (Emphasis added.)

12           The provision relating to release upon a sale of the  
13 Improved Property is ambiguous as to an absolute release. That  
14 language reads: "If [the Improved Property] sells, the maximum  
15 dollar amount the Borrower has to pay is \$150,000, but in no  
16 event more than is required to reduce the [LTV] to less than 50%  
17 on [the Unimproved Property]." (Emphasis added.) This language  
18 retains the reference to the requirement that the LTV on the  
19 Unimproved Property be maintained at 50%. The record reflects  
20 that by December 2007, the value of the Unimproved Property had  
21 declined from \$3.1 million to at most \$2.5 million, but possibly  
22 as low as \$1.2 million. In light of the declining value of the  
23 Unimproved Property, it was impossible to implement the release  
24 provision by its express terms, even given the existence of a  
25 sale.

26           Ms. Spiegel asserts that the bankruptcy court erred when it  
27 "implied a term" into the Release Clause. The implied term,  
28 according to Ms. Spiegel, was that the parties assumed the

1 Unimproved Property would increase in value. We find no error in  
2 the bankruptcy court's observation that the Release Clause would  
3 only make sense if Ms. Spiegel assumed that the value of the  
4 Unimproved Property would increase.

5 Finally, Ms. Spiegel points out that, in addition to  
6 modifying the Release Clause, Mr. Harris also modified the  
7 acceleration clause in the WGLP Note, which by its terms was  
8 "subject to the release clause . . . ." However, the only change  
9 made to the acceleration clause was to substitute for the phrase  
10 "said real property" the lot description for the Unimproved  
11 Property. The modification was intended by Ms. Spiegel to ensure  
12 that a sale of the Improved Property could not form the basis of  
13 an acceleration of the WGLP Loan. The acceleration clause was  
14 exercised in response to the failure to make payments due under  
15 the terms of the WGLP Note beginning with the January 2008  
16 interest payment.

### 17 3. Mr. Wright Did Not Breach the Agreement

18 Ms. Spiegel asserts that even under the bankruptcy court's  
19 interpretation of the Release Clause, Mr. Wright breached the  
20 "agreement" (1) by failing to disclose to Ms. Spiegel his own  
21 estimate of the value of the Unimproved Property, and (2) by  
22 asking Ms. Spiegel for an appraisal of the Unimproved Property  
23 when it was the obligation of WGLP, not of Ms. Spiegel, to select  
24 an appraiser.

25 Mr. Wright counters that in arriving at his opinion of value  
26 he relied on Ms. Spiegel's agent, the realtor who was attempting  
27 to sell the Unimproved Property. Further, he and his attorneys  
28 repeatedly requested information from Ms. Spiegel regarding the

1 value of the property without response. Finally, he contends  
2 that the Release Clause did not require WGLP to hire an  
3 appraiser, only to "approve" the appraiser who was selected.

4 These inactions complained of by Ms. Spiegel neither  
5 constitute a breach of the Release Clause, nor evidence that  
6 Mr. Wright was acting in bad faith vis-a-vis the Release Clause.

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8 C. Motion to Strike Portions of Appellees' Brief.

9 Appellants filed a last minute motion seeking to have  
10 stricken four portions of Appellees' brief. We deny the motion  
11 for the following reasons. First, the proposed sale of the  
12 Improved Property to Ms. Schaffner, Appellees' concerns with the  
13 terms of that "sale," and the removal of dirt from the Unimproved  
14 Property by Appellants, all are part of the factual record.  
15 Second, we are unable to find in Appellees' Brief, or in the  
16 record for that matter, any "contentions and implications" that  
17 Appellants misused the loan funds, let alone any which might  
18 constitute "unsupported slander." Finally, whether the  
19 modifications to the Release Clause must be construed against  
20 Appellants is a matter of law, which we are required to determine  
21 in our disposition of this appeal. As such, it is an appropriate  
22 subject for inclusion in Appellees' Brief.

23  
24 **VI. CONCLUSION**

25 Appellants' motion to strike portions of Appellees' Brief is  
26 DENIED.

27 The bankruptcy court reasonably interpreted the Release  
28 Clause to mean that Ms. Spiegel was entitled to a release of the

1 Improved Property only if the LTV on the Unimproved Property  
2 would not exceed 50% as a result. Accordingly, we AFFIRM.

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