IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIV.

CASE NO.: 2019-16913-CA-01 (44)

OPA-LOCKA COMMUNITY DEVELOPMENT CORPORATION, INC., a Florida non-profit corporation,

Plaintiff,

v.

HK ASWAN, LLC, a Massachusetts limited liability company, HALLKEEN MANAGEMENT, INC., a Massachusetts corporation, and ASWAN VILLAGE ASSOCIATES, LLC, a Florida limited liability company,

Defendants.
_____/

DEFENDANTS HK ASWAN, LLC, HALLKEEN MANAGEMENT, INC., AND ASWAN VILLAGE ASSOCIATES, LLC'S MOTION FOR RECONSIDERATION OF OMNIBUS ORDER, DATED JULY 7, 2020

Defendants HK Aswan, LLC ("HK Aswan"), HallKeen Management, Inc. ("HallKeen"), and Aswan Village Associates, LLC ("Owner") move this Court to reconsider and set aside the Court's non-final Omnibus Order on: (i) Defendants' Motion for Summary Judgment; (ii) Plaintiff's Renewed Motion for Partial Summary Judgment; (iii) Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment; and (iv) Defendant HallKeen's Motion for Summary Judgment on Count I ("Omnibus Order"). The Court should reconsider the Omnibus Order, enter summary judgment in Defendants' favor and against Plaintiff Opa-locka Community Development Corporation, Inc. ("OLCDC"),[1] and enter summary judgment in HallKeen's favor as to Count I.[2]

[1] The Court found that OLCDC is entitled to specific performance but did not identify on which cause of action where OLCDC requested specific performance, either Count II or Count III, it was granting summary judgment.

[2] Defendants refer to deposition exhibits in the record as "Dep. Ex." and deposition transcripts in the record as "[Last Name of Witness] Dep."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

The central theme of Plaintiff's claims for relief is that good public policy will be served if it is allowed to win. Indeed, since the Court entered its order, Plaintiff has been trumpeting its victory throughout the country as an enormous win for non-profit entities who participate in agreements like the one before the Court and a great outcome for affordable housing. Unless set aside, not only is the Court's refusal to follow well-established law construing right-of-first-refusal provisions an improper windfall for this Plaintiff in this litigation, but it is also the antithesis of good policy and frustrates the cause of affordable housing, which depends on the willingness of investors and managers to take risk within the parameters of structured legal precedent.

Plaintiff was asked by its co-member, who is also the majority member and company manager of Owner, to consider a *proposal* for further discussion with the proposed result of upgrading the Aswan Village Apartments ("Property") with millions of dollars of capital improvements while extending affordability at least fifteen (15) years *beyond* the minimum requirements noted in the Right of First Refusal Agreement ("Agreement") held by Plaintiff. The concept, as discovery revealed, was in fact very similar to the business plan for the Property that Plaintiff and its consultants contemplated, and any party privileged to the facts cannot interpret that concept as an assault on the future of the Property as a quality, long-term affordable housing option. The transaction Plaintiff was asked to consider would have also generated a significant distribution of proceeds to Owner's sole member, which is forty-nine percent (49%) owned by Plaintiff and, presumably, Plaintiff would have been able to use its forty-nine percent (49%) distribution to make new investments in other properties and for other purposes to benefit the community.

The Court concludes that a preliminary, non-binding *proposal* and *discussions* between the co-members regarding the proposal is conduct that, though clearly not the intent of the parties, allows for Plaintiff to increase its forty-nine percent (49%) participation in any equity proceeds to one hundred percent (100%). Such a conclusion contradicts the business deal negotiated between the co-members and agreed to by them in 2014 when HK Aswan stepped in as the new managing

member of Owner after years of financial distress, at a time when the economic future of the Property was in question. It is also contrary to the plain reading of the Agreement on which HK Aswan and HallKeen in 2014 agreed to step in to help turn the Property around, contrary to common law, and contrary to the well-recognized collaborative and productive relationships established nationwide between for-profit and non-profit affordable housing developers and owners to create and preserve affordable housing using the Low Income Housing Tax Credit ("LIHTC") program.

The unintended consequence of the Court's order is simply to stifle the necessary business and financial analyses required to evaluate an aging property and promotes a situation where owners, managing members, and general partners will fear that any good-faith attempt to fulfill their duties by evaluating recapitalization options could be interpreted holistically as "manifest intention to sell," creating an artificial trigger to a preemptive right granted in a LIHTC transaction. Here, we have a case where Owner had a business plan that included the long-term, continued ownership and operation of the Property. In light of market conditions, one member thought it prudent to evaluate and present alternatives it saw as attractive to its co-member partner, who happens to a hold a right of first refusal. The proposal presented to Plaintiff was intended to address understood objectives of quality long-term affordable housing, while allowing both members to realize near-term financial gains. It is undisputed that Plaintiff had the right to reject any additional discussion, and, alternatively, had the right to propose additional or different business terms or plans for the Property.

Applying the facts to the law precludes the windfall Plaintiff seeks. As a matter of Florida law, an owner's or its member's consideration of a third party's letter of intent that is expressly nonbinding and contains indefinite material terms does not trigger a right of first refusal. Applying the plain language of the governing agreement, no sale was imminent and no purchase offer had been made, much less accepted by Owner. That is not even disputed. Indeed, the Court's order expressly found that to be the case. With these findings, the Court should have entered summary judgment in Owner's favor and in favor of HK Aswan and HallKeen.

The Court's conclusion by summary judgment that the right was triggered when Owner "manifested an intent to sell the Property" would alter the agreements by establishing a new common law trigger for a right of first refusal, which, if not set aside, will likely have a chilling impact on the creation and preservation of affordable housing. The best that could be said about Plaintiff's claim is that, if such an intent gave the rights alleged, whether it existed in this case was a disputed issue of fact, incapable of resolution by summary judgment.

The Court's construction of the Agreement misapplied clear Florida Supreme Court precedent that defines the elements of a right of first refusal, misconstrued the language in Section 42(i)(7) of the Internal Revenue Code, and misconstrued the analyses of the only two courts in the United States that have adjudicated when a Section 42(i)(7) right of first refusal is triggered.

Unless set aside, the Court's rulings will cause unintended and substantial adverse consequences for the LIHTC program, chilling the working relationships between for-profit and non-profits, impairing present and future affordable housing projects and, ultimately, harming the very persons and principles Plaintiff has disingenuously claimed it is protecting through this lawsuit. The negative consequences of the rulings have already been widely discussed in the industry. If the Court intended a result—keeping old housing stock available as affordable housing—that objective has nothing to do with this Court's order because the proposal submitted to Plaintiff for its consideration resulted in affordability in excess of that required under the Agreement.

Finally, in concluding that no imminent sale of the Property, or at a minimum, no good faith third party offer and the owner's willingness to accept it, is a required element of Plaintiff's purchase "right," the Court is wrongly determining the "right" to be *something other than* a right of first refusal as defined under Florida law. Plaintiff's "right" as defined in the Omnibus Order is much broader than a right of first refusal and, therefore, is an unreasonable and unenforceable restraint against Owner's property rights, making the contract conveying that right unenforceable (and ironically, a broader, new kind of right not contemplated by the Section 42(i)(7) safe harbor,

which only contemplates a right of first refusal). Based on the Court's conclusion, Plaintiff would have no enforceable right to purchase the Property at any time and under any circumstance.

For the reasons set forth herein, the Court must reverse the Omnibus Order and enter judgment in Owner's favor.

II. LEGAL STANDARD

"An order granting summary judgment is an interlocutory order, and a trial court has inherent authority to reconsider and modify its interlocutory orders." *AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123, 1125 (Fla. 3d DCA 2008). "Motions for reconsideration apply to nonfinal, interlocutory orders, and are based on a trial court's inherent authority to reconsider and, if deemed appropriate, alter or retract any of its non-final rulings prior to entry of the final judgment or order terminating an action." *Taufer v. Wells Fargo Bank, N.A.*, 278 So. 3d 335, 336-37 (Fla. 3d DCA 2019); *see, e.g., OneWest Bank, FSB v. Jasinski*, 173 So. 3d 1009, 1011 n.3 (Fla. 2d DCA 2015) ("the proper motion by which to challenge a non-final summary judgment is a motion for reconsideration"). "[A] motion for reconsideration may be filed at any time before the entry of final judgment." *Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014).

III. ARGUMENT

A. The Omnibus Order Ignores the Agreement's Clear and Unambiguous Language

The Omnibus Order correctly concludes it must interpret the right of first refusal ("ROFR") based on the language reflected in the Agreement. Omnibus Order at 13. The language of the Agreement compels a conclusion precisely opposite to that which the Court reached. The plain language of the Agreement requires more than a "manifest decision" to sell, even if it were the minimum standard under applicable law—which it is not. The negative covenant states, in relevant part, that "the Company *will not sell* the Project or any portion thereof to any Person without first offering the Project for a period of forty-five (45) days to Purchaser . . . at . . . the Buyout Price[.]" Omnibus Order at 13 (emphasis added). A "desire" or "decision to sell" is not a sale. This negative covenant, read as it must be, simply means that Owner cannot sell the Property without first offering OLCDC the opportunity to exercise its ROFR to purchase the Property—the failure of

which would constitute a breach of the Agreement. Indeed, the Court recognized the "common everyday definition of the word 'sell' . . . means to 'give or hand over (something) in exchange for money, or 'to transfer (property) by sale.'" *Id.* at 15. In so recognizing, the Court found that no sale had occurred nor was imminent. *Id.* at 4. Thus, under the plain language of the Agreement, no breach did or could have occurred.

To reach an erroneous public policy outcome, the Omnibus Order alters the language of the Agreement and adds "desire" or "decision to sell" as triggering the ROFR. Those words are not found *in the Agreement* or, as discussed herein, *in the plain language of Section 42(i)(7)*. *Id.* at 15 (citing *19650 NE 18th Ave., LLC v. Presidential Estates Homeowners Ass'n, Inc.*, 103 So. 3d 191, 194 (Fla. 3d DCA 2012) (the court cannot rewrite a contract "to add language the parties did not contemplate at the time of execution.")). Indeed, the Court's order cites case law in which the underlying contractual right of first refusal, unlike the ROFR here, was by its own language triggered upon a desire or intent to sell. Omnibus Order at 20 (citing *Vietor v. Sill*, 243 So. 2d 198, 199 (Fla. 4th DCA 1971) and *McDonald's Corp. v. Roga Enters., Inc.*, 2010 WL 4384214, at *2 (S.D. Fla. Oct. 28, 2010)).

Consequently, the Court should enforce the parties' "contractually agreed-to triggering requirements," Omnibus Order at 19, and, as a result, find that the ROFR remains unripe pursuant to its plain and ordinary language because, as the Court further acknowledged is undisputed, "Owner has not entered into a purchase and sale agreement for the sale of the Property at any time, nor scheduled a closing to consummate a sale of the Property." Omnibus Order at 4. It further recognized no enforceable offer to purchase had been presented because the letter of intent expressly "acknowledges its nonbinding, preliminary nature." Omnibus Order at 8. As such, the letter of intent was not capable of acceptance and the ROFR not triggered.

B. The Omnibus Order Misapplies Florida Law Regarding Rights of First Refusal

In addition to disregarding the language of the Agreement, the Omnibus Order erroneously concludes that Florida law does not require a third-party offer to trigger a so-called "fixed-price" right of first refusal. *See* Omnibus Order at 20–22. Florida law defines a right of first refusal as a

preemptive right triggered upon owner's receipt of a third party offer and manifest willingness to accept that offer. *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1285 (Fla. 2008). For purposes of triggering rights of first refusal, there is no distinction under Florida law between "meet-and-match" rights of first refusal and "fixed price" rights of first refusal. *See Old Port Cove*, 986 So. 2d at 1285. The Florida Supreme Court's discussion in *Old Port Cove* of the various types of rights of first refusal does not hold that rights of first refusal, which "require offering the property at a fixed price (or some price below market value)," are triggered by anything less than an owner's willingness to accept a third party offer. *Id.* at 1285. No Florida case has held otherwise. Any "decision to sell" property must necessarily arise from "an owner['s] manifest[ ] willingness to accept *a good faith offer*." *Id.* at 1285, 1287 (emphasis added).

Indeed, OLCDC recognized this well-accepted legal principle when it filed its Complaint improperly alleging that Lincoln Avenue Capital's ("Lincoln" or LAC") unenforceable letter of intent to Owner constituted a third party "offer" to purchase the Property and that Owner manifested a willingness to accept that purported offer. Compl. at ¶¶ 5, 45, 59, 64, 73. OLCDC was estopped from contending its "right" is triggered by vastly different conduct from that which it alleged. Because it is undisputed that the letter of intent is not an offer, Omnibus Order at 8 and 12, the letter of intent did not trigger the right of first refusal under established Florida precedent. Therefore, OLCDC's attempt to enforce the ROFR is premature.[3]

The Omnibus Order's conclusion that Florida's offer requirement is "nonsensical" when applied to fixed price rights of first refusal is flawed. Omnibus Order at 22. Indeed, the offer requirement is sensible and a necessary element of every right of first refusal. Requiring receipt of

[3] The Court should also reconsider the Omnibus Order because it improperly grants summary judgment on a legal theory that was not pled in the Complaint—OLCDC alleged the ROFR was triggered when Owner manifested a willingness to accept an offer to purchase the Property. *Reina v. Gingerale Corp.*, 472 So. 2d 530, 531 (Fla. 3d DCA 1985) ("At a summary judgment hearing, the court must only consider those issues made by the pleadings"); *Fernandez v. Fla. Nat'l College, Inc.*, 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006) (trial court at a summary judgment hearing could not consider legal theory of apparent agency that was not pled in complaint); *Pompa v. Martinez*, 614 So. 2d 661, 662 (Fla. 2d DCA 1993) (reversing trial court order granting motion for summary judgment directed to second amended complaint because it was based upon a different and distinct theory of liability alleged in the third amended complaint).

a third party offer that an owner is willing to accept ensures that an owner is provided with the opportunity to sell his property. That is, if the holder of the right of first refusal chooses not to exercise its purchase right, the owner is free to sell its property to the third party who presented the offer that triggered the right. Disregarding the objective "offer" standard in determining the time at which an owner decides to sell under a right of first refusal—whether it is a "meet and match" or a "fixed price" one—would impair the owner's ability to arrive at a "decision to sell" and, thereby, frustrate the owner's ability to choose between retaining ownership and selling it, and, importantly, the timing of such a decision.

The Omnibus Order's inference that an offer requirement would make it "nearly impossible" for OLCDC to exercise the ROFR misses the point. Omnibus Order at 22. The parties intended the 2014 agreement set forth in an amended operating agreement to defer the decision and timing of a sale to OLCDC by giving it new rights to compel a sale and rights to block any proposed sale.[4] There was never an expectation that either Owner, its manager, or any of Owner's lower-tier members, could or would cause a sale unless the parties crafted a plan that met OLCDC's objectives or OLCDC took unilateral action under the buy-out terms of the 2014 agreement. OLCDC has the power to block a sale or, in this case, terminate negotiations leading to a potential sale, simply by refusing to waive the right of first refusal to allow any negotiations to go forward. If the parties do not present such a plan to OLCDC, OLCDC is then the only party that can unilaterally cause a sale, which may or may not result in OLCDC exercising its ROFR. What the Omnibus Order's interpretation of the ROFR and Florida law makes "nearly impossible," as discussed herein, is a dialogue between partners in a LIHTC transaction regarding future plans.

The Court's reading of *Homeowner's Rehab* is misplaced. The right holder there could exercise its fixed-price, Section 42 right of first refusal once the owner was willing to accept a third party offer—which, like Florida common law, was a prerequisite to triggering such rights under Massachusetts common law. *Homeowner's Rehab, Inc. v. Related Corporate V SLP L.P.*,

[4] *See* Dep. Ex. 101, First Amendment to Operating Agreement of Aswan Development Associates, LLC at § 13.

99 N.E. 3d 744, 758-59, 761 (Mass. 2018). Moreover, case law in Florida illustrates that even when an owner who has granted a preemptive right subsequently enters into a purchase and sale agreement with a third party—it is undisputed that has not happened here—it is not atypical to structure the potential sale subject to the right holder being afforded the opportunity to exercise its preemptive right. *See Keys Lobster, Inc. v. Ocean Drivers, Inc.*, 468 So. 2d 360, 361-63 (Fla. 3d DCA 1985) (ROFR triggered when lessor entered into purchase and sale agreement with third parties "made subject to . . . right of first refusal"); *Coastal Bay Golf Club, Inc. v. Holbein*, 231 So. 2d 854, 856 (Fla. 3d DCA 1970) (ROFR triggered when "plaintiffs entered into an agreement entitled 'Contract of Sale' . . . by which they agreed, subject to the right of first refusal . . . to sell the aforesaid property").

Further, the Omnibus Order's elimination of a third-party-offer requirement for rights of first refusal renders OLCDC's "right" to be nothing more than an unenforceable restraint against alienation under Florida law. Rights of first refusal are restraints on alienation of property and, therefore, courts must strictly construe such rights as Florida law disfavors them. *See Old Port Cove*, 986 So. 2d at 1287; *Holden v. Gardner's Estate*, 420 So. 2d 1982, 1084 (Fla. 1982); *Lakeside Manor Condo. Ass'n, Inc. v. Forehand*, 513 So. 2d 1104, 1106 (Fla. 5th DCA 1987). In Florida, a right of first refusal with a fixed purchase price (i.e., below market price) for an unlimited duration is unreasonable and invalid. *Iglehart v. Phillips*, 383 So. 2d 610, 611 (Fla. 1980). Section 42(i)(7) prevents such rights from being deemed unenforceable if they constitute rights of first refusal under applicable state law. *See Homeowner's Rehab*, 99 N.E. 3d at 757-59. By eliminating the requirement of a third-party offer and owner's willingness to accept it, the Omnibus Order constructs OLCDC's "right" as follows: a below-market purchase right of unlimited duration divorced and untethered from the definition of a right of first refusal that has been established in Florida law for the past fifty years. As such, based on the Court's construction of OLCDC's purchase "right" as uniquely and materially different from a right of first refusal, the "right" is outside of and beyond the plain language of Section 42(i)(7). Absent Section 42(i)(7)'s application, OLCDC's below-market purchase right of unlimited duration is devoid of any congressional

public purpose and relegated to nothing more than an unreasonable restraint on alienation. As such, based on the Court's reasoning in the Omnibus Order, OLCDC has no enforceable right to purchase the Property under any terms at any point in time. For this additional reason, the Court's conclusion in the Omnibus Order dictates that judgment should be entered in favor of Defendants and not OLCDC.

C. The Omnibus Order Erroneously Concludes That Section 42 Imposes Triggering Requirements beyond Those Required by Common Law

Despite acknowledging that a Section 42(i)(7) right of first refusal is tethered to common law, the Omnibus Order concludes that Section 42 imposes a triggering event detached from the language of the Agreement and Florida common law. Omnibus Order at 18-19. This conclusion, however, is unfounded based on the plain and clear language of Section 42 itself.

The Court's Omnibus Order goes beyond interpreting the right of first refusal in light of Section 42 and engrafts a requirement onto the statute that Congress did not create. Section 42(i)(7) recognizes only that an owner may grant a below-market right of first refusal in a LIHTC transaction that will not be deemed a taxing event that disallows the property owner from obtaining the income tax benefit from tax credits issued in a LIHTC transaction. The text of the statute does not create a right of first refusal, it does not mandate that such a right exist in a LIHTC transaction, and does not otherwise provide when such rights are triggered. 26 U.S.C. § 42(i)(7). Specifically, the provision ensures that no federal income tax benefit "fail[s] to be allowable" to the owner of a qualified low income building merely by reason of a right of refusal being held by tenants of the building, a government agency, or a qualified non-profit; and (b) establishes a minimum purchase price for a right of first refusal granted in an affordable housing transaction. 26 U.S.C. § 42(i)(7)(A)-(B).[5] That's it. Therefore, when interpreting a right of first refusal, Section 42 only provides guidance in determining whether the right of first refusal as written falls

[5] Under Florida and federal law, the Court must interpret the statute by its plain and unambiguous terms. *State v. Peraza*, 259 So. 3d 728, 733 (Fla. 2018); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458-59 (2012).

within the statute's safe harbor for below-market purchase rights of unlimited duration. It does not dictate what conduct triggers a right of first refusal under applicable state law.

D. Contrary to the Omnibus Order's Conclusions, Based on the Plain Language of the Statute, Congress Did Not Preempt State Common Law on What Constitutes a Right of First Refusal and What Is Required to Trigger It

As recognized by the only two court decisions adjudicating the triggering events of Section 42 rights of first refusal, the applicable common law applies. *See Homeowner's Rehab*, 99 N.E. 3d at 758-59, 761; *Senior Housing Assistance Group v. AMTAX Holdings*, 260, LLC, 2019 WL 1417299 (W.D. Wash. Mar. 29, 2019). In both instances, the courts found that Massachusetts and Washington law, like Florida law, require an owner to manifest a willingness to accept an enforceable third party offer to trigger a right of first refusal—notwithstanding the fixed price nature of a Section 42 right of first refusal. *Id*. The *Homeowner's Rehab* decision further recognized that "a right of first refusal granted in accordance with § 42(i)(7) can only be exercised, consistent with congressional intent, when the owner of the property has made a decision to accept an enforceable third-party offer." 99 N.E. 3d at 758-59, 61 (emphasis added). This is so despite the fact that a "right of first refusal under § 42(i)(7) eliminates" the need for a right holder to "match the third-party price" of a third party offer. *Id*. Abiding by Florida's enforceable offer requirement is consistent with the statutory scheme of Section 42 and, therefore, does not meaningfully deprive OLCDC of its right to exercise the preemptive right when appropriately triggered.

E. The Court Made Factual Findings Inconsistent with the Record

The Omnibus Order made factual findings inconsistent with the undisputed record. The Court concludes that "both Defendants' and OLCDC's understanding is that it was the future closing of the contemplated transaction with LAC that 'will' cause the ROFR to 'go away.'" Omnibus Order at 17. This finding, however, is inconsistent with a separate finding that *is* supported by, and undisputed in, the record. The Court separately found that "Defendant also informed Logan that *any further discussions with Lincoln* were *conditioned upon* OLCDC agreeing to terminate, or waive, its right of first refusal." Omnibus Order at 10 (emphasis added).

This finding—that further *discussions* between the parties were *conditioned* on an agreement to waive the right of first refusal—is consistent with the record evidence, including the April 16, 2019 communication from Andy Burnes to Willie Logan, *as well as* the deposition testimony of both Defendants' and OLCDC's representatives.[6] It is further undisputed that OLCDC never agreed to this condition.[7]

Most importantly, the Court's recognition of these facts eliminates any public policy benefit derived from the Omnibus Order. OLCDC could have simply said, "no, you cannot sell the Property without affording us the right to acquire it" or "OLCDC is interested in a plan if it incorporates the following key business and mission based terms," or "OLCDC is not interested in negotiating a new business plan at this time." OLCDC's remedy is not Owners' forfeiture of ownership—but preventing any proposed sale or forcing a sale based on its newly bargained-for right in 2014.

As such, absent OLCDC's consent to waiving its right of first refusal, no desire to sell can be attributed to Owner as the members of Aswan Development Associates, LLC ("ADA"), the sole member of Owner, understood this waiver was necessary to continue *discussions* with Lincoln. Indeed, without OLCDC's consent to waiving its right of first refusal, there could be no meeting of the minds between the two members of ADA that is otherwise necessary to make a decision on behalf of the Company.[8]

---

[6] *See* Dep. Ex. 123; *E.g.*, Burnes Dep. at 180:23–181:4; 184:17-25; Logan Dep. at 279:4-14; Strickland Dep. at 146:12-147:2; D. Williams Dep. at 66:7-14.

[7] *See* Dep. Exs. 5, 6; Logan Dep. at 279:4–280:18.

[8] For the same reasons, the Court improperly found that OLCDC "carried its burden of disproving each of Defendants' affirmative defenses." Omnibus Order at 23. Where the record evidence establishes the utter lack of a desire to sell on the part of ADA, OLCDC cannot have overcome each of Defendants' affirmative defenses, including the defense of breach of the covenant of good faith and fair dealing. Indeed, the Court finds that "Defendants did not understand OLCDC to have decided to buyout HKA's interest . . . ." Omnibus Order at 8 (emphasis in original). This disregards the internal communication and deposition testimony from Mr. Burnes that on March 13 Willie Logan had in fact agreed to purchase HKA's interest. Burnes Dep. at 174:12–175:12; Dep. Ex. 118 ("Mark: Talked to Willie today and they want to buy us out of Aswan. We talked about who triggers process and I said I would look into it."); Dep. Ex. 129 ("Aswan-OLCDC wants to buy"); Dep. Ex. 44; Dep. Ex. 63; Ex. 87 ("Gus, given that HallKeen are not disputing we have the right to buy them out and they are amenable to it, what services we need from Gary to do that transaction.").

The Court's ruling relies on an interpretation of the subjective intent of the parties, which is improper on summary judgment,[9] and in any event inconsistent with the record evidence.

F. The Omnibus Order Will Have an Adverse Chilling Effect on the Decision-Making Process in Non-Profit and For-Profit LIHTC Partnerships

Owner not only disagrees with the Omnibus Order for the legal reasons above but is also compelled to highlight the unintended and substantial adverse effects on affordable housing that will result from the Court's conclusions. The Court's conclusion that an owner's "manifest intent to sell" its property is the trigger for activating a right of first refusal granted in a LIHTC transaction—notwithstanding a negotiated agreement that states otherwise and applicable common law requiring, at a minimum, an owner's willingness to accept a third party offer—will have a chilling effect on non-profit and for-profit partners' desire to work collaboratively in developing affordable housing.

Non-profit organizations play a significant and vital role in the creation and preservation of quality affordable housing as do developers, owners, managers, financers, and service providers. *See* Affidavit of Andrew Burnes at ¶ 3 ("B. Aff.").[10] While there is no available data with respect to the overall development of LIHTC properties that identifies the breakdown between projects developed by for-profit developers as compared to non-profits, industry experts estimate that for-profit developers develop eighty percent (80%) of LIHTC projects, with a significant number of these projects being joint ventures between for-profit and non-profit partners. *Id.* at ¶ 6.

In a LIHTC partnership, it is often difficult to understand the true economic value of the partners' respective interests in any potential buy, hold, or sell scenario without exploring what is possible through negotiation and dialogue with these third parties and among partners. *Id.* at ¶ 11. This is so because of the complexities relating to affordable housing finance, real estate, and capital markets—particularly when the time comes to evaluate recapitalization options for a LIHTC property at, near, or after the 15 year Compliance Period. *Id.* The selling of aging LIHTC properties

[9] The issue of intent is ordinarily a question of fact that a court should not decide at the summary judgment stage. *Hodge v. Cichon*, 78 So. 3d 719, 723 (Fla. 5th DCA 2012).
[10] Defendants append a copy of the affidavit as **Exhibit A** hereto.

does not hamper a non-profit's ability to expand affordable housing stock—particularly, as was proposed here, a sale to a to-be-created joint venture entity comprised of Lincoln, another experienced affordable housing developer, and HK Aswan and OLCDC. *Id.* at ¶ 13. That proposed sale would have allowed for a resyndication of newly issued low-income housing tax credits that would have generated new capital that could have been invested to upgrade the aging property and that would have resulted in a long-term extension of the affordability requirements. *Id.* Consequently, before a partnership can make a decision on what to do with a LIHTC property, it is important for all stakeholders in a partnership to inform themselves as much as possible of the various alternative scenarios and their potential risks and rewards. *Id.* at ¶ 11. Appropriate on-site due diligence, discussions with appraisers, brokers, potential buyers, lenders and investors, and discussions with local stakeholders are all appropriate, if not necessary, steps in evaluating the potential scenarios. *Id.* The unintended consequence of the Omnibus Order and its conclusion that a mere "manifest intent to sell" without any objective criteria—such as the triggering event set forth in the plain words of the parties' agreement or the common law requirement of a third-party offer—is problematically subjective and, thus, will chill the collaborative process that exists between for-profit and non-profit partners in LIHTC transactions. *Id.* at ¶ 14.[11]

Typically, the general partner or managing member of a property owner is responsible for considering what is in the partnership's best interest—whether it be a loan, equity commitment, joint venture, or a sale. *Id.* at ¶ 12. However, as organizational documents generally mandate, all partners share in and discuss that consideration to determine what is possible with some level of detail. *Id.* This process necessarily requires individuals to be able to discuss and agree to terms upon which they might consider proceeding. *Id.* The fact that many individuals in partnerships and

[11] As the Court noted in its Omnibus Order, OLCDC's ultimate position in this lawsuit—which, as described herein, has evolved over time and is not rooted in the allegations of the Complaint—is that OLCDC's right "is triggered at the moment Defendants manifested an intention to sell Aswan Village." Omnibus Order at 12-13. In accepting OLCDC's legal argument and finding in its favor, the Court has tasked future parties and courts with identifying at what "moment" this manifest intent occurs, a task fraught with subjectivity and uncertainty—and that is ungrounded in the parties' agreed-upon contractual language and Florida law.

limited liability companies wear multiple hats and have different rights, duties, styles of negotiation, and processes for decision making depending on which hat they are wearing complicates this dialogue. *Id.* In the ordinary course, individuals and business organizations have come to trust that official acts and decisions are made by votes and resolutions, noting who and on what authority decisions are being made. *Id.* Individual decision makers, therefore, have felt free to discuss and explore the limits of what may or may not be desirable without blurring the distinction between an official act, and due diligence or dialogue. *Id.* A mere "manifest intent to sell"—the standard the Omnibus Order adopts—impairs this decision-making process, bringing any dialogue between partners in a LIHTC transaction to a standstill.

The Omnibus Order acknowledges the investigative diligence HallKeen undertook to determine whether a recapitalization opportunity existed, and whether that opportunity would be desirable and mutually beneficial to *both* HK Aswan and OLCDC. Yet, the order fails to take into account the chilling effect that the subjective "manifest intent" standard will undoubtedly have on this process. This new and unclear standard will discourage owners and general partners from evaluating and presenting sale and recapitalization options to its non-profit partners who hold rights of first refusal, and will chill what should be an open and candid discussion, if not collaboration, to identify recapitalization or structuring options that could benefit affordable housing communities. *Id.* at ¶ 14. Many owners and general partners will be uncertain as to whether the processes defined in their right of first refusal agreements are sufficiently clear to qualify as a trigger based on the trial court's new standard. *Id.* at ¶ 15. Consequently, the uncertainty created by the Omnibus Order jeopardizes new partnerships between for-profit and non-profit sponsors that pair the strengths of each partner to secure important resources or serve unique community needs. *Id.* at ¶ 14. And, the ability for existing deals to attract new general partners to help stabilize troubled assets involving non-profits will likely compel the incoming general partner to mandate the elimination of such right as a condition to stepping in due to unclear acts that might trigger the right. *Id.*

Since Banc America Community Development Corporation ("BACDC") first approached HallKeen's principals in 2011 to determine if there was an interest in purchasing BACDC's interest in the project, HallKeen's principals and their attorneys operated with the understanding that the Agreement allowed OLCDC the right to block a sale by indicating an intention to exercise its right of first refusal. *Id.* at ¶ 16. The plain language in the Agreement precisely defines the trigger for that right and the Court's addition of other triggering events finds no support anywhere. In addition to the windfall achieved here, the Court's conclusion that OLCDC's "right" was triggered in the absence of an imminent sale—much less the absence of the notice prescribed in the Agreement, or of a third-party good-faith purchase offer and the owner's willingness to accept it—creates uncertainty of immense proportion as to what objective facts will be deemed necessary to constitute a property owner's "manifest intention" to sell its property. *Id.*

G. The Omnibus Order Focuses on Facts Unrelated to Determining the Triggering Event of the ROFR and Mischaracterizes HallKeen's Intentions with Respect to the Property

The legal issue framed by OLCDC's allegations was narrow in scope—limited to determining whether its dormant right was triggered.[12] Yet, the Omnibus Order focuses, in part, on matters unrelated to the core issue—in particular, Owner's corporate restructuring in 2014 when the original developer, BACDC, and the investor member, chose to exit the project and HK Aswan, *with OLCDC's consent*, acquired an ownership interest in the project and became the Managing Member of Owner and ADA, its sole member. BACDC contacted HallKeen because of its experience and excellent reputation in the affordable housing industry. *Id.* at ¶¶ 25, 28. HallKeen agreed to the acquisition at a time when the Property was still recovering from operating deficits and economic distress, and there was no guarantee of success. *Id.* at ¶ 25.

The Omnibus Order did not follow a trial on the merits but on competing factual assertions, precluding summary disposition based on OLCDC's unfounded standard of "desire" or "intent" to sell. HK Aswan's motivations for acquiring its ownership interest in the project in 2014 and

[12] Indeed, OLCDC itself agreed that discovery in this matter should be limited to a beginning date range of June 2018.

recapitalizing the project in 2019 are irrelevant to the issues the Court decided. The Omnibus Order wrongly characterizes HallKeen, its principals, and its affiliates as though they were interested in nothing more than a short-term investment in the Property with no meaningful regard for OLCDC, its interests, and that of the community in which the Property is located. While such characterization is not relevant to the legal issue of whether the ROFR was triggered, OLCDC nonetheless advanced such a characterization solely for the benefit of prejudice, which appears to have worked. This characterization is inaccurate, contrary to the facts in the record, and likely arises from OLCDC's repeated and unfounded mischaracterizations of HallKeen as an "aggregator"—which HallKeen is not.

At times, OLCDC inappropriately referred to HallKeen as an "aggregator" in an effort to cast HallKeen in a negative light and benefit from that gross mischaracterization.[13] Although no legal definition exists, it is a pejorative term used at times in the affordable housing industry to describe large companies that buy out tax credit investors in older LIHTC transactions and view the partnership and its development as a financial instrument rather than as a real estate investment. *Id.* at ¶ 20. Managing members and general partners, for-profit and non-profit alike, have concerns that after successfully delivering tax credit benefits over ten (10) years, the ninety-nine percent (99%) tax credit investors will sell their ninety-nine (99%) passive interests to an "aggregator" limited partner without managing member consent. *Id.* Aggregators have a reputation for adding no value and, through action and inaction, frustrating the intended economics or mission of a property and its remaining partners; in particular, the benefits expected by the managing member or general partner. *Id.*

Were it relevant, HallKeen and its affiliates came into this transaction as the new *managing member* (not replacing the passive ninety-nine percent (99%) tax credit investor) with the *consent* of all partners (including OLCDC), prior to the delivery of all tax credits at a time when the property was suffering deficits and in need of new leadership. *Id.* at ¶ 21. Immediately after being

[13] *See* OLCDC's Renewed Motion for Partial Summary Judgment at 6; February 12, 2020 Hearing Transcript Notice of Filing Hearing Transcripts, at 82:10–86:1. *See also* May 18, 2020 Hearing Transcript at 32: 3–33:8; 95:16–97:3, a copy of which is appended hereto as **Exhibit B**.

admitted as the new managing member, HallKeen took immediate steps to secure, for the benefit of all partners, the redemption of the tax credit investor's interest as a way to improve control and economics for all partners, including OLCDC, and to ward off any threat of an "aggregator" coming in later. *Id.*

From the time of its formation in 1991, HallKeen and its affiliates have been working diligently in the affordable housing industry with the goal of providing quality oversight and stewardship to each of the properties it develops or in which it invests. *Id.* at ¶¶ 21-22.[14] Over time, HallKeen and its affiliates have come to own and/or manage more than forty-two (42) affordable housing, market rate, and assisted living properties in eleven (11) states—currently totaling more than 8,500 individual units. *Id.* at ¶ 23. These properties include a broad range of affordable housing and assisted living communities. *Id.* HallKeen and its affiliates have stabilized and revitalized various properties so that they perform positively and enhance the neighborhoods in which they are located. *Id.* In many of the affordable housing properties, HallKeen has non-profit partners with whom it works closely to achieve various mission goals to provide quality housing for the residents. *Id.* Currently, HallKeen partners with four (4) non-profit entities and has third-party management contracts with seven (7) other non-profits. *Id.*

HallKeen's approach when developing or acquiring ownership in a property, whether it be an affordable housing, assisted living, or mixed-use development, is to retain ownership for an extended period, and when it sells, reinvest in other properties. *Id.* at ¶ 24. During the almost three decades in which HallKeen and its affiliates have owned affordable housing properties, no more than five (5) of the total forty-seven (47) affordable housing properties have been sold. *Id.* For OLCDC to use the term "aggregator" in describing HallKeen for the sole purpose of causing prejudice is both irrelevant and demonstrably false.

With respect to the OLCDC-HallKeen partnership at issue in this dispute, OLCDC and HallKeen first came together in 2011 when BACDC approached HallKeen to see if its principals

[14] Indeed, as Mr. Burnes testified in his deposition, HallKeen recently strengthened its commitment to creating an enduring stabilized platform for affordable housing investments long into the future. *See* Burnes Dep. at 24:4–7; *see also* B. Aff. at ¶ 21.

would be interested in acquiring an ownership interest that BACDC described as a troubled LIHTC property in Opa-locka, Florida. *Id.* at ¶ 25. BACDC, which controlled the project, proposed selling its interest to a HallKeen affiliate and having that company step in as the managing member, with HallKeen serving as the day-to-day property manager. *Id.* At that time, the real estate markets were still reeling from the 2007-2008 market crash, particularly in South Florida. *Id.*

While the development of the Property in the early 2000s, including the creation of 216 quality affordable housing units in Opa-locka, created an extremely important affordable housing option, the Property had a difficult start. *Id.* at ¶ 26. From inception, it suffered many setbacks, including major delays and cost overruns, and the Property never achieved the stabilization requirements required by the lender. *Id.* BACDC ultimately lent millions of dollars to the project to support operating deficits and cost overruns. *Id.*

In 2011, when BACDC suggested to HallKeen that it and an affiliate become involved with the Property, the Property had *never* generated positive distributable cash flow and had suffered years of operating deficits. *Id.* at ¶ 27. The Property was in the seventh year of its tax credit compliance period, with three (3) years of tax credits remaining and eight (8) years remaining in the initial 15-year Compliance Period. *Id.*[15]

BACDC and others knew HallKeen as a proven and experienced owner, developer, and manager of LIHTC properties that had successfully stepped in to help turn around other troubled properties in the past. *Id.* at ¶ 28. HallKeen had demonstrated a commitment to affordable housing, had an excellent relationship with the lending and regulatory agencies, and had formed many successful partnerships with non-profit organizations. *Id.* As an "owner/operator," HallKeen as known to have the skills and human resources needed to tackle complex issues. *Id.*

HallKeen completed its initial research and concluded that BACDC had taken extreme measures to address responsibly the major property challenges, although much hard work

[15] The ownership structure for the project was comprised of the tax credit investor, which had a 99.99% ownership, and the Class A Member, Aswan Development Associates, LLC ("ADA") having .01% ownership. *Id.* at ¶ 29. As to ADA, OLCDC and BACDC held 51% and 49% membership interests, respectively. *Id.* BACDC also served as the Managing Member of the owner and ADA. *Id.*

remained to stabilize the project. *Id.* at ¶ 30. A key condition to HallKeen's involvement in the project was securing OLCDC's consent as well as consent from the tax credit investor. *Id.*

After exchanging draft letters of intent, OLCDC and HallKeen chose to move forward. *Id.* at ¶ 31. To address the parties' expectations, they negotiated amendments to Owner's and ADA's operating agreements. *Id.* Included among the parties' expectations were: (a) HallKeen's expectation that its affiliate would have the potential to benefit if the property performed positively and added monetary value to the asset in excess of the debt, and (b) OLCDC's expectation that it could eventually own or control the property. *Id.* To this end, HallKeen and OLCDC negotiated a provision that was included in ADA's amended operating agreement that provided OLCDC with the right to obtain sole ownership of the Property in the future by initiating a process that would enable it to purchase the Property pursuant to its right of first refusal, and, in turn, pay HK Aswan the fair market value of its majority membership interest in ADA. *Id.* OLCDC did not have this right during the years in which BACDC controlled the property. *Id.*

OLCDC not only consented to HK Aswan's purchase of BACDC's interest in ADA, but it also sold two percent (2%) of its membership interest to HK Aswan for $225,000 for HK Aswan to hold the majority fifty-one (51%) percent membership interest in ADA and, thereby, control the project, subject to limitations set forth in the companies' operating agreements. *Id.* at ¶ 32. To facilitate the parties' intentions, OLCDC consented to HK Aswan becoming Manager of ADA and Owner, and to the engagement of HallKeen as day-to-day property manager. *Id.*[16]

Accordingly, as the undisputed restructuring process reveals, HallKeen invested in the project to turn it around and have it provide long-term quality affordable housing.

H. The Omnibus Order Improperly Grants Specific Performance Against Defendants HK Aswan and HallKeen

The Omnibus Order grants specific performance against HK Aswan and HallKeen Management, finding that each party, along with Owner, breached the Agreement. *See* Omnibus Order at 18, 25. Notwithstanding the fact that HK Aswan and HallKeen Management are not

[16] When the parties completed the corporate restructuring in December 2014, OLCDC's ownership in ADA increased materially from its original *de minimis* fractional interest of .001% to 49%. *Id.* at ¶ 33.

parties to the Agreement, Count II and Count III, which seek specific performance, are asserted only against Owner as the contractual counterparty to the Agreement. It is error for the Court to enter summary judgment on a claim that is not pled against HK Aswan and HallKeen. *Bldg. B1, LLC v. Component Repair Servs., Inc.*, 224 So. 3d 785, 788-89 (Fla. 3d DCA 2017) (finding plaintiff "cannot recover on this unpled claim" where plaintiff "never pleaded any entitlement to such damages"); *Bull Motors, L.L.C. v. Brown*, 152 So. 3d 32, 36-37 (Fla. 3d DCA 2014) (reversing order granting permanent injunction where plaintiff never pled entitlement to the injunction); *Bloom v. Dorta–Duque,* 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999) (stating that "[i]t is well settled that a defendant cannot be found liable under a theory that was not specifically pled").[17]

IV. CONCLUSION

For the reasons stated herein,[18] the Court should reconsider its Omnibus Order and enter summary judgment in favor of Defendants.

WHEREFORE, Defendants request the Court: (a) grant this Motion; (b) reconsider its Omnibus Order; (c) grant Defendants' Motion for Summary Judgment; (d) grant Defendant HallKeen's Motion for Summary Judgment on Count I; (e) deny OLCDC's Renewed Motion for Partial Summary Judgment; (f) deny OLCDC's Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment; (g) enter judgment in favor of Defendants and against OLCDC; (h) award Defendants attorneys' fees and costs incurred in this litigation to the extent permissible under Florida law; and (i) grant all other relief the Court deems just and proper.

---

[17] The Omnibus Order also improperly denied HallKeen's Motion for Summary Judgment on Count I. There was no basis for OLCDC to assert a declaratory judgment claim against HallKeen as it is not a party to the Agreement and thus is an improper party. *See* HallKeen's Motion for Summary Judgment on Count I and its Reply in support of the motion.

[18] Defendants also refer to the arguments asserted in their related filings of record: (i) Defendants' Motion for Summary Judgment [Filing # 103228634]; (ii) Defendants' Reply in Support of their Motion for Summary Judgment [Filing # 104885314]; (iii) Defendant HallKeen's Motion for Summary Judgment on Count I [Filing # 103229808]; (iv) Defendant HallKeen's Reply in Support of its Motion for Summary Judgment on Count I [Filing # 104885334]; (v) Defendants' Response in Opposition to Plaintiff's Renewed Motion for Partial Summary Judgment [Filing # 104510626]; and (vi) Defendants' Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment [Filing # 106617922].

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that undersigned counsel has electronically filed the foregoing document with the Clerk of the Court using the Florida Courts E-Portal. Pursuant to Fla. R. Jud. Adm. 2.516(b), I also certify that the foregoing document has been furnished to all counsel of record identified on the Service List below by e-mail on July 30, 2020.

STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.

s/ Mark D. Solov
MARK D. SOLOV, FL Bar No. 511676
Email: msolov@stearnsweaver.com
Secondary: mfigueras@stearnsweaver.com
JOSE G. SEPULVEDA, FL Bar No. 154490
Email: jsepulveda@stearnsweaver.com
Secondary: mleon@stearnsweaver.com
RYAN T. THORNTON, FL Bar No. 99195
Email: rthornton@stearnsweaver.com
Secondary: cveguilla@stearnsweaver.com
ALEJANDRO D. RODRIGUEZ, FL Bar No. 124493
Email: arodriguez@stearnsweaver.com
Secondary: mfigueras@stearnsweaver.com
150 W. Flagler St., Suite 2200, Miami, FL 33130
Telephone: 305.789.3200

SERVICE LIST

DLA PIPER LLP (US)
Lida Rodriguez-Taseff
Primary Email: Lida.Rodriguez-Taseff@us.dlapiper.com
Secondary: Dawn.Perez@us.dlapiper.com

WINTHROP & WEINSTINE, P.A.
David A. Davenport
Primary Email: ddavenport@winthrop.com
Secondary: BSmith@winthrop.com
Secondary: MLauseng@winthrop.com

Counsel for Plaintiff Opa-locka Community Development Corporation, Inc.

EXHIBIT A

Affidavit of Andrew Burnes

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIV.

CASE NO.: 2019-16913-CA-01 (44)

OPA-LOCKA COMMUNITY DEVELOPMENT CORPORATION, INC., a Florida non-profit corporation,

Plaintiff,

v.

HK ASWAN, LLC, a Massachusetts limited liability company, HALLKEEN MANAGEMENT, INC., a Massachusetts corporation, and ASWAN VILLAGE ASSOCIATES, LLC, a Florida limited liability company,

Defendants.
_____/

AFFIDAVIT OF ANDREW P. BURNES

STATE OF MASSACHUSETTS)
ss:
COUNTY OF NORWOOD)

BEFORE ME, the undersigned authority, personally appeared Andrew P. Burnes, Manager of HK Aswan, LLC ("HK Aswan"), Manager of Aswan Village Associates, LLC ("Owner" or "AVA") and Aswan Development Associates, LLC, and who also holds the positions of President and Chief Operating Officer of HallKeen Management, Inc. ("HallKeen"), who, after being first duly sworn, deposes and says:

1. I am over the age of eighteen (18) years, *sui juris*, and am competent to testify.

2. I affirm, under penalty of perjury, the statements in this affidavit are made from my personal knowledge and my nearly thirty (30) years of owning and managing affordable housing properties and working collaboratively with non-profit and for-profit partners, and are true and correct to the best of my personal knowledge, and based upon my review of the companies' books and records that are prepared and maintained in the ordinary course of business.

I. Collaboration between For-Profit and Non-Profits in Affordable Housing Transactions

3. Non-profit organizations play a significant and vital role in the creation and preservation of quality affordable housing as do developers, owners, managers, financers, and service providers. Local non-profits and community development corporations, in particular, are generally connected to the fabric and particular needs of the communities they serve. The Low Income Housing Tax Credit ("LIHTC") program is one of the major programs used successfully by non-profit and for-profit sponsors and developers to subsidize, create, and preserve quality affordable housing.

4. Companies (or newly-formed affiliates) desirous of using the LIHTC program to preserve or create new affordable housing assemble the financing, the development team, and typically serve as the managing member or general partner of the company or partnership they form to own and/or develop an affordable housing property. These companies or their affiliates also provide certain financial guarantees and assurances to the lenders and investors financing the affordable housing property.

5. Although non-profits and for-profits often work independently, in a large percentage of low income housing tax credit properties, for-profit and non-profit companies work collaboratively to create or preserve quality affordable housing by combining each parties' skill strengths, financial strengths, access to capital, mission, and creativity. Mostly, these for-profit/non-profit "partnerships" benefit the larger mission that both parties share to create, preserve, and operate quality affordable housing.

6. While there is no available data with respect to the overall development of LIHTC properties that identifies the breakdown between projects developed by for-profit developers as compared to non-profits, industry experts estimate eighty percent (80%) of LIHTC projects are developed by for-profit developers with a significant number of these projects being joint ventures between for-profit and non-profit partners.

7. Generally, for tax and ownership purposes, the granting of a below market option in a party's ownership interest in an affordable housing project (or any project for that matter) results in possible tax issues relative to the owner's interest to which the option relates. Section 42(i)(7) of the Internal Revenue Code does permit a LIHTC property owner to grant a potentially below market right of first refusal to a tenant, government housing authority, or qualified non-profit. Such right of first refusal cannot be triggered until after the fifteen (15) year Compliance Period, as set forth and defined in Section 42.

8. Section 42 does not mandate that property owners grant a right of first refusal in any particular LIHTC transaction. If granted, Section 42(i)(7) does not mandate when the right of first refusal is to be triggered after expiration of the Compliance Period and under what circumstances. The parties currently understand they are free to negotiate, pursuant to applicable

state law, how and when the right is triggered as well as any purchase price so long as it is equal to or in excess of the minimum purchase price set forth in Section 42(i)(7)(B).

9. In many instances, the property owner and non-profit agree to a right of first refusal purchase price in excess of the minimum purchase price, or agree that the right cannot be triggered until well after the end of the Compliance Period or, alternatively, agree that the preemptive right cannot be triggered at all so long as the owner performs and behaves in a specified manner agreed upon by the non-profit.

10. Not every non-profit who participates in a LIHTC transaction secures a right of first refusal with the sole intent and purpose of owning the property in the future, or keeping all future benefits for itself. Many non-profits are willing to align their interests in cash flow and residual value with that of their for-profit partner to motivate and incentivize certain win-win outcomes. In most cases, a non-profit right of first refusal, at a minimum, gives the non-profit the opportunity to participate in decisions that determine future plans for an affordable housing property. Of these, many result in material and desirable cash infusions to the non-profits that help non-profits strengthen their organizations and further their missions.

11. Due to the complex and evolving nature of affordable housing finance, real estate markets, and capital markets, when the time comes to evaluate recapitalization options for a LIHTC property—particularly one at, near, or after the 15 year Compliance Period—it would be remarkable if any single person or company could understand all possible opportunities without exploring a number of options with third parties. It is often difficult to understand the true economic value of ones interest in an affordable housing project without exploring the limits of what is possible through negotiation and dialogue with these third parties and among partners. Appropriate on-site due diligence, discussions with appraisers, brokers, potential buyers, lenders,

and investors, and discussions with local stakeholders are all appropriate, if not necessary, steps in evaluating and presenting any vetted buy, hold, or sale scenario. Before any decision (or no decision) is made, it is to the benefit of all stakeholders in a partnership to be as informed as possible, understanding one or more options in a reasonable amount of detail and their potential risks and rewards.

12. It is generally the responsibility of the general partner or managing member of a LIHTC property to consider what is in the best interest of the owners of the property. All partners, however, share in and discuss that consideration to determine what is possible with some level of detail. Whether it be a possible loan, equity commitment, joint venture, or a sale, in order to reach out and determine what is truly possible at some level of detail, individuals must be able to discuss and agree to terms upon which they expect they might proceed. This dialogue is complicated by the fact that many individuals wear multiple hats and have different rights, authority, duties, styles of negotiation, and processes for decision making depending on which hat they are wearing at a particular time. In general, individuals and companies have come to trust that official acts and decisions are made by votes and resolutions, noting who and on what authority decisions are being made. Therefore, individual partners have felt free to discuss and explore the limits of what may or may not be desirable without blurring the distinction between an official act and such due diligence or dialogue.

13. The selling of aging LIHTC properties does not hamper a non-profit's ability to expand affordable housing stock. This is particularly so with respect to Lincoln Avenue Capital's ("Lincoln" or "LAC") proposal at issue in this dispute, which proposed a sale to a to-be-created joint venture entity comprised of Lincoln, another experienced affordable housing developer, and HK Aswan and OLCDC. That proposed sale would have allowed for a resyndication of

newly-issued low income housing tax credits that would have generated new capital that could have been invested to upgrade the aging property and that would have resulted in a long term extension of the affordability requirements.

II. The Court's Omnibus Order Creates Confusion and Uncertainty in the Affordable Housing Industry

14. The new "manifest decision" standard in the Court's Omnibus Order dated July 7, 2020, which ignores the sale prerequisite in the parties' ROFR and the Florida common law offer requirement, will discourage owners and general partners from evaluating and presenting sale and recapitalization options to its non-profit partners who hold rights of first refusal, and will chill what should be an open and candid discussion, if not collaboration, to identify recapitalization or structuring options that could benefit affordable housing communities and that might be appealing to a non-profit holder of a right of first refusal. Consequently, new partnerships between for-profit sponsors and non-profit sponsors, where the strengths of each are paired to secure important resources or serve unique community needs, will be particularly jeopardized. The ability for existing deals to attract new general partners to help stabilize troubled assets where non-profits are involved will likely move the replacement general partner to mandate the elimination of such right as a condition to stepping in due to unclear acts that might trigger such right.

15. In existing and in new affordable housing partnerships, many owners and general partners may conclude that it is impossible to evaluate and present for discussion recapitalization options without risking that such productive dialogues will be interpreted as "manifest decisions to sell." Many owners and general partners will be uncertain as to whether the processes defined in their right of first refusal agreements are sufficiently clear to qualify as a trigger based on the

trial court's new standard. The combined uncertainty will create a chilling effect on collaboration and open communication between non-profit and for-profit members.

16. Since 2011, when Bank of America approached HallKeen's principals about acquiring the interest held by its affiliate, Banc America Community Development Corporation ("BACDC"), in the Aswan Village Apartments ("Property"), HallKeen's principals and their attorneys operated with the understanding that the Right of First Refusal Agreement ("Agreement") dictated that OLCDC's preemptive right would be triggered no later than forty-five (45) days prior to an imminent sale or if the property owner (i.e., counter-party to the Agreement) otherwise sent a written notice to OLCDC offering the Property for sale at the "Buyout Price." That is, OLCDC had the right to block a sale by indicating an intention to exercise its right of first refusal. It is difficult to understand how the plain language in the Agreement does not contain a sufficiently-defined triggering event. The Court's conclusion that the right of first refusal was triggered in the absence of the prescribed 45-day notice of an offer from Owner or an imminent sale—much less the absence of a third-party good-faith purchase offer and the owner's willingness to accept it—creates uncertainty of immense proportion as to what objective facts will be deemed necessary to constitute a property owner's "manifest intention" to sell.

17. Because of the Court's ruling, many new and existing partners in LIHTC partnerships will be uncertain as to whether the trigger language in their agreements is sufficient to pass the court's new standard.

18. Based upon my nearly thirty (30) years of owning and managing affordable housing properties and working collaboratively with non-profit and for-profit partners, it is my opinion that the uncertainty and confusion that arises from the Court's newly-adopted standard

will discourage certain types of partnerships between for-profit and non-profit companies, and will serve as an obstacle to open and candid dialogue and collaboration among existing and new partners to evaluate options and maximize financial and mission-based outcomes. Partners will fear falling into a "manifest decision" trap, and this fear will chill collaboration and open dialogue among partners.

III. The Trial Court's Mischaracterization of the 2014 Corporate Restructure Transaction and HK Aswan's Motivations

19. The Omnibus Order incorrectly characterizes HallKeen, its principals, and its affiliates as though they are were interested in nothing more than a short-term investment in the Property with no regard for OLCDC, its interest, and that of the community in which the Property is located. This characterization is not accurate, is contrary to the facts in the record, and likely arises from OLCDC's repeated and unfounded mischaracterizations of HallKeen as an "aggregator," which HallKeen is not.

20. At times, OLCDC inappropriately referred to HallKeen as an "aggregator." Although no legal definition exists, it is a pejorative term recently used occasionally by commentators, bloggers, and others to describe large companies that buy out the tax credit investors in older LIHTC transactions and view the partnership and its development as a financial instrument rather than as a real estate investment. Managing members and general partners, for-profit and non-profit alike, have concerns that after successfully delivering tax credit benefits over ten (10) years, the ninety-nine percent (99%) tax credit investors will sell their ninety-nine (99%) passive interests to an "aggregator" limited partner without managing member consent. Aggregators have a reputation for adding no value and, through action and inaction, frustrating the intended economics or mission of a property and its remaining partners; in particular, the benefits expected by the managing member or general partner.

21. HallKeen and its affiliates are the antithesis of those types of singled-minded companies. For nearly thirty (30) years, HallKeen and its affiliates have been working diligently in the affordable housing industry with the goal of providing quality oversight and stewardship to each of the properties in which it invests. As I previously testified, HallKeen has recently strengthened its commitment to create an enduring stabilized platform for affordable housing investments long into the future. In particular to the transaction at issue here, HallKeen and its affiliate, HK Aswan, came into the Aswan Village Apartments transaction as the new managing member—not replacing the passive ninety-nine percent (99%) tax credit investor—with the consent of all partners (including OLCDC), prior to the delivery of all tax credits at a time when the Property was suffering deficits and in need of new leadership. Immediately after being admitted as the new managing member, HallKeen took immediate steps to secure, for the benefit of all partners, the redemption of the tax credit investor's interest as a way to improve control and economics for all partners, including OLCDC, and to ward off any threat of an "aggregator" coming in later.

22. HallKeen's involvement in affordable housing began in 1991. Dennison Hall, John Hall, and the late Robert Kuehn formed a joint venture to acquire McNeil Management, Inc., a company that, at that time, had more than twenty (20) years of experience managing affordable housing properties. That business venture lead to the formation of HallKeen. Since its formation, HallKeen has continuously been engaged in the management of various types of affordable housing properties and affordable assisted living facilities.

23. Because the founders of HallKeen had substantial experience in various aspects of real estate ownership and development, and because of their experience in managing affordable housing properties, HallKeen, through affiliate entities, acquired ownership interests primarily in

affordable independent housing and affordable assisted living properties. Over time, HallKeen and its affiliates have come to manage, own, or manage and own more than forty-two (42) affordable housing and affordable assisted living properties in eleven (11) states, currently totaling more than 8,500 individual units. These properties include a broad range of affordable housing and assisted living communities. HallKeen has undertaken development and employed its knowledge, experience, and efforts to stabilize and revitalize various properties so that they perform positively and enhance the neighborhoods in which they are located. In many of the affordable housing properties in which HallKeen is involved, HallKeen manages for non-profit partners with whom it works closely to achieve various mission goals to provide quality housing for the residents. Currently, HallKeen is a partner with four (4) non-profit partners in five (5) different projects, including OLCDC, and it has third-party management contracts with seven (7) other non-profits, including twenty-nine (29) different properties with a total 1,833 units of affordable housing.

24. HallKeen's approach when developing or acquiring ownership in a property, whether it be an affordable housing, assisted living, or mixed-use development, is to retain ownership for an extended period. In certain limited circumstances, HallKeen has elected, with the support of its co-owners, to sell a property, or to sell its ownership interest. During the almost three decades in which HallKeen and its affiliates have owned affordable housing properties, HallKeen has sold five (5) properties (two of which were market-rate apartments while the other three were affordable housing) of the total forty-seven (47) affordable housing properties HallKeen has owned. HallKeen has no additional pure market-rate apartments in its portfolio; it does have numerous mixed-income apartment communities. None of these properties sold (or currently owned) have been converted from affordable housing to market-rate housing.

There was never any conversation or dialogue that the Property would be converted to market-rate housing, with the exception of the inaccurate representations advanced by OLCDC and its lawyers.

25. OLCDC and HallKeen first came together in 2011 when Bank of America, through its affiliate, BACDC, approached HallKeen to see if its principals would be interested in acquiring an ownership interest in a troubled LIHTC property in Opa-locka, Florida known as the Aswan Village Apartments. Bank of America proposed that HallKeen, through an affiliate, replace BACDC, which had a controlling interest in the Property, and step in as its replacement-managing member, with HallKeen taking over as the day-to-day property manager. At that time, the real estate markets were still reeling from the 2007-2008 market crash, particularly in South Florida, and HUD-regulated rents were expected to remain frozen in the greater Miami area for multiple years, potentially adding to operating distress. BACDC approached HallKeen because of its excellent past performance in projects in which BACDC or its affiliates were involved. HallKeen agreed to the acquisition at a time when the Property was still recovering from operating deficits and economic distress, and there was no guarantee of success.

26. While BACDC's development of the Property in the early 2000s, with the creation of 216 quality affordable housing units in Opa-locka, created an extremely important affordable housing option, the Property had a difficult start. From inception, it suffered many setbacks, including major delays and cost overruns related to the need for a methane collection and alarm system in each building as well as monitoring wells due to heath and explosion concerns. The Property suffered delayed lease-up and never achieved its stabilization requirements with the lender. BACDC purchased the bonds in lieu of default in order to provide

the Property with time to stabilize, and lent millions of dollars to the Property to support deficits and overruns.

27. In 2011, when Bank of America suggested to HallKeen that it and an affiliate should become involved with the Property, the apartment complex had never generated positive distributable cash flow and had suffered years of operating deficits. The Property was in "year 7" of its tax credit compliance period with three (3) years of tax credits remaining and eight (8) years remaining in the initial 15-year Compliance Period.

28. HallKeen was known to Bank of America and others as a proven and experienced owner, developer, and manager of LIHTC properties and had successfully stepped in to help turn around other troubled properties in the past. HallKeen had demonstrated a commitment to affordable housing, had an excellent relationship with the lending and regulatory agencies, and had formed many successful relationships with non-profit organizations. As an "owner/operator," HallKeen was known to have the skills and human resources to tackle complex issues.

29. At that time, the ownership structure for the Property was comprised of Enterprise Community Investment Corp, which was the tax credit investor having 99.99% ownership, and the Class A Member, Aswan Development Associates, LLC ("ADA"), having .01% ownership. As to ADA, OLCDC and BACDC held 51% and 49% membership interests, respectively. BACDC also served as the Managing Member of the owner entity and ADA. The property debt included about $7.3 million of first mortgage debt and $3.8 million of subordinate financing, including $2.0 million from Florida Housing Finance Corporation and $1.8 million from OLCDC as a pass-through loan from a local government entity. The debt did not include over $2 million of advances BACDC made to stabilize the Property (and eventually

forgave), without which a foreclosure would have likely wiped out OLCDC's and BACDC's positions.

30. While the community continued to have its challenges, HallKeen completed its initial research and concluded that BACDC had taken extreme measures to address responsibly the major property challenges, although much hard work remained to stabilize the Property. The, worst, however, appeared to be over and, with proper oversight, HallKeen saw a path to success. A key condition to HallKeen's entering the ownership of the Property was securing OLCDC's consent as well as consent from Enterprise Community Investment Corp., each of which was granted.

31. After exchanging draft letters of intent, OLCDC and HallKeen chose to move forward to negotiate amendments to the owner's and ADA's operating agreements that would address the parties' expectations. Included among their agreements were: (a) HallKeen's expectation that its affiliate would have the potential to benefit if the Property performed positively and added monetary value in excess of the debt, and (b) OLCDC's expectation that it could eventually own or control the Property. To this end, HallKeen and OLCDC negotiated a provision, included in ADA's amended operating agreement that provided OLCDC with the right to obtain sole ownership of the Property in the future, by initiating a process that would enable it to purchase the Property by buying HK Aswan's interest at fair market value. OLCDC did not have this right during the years in which BACDC controlled ADA. The underlying Right of First Refusal (wherein OLCDC could buy the Property for $1 over the debt and tax liability) remained in place should HK Aswan exit the Property.

32. OLCDC not only consented to HK Aswan's purchase of BACDC's interest and new terms in ADA, but it also sold two percent (2%) of its membership interest to HK Aswan for $225,000 in order for HK Aswan to hold the majority fifty-one (51%) percent membership interest and, thereby, control the Property, subject to the limitations set forth in the companies' operating agreements. To facilitate the parties' intentions, OLCDC consented to HK Aswan becoming Manager of both ADA and Owner, and to owner's engagement of HallKeen as day-to-day property manager.

33. After the parties completed the corporate restructuring in June of 2014 with BACDC, they immediately moved to complete negotiations and a buyout of Enterprise Community Investment Corporation's 99% tax credit investor interest. By January 1, 2015, without contributing any new capital, OLCDC's ownership in ADA, which became the sole member of AVA, increased substantially——from its original *de minimis* fractional interest of .001% to 49%, while warding off any potential threat from an "aggregator" down the road through HK Aswan's successful negotiation of Enterprise Community Investment Corporation's exit effective December 31, 2014.

FURTHER AFFIANT SAYETH NAUGHT.

ASWAN VILLAGE ASSOCIATES, LLC
a Florida limited liability company,

By: HK ASWAN, LLC
a Massachusetts limited liability company,
it's Manager,

ANDREW P. BURNES, Manager

THE FOREGOING INSTRUMENT was acknowledged before me by means of physical presence, on this 30th day of July, 2020, by Andrew P. Burnes, Manager of HK Aswan, LLC, Manager of Aswan Village Associates, LLC. He is personally known to me or has produced _____ as identification.

NOTARY PUBLIC, State of Massachusetts
Print or Stamp Name: Linda A Morell

My Commission Expires:
9/12/2025

Linda A Morell
NOTARY PUBLIC
Commonwealth of
Massachusetts
My Commission Expires
September 12, 2025

EXHIBIT B

May 18, 2020 Hearing Transcript

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2019-016913-CA-01

OPA-LOCKA COMMUNITY DEVELOPMENT CORPORATION, INC.

Plaintiff(s),

v.

HK ASWAN, LLC, et al.

Defendant (s).

_____/

HEARING PROCEEDINGS
BEFORE THE HONORABLE
WILLIAM THOMAS

DATE TAKEN: May 18, 2020

TIME: 11:50 A.M. - 02:20 P.M.

PLACE: VIDEO CONFERENCE (via Zoom)

****

APPEARANCES:

DAVID DAVENPORT, ESQUIRE (Via Zoom)
WINTHROP & WEINSTINE
CAPELLA TOWER, SUITE 3500
225 SOUTH SIXTH STREET
MINNEAPOLIS, MINNESOTA 55402
ON BEHALF OF THE PLAINTIFFS

LIDA RODRIGUEZ-TASEFF, ESQUIRE (Via Zoom)
DLA PIPER
200 S. BISCAYNE BOULEVARD, SUITE 2500
MIAMI, FLORIDA 33131
ON BEHALF OF THE PLAINTIFFS

MARK SOLOV, ESQUIRE (Via Zoom)
STEARNS WEAVER MILLER WEISSLER ALHADEFF
150 WEST FLAGLER STREET, SUITE 2200
MIAMI, FLORIDA 33130
ON BEHALF OF THE DEFENDANTS

JOSE SEPULVEDA, ESQUIRE (Via Zoom)
STEARNS WEAVER MILLER WEISSLER ALHADEFF
150 WEST FLAGLER STREET, SUITE 2200
MIAMI, FLORIDA 33130
ON BEHALF OF THE DEFENDANTS

ALSO PRESENT VIA ZOOM:

DR. WILLIE LOGAN
QUINN SMITH
NIKISHA WILLIAMS
RYAN THORNTON
ANDREW BURNS
MARK HESS

P-R-O-C-E-E-D-I-N-G-S

THE BAILIFF: The next case is 2019-016913, Opa-Locka Community Development vs. HK Aswan. One, for partial summary judgment, and two for summary judgment against plaintiff, and the other one is for judgment on the pleading.

THE COURT: All right. Can you announce for your court reporter, please?

MS. RODRIGUEZ-TASEFF: Yes, Your Honor. Good morning.

Lida Rodriguez-Taseff from the law firm of DLA Piper on behalf of the plaintiff, Opa-Locka Community Development Corporation.

MR. DAVENPORT: Good morning, Your Honor.

David Davenport from Winthrop & Weinstine also on behalf of plaintiff; we have with us on the Zoom call today Dr. Logan, Quinn Smith and Nikisha Williams all from OLCDC.

MR. SOLOV: Good morning, Your Honor.

Mark Solov from Stearns, Weaver, Miller joined by Jose Sepulveda. Also on the call today from Stearns Weaver, we have Ryan Thornton, Alex Rodriguez and our client representatives, Andrew Burns and Mark Hess.

THE COURT: Is that everyone?

MR. DAVENPORT: I believe so.

THE COURT: All right. What are we going to do first?

MR. SOLOV: I just want to confirm we have a court reporter on, Your Honor. I believe one was ordered.

THE COURT REPORTER: Yes. Yes, I'm here.

MR. SOLOV: Okay. Thank you.

THE COURT: All right. What are we going to do first?

MR. DAVENPORT: I think we have the plaintiff's motion noticed up as first, Your Honor.

THE COURT: Okay.

MR. DAVENPORT: If I may share a screen. If I could get permission.

THE COURT: You may.

MR. DAVENPORT: Do you see that, Your Honor? Is that available for everyone?

THE COURT: I see it.

MR. DAVENPORT: I saw Mr. Smith nodding.

So this case, Your Honor, like many cases going across the country right now, it's about the preservation and sustainability of affordable housing. But in particular, for local ownership and control in perpetuity.

For context, Aswan Village Apartments is located north of Miami in the city of Opa-Locka; and it was originally built back in the '70s, and for many years

operated well up until into the '90s. It was once a very desirable community for young professionals, including many college graduates. But after, you know, roughly a couple of decades, largely absentee landlords who extracted value from the community via rents, they put very little back in, substandard living conditions led to abandoned apartment complexes to the detriment of the community in the late '90s.

Many years later, because of Dr. Willie Logan, other concerned constituents, OLCDC's mission-based objectives in a government-subsidized program that we'll talk about today to create affordable housing, the project was ultimately rehabilitated largely through the destruction of abandoned buildings and the construction of new, safe, affordable housing.

So, out of four affordable housing developments located in Opa-Locka, three that had been done in the last several decades, three of which have been involved with -- with OLCDC and one by the Urban League.

Now, here we are in a setting, Your Honor, after investing decent, safe, and affordable housing subsidized by the program, and also by Miami-Dade County, we are essentially in a position of having to fight to protect and preserve the mission that OLCDC set out to lift up and support the local community.

It's a terrible cycle, Your Honor. The implications in -- of this case, they're critical for OLCDC, but they go far beyond your courtroom, Your Honor, and we'll illustrate that today in my arguments. Because in essence, everything that the defendants are attempting to do and have done throughout this case violates the party's contract, public policy and the goals and objectives of the LIHTC program. It's inconsistent with case law.

So what we have, Your Honor, is a PowerPoint today where we will go through and it highlights some of the benefits of the program, we'll touch on the apartments, we'll identify the Section 42(i)(7) ROFR, we'll talk about the rules of contract interpretation, the undisputable material facts, the dispute, and why case law supports ruling in favor of OLCDC. Not only for the initial motion for judgment on the pleadings that were brought early on in this case, but alternatively for summary judgment.

So the LIHTC program, Your Honor, is a federal subsidy designed to promote the construction and rehabilitation of affordable rental housing. It has two principal goals; one is the creation of the affordable housing and critically for why we're here today, the preservation of it. The tax credits are allocated to each state by population and the states have discretion to allocate tax credits to qualified low-income housing

projects as they deem appropriate. To qualify, you have to satisfy a number of conditions.

In essence, you have to agree to only rent the units to households below certain qualified limitations as set forth in materials that come out from HUD. They limit the rents during the period -- first 15 years, called the compliance period.

And here's where it becomes very critical for what we have here today. Section 42 requires each state to set aside at least 10 percent of the allocable tax credits for projects that will have nonprofit participation. In our industry, Your Honor, we call that a 10 percent set-aside. It's identified in 26 USC Section 42(h)(5).

Now, what did the tax credits do? They provide a dollar-for-dollar reduction of income tax liability. And this is important because it incentivizes corporate investments in the development of affordable housing. It creates a public/private partnership that, since 1987, has self-financed nearly 300 million units of affordable rental housing. And that's a drop in the bucket for what we need. These tax credits incentivize companies with large, predictable, annual income tax liability to invest in our communities. And when they do that, the allocation of the credits that has been given to the real estate developer can then be monetized.

So, for example, if a company like OLCDC, which is a mission-based nonprofit in Miami-Dade County, receives an allocation of tax credits, they can monetize that by selling it to a bank, and a bank will buy the right to receive those tax credits, and it will then be combined with debt used to finance the construction of affordable housing.

Now, the compliance period is a big indicator; a big event in all of these deals. Because at the end of the compliance period, the tax credit investor will have agreed to the benefits of the credits and now they're looking to exit, because they have little monetary incentive to remain in most of these deals at the end of the compliance period, because they bought the right to receive credits and the right to receive the allocation of taxable losses.

So, what you end up with is some very common concepts, a right of first refusal, buy-out options. These are tools that can be used by nonprofit sponsors to participate, or maybe for-profit developers to participate and buy the original investor, so that they can exit after the end of the compliance period.

And here's where you get the Section 42(i)(7) ROFR. Congress created this unique statutory right and then made it available only to nonprofit participants like Opa-Locka

Community Development Corporation. It ties in wonderfully to the 10 percent set-aside. If you say that the Congress intended to set aside 10 percent, and you couple that with an understanding that they created this valuable right only for nonprofits, it's crystal clear that Congress wanted nonprofit participation in our local communities to participate in affordable housing, and have an opportunity to sustain local ownership at the end of the compliance period.

Now, what is Section 42(i)(7)? What does it do? It creates a safe harbor. It provides that the tax benefit will not fail if a nonprofit participant is given the statutory right. And the right is important because it's not a common law right, it's a statutory right. And it says you can purchase the project, the apartment complex, at the end of the compliance period for a minimum purchase price, which is defined as debt plus taxes.

And so, this takes us to Aswan Village Apartments. We touched briefly about the history of the apartment complex already. OLCDC rehabilitated it by taking vacant, eyesore buildings in a community that had been abandoned and rebuilt it. And the result of it was safe, affordable housing.

How did they do it? The Florida Housing Corporation awarded OLCDC tax credits out of the 10 percent set-aside.

OLCDC was able to monetize that by selling the allocation of those credits to Bank of America for $7 million, approximately. Miami-Dade County, another constituent interested in the preservation and creation of affordable housing with nonprofit-based local participation, granted OLCDC a $2 million grant. So now there's the ability to have $9 million of equity to combine with debt.

So a company is formed; that company is Aswan Village Associates. It's formed in 2003; it acquires, demolishes, rehabilitates and does the developing; and you have the Aswan Village Apartments.

Now, for more than ten years after Bank of America had received the full benefit of those credits, it left the company. It sold its position to HK Aswan, which we'll call HKA, for an undisclosed amount, but it's somewhere between 250,000 to $400,000.

Now, why did they pay so little? Because of OLCDC Section 42(i)(7) ROFR. They knew when they stepped into Bank of America's position in the Aswan Village Apartments that they had no right, no meaningful right to the equity that would be in the apartments at that time, or would continue to rise through appreciation over time. And so they sought to eliminate OLCDC's ROFR, but OLCDC refused to give it up.

The price to step into Bank of America's shoes by

these defendants was cash flow streams that HKA would receive from apartment operations as partial owners, and property management fees that its affiliate, HKM, the HallKeen Management defendant, would be paid to manage the apartment operations under a property management agreement.

So they had two sources of income; a property management agreement and some cash flow streams that would continue. And they were not significant in the lifespan of this project or in their anticipated investment and return on investment, because they paid somewhere between 250 and $400,000.

Now, the company is a single member LLC, and that member is Aswan Development Associates, ADA. At present, OLCDC owns 49 percent and HKA owns 51 percent.

This is the chart that reflects the current structure of the parties and their relationships through Aswan Village Associates.

For visual, Your Honor, this is what a portion of the property looks like. It's located, as I said, north of Miami in the city of Opa-Locka; clean, safe, affordable housing where once vacant, unsafe, less than desirable areas existed in the community.

So now we go to OLCDC's ROFR. What does it look like? Well, it's important to know that Section 42 does

not provide a form ROFR. Rather, as I said earlier, provides a safe harbor. It allows for parties to agree to a ROFR that includes a minimum purchase price.

So what is the result of that? The result of that is parties freely negotiate the terms. And if they want, they can add conditions. Sometimes they do, sometimes they don't. But the important thing here, Your Honor, is not all Sections 42(i)(7) ROFRs and LIHTC agreements are the same.

As you'll see from some of the case law that's beginning to emerge because of the problems we are facing in our industry, some have conditions, others do not. In this case, Section 42.02 of the company's operating agreement recognizes OLCDC's ROFR, and it places restrictions on the company. It creates a preemptive, proactive, defensive right in favor of OLCDC.

Exhibit J to the operating agreement contains the language of our ROFR.

In this dispute, Your Honor, like others that are emerging across the country, it turns on contract interpretation and well-established rules of law applicable thereto. The material facts are not in dispute. They were first identified in the pleadings.

Here's what the operating agreement says; this is the restriction in red. The company will not transfer, sell,

alienate, et cetera, without first giving us the opportunity to buy it, to the minimum purchase price. Here's the language from Exhibit J. This is our ROFR, this is what gives us the right, as we sit here today, Your Honor, in our estimation, based on the undisputed facts to summary judgment, because we've met the conditions.

The conditions are essentially modest, they're consistent with what Congress intended when they created this ROFR back in the late 1980s. After the end of the compliance period, provided a right of first refusal is conditioned upon an agreement to maintain the projects low income and provided that we then thereafter record that, after we close on the transaction. We get to buy it for debt plus taxes. And they have to offer it to us before they sell it, try to sell it, before they do the things that we're going to see that they did and ultimately gave rise to us being able to exercise our right.

It's very consistent with Section 42. The purchase price is minimum; the conditions are unrestrictive and simple. And they're right there.

How do we know what triggers this? What triggers this, Your Honor, is the decision to sell. Is there a manifest intent of a decision to sell the property? We know that there is. And how do we know that that is the

test? Because the house committee report describes it simply as the right to, quote, "purchase the building for minimum purchase price, should the owner decide to sell at the end of the compliance period." That's it.

We didn't see conditions placed on it other than those articulated here. It's a matter of contract interpretation.

So, what are the rules of contract interpretation that we believe the Court should focus on?

THE COURT: Mr. Davenport, I apologize.

So, first and foremost, because you just made reference to the house committee reports, are you telling me that I cannot look at this contract and determine what the rights and responsibilities of the parties are, just by looking at the contract? I have to -- I have to take in extrinsic evidence in order to glean what was meant when the parties signed Section 42 or created Section 42?

MR. DAVENPORT: No, Your Honor, I'm not saying it that way. What I am trying to say is, under the case law that's articulated on the screen in front of you, what you should do, and what I hope you will do, is consider all of the laws which exist at the time that the parties made their contract. And those are part of, they're entered into, they're essentially a part of the contract because they're expressly referred to and incorporated into the

terms thereof.

So, the meaning of the contractual terms and the rights attendant to it are animated and defined by the applicable law integrated in the contract. So, it's not extrinsic evidence in so much it is understanding that this is a Section 42 ROFR, it's referred to, replete, throughout the parties' contract. So as you're interpreting it, you look to Section 42 just like you would to another case, to another statute. If it makes reference to a Florida state statute, you'd say, okay, well, that is something that I need to look at and consider in order to give meaning to this contract.

THE COURT: But why am I looking at committee rule -- why am I looking at committee reports?

MR. DAVENPORT: Because the house committee report helps identify and illustrate and explain what Section 42 is intended to accomplish.

THE COURT: So you're telling me in order for me to understand what the parties intended, it's not enough for me to just look at the agreement which incorporated the ROFR Section 42, and the law that existed at the time; I also have to look at how the committees viewed it?

MR. DAVENPORT: Insofar as it relates to trying to understand what Section 42 means and what was intended by this ROFR, yes, Your Honor, that's what I'm saying. And

I'm not meaning to suggest that it's extrinsic evidence. It's part of the body of the law that makes up Section 42. And we know from Florida law and other common law throughout that the goal is to determine what the parties' intention was at contract formation, by considering not only the words used in the contract, but the obvious purpose intended behind those words.

So, what did the parties intend when they said I want to give OLCDC the Section 42(i)(7) ROFR? And what they intended and what they animated is defined by the applicable law and the house committee report that helps illustrate that law.

And I will get to some case law later on specifically on point in the Homeowners Rehab case, which the Supreme Court of Massachusetts talks specifically about that and addresses any concerns to the extent there are any relative to why you would want to look at the house committee report, and it really is not extrinsic evidence.

So, that's the first rule of contract interpretation, Your Honor. And the next three rules are identified on the next slide.

And we know we are not supposed to interpret a contract so as to render a portion of it meaningless or useless. Every provision must be given meaning and effect. And what the defendants are trying to do is

essentially create a situation where OLCDC's ROFR is meaningless, will have no affect, and practically could never be exercised.

We know we may not rewrite contracts. We know that the case law says you can't add meaning that's not present, and you can't reach results that are contrary to the parties' intent. We know that the ROFR here was not intended to be a hurdle. We know that the ROFR here was not intended to have roadblocks, but those are the arguments that our opponents are marshaling in front of you relative to these proceedings.

We also know that you must construe the plain language of a contract to give effect to the parties' intent. So when we look at the plain language of this agreement, what did the parties intend? An ease of transfer to Opa-Locka to maintain the Section 42 minimum purchase price.

So, Your Honor, the undisputed facts are quite simple.

And I just want to apologize. Right here in the timeline, I have two dates of October 8th, 2018. Despite all of our best efforts, the second date should be December of 2018 in the slide here that I'm kind of hovering over. It will become more apparent as I walk through this timeline.

But in October of 2018, HallKeen become concerned about what they perceived to be water quality issues in South Florida, specifically Miami-Dade County. So then commenced an internal process to evaluate exiting South Florida and getting rid of their positions of ownership there.

And so the pdf that I just clicked on, Your Honor, is part of the record in the case. This is the email that kicked it all off. Internally, the principal, Denison Hall, at HallKeen reads this article, he forwards it to Mr. Burns, who's participating today on our Zoom call, and he says this suggests to me we need to sell our Miami area properties ASAP.

So they want to quickly find out what they can sell them for. It's of high importance; he's not going to let it slide. He acknowledges, however, something that's critical here. With respect to Opa-Locka CDC, Mr. Denison Hall, the primary owner says: I assume we have to offer them right of first refusal or something similar. I suspect he probably remembered that, because when they bought the deal for less than $400,000 it was because of the ROFR.

So that's October of 2008. Now, what did they do? They spent the next couple of three months doing a bunch of internal due diligence to try to figure out values upon

a sale. And this is now December of 2018, they engaged Novogradac.

Now, Your Honor, in our industry, there are a variety of accounting firms that provide services to audit work, to income tax work, and Novogradac is one of them. They're perhaps the largest provider in our industry.

And what did they do? Mr. Hess went to Charlie Rhuda of Novogradac, subject matter was Aswan, Park City, and Palmetto. Those are the three Florida properties that HallKeen has an ownership interest in. And they executed an engagement agreement, and they assumed that Aswan would sell for $20 million. And they wanted to do a hypothetical sale and distribution analysis, because they were assuming that the real estate would be sold, and the partnerships would be liquidated. So they wanted to figure out a hypothetical sale price and a variety of different things.

And then, they ultimately went through and signed an engagement with Novogradac to provide that in there in their initial due diligence period.

Dr. Logan and OLCDC don't know this is happening at that time. What Dr. Logan will find out on January 28, 2019, when Mr. Burns comes to Miami to meet with him while he's there for another trip, he meets with Dr. Logan, and for the first time he tells Dr. Logan that HallKeen is

looking into, considering selling the Florida properties and getting out. The meeting is short and it ends, and they go about their way.

Now, you fast-forward -- trust me when I tell you, there's a lot of discovery that flows into a lot of these timeframes, but we're trying to highlight the most important ones that are case dispositive in our mind and provide you with a sample.

March 4, HallKeen acknowledges that Dr. Logan and OLCDC is still resisting a sale. Mark Hess writes on March 4 to Jeff Irish at LIHTC Advisors, which is a brokerage firm in our industry, Your Honor. There are several of them that have experience in selling low-income housing tax credit projets at the end of the compliance period. And he acknowledges that Aswan is the trickiest, because OLCDC's objectives, remember they're mission-based, and they know we want to continue to own, are resisting a sale for fixing up any portion of their interest. It states, we hope to present some options to OLCDC first week in April so we can pick a direction. Hope to present some options to OLCDC.

We know that on March 13, HallKeen receives solicited letters of intent. They went out into the market, and they solicited offers from a variety of people, including Lincoln Avenue Capital who's a New-York-based private

equity firm. And here's Mr. Hess communicating internally, after having received from Mr. Burns the letter of intent for HallKeen Florida's assets, Park City, Aswan, Palmetto. They received a solicited offer from Lincoln Avenue Capital, whereby Lincoln Avenue Capital would purchase all three of the apartment complexes. So that's March 13.

Now, remember in the earlier slide they said they were going to present Dr. Logan with some options. Well, that didn't happen. Instead, what happened is on April 16, 2019, HallKeen lets Dr. Logan know, we've made a decision; we have decided to go forward with Lincoln Avenue Capital; we are going to sell the Aswan Village Apartments for $21 million. And the terms of that transaction are outlined in the letter of intent.

They're excited about it. They like the relationship. Then they present OLCDC with a false choice; you're going to lose your ROFR, but you can stay in and earn a fee of $18,000 per year for so long as the OLCDC debt stays in place.

Well, let me provide a little context. Remember when I told you about that $2 million Miami-Dade County grant? That was provided to the partnership effectively as debt, to be repaid. And so, they're effectively saying your ROFR is going to go away, you can stay in the partnership,

and you'll continue to pay back what you owed. They want a decision from OLCDC, they want to keep the process moving with Lincoln Avenue Capital. To make no doubt about it, they provide Dr. Logan with the letter of intent.

Now, in this particular instance, they ultimately ended up splitting the letter of intent out to identify Aswan Village Apartments as the singular subject of the letter of intent provided to Dr. Logan. And it outlines the terms and conditions. And it talks about a 21-day period for the seller to accept. The purchase price is $21 million. And let's look and see; fee simple, purchase type, it's going to sell the property, the apartment complex is going to change hands, there will be a fee simple transfer of ownership to a new entity. It's going to sell for $21 million.

And look what Mr. Hess does; he acknowledges it and accepts it on behalf of the seller.

So the seller has accepted and acknowledged the letter of intent. You have an offer, you have acceptance, and they want to know from Dr. Logan what he wants to do.

So what does Dr. Logan do? Dr. Logan, then, on May 6th responds. And he responds by indicating, you asked for our approval, you got it, we're giving it to you within 21 days. Now we know that the partnership has

manifested an intent by both parties, and he exercises his right of first refusal. And effectively at that point, that's what leads us to the litigation.

Now, importantly, prior to that time, on April 29, 2019, HallKeen had gone back to Novogradac. And they went back to Novogradac because they had the LOI signed with Lincoln Avenue Capital, and because they had decided to go forward, and because they were going to sell. And they asked Novogradac, let's do a second sales projection; let's do a second disposition analysis for Aswan. And they provided the Lincoln Avenue Capital letters of intent for Aswan, Park City and Palmetto.

Now, they may cite -- suggest that they didn't intend to go forward, that there was no decision to sell, but there absolutely was, and the facts are undisputed in that regard in any material way.

So, we have a dispute. And essentially the dispute is they want to deprive OLCDC of its ROFR and they want to sell Aswan Village Apartments for fair market value, they want to strip the property of its equity, they want to take more than $5 and a half million for themselves after investing no money in the company, after purchasing from BOA the interest in the company for less than $400,000. They want to add conditions to the ROFR that are inconsistent with Section 42, inconsistent with its

intent, inconsistent with the plain and unambiguous language of the contract. They're simply trying to do something that was never contemplated nor intended by the original parties.

THE COURT: Can I pause you for a minute, counsel. Can you go back to -- I believe I read that what the defendants are arguing is that the letter of intent was -- they said it was -- I believe the language they used was nonbinding. They said it was a nonbinding letter of intent and that it was never accepted, and that in fact it was signed by -- it wasn't signed by the owner, it was signed by -- I think the person was the vice president of marketing, or vice president of acquisitions, who didn't have any authority to bind the owner, and that is evidence that it would just be an exploration, to see what their options were as compared to having entered into an enforceable agreement.

MR. DAVENPORT: So, a couple of things there to unpack, Your Honor.

Yes, the letter of intent is nonbinding. By its very nature, letter of intents are inherently nonbinding. They're essentially what we call a term sheet, a deal letter, a memorandum of understanding. It outlines the parties' understanding which they intend to form later a legally binding agreement.

And herein comes the paradox, where if you have a minimum purchase price Section 42 ROFR and you have to have a binding and enforceable agreement in place, you will never get one. Because nobody is going to come in and present a binding and enforceable LOI in most instances, as the defendants are positing should exist here, when they know after all of that due diligence somebody can come in and buy it for debt plus taxes rather than $21 million. So they're creating an impractical scenario which would be inconsistent with what contract rules of interpretation require.

THE COURT: But what they argued is that, they argued it happens all the time. They just simply -- they put a clause in there that makes sure everybody understands that your rights are subject to the right of first refusal of the other party. And their argument in their pleadings was you seem to think that that never happens, but it happens all the time in business, that people enter into contract with the understanding that it's subject to other people's rights.

MR. DAVENPORT: I think in part that's what they're saying, but I'm not entirely sure that I understand it that way. They have argued many different variations throughout the case.

First, it started with you have to have a binding and

enforceable agreement between the parties. Well, that creates an outrageous result, because you're going to enter into a binding and enforceable agreement that the company is going to have to breach, because it's going to then say I can't sell this to you; I'm going to sell it to OLCDC for debt plus taxes.

So, the case law that we'll get to later will suggest and confirm that that argument doesn't work for the defendants; they shifted.

One of the arguments that they made, you just highlighted, was the gentleman that signed, acknowledged, accepted, after deciding to move forward with the sale, was Mr. Hess. They basically said, hey, look, he didn't have authority to sign on behalf of the seller.

Well, he did. He also did in fact sign on behalf of the seller. Maybe what they're trying to say is because he put his title VP of acquisition and development, that's his role with HallKeen Management, who is the management agent on behalf of the company. He has such authority to conduct business on behalf of the company.

It's a difficult task, in my mind, for them to articulate a legitimate genuine dispute by contending that the seller did not acknowledge and accept the letter of intent when he signed the document that says he acknowledged and accepted it on behalf of the seller.

THE COURT: I'm sorry. Can I ask you --

Are you characterizing this letter of intent and everything that happened afterward, after its signature by the vice president, are you characterizing that as an enforceable offer or -- and I'm not talking about just the letter of intent, I'm talking about the letter of intent and everything that happened, all the communication that happened after it. Is that something that creates an enforceable offer, or it's signifying an objective way for this Court to determine that, you know, that the owner was willing to -- or expressed a manifest intent to sell, or is it -- is it something less than that, or is enforceable not required?

MR. DAVENPORT: I don't believe enforceable is required, Your Honor, under the terms of this ROFR. What I am suggesting is the former, that the letter of intent is an indication that they decided to move forward. There was a decision to sell that was made at the time it was executed, and that is sufficient for us to move forward to execute on our ROFR.

THE COURT: But their argument was that the courts have talked about this, and what the courts have consistently said is that there has to be some objective way of determining when the right of first refusal kicks in. Because if not, I believe what they argued is that

the courts would constantly be resolving these disputes where people are running to the court saying it kicked in now, it didn't kick in. So they said that the courts created a standard, which is an objective standard, for making such determinations.

MR. DAVENPORT: Well, Your Honor, I think the objective way in this instance for this ROFR is was there a manifest intent to sell, was there a decision to sell and did they manifest that. And the answer is yes, they did.

THE COURT: Can I just ask you, sir: Do you agree then that it does have to be an objective criteria, but the objective criteria as to when the right of first refusal is triggered is based upon a manifest intent to sell as compared to objective criteria that there was an enforceable offer that the owners were willing to accept?

MR. DAVENPORT: I agree with that, Your Honor.

THE COURT: All right. Go ahead.

MR. DAVENPORT: So, now you go to the dispute. And where we left off, Your Honor, was essentially what is happening to OLCDC and what is happening in our industry is an emerging threat that is playing itself out here. And this is a report from the Washington State Housing Finance Commission. Senator Maria Cantwell from the great state of Washington has been an advocate for affordable

housing for her time in the Senate. And there was a very significant amount of litigation going on in Washington over the course of the last couple of years which produced this report in September of 2019. And the report, Your Honor, is part of the record; it's cited for context and supplemental secondary authority.

What it highlights for us, Your Honor, is that there's a number of private firms that have recently been challenging LIHTC project transfer rights like OLCDC's across the country. And the objectives are the same; they want to assert a myriad of claims and arguments against project transfers, including transfers to nonprofits. And essentially, what they've done is they aggregated these interests.

Like HallKeen, they came in after the credits were gone, Bank of America got their credits. And now you have somebody that came in, aggregated a collection of interests, and find themselves in a situation where they try to monetize a less than $400,000 investment to turn it into $5.5 million, and deprive OLCDC of what it's supposed to have. And they take advantage of these resources of disparity to leverage scale, in hopes of overwhelming their counterparts. That's all in the report.

THE COURT: Mr. Davenport, can I ask you, just for purposes of the Court's understanding.

The owner, if they did not sell this property, what they would continue to do is they would continue to be owners and they would continue to get, what, management fees from the property; because you said the tax credits had already been used up.

MR. DAVENPORT: Essentially two things, Your Honor. So the owner is the company of which my client has a 49 percent interest and they have a 51 percent. The owner of the company would continue to collect rents, and to the extent that there was cash flow to be distributed, then it would be distributed amongst the partners that way. And then, the principal benefit for these defendants is the management fee, HKM receives a percentage, I believe it's 5 or 6 percent. I apologize for not having that at the tip of my tongue, but annually based on the rents to manage and operate the project.

So they have the fee streams from property management, and then they have the ability to take some cash flow distribution to the extent that there are any. And they have more than recovered their $400,000 investment through the income streams.

Did that answer your question, Your Honor?

THE COURT: It did. But I'm not understanding. Can I ask you from your perspective, and I'm not sure whether this plays any role in ultimately what the Court has to

decide.

So, why would they do that? I'm trying to understand; why do they enter into these agreements if all they're really getting is the management fees, and ultimately once all the tax credit had been used up, then I'm trying to understand why was the -- what's the financial incentive to do this?

MR. DAVENPORT: You know what, Your Honor, you're hitting on all the right questions from my perspective. The WSHFC report will answer a lot of those questions. Essentially what happens is, you end up in this scenario where OLCDC has a partner they didn't do a deal with. It didn't do with a deal with HallKeen; it did a deal with Bank of America. Bank of America had a tax credit fund 15, 16 years ago and they bought credits. They didn't want income streams, because this is a tax credit investment. It's a vehicle to reduce income tax.

So when you get to the end of Year 15, if Bank of America is still sitting there with Dr. Logan, this probably wouldn't be that big of a problem. But the problem exists because of this threat in our industry, where people like HallKeen and about four others in the industry have come in and recognized there's an opportunity to monetize a tax credit investment that has run its course, by stripping the equity out of the

project, and taking from it something that we didn't invest in.

Most of these exits throughout our industry proceed forward without incident, without challenge. But where we have a problem is where you an aggregator, somebody like HallKeen who didn't invest in the deal. They want to monetize, they want to strip local wealth and send it somewhere else. And that's the threat to the industry. That's the threat that's identified here in the WSHFC report. That's what faces OLCDC and many of my other clients across the country.

Now, in a for-profit realm it's different because we don't have a nonprofit right of first refusal to fight about. They try to frustrate other options; the right to buy for fair market value minus the discounts. I won't open that Pandora's box. Some of that is discussed in the report. But the only principal reason why we have a problem here today is because the original investor in our deal was gone. They sold their position in this investment, in this community asset, to HallKeen. And now HallKeen is saying, all right, I got what I paid for, they valued that position at less than $400,000. They looked at what their anticipated revenue streams would be for operations and what the anticipated revenue streams would be for property management, and they put a dollar value on

it, and Bank of America sold it to them.

I can assure you that the undisputed material facts in this case, and in the other cases that I have where this is going on, the HallKeen entities and people like them did not put residual value at Year 15 on these interests. Because if they had, they would have written Bank of America a check for millions and millions of dollars.

So now what they're doing is they're turning this upside down and creating this vicious cycle, where after my client has done everything right and rebuilt the community, and delivered the tax credits to Bank of America, they're trying to strip all the equity, which in turn then prevents OLCDC from doing the things that need to be done to this property after 15 plus years of operation. Capital expenditures, improvements for the tenants. These folks deserve good parking lots, they deserve good roofs, they deserve to have upgrades to their amenities. But when you strip all the equity away, you prevent OLCDC from doing it. You also prevent OLCDC from doubling down and offering more services. You also prevent OLCDC from doubling down and creating new affordable housing.

So it's a real threat. The economics can get somewhat hard to understand, because you have to think

like someone who values money over safe, affordable housing.

And that's what we have going on here in our industry. And it's an emerging threat that is facing OLCDC. It has produced case law that I'll dive into now, Your Honor, starting right here in my humble state of Minnesota. Common Bond Investment Corporation, a nonprofit, community-based organization spun off out of the archdiocese of St. Paul. This is what I understand to be the first ROFR case that we see.

We went to challenge -- excuse me. We went to exercise the ROFR. Nobody challenged the exercise. Nobody said that there was a triggering event that was missing. Nobody say you needed an enforceable offer. We exercised the option based on what we had available to us. And what did we see? They said, no, you don't have a viable ROFR. Why not? They try to take advantage of a clear scrivener's error. There was a typo in it. It had been given to a for-profit affiliate of Common Bond rather than a nonprofit. It was a mistake.

After discovery, after they admitted they drafted it, after we found the drafter and she said it was a mistake, and I knew it back then but I was told not to fix it, the Court easily reformed the contract to give intent to providing and enforcing the Section 42(i)(7) ROFR, and

Common Bond bought for debt plus taxes.

The next case we see, Your Honor, worked its way all the way up to the Massachusetts Supreme Court; Homeowners Rehab versus Related Corp. Related Corp is controlled by a different entity than did the deal back in the day, another one of these aggregators. That case started with district court back in, like, 2016, made its way through, got through summary judgment and then was going up on appeal. The Massachusetts Supreme Court grabbed it and said you're going to skip through a layer of appeal and you're going to come directly to the Massachusetts Supreme court.

The right of first refusal at issue in that case was different. And this is why I say they're not all the same. It required a third party offer, adding a layer onto the decision to sell standard. It was contract interpretation. The plaintiff argued it could exercise once a third party makes an enforceable offer. That's what the plaintiff argued. The defendant argued you can't exercise until the partnership receives a bona fide offer from third parties, then decides with limited partner consent to accept the offer.

So, you ask yourself why they're talking about an offer and fighting over enforceability and third parties and deciding? Because that contract required an offer.

So, there were three issues: Did the offer need to be bona fide from a third party? Did the partnership need to accept it in order for the nonprofit to exercise? And can the general partner, the nonprofit, make the decision on behalf of the partner without the limited partner consent?

I respectfully submit, Your Honor, when you read that case, you will see that it played out there the same way the defendants here are trying to play it out, which is leave the nonprofit holding the bag with a practically impossible and impractical right of first refusal that can ever bring the value that it was supposed to bring to the OLCDC consistent with the 10 percent set-aside.

So, what did the Massachusetts Supreme Court tell us? Section 42 should not be interpreted such that the nonprofit sponsor can be denied a meaningful opportunity to acquire the property interest. It told us, don't let the defendants in Opa-Locka do what they're trying to do here in Massachusetts. Congress intended for nonprofit organizations to be able to exercise the right of first refusal "when the owner decides to sell". They relied upon the legislative intent behind the statute to illuminate its purpose and what the parties' contract said, that the language in the agreement meets that statutory and practical context.

Now, here's an important piece. Applying Massachusetts law, the Court held that the ROFR must be triggered by bona fide and enforceable offer to purchase the property, meaning an offer that is honestly made -- made honestly and with serious intent. That's what they said. Now, the little ellipses is just a Massachusetts case that was cited in support of this, but they defined what it meant, a bona fide and enforceable offer, meaning an offer that's made honestly and with serious intent.

If that's the standard in our case -- and I don't think it should be because we have a different ROFR. But if that's the standard in our case, we meet it. That offer from Lincoln Avenue Capital was made honestly and with serious intent. And that's what they defined bona fine and enforceable to mean. And the owner of the property must have decided to accept it.

THE COURT: Does it have -- so when you think about offer, does it have to be -- like a letter of intent is nonbinding. So in other words, could they have just simply said, I changed my mind? And, I mean, we are having -- it's like we're having discussions. So when they said bona fine and enforceable offer, then a letter of intent is not an enforceable offer. A letter of intent is just simply a conversation with everybody's expressing a desire. But how is it enforceable?

MR. DAVENPORT: By its very nature, it's not enforceable, Your Honor, and I have to concede that because it's nonbinding.

THE COURT: So what it is is that -- and even when you define it in the bold part here, when you say meaning an offer that is made honestly and with serious intent, they're arguing that the only way that there could be a bona fide and enforceable offer, pursuant to this case, is if it is in fact something that is -- that obligates, binds -- binds the parties, and the owner then accepts that offer.

MR. DAVENPORT: That is essentially their argument. Yes, they are -- they are hanging part of the pillars of their argument on we have to have an enforceable offer in order --

THE COURT: But is that inconsistent with this case, is what I'm asking?

MR. DAVENPORT: Yes, it is entirely inconsistent with this case.

THE COURT: Because? I'm sorry. You may have already said it, but could you say it again for me.

MR. DAVENPORT: Two points -- they're from a third party; ours is not. And so the reason they're talking about bona fide and enforceable is that's what the parties were arguing, and the court said, okay, it needs to be

triggered by a bona fide and enforceable offer. What does that mean? That means its intent. It's not enforceable in the context of I can run into court and sue you, right. They defined it to mean was that offer made honestly and with serious intent. That's how they defined it. And the defendants are essentially leaping out that definition of honestly and with serious intent, and saying, look, Judge, this is not binding, it's not enforceable, there's nothing to talk about.

THE COURT: I know you're about to talk to -- I know you want to talk to me -- maybe it's your next case, you're going to talk to me about the Senior Housing Assistance Group case. But I'm just curious. Is this new to Florida? Are there no cases developed in Florida where the Third District or any sister circuits have had the opportunity, or even the Supreme Court, to weigh in on this and give this Court guidance on what should happen? Is that why you all are citing me Minnesota, Wisconsin -- and Washington and all these other states, Massachusetts, all these other cases?

MR. DAVENPORT: Yes, sir. This is the one. This is the first. And, you know, I'm thankful that OLCDC gave me the opportunity to serve on their behalf, because it's critical. It is an issue, as I understand it in Florida, of first impression.

Now, it's not an issue of first impression relative to Florida common law. In other ROFR settings, in other options setting where ROFR is exercised to create a binding option, we have lots of case law that will help illuminate why we're right, why we believe, if we have to get into Florida common law, why we win there to, but I'm unaware of any Section 42 ROFR case in the state of Florida.

Now, it's not the only case in the state of Florida where I've litigated Year 15 exit disputes with an aggregator. I have a case right now in Orlando where we just got summary judgment against an aggregator in front of Judge Jordan. It's CED Capital, it's published in Westlaw, it involves a stock purchase option.

I will identify for you, Your Honor, every case that I'm aware of that involves a Section 42 ROFR, and I'm doing so chronologically in my presentation. I don't believe we missed any because since the Common Bond case, this has become my practice. Our firm has made a decision to do what we can to help our clients like OLCDC in the general partner community and the LIHTC industry fight to preserve and protect affordable housing, so I think I know about all of these cases.

THE COURT: All right. You may continue.

MR. DAVENPORT: Thank you.

So the SHAG case, results driven. Clearly, in my mind, when you read the case, you can see why it ended up. I don't think anybody has to go beyond the first two pages to see where the Court was going to go. Senior Housing Assistance Group ultimately put itself in a position where they were unable to execute on more than half dozen or more ROFRs. The questions presented were, whether the third-party offer is legally sufficient to trigger the ROFR at issue, and whether the doctrine of unclean hands precluded the exercising of ROFR.

There, the ROFR could be triggered if the owner received a bona fide offer from a third party acceptable to the property owner. So the Court had to evaluate, is there a willing seller, and is there a willing buyer. Critical to SHAG is bona fide. Made in good faith, without fraud or deceit, sincere and genuine. And when you unpack the SHAG, what you will see is they didn't meet it. There was some shenanigans going on, they had a for-profit investor -- excuse me -- a for-profit developer by the name of Brian Park. The Court made some very damning determinations of his credibility, and ultimately the relationship between Mr. Park and the nonprofit resulted in a determination that there was no bona fide, made in good faith, without fraud or deceit a sincere and genuine offer, no willing seller, no willing buyer. The

Court applied Washington common law without consideration of or context to Section 42.

The next slide, Your Honor, is Riseboro.

THE COURT: Before you go there, because I saw something I thought was interesting in the SHAG case, is that it said that it cannot just be an expression of interest or an invitation to negotiate.

You're saying that's not a bona fide offer. An expression of interest or invitation to negotiate is not enough?

MR. DAVENPORT: That's right, Your Honor, because, you know, that deal required a bona fide offer from a third party, and bona fide needed to be made in good faith, sincere and genuine without fraud or deceit.

Ultimately, Your Honor, my humble opinion, I mean we were representing a bunch of amicus people who were going to file a brief and see what we can do to try to right what we thought to be the wrong in the SHAG case, and I'm not necessarily here to talk about the outcome, but the failure of that Court to acknowledge and apply and articulate Section 42, and what goes into a Section 42 ROFR, and evaluating that outcome trough the lens of Section 42 ROFR rather than under Washington common law -- again, I understand why the Court did it, it's results driven, I'm not trying to be overly critical here, but the

SHAG case in my mind really is apples and oranges to what we have here.

THE COURT: Well, Mr. Davenport, can I ask you, sir, both of the cases that you've discussed with me so far, and that is the Homeowners Rehabilitation case and the SHAG case, your way of distinguishing those cases from what we have here, is that they required a third party, an offer from a third party, or a bona fide third party offer.

What is the case that is analogous to what we have here, where there's no requirement of a bona fide offer from a third party, it's just a requirement of just a right of first refusal once you, as you argued, manifest an intent to sell?

MR. DAVENPORT: Our case, Your Honor.

THE COURT: Okay.

MR. DAVENPORT: I'm sorry to say. I mean, it's our case. And quite frankly, the Homeowners Rehab case illustrates for us why it's close, because it talks about Section 42, and it advises that if we're going to be looking at a Section 42 statutory right of first refusal, we ought to be mindful of the manifest intent decision to sell.

THE COURT: So does that mean, Mr. Davenport, that you don't have another case in any jurisdiction in the

country where there was no requirement for a bona fide third party purchase? It was just a right of first refusal that was written into the agreement and that's all it really said.

MR. DAVENPORT: Specific to Section 42, yes, Your Honor. But what we know from looking at Florida law in the context of right of first refusals, and we know from looking at common law from other jurisdictions across the country, that a letter of intent is sufficient; a letter of intent that's accepted and agreed to is sufficient.

We have the MacDonald's Corporation case that we cited, we have -- and that's from United States District Court Southern District of Florida. We have from the Supreme Court of Florida in the Old Port Cove Holdings case, that if the owner decides to sell, if there's a manifest willingness to accept, the ROFR is triggered. We know from the Florida Fourth District Court of Appeals in the Vara case that the trigger is the notice of intent to sell.

So we have some Florida case law that's very much on point. I wish, Your Honor, that I had a Section 42 case specific to this language; I don't. So, I hope I answered your question on that one.

THE COURT: You did. And at some point, we're going to have to -- and thank you for being so patient. We're

going to have to hear from the defendants, because you've been going on for a while now.

MR. DAVENPORT: Thank you, Your Honor. I'll get through this real quick.

So the Riseboro case that I was just touching on, this one is playing itself out now in the Eastern District of New York. This one, thus far, is in dealing with some dispositive issues. The Court has held that Section 42 ROFRs cannot be interpreted purely under common law, but must be interpreted consistent with the statutory scheme of Section 42. That case is currently in a dispositive motion fashion, I would imagine in the next couple of months we're going to have a decision. Not involved in that case.

Tenants Development Corporation, the nation's oldest CDC, started as a result of the civil rights movement in Boston. We filed the case last week in the United States District Court of Boston on their behalf; we'll see where that case goes.

That's the landscape of the Statute 42 cases as I know it, Your Honor.

And rather than beat a dead horse, I just wanted to wrap up with plain language. When we look at the plain language, we know that we have satisfied the conditions, and we know that the defendant's interpretation adds

additional conditions that are simply not there. The Section 42 standard that we've gone through at length now, we believe we prevail on that. Their interpretation requires an additional receipt of third party offer that's enforceable, et cetera. They have even gone so far as to say at one point in this case, our right couldn't be exercised until they actually sold the property. Clearly that would be an absurd result.

And then finally, in Florida common law, I've indicated the Old Port Cove case, the MacDonald's case and others. We believe that the common law in Florida would support our interpretation. And similarly common law generally across the country, we've cited a lot of cases that we believe, Your Honor, would support the determination that our clients are entitled to, A, judgment on the pleadings, or alternatively at this point, given the factual record, summary judgment because there's no disputed issue of material fact concerning the decision to sell or the manifest intent thereof.

Thank you for the wide range of latitude and time you gave me, Your Honor. That's all I have at this time.

THE COURT: Before I turn it over and I hear from Mr. Solov and/or the other side, can I ask you, there was -- part of your argument in the papers, I remember reading that you argued -- I think it was in your

response -- that an offer is not the only way to trigger the right of first refusal.

Can you talk to me? What were you -- did you argue that?

MR. DAVENPORT: I'm sorry; I'm not tracking the question, Your Honor.

THE COURT: Meaning that in here, the argument is that -- they're arguing that the only way that the right of first refusal can be triggered is if there was an offer, a good faith offer. And I thought I was reading your papers to say that an offer is not the only way to trigger the right of first refusal.

MR. DAVENPORT: Yes. I mean, I would say when you look at the language, you know, what's required, a decision to sell. And if the company decides to sell, they need to go to OLCDC and say, hey, guys, you got 45 days. You want to buy it for debt plus taxes, let me know, because I can't sell, I can't go forward with my decision to sell until I give you this opportunity. You know, that's what should have happened, right. But instead, they went down this other path, and then they came in and they announced, we've decided to sell, Dr. Logan, so here you go.

I mean, I sit back, and I put myself in his shoes. I love him to death, but it was a difficult deposition to

defend, because what was he supposed to do? You know, he was presented with this scenario where we're selling, you're in or you're out; we've made the decision. What else was he supposed to do but exercise, right? I mean, under the facts that he was presented with, Dr. Logan, on behalf of OLCDC accepted and moved on and exercised in the ordinary course.

And what should have happened, and what happens in most of these deals where you don't have a new partner who's trying to strip value and wealth from the community, they say, hey, you want to exit? Okay, well, you've got the right to do this right of first refusal. You want to buy it for debt plus taxes? He could have saved himself all sort of hassle and headache by just following what the parties intended and what they laid out in their agreement.

THE COURT: I think they were making the argument, though, is that they're required to give 45 days, and I'm assuming if you don't exercise your option within that 45 days, you lose it.

So the question is, I think they made the argument, well, when is the 45 days supposed to begin to run? And that's why they're saying there has to be clear, objective criteria. Because if not, if it's just subjective, amorphous type of communication, then nobody even knows

when your 45 days starts to run and when it expires, so that you would basically waive any right of first refusal.

MR. DAVENPORT: They most definitely argued those type of things, Your Honor, to create this doom and gloom and subjective, you know, uncertainty to make it appear to be all sort of litigation. I would just respectfully disagree with them, and there really is no confusion.

It's pretty simple. Was there a manifest intent to sell; did they decide to sell. And when they manifested that decision, they needed to allow us the opportunity to buy.

And we saw from the timeline, when they sent on April 16th the executed, accepted-on-behalf-of-the-company letter of intent and told Dr. Logan in no uncertain terms, we have decided to sell. The clock started to run.

THE COURT: All right.

MR. DAVENPORT: And up until that time, what they had told him was we're looking into it, we're considering it, we're weighing our options. Remember in March, they said to LIHTC Advisors, we're still kicking the tires on this, we're looking to present Dr. Logan with some options. Then they presented him with one; we decided to sell.

THE COURT: So, that wouldn't have been enough? Them simply saying, hey, Mr. Logan, we're thinking about our options here, we're weighing some things, without --

without basically saying is that, as you've indicated here, we have an offer, we're selling it for $21 million, and this is who we're selling it to, we're accepting it.

MR. DAVENPORT: Right.

THE COURT: All right. Let's hear from the defense, please.

MR. SOLOV: May it please the Court, Your Honor. After Mr. Davenport closes his screen, I'd like to be able to share the screen, Judge.

THE COURT: Okay.

MR. SOLOV: Okay. Thank you.

All right. Your Honor, as we started this case many months ago, we said to Your Honor that OLCDC has a right of first refusal, it's just not ripe. And we repeat that because that is the case; they have that right. It has remained dormant because it hasn't been triggered at any point in time since it was granted in 2003.

Now, it's important to remember there are a number of different parties and entities involved. And the right of first refusal has been granted by the fee simple owner, Aswan Village Associates. And there was some discussion and colloquy and questions you asked, there was nothing in the record whatsoever that Aswan Village Associates did anything. What you did see is Aswan Village Associates has -- it's a single member limited liability company,

it's owned 100 percent by Aswan Development Associates. And Aswan Development Associates is owned 51 percent by HK Aswan and 49 percent by OLCDC.

So what you saw were, you saw a lot of communications back and forth, and that's what most of the discovery was, between the two members. And these two members must come to an agreement in order for Aswan Development to make a decision to sell, and Aswan Village Associates can't sell without the consent of Aswan Development Associates, its member. So, you will see as we go through this -- and there's nothing that Mr. Davenport showed you and there's nothing in the record that the owner of the property took any action whatsoever.

Now, there are essentially, Judge, four primary reasons why we prevail. I'm going to just list them quickly, and then we're going to go through them in detail.

The first, Your Honor, is -- under the plain and simple terms of the agreement, it says -- and we'll look at that in detail, it says will not sell, and there has been no sale of the property, obviously, nor has there one been scheduled, and nor has the owner, Aswan Village Associates, ever offered it at any time to in any way trigger the 45 days.

Secondly, under Florida common law, which is --

certainly relates to the right of first refusal because it is governed by and negotiated with in accordance and construed with the Florida law, and that also tells us that here, not only must an owner manifest an unconditional willingness to accept, it must accept a third-party offer. We'll get to in a moment. And a third-party offer isn't just a letter of intent, isn't just an interest. It must be certain definite terms, capable of which are being accepted, will result in a binding contract.

Then we go to the other -- the two cases, the two non-Florida cases that do discuss when a right of first refusal is triggered. And they clearly are consistent in terms of analyzing the right of first refusal, even one granted in Section 42, and they identified it, something less than an offer cannot trigger a right of first refusal. And the letter of intent that was granted in this case is -- by its terms was a nonbinding, nonbinding, and contained two actually different proposals.

And on top of all of that, if you were to accept the standard that Mr. Davenport promotes, which has many problems and turns real estate law on its head, a decision alone, if you were to consider that standard -- again, I would tell the Court there's no evidence that the owner, the owner, the members of certain -- of a member may have

had a decision to sell, but the fee simple entity, the counter party to the right of first refusal, there's no evidence it made any decision.

Secondly, if you accept Mr. Davenport's arguments, as you said a moment ago, Your Honor, there are multiple points in time where he says it was triggered back in January when they were aware of it. And if it was triggered in January, then they would have had to exercise it in 45 days.

Moreover, the discussions that were had between Mr. Burns as a half of HKS, one of the members, were conditional to OLCDC waiving its right, and OLCDC unequivocally said it's not going to waive its right.

Now, what Mr. Davenport did not mention, which is --

THE COURT: Mr. Solov, can I just interrupt you for one minute?

MR. SOLOV: Yes, Your Honor.

THE COURT: Who are the principals of the owner?

MR. SOLOV: The principals -- well, let's go back to the ownership chart, Your Honor.

Aswan Village Associates is a limited liability company. It has one member, okay. That member is also a limited liability company, Aswan Development Associates. That company has two members, HK Aswan and OLCDC. So, the two members down here have to make agreement on all

material decisions to -- for Aswan Development to make a decision, and then Aswan Development has to be in concurrence with Aswan Village Associates, the ultimate fee simple owner.

THE COURT: All right. I don't understand that. So, really, aren't you telling me that once HK Aswan, who's 50 percent -- 51 percent owner of ADA, once they make a decision to sell, and Opa-Locka Community Development Corporation, 49 percent, they acquiesce and say, okay, we accept that you're selling, and we're operating our right of first refusal, that's a decision then of Aswan Development Associates, and there's nothing else for Aswan Village to do; is there?

MR. SOLOV: Well, there was no formal action -- HK Aswan made a conditional decision to sell subject to OLCDC waiving its right of first refusal. But as these two members, they didn't take any action. There was -- there were no letters granted, there were no agreements entered into. There was nothing that was done at the ownership level, it was all done down here. Now these companies each have separate operating agreements. This has been amended once; this has five different times. You just can't collapse the discussions that they have here and disregard the various entities, because everything that they've done in the past, they've taken formal action.

THE COURT: But isn't Aswan Village Associates -- forgive me for using the term -- but, isn't it just ceremonial?

MR. SOLOV: No, Your Honor, it's more than ceremonial. I mean, Aswan Village associates has a bank account, it has a tax folio ID number, it pays real estate taxes. All the residents enter into leases with Aswan Village Associates. It's a separate standalone legal entity, but binding all actions taken, but there's a separate entity here that also takes action. That's why you have two operating agreements.

THE COURT: And I apologize. I apologize because I'm being a little thick here when you explained it to me. But what I'm trying to understand is, who's going to make the decision for Aswan Village Associates. Who's going to vote to say whatever Aswan Development Associates did, or whatever HK and Opa-Locka Community Development wants to do, who's going -- as we go up, who's making that decision?

MR. SOLOV: Well, the two members at the lower level would have to direct the owner, Aswan Development Associates. That owner, Aswan Development Associates, would have to direct Aswan Village -- Aswan Development Associates has to direct Aswan Village Associates.

THE COURT: And I understand that.

Who are the board members or who are the ones that would be voting for Aswan Development Associates? Who are they?

MR. SOLOV: Aswan Development Associates is comprised of these two entities. OLCDC would have to make a decision in its 49 percent and HK Aswan in its 51 percent.

THE COURT: Okay. And once that is done, if HK Aswan and Opa-Locka Community Development Corporation make a decision, then they are making the decision for Aswan Development Associates?

MR. SOLOV: That would be correct, Your Honor.

THE COURT: Okay. Now, my question now becomes: Who then, after that decision is made, who's making the decision for Aswan Village Associates?

MR. SOLOV: Well, Aswan Development Associates would make that decision based upon what its members directed, and there would be whatever formal documentation was required by Aswan Development Associates in order for AVA to take formal action. That's the way their operating agreements are structured, Your Honor.

THE COURT: Okay. Go ahead.

MR. SOLOV: So I want to go back to where the case started.

The case started with OLCDC filing a lawsuit and alleging that the management company -- and by the way, we

have a separate motion for summary judgment because the management company, there's no relief sought against it, it's not a party to the right of first refusal, but the management company in HK Aswan are alleged to have accepted, Your Honor, the offer expressed by the letter of intent. Even today, throughout his presentation, Mr. Davenport repeatedly said that there was an offer, there's an offer. And the letter of intent is nonbinding by its terms, and it is not an offer because an offer requires specific and definite terms which, if accepted, would result in a binding contract.

So this is what they alleged; they accept the offer, they said the letter of intent was an offer, and they said throughout that HKA and HKM accepted LAC's offer on behalf of the company. So the offer is not capable of being accepted. And then with respect to the motion for judgment on the pleadings, they said the only thing -- this is in their papers -- that remains for the Court to make -- is to make the legal determination of whether the uncontroverted facts, which are outlined in the pleadings, sufficiently demonstrate they manifested a willingness to accept a good-faith offer.

So, in the beginning of the case, although they are mischaracterizing the letter of intent as an offer, they recognize that you needed an offer. And in their motion

for judgment on the pleadings, they said you needed an offer.

But as we move through the case, and we'll get to this a little bit later, after the Gary Cohen email came out, and after OLCDC's own transactional lawyer, who practices daily in their affordable housing, low income housing tax credit area, said that the letter of intent is not an enforceable offer, and you need an enforceable offer for a right of first refusal under Section 42, they switched, they moved the goalpost, so to speak, and they no longer said you need an offer, you just need a decision to sell. But as Your Honor noted, this is all about --

THE COURT: Before you go on to your next argument, can I ask you, sir, because I do recognize that you also have a motion for summary judgment that's pending.

MR. SOLOV: Yes.

THE COURT: Do you agree that -- that this decision that this Court has to make today should be decided by this Court as a matter of law, whether it's in favor of you or whether it's in favor of the plaintiffs, that it's a decision that is a decision as a matter of law as compared to genuine issues of facts?

MR. SOLOV: Well, from our perspective, Your Honor, we believe it's absolutely crystal clear. If you were to go to accept the plaintiff's decision standard, you would

have to make certain factual findings in order to rule in their favor, and that may create an issue, but you would have to reject Florida law, you would have to consider our defenses. But there are many hurdles that you will have to get to in order to accept their standard, which is rejecting Florida law, it's rejecting the contract and it's rejecting what the cases in this country have ruled trigger right of first refusal.

THE COURT: I guess what I'm asking, and I think you may have answered it by saying you believe that you are entitled to a summary judgment as a matter of law, but you don't believe -- if I accept their version of how this right of first refusal should be interpreted, that they're not necessarily entitled to a judgment as a matter of law because there are factual issues, genuine issues of fact that a prior fact would have to resolve?

MR. SOLOV: Yes, Your Honor.

THE COURT: Go ahead, sir. I'm sorry.

MR. SOLOV: Going back to the contract, the right of first refusal agreement, all right. It is between, as we say, Aswan Village Associates and, of course, Opa-Locka. And the operative language, the operative language here in the first -- really, it's in the first two or three lines. It says after the end of the compliance period, I think that's what Mr. Davenport mentioned, that's the statutory

15-year period in these tax credit transactions where the owner is precluded from selling the property. And if the owner sells the property, then there's a penalty and the owner would have to give back a certain amount of the tax credits and they would have to do that with interest.

So this right of first refusal is more conservative than the one in, say, in the Massachusetts case, and we'll get to that in a minute. This says you will not sell the project or any portion thereof to any person without first offering the project for a period of 45 days to the purchaser.

Now, Mr. Davenport would have you read into this will not desire to sell, right, or will not think about selling, or will not consider selling. But it doesn't say that, Your Honor; it says -- it says will not sell.

And in fact, Mr. Davenport, also he pointed to the -- this is Section 14 of the operating agreement, and it has other restrictions. It says yes, will not transfer, sell, alienate, assign, give, bequeath; these are all active verbs, Your Honor. Selling something in a real estate transaction is when a consideration is paid and the deed is exchanged. Entering into a purchase and sale agreement is a promise to convey a deed and the buyer promises to pay. Acknowledging a letter of intent is merely an initial preliminary discussion.

So, going back to the right of first refusal agreement, it's very definite. It says will not sell. Doesn't say consider selling; doesn't say think about selling; it doesn't say going to Joe's Stone Crab with Mr. Burns and Dr. Logan discussing it, or going and getting an appraisal. It says will not sell. And of course we all know what sells mean, but, you know, just to make sure we understand it, the New Oxford American Dictionary clearly identifies sell means in the ordinary meaning to give over or hand over something in exchange for money.

And we cited here, Judge, we cited the Middle District case in Florida, a 2004 case, in which some shares were transferred to a trust, and in order to trigger the right of first refusal, they had to be sold. And the Court determined because there was no value that was paid, the Court said it could not trigger the right of first refusal because sell means sell; you must have consideration. Merely giving the shares did not constitute a sale.

Now, let's go back and consider the right of first refusal in the timeline here, Your Honor.

THE COURT: Can I ask you, Mr. Solov; can you work with me here.

MR. SOLOV: Yes, Your Honor.

THE COURT: If it requires you to sell, isn't that

too late?

MR. SOLOV: No, no, no. No, Your Honor.

THE COURT: If in fact -- well, go ahead. I'll let you explain.

MR. SOLOV: I don't mean to interrupt you; I just want to explain on the timeline and the reasoning behind this.

So, rights of first refusal are contracts and you can have certain conditions to them, as Mr. Davenport had noted. The right of first refusal here --

THE COURT: John, I need to make sure everybody is on mute. Andrew?

Mr. Solov, I apologize. It's some people from another hearing.

MR. SOLOV: That's fine. Do you need to take a break to deal with that?

THE COURT: I'm just trying to get Andrew or staff so I can make sure everybody else is muted. They probably went to lunch.

John? Andrew? I apologize, Mr. Solov. Everybody that is on, the Court is running late. If for some reason you can't remain, we'll have to reschedule your hearing, but I don't want to rush Mr. Solov, I want to give him the same amount of time that I gave counsel.

All right. Go ahead, Mr. Solov.

MR. DAVENPORT: So the timeline here for the right of first refusal agreement here, it doesn't say that it's triggered when you begin negotiating. And even if you negotiate a purchase and sale agreement, that doesn't trigger it. And even if you were to accept, say, a deposit here. It's triggered 45 days before a sale would be scheduled, because it says will not sell. And again, in the real estate world, in the ordinary course, selling real estate is when there's a closing and a deed is delivered and money is exchanged.

You said, why would that be? Well, this is a very heavily regulated property as well as all low income housing tax credits. When HK Aswan came in, it took three years in order to get all the approvals from the Florida Housing Finance Corporation and from Miami-Dade Housing Authority and what other lenders. And so, you would necessarily not want to have the right of first refusal triggered in this type of transaction, Your Honor, unless you knew you had the regulatory approvals, so that in the event, and we'll come back to this in a moment, in the event that OLCDC chose not to exercise its right, then you can conclude your sale and go with the third party who initially expressed interest.

So here, not only is there an offer that's been made, there would have necessarily been a purchase and sale

agreement that would have been accepted, which would have been the manifestation of the owners' interest in selling.

So -- but once -- let's look at what is not here. There are two cases that Mr. Davenport mentioned. One is the Old Port case, it is an earlier case. It's -- it's not a tax credit case by any means, it's a 1971 case. In that case, the operative language said: Should the owner or the party -- actually, it was a restriction on owners, condominium owners, from selling their property. It says if any of the owners ever desire to sell, then they had to first offer their property to the other -- to the other owners, and they had to tell them the terms and conditions of what they wanted, they had to make an offer, and that's what triggered that.

Secondly, with respect to the MacDonald's case, it also said if the owner, which was the lessor, if the owner desired to accept said offer, or make an offer, that triggered the right of first refusal. We do not have -- we do not have that here. What we have, Your Honor -- if you go back and look our document, we have will not sell. It's what it says. Will not sell.

Now, whether Bank of America and OLCDC thought about putting will not -- will desire to sell or think about selling, they didn't put it in the document, Your Honor. And in 2014, although when HK Aswan came in and bought its

51 percent interest, and many portions of the operating agreement, both at the AVA level and the AD level or ADA level, were modified or changed, the right of first refusal was not changed, and it says will not sell. So, there is a distinction between selling and desiring to sell, or thinking about selling.

So, under the plain and simple terms of the agreement, Your Honor, we should prevail. There's not a single allegation in the complaint that there was a sale scheduled and that we were within 45 days. And we would say that if we're at 44 days, and there's a closing scheduled, OLCDC could run into Your Honor and say they didn't offer to us, as the owner were supposed to, and we have a right to, you know, to exercise a right because it was triggered automatically. That never happened. They didn't allege it. There are no facts whatsoever.

So, the next thing we want to move on to, Judge, is we want to move on to Florida law because this right of first refusal is very much -- is very much tethered to Florida law as all rights of first refusal are governed by state law.

Now, the primary case, the primary, I think, case that really addresses rights of first refusal is this Florida Supreme Court case in 2008, the Old Port Cove case, and Mr. Davenport mentioned it. But rights of first

refusal have been discussed in Florida since 1970 and the law has been consistent in defining a right of first refusal.

So, in this case, the Florida Supreme Court was considering whether a right of first refusal, whether it violated under rule against perpetuities. And -- and you must recognize a right of first refusal is a restraint on alienation; and generally, as a matter of general law and general property law, restraints against alienation are disfavored. So, the Court was considering whether one, like the Opa-Locka right, one that was unlimited in duration and one that was for a below market price, whether it violated the rule against perpetuity.

So, importantly, the Florida Supreme Court said to decide whether it violates a rule, we must define what is a right of first refusal.

So the Court says we'll look at what one court has said, one Florida court. So they go to the very next page, and the Court says this is the definition of right of first refusal, this is the definition of every right of first refusal. It's a right to elect to take specified property at the same price on the same terms and conditions as those contained in a good-faith offer by a third person, if the owner manifests a willingness to accept that offer.

So, you have the first part of it, is a third-party good-faith offer. You have the second part, which is the owner's willingness to accept it. The owner doesn't have to enter into an agreement, Your Honor, just has to be willing to accept it. And that's what the triggering point is. And the Court cites the Pearson case and it cites at 900, and that's a 1986 case.

Now, the Court goes on further to point out, appropriately so, that rights of first refusal are not all the same in terms of the pricing. And at various parts of their briefing, OLCDC says, well, we're a below market, we're not a meet and match, so we don't -- we don't fit into the regular right of first refusal paradigm. Well, that's wrong.

As the Supreme Court says, such rights vary in form, some require offering the property at a fixed price or some price below market, a discount, while others, like the ones here, simply allow the holder to purchase the property on the same terms. And importantly, the Court says they are often confused with options.

And really, what Mr. Davenport is promoting, which we'll get to in a few moments, he's promoting an option, which -- ironically which would render their right of first refusal completely invalid.

And it says, the Court distinguishes the two because

an option gives the holder the right upon the occurrence of a certain condition to exercise, whereas unlike an option, a right of first refusal does not grant the power to compel an unwilling seller. Because a right of first refusal is what? It's a preemptive right and it has to preempt something, right, Judge? And what it preempts, it preempts a potential transaction. It preempts the owner having received a good-faith offer, and then the owner is willing to accept that offer. But if you have a right of first refusal, then it is triggered, it is then offered to the holder, and the holder may or may not accept that and exercise it; and if it doesn't, then the owner gets to complete it.

Now, in their briefs and even on their PowerPoint, OLCDC quotes this portion of the case. Again, we're still in the Supreme Court case.

Excuse me, Judge. Okay.

In this portion of the case, the Court is -- is recognizing that a right of first refusal, if it is -- if the owner is willing to accept the offer, then that does become an option at that time, and they're considering whether it's an interest in land. And the Court said, Therefore, a right of first refusal, which may or may not ripen into an option, depends on whether the owner decides to sell.

Well, Mr. Davenport is taking this and he's jumping to the decision, but he's not -- he is ignoring, he is completely dismembering the definitional element, the conditions that make up a right of first refusal. And what -- and we'll look at his slide in a moment. But what he is ignoring as well is the Court, the Supreme Court is citing the Pearson case. And of course, the Supreme Court, if you go back a page, Judge, we go back to the very definition of a right of first refusal which the Supreme Court laid out; it's page 900.

So, you cannot get to a decision to sell, and I made this up just because of being -- both easier than trying to write this out with my mouse. You cannot get to a decision to sell without having, one, a third-party offer, it's got to be a good-faith offer in Florida, and the owner's manifest willing to accept it. Only then, Judge, do you get the decision to sell.

THE COURT: Mr. Solov, can I ask you, sir?

MR. SOLOV: Yes.

THE COURT: Isn't that what we had here?

MR. SOLOV: No, we didn't have a decision to sell, Your Honor.

THE COURT: You didn't have an executed -- you didn't have an executed contract, but you had -- but you had -- what I thought is, what was represented is you had a

letter of intent, you negotiated the amount, you've -- you expressed to Mr. Logan that you were going to accept the offer that was made, and you were going to sell to them. And I'm assuming that the -- the offer from Lincoln Capital was a good-faith offer. I shouldn't assume that, I think I can conclude that it was a good-faith offer. So why isn't -- why didn't you have a good-faith offer that expressed the manifest willingness that you were -- you expressed a manifest willingness to accept, and that equals your decision to sell?

MR. SOLOV: Well, for -- for a couple of reasons. We'll just jump to the right of first refusal.

First of all -- first of all, Your Honor, this is -- this is not an offer because, number one, by its terms it says it's a proposal, and there is a distinction. And let's see here. Under even under -- we cited this case, couple of cases that are briefed, where I think this is the Sandro Properties case, where the Court said plaintiff could not enforce its right of first refusal, its acceptance of then defendant's offer based upon -- the third-party's proposal did not constitute an offer that could trigger an enforceable contract.

So the law is clear, Judge, that you cannot -- a proposal isn't an offer. And so, whether you say you accept it, you're accepting something that has no legal

binding effect. But more importantly, not only did Lincoln Avenue says this -- and by the way, we'll get to this in a moment. Let me go back to a minute here.

This is written on Lincoln Avenue Capital letterhead. The principal of Lincoln Avenue, Jeremy Bronfman, testified there is no entity, no company that prepared this letter. Lincoln Avenue Capital is a trade name for two primary companies and many, many single purpose other affiliate entities. So, he couldn't identify which particular Lincoln Avenue Capital presented this. But if we go to --

THE COURT: What am I supposed to take from that?

MR. SOLOV: Well, it's not even a legal -- it's not even a singular legal entity that's making a presentation. It -- you can't attribute it to any company. It's not enforceable, Your Honor. It's -- it's an organization that wasn't acting through any particular entity, keeping in mind the legal definition of offer is if you accept it you would have a binding contract.

So somebody -- so a letter written on a letterhead that can't be accepted and it wouldn't even know who the author is has no legal import.

THE COURT: So, what was even -- so that -- so that I'm trying to understand then --

All that being said, then what is all this purpose of

you all writing to Mr. Logan, telling Mr. Logan, look, we have this offer, or we have this -- I'm using the word offer, I know I have to be careful here because I don't have the letter in front of me.

We have this -- we're having this discussion and we got 20 -- an offer for $21 million to purchase -- I mean to sell the property for $21 million, we're going to accept that offer. We need to know what your position is and whether or not we can come to some terms. You even went on to say to them that you believe that they have forfeited or that their right of first refusal has been extinguished. So I'm trying to understand, what -- what is all of that? That's just --

MR. SOLOV: What -- what all of this is, Your Honor, that's a good question. It is what -- it is what members of owner -- an owner do in trying to understand what their potential alternatives are and what the market will provide. When -- the record is, when Mr. Burns presented the broker's opinion of value in January 28, 2019, to Dr. Logan and their -- and their consultant, Gus Dominguez, they were -- they were not accepting of the values from the broker's opinion of the value. They thought they were overstated; they couldn't believe that somebody would say our property is worth 20 or 21 million. The last time, as the record indicates, the parties had

looked at the value, it was somewhere around 15 or 16 million.

So as a result of that, they went out to the market to see if anybody had any interest. And when Lincoln came back, Lincoln came back and presented two alternatives; one was, well, this is one option, it's $20 million.

And by the way, contrary to everything Mr. Davenport was saying, this property was -- is going to continue to be affordable for either 20 or 40 more years pursuant to the land restriction agreement. Lincoln Avenue Capital is a developer of affordable housing, and that's what this was contemplated to be, if it was going to go through.

So the first one was $21 million going directly into a tax credit partnership. The second alternative that was presented was significantly less, or materially less, $20,370,000, and this was going to go into a bridge or a temporary partnership, and then they would go out and form a new partnership once they got the tax credit investors. So, the members at the member level were exploring what was out there.

THE COURT: But Mr. Solov, I -- I'm sorry, I got to interrupt you, sir. Here's the part that I'm really struggling with, sir.

MR. SOLOV: Yes, sir.

THE COURT: I'm really struggling with if the members

at the membership level were just exploring well, what's the value, what are we really dealing with here, why did you send the letter to Mr. Logan? And not only did you send the letter to Mr. Logan expressing what -- that there was an offer, and that you were inclined to accept the offer, but you also in that letter suggested to him that the right of first refusal, his right of first refusal had been extinguished.

Help me understand. Like if you want to go ahead and explore what you think ultimately the property is worth, then you could do that. But why did you feel a need, if you didn't think that the right of first refusal had been triggered, what was the need to communicate to Mr. Logan that you had a $21 million offer?

And then, here's the other caveat: He then said to you, he then said to you, well, okay, if you're inclined to accept that offer, then we're invoking our right of first refusal. And you didn't say at that point, maybe you did, but did you then say hold up, no, no, no, your right of first refusal doesn't even kick in yet because we're not accepting any offer.

Like, I'm trying to understand; when you say, oh, this is just people exploring, and just trying to figure it out, then why create all this chaos by communicating to Mr. Logan that there's an offer that you're inclined to

accept for $21 million?

MR. SOLOV: Well, Your Honor, what had been going on at that point -- let's move to that.

At that point -- actually, since early February, Dr. Logan had told Mr. Burns that OLCDC wanted to buy HK Aswan's 51 percent membership interest. He had told Dr. Burns that, excuse me -- he told Mr. Burns -- Dr. Logan told Mr. Burns that. He said, Hi, Andy, I'm writing to follow up to see if we can sit down to discuss buying HallKeen's interest in Aswan, and in another property that's not part of this litigation. One of the two other properties that HallKeen Affiliates had an interest in, Park City, OLCDC had a very small interest; they didn't have the 49 percent, they had a smaller interest.

So at that time, at that time, Dr. Logan wrote Mr. Burns and said we want to sit down and we want to do that, and we want to talk to you about buying that, your -- your 51 percent interest, which they were looking at, valuing it at approximately $5.1 million. And in fact, at that time, OLCDC was applying for a loan from the Raza Fund, trying to do this.

So, Mr. Burns is thinking, well, Dr. Logan told me OLCDC wants to buy us out, that's fine, that's fine. But meanwhile, Dr. Logan hadn't told them they'd gotten any

commitment from any lender. And Dr. -- and Dr. Logan had said we think that price may be -- meaning the -- the broker's opinion of value may be overstated.

So, there are lots of things going on between the parties evaluating what the property may be worth, whether it'd be on the market, whether OLCDC could get a loan. But more importantly, Dr. Logan said, Andy, I want to sit down and talk about buying your interest.

So, that's how it came to bear that when Mr. Burns sent this email -- and we've been only looking at a portions of this email.

Mr. Burns said, you know, we've decided to go forward with Lincoln Avenue Capital for recapitalizing our Florida deals; so pricing came in better, okay. He's also talking about the Palmetto property, which is -- which is on the West Coast, the Park City property which is -- which is in Miami-Dade, the Park City Waterfall, which is the way the -- the profits are distributed.

And he went on to say, as Mr. Davenport pointed out, he went on to say, you know, to be clear, HK and OLCDC will lose control to LAC if they go forward with moving along for the sale of Aswan. And, of course, he says OLCDC's right of first refusal will go away, but we can stay in the partnership and have an interest, meaning collectively, OLCDC and HK Aswan.

And then down here in closing, he says: We are anxious to keep the process moving. We would like to get a decision from you at your earliest convenience. We want to know whether OLCDC wants to stay in Aswan as a 10 percent partner or does OLCDC want to buy us out, because OLCDC had been saying do you want to buy us out. That's what -- I mean -- we wanted to buy you out.

And then in conclusion, Mr. Burns says, but regardless we want to move forward on Park City and Palmetto. Otherwise, it's status quo; we don't have to do anything.

So at this point in time, Your Honor, there is from -- from HK Aswan's interest and perspective, there's no even idea that OLCDC wants to trigger its right of first refusal. As far as HK Aswan is considering, OLCDC is out getting a loan that's going to purchase its 51 percent interest. But since Lincoln Avenue presented an opportunity, which Mr. Burns thought was something that OLCDC may want to continue, they can stay in it and be an owner, albeit a minority owner as would HK Aswan, the property would have a new developer that would get tax credit funding to do anything in the future that may be necessary, or they could decide to do nothing and keep everything as it is.

THE COURT: And what was Mr. Logan's response to this

letter?

MR. SOLOV: Well, just to look at Mr. Logan, when we asked him in his deposition, we asked him, point blank, so you understood that Mr. Burns had conveyed to you that the transaction contemplated by Lincoln Avenue was conditioned upon Opa-Locka Community Development Corporation waiving its right of first refusal? To which he replied, yes.

So Mr. Burns -- Dr. Logan understood Mr. Burns said if you want to keep talking to Lincoln Avenue, because they were in the preliminary phase, they were talking, you have to say you're going to waive it, because we're not going to go forward, and we're not going to get into a purchase and sale agreement at that point if you're going to trigger your right of first refusal. We need to keep -- we need to understand what your intentions are; are you going to buy us out? Are you going to waive your right? What are you going to do?

In answer to your question, Dr. Logan didn't say anything until May 6th, when he wrote a letter and said, oh, we're exercising our right of first refusal. But he didn't say we're waiving our right of first refusal. So one could imply either he waived the right of first refusal because he said we want to go forward with the transaction, or you can take it literally, as he said, which is we're not waiving; we want to trigger our right.

So either one of two ways, either he didn't agree to Mr. Burns' request to waive the right, and therefore Mr. Burns went back to Lincoln and said, well, as the two members at the owner level, down below, we couldn't come to an agreement, so we're not talking to you anymore, Lincoln Avenue, and that was the end of the conversations with Lincoln Avenue. A month later, a letter was sent by Dr. Logan saying, well, we want to go forward, we're triggering our right of first refusal.

So, Your Honor, at the end of the day, at the end of the day, there was no offer.

Going back to the Old Port Cove case, to be clear, to make it -- just so we cross all our Ts here, Judge, if I may. Just a minute here.

Let's see. We asked Mr. Bronfman, Mr. Bronfman was one of the principals -- let me make sure I'm on the right page.

Mr. Bronfman was the principal who testified on behalf of Lincoln Avenue Capital. We asked him, do you believe that this letter of intent -- that this LOI attached to Exhibit No. 22 is binding on any party; he said no. Then we also asked him, he testified a little later something about it not being enforceable. He was asked, now, you stated when counsel asked you, you said something about whether Lincoln Avenue Capital could not

enforce the letter of intent. What did you mean by the words could not enforce? What does that mean? It means -- it means that I have no liability if I don't perform and they have no liability if they don't move forward. There's nothing. This is not -- our LOIs aren't binding.

So, this is Mr. Bronfman, the principal who oversaw the letter of intent that was sent, and he unequivocally says it's not binding. Of course it wasn't binding; it wasn't intended to be binding. It's not an offer. And because it's not an offer, it can't be triggered.

Bear with me one second, Your Honor.

This is where the case changed; we have the Gary Cohen email, Your Honor. Now, the Gary Cohen email came in, this was said, it was disclosed in discovery because it was shared with some third parties. And this email Mr. Cohen wrote on April 18, which is two days after Mr. Burns sent the letter -- the letter of intent to Dr. Logan.

And Mr. Cohen again, a practitioner in low-income housing tax credits transactions, he wrote unequivocally, he said the potential problem we may encounter, assuming HK Aswan will oppose the exercise of the ROFR, is that the Lincoln Avenue Capital letter is not an enforceable offer. It has language expressly stating that it's not

enforceable.

Both of the -- and he attached two cases, he attached the Massachusetts case, he attached the Senior Housing case. And what did he say? He said both of the attached cases focus on the element -- on this element and indicate that absent an enforceable offer, Section 42 ROFR cannot be exercised. The Lincoln offer letter is attached.

So there is no -- there's no question in this record, Your Honor, that this right of -- I mean, this letter of intent is not an offer in the legal sense. It can't be accepted and it cannot trigger any right of first refusal under common law. The right of first refusal agreement here requires more than just a common law offer, an owner willing to accept. It requires a closing to be scheduled. So you will necessarily have a purchase and sale agreement, which would be the owner's ultimate manifestation of the acceptance of an offer.

So under Florida law, even if you step away from the specific terms of the contract, Your Honor, there is no offer in the record. There is nothing that can be accepted. And absent an offer and an owner's willingness to accept, and there's no evidence the owner consents, Florida law says their right of first refusal remains unripe. And we prevail under Florida law. Your Honor would have to reject the Old Port Cove case which defines

what a right of first refusal is.

Now, going to Section 42, Your Honor. Section 42 does not rewrite the parties' agreement. And Section 42 does not supplant or supercede or abrogate Florida law, What Section 42 says, and what it does is, it provides that if tax credits are given in an affordable housing transaction, and a right of first refusal is given -- and keep in mind, right of first refusal is not -- it is not required by law to be given to any nonprofit or tenant or government agency, Your Honor. It's a matter of whether that's decided at the beginning of the transaction.

But Congress said, if no federal income tax benefit shall fail. So what that means is, your ability to get tax credits will not be denied by reason of a right of first refusal held, and it was originally just given to tenants, and then it was later amended to be given to a governmental housing agency or to be given to a 501(c)(3) nonprofit.

And the reason this is important, Judge, is because under tax law, as I understand it, that if you give -- if an owner of a property gives a below market option to someone, that is deemed to be a transfer of the owner's beneficial interest in the property. And because low-income housing tax credit regulations and the IRS code says that the owner must own the property for 15 years,

you cannot give an option to somebody at below market. It would violate the requirements of the owner holding the property for 15 years.

So what Congress did was, it said you can have a right of first refusal, not an option, a right of first refusal. So that's important because, for a right of first refusal, you necessarily need an offer and you need an owner's willingness to accept.

Now, we mentioned the Massachusetts Supreme Court, the Homeowners Rehab case. In the Homeowners Rehab case, the Court considered all these issues in the case. The first thing the Court said, among many things, is Section 42 does not mandate that non-profit organizations be granted a right of first refusal. They recognized that, because that's the law. It also doesn't say if you give a right of first refusal, when it should be triggered and how it should be triggered. What it says is, there's a minimum statutory formula that dictates the minimum price. You can negotiate a higher price for the purchase, but you must have a -- this price, and that's the floor that Congress set in terms of all that was required if you give a right of first refusal.

Now, just like the Old Port Cove Florida Supreme Court, the Massachusetts Supreme Court recognized an option to purchase entitles the holder of the property --

to purchase the property from the owner at a specific price, the holder can exercise it unilaterally, compelling even an unwilling owner to sell. So there's -- an option doesn't have an offer and an owner willing to accept. So what Mr. Davenport seems to be suggesting to the Court is a mere decision to sell, we would say it's akin to more of an option, certainly not a right of first refusal.

And the Court goes on to say, once again, in contrast, a right of first refusal is only a preemptive right, prohibiting the owner from selling the property to a third party without first offering the property to the holder at the third party's offering price.

And they go on to recognize that unlike an option to purchase, a right of first refusal cannot be exercised unilaterally. You have to have two conditions, as the Florida Supreme Court defined the two elements.

First, a first refusal must be triggered by a bona fide and enforceable offer, meaning one honestly and serious intent. This is different than what Mr. Davenport said. Mr. Davenport said, oh, it just needs to be honest and serious. No, it must be an enforceable offer that the owner could accept.

Second, as the Court says, the owner of the property must have decided to accept that offer.

Now, the Court goes on to say, you don't have to

accept the offer. And in Florida law, you don't have to accept the offer. You just have to manifest some willingness to accept the offer.

THE COURT: In that paragraph that you just read, doesn't -- can you go back, please?

Okay. Where it says a bona fide and enforceable offer to purchase the property, and then it says meaning an offer that is made honestly and with serious intent. Isn't that what they're defining, they're defining a bona fide and enforceable offer to purchase the property. They're saying that what that means is, meaning an offer that is made honestly and with serious intent. No?

MR. SOLOV: Yes, but -- but that's qualifying enforceable offer. So you have to have all material terms and it has to be made honestly with serious intent from the legitimate party who's capable of making the offer for whatever property is at issue, but you have to have an enforceable offer. It's more than just honesty and serious intent, it has to be enforceable, Your Honor.

So what the Court also went on to say, it noted that the distinction, just as the Florida Supreme Court noted, Your Honor, the distinction that there are some offers that are meet and match, where you meet the third party offer, it noted that with Section 42, it allows the holder to purchase the property even at -- at the Section 42

price. So they recognized that.

And they recognized -- ultimately, the Court said a right of first refusal cannot be exercised unless the owner of the property has decided to accept a third-party offer. The decision to sell, again, Your Honor, you can't have a decision to sell without the subjective third-party offer that the owner is willing to accept. It doesn't matter if your right of first refusal is at below market discount, you need the third-party offer to do that. And it's important because, remember, it's a preemptive right, Judge, it preempts what, you have to have something to preempt. You preempt another party's willingness to make the offer, and the owner's consideration of potentially buying it.

Now, the Court went on to say in looking at the statutory language and in looking at Congress's intent, the Court went on to say, we therefore conclude that the right of first refusal here cannot be exercised unless the partnership decides to accept a third-party offer. And then concluded -- importantly, the Court concluded, we have stated that unless otherwise negotiated between the parties, a right of first refusal granted in accordance with Section 42(i)(7) can only be exercised consistent with Congressional intent when the owner of the property has made a decision, but the decision is buttressed by an

enforceable offer made by a third party. You have to have that, if you were to accept what Mr. Davenport is saying to you, a decision that's just -- that is not a right of first refusal. It may be some other right, Your Honor, but it's not a right of first refusal.

And similarly in the Senior Housing case, the Court considered the same -- the same analysis, Your Honor. The Court -- I think Your Honor mentioned that. The Court first looked at -- of course it was sitting in diversity, looking at Washington state law. But the Court said for each of SHAG's ROFR to be triggered, the owner of the property at issue must receive a bona fide offer from a third party acceptable to the owner, then they quote this case as well for the same principle.

Now, there were several purported -- I used the term offer, but they were not offers. They were in fact letters of intent. And I think Mr. Davenport even mentioned they were deemed to be sham; they weren't legitimate. The letters of intent, you know, it's specifically said they were only basic terms, they were not intended to encompass all the material terms that would be needed.

So, at the end of the day, after the Court considering all of that, the Court ultimately said, given all of the above, the Court concludes that SHAG's ROFR to

purchase Boardwalk and Rose were not triggered. Why? Because there was no offer and there was no willingness to accept.

THE COURT: Well, can I ask you: The letter of intent in this particular case, did it outline the material terms?

MR. SOLOV: Well, it outlined -- that's a good question, Your Honor. It outlined two different transactions. And I don't know how anybody can accept two transactions.

First, you have one transaction that was for $21 million. And then it was -- it was a structure that was closing directly into a tax credit partnership. So this was one alternative, all right. Now, right below this, it triggered an alternative, $20,370,000. So if my math isn't off, it's a $630,000 difference. This was closing into a bridge partnership and then into a tax credit transaction.

So, not only were there to be two alternatives, it does go on to say -- or it does state in the introduction that in fact this is not intended to be a complete or definitive statement of all terms and conditions of the proposed transaction.

So to answer your question, no, it was not all of the material terms and conditions; it was genuinely two

different general ballpark pricing and two different types of transactions.

THE COURT: Well, isn't the whole purpose of the letter of intent -- nobody's just going through this exercise just to go through it. Isn't the whole purpose of going through this letter of intent is so that you can say, okay, we are prepared to enter into a formal binding agreement. It may not be -- the letter of intent, I think everybody agrees is not a binding agreement. I don't think anybody's argued that the letter of intent is a binding agreement. But it's not as if it's just a letter that is saying, hey, I was thinking about maybe buying your property. It's more than that. It's everybody's expression, it's everyone's expression of an intent to enter into a binding agreement. Is that fair?

MR. SOLOV: That's fair, but that doesn't trigger a right of first refusal under Florida common law, that will not trigger a right of first refusal under Massachusetts common law, or pretty much a common law of any other state. The right of first refusal is triggered again, Your Honor, when you have a third-party offer and when you have the owners willing to accept it.

So, that goes to the very point why we had frustration when we came into Your Honor's court, oh so many months ago, because although OLCDC alleged this was

an offer, it is not an offer. An offer has to have definitive material terms, which are capable of being accepted, which constitute an enforceable contract. We cite these cases, Judge, in our papers. It's an expression of an assent by a party to certain definite terms. And if accepted, will conclude into a contract.

THE COURT: But do you -- what did you understand it to be? And I don't mean you as the lawyer. What did Mr. Burns understand it to be when he immediately communicated to Mr. Logan? What did he call it?

MR. SOLOV: I don't know what he called it, but he testified that he was --

THE COURT: No, no, no. I want to know when he sent the letter to Mr. Logan, what did he -- and he made reference to the $21 million, what did he call it?

Did he say we have -- some people have expressed an interest?

MR. SOLOV: Here's -- this is the email, just so you can see, Your Honor. This is, again, we referenced this. This is the April 16, 2019, email, which had the letter of intent attached to it. He said, as you can see from the attached LOI, we've decided to go forward with Lincoln Avenue Capital. And in the end the pricing came in a bit better, you know, for Park City. He's talking about three different properties here. And they're all independent,

they all stand on their own, and they all have separate --

THE COURT: So what did he -- so when he uses the phrase we have decided to go with Lincoln Capital --

MR. SOLOV: Yes.

THE COURT: He's not -- he doesn't think that it's an offer. He's thinking -- when he said we have decided to go with, he's basically suggesting that, oh, we're having some conversations and somebody has made an offer. I mean, someone has expressed an interest. But when he said we have decided to go with, that says to me we have decided to accept -- Lincoln Capital has made us an offer and we decided to accept it.

MR. SOLOV: Well, with respect to the other properties that aren't part of this case, they did move forward in trying to --

THE COURT: When he was talking about -- I'm sorry, Mr. Solov, I'm cutting you off.

When he was talking about it, he was talking about the collective deal. He didn't say, Mr. Logan, there are three properties and we decided to go with Lincoln Capital. He starts the letter out by saying, we decided to go with Lincoln Capital.

MR. SOLOV: But he closes the letter or the email more importantly, I have it on the screen, he said, and we talked about this earlier, we would like to get a decision

from you at your earliest convenience as to whether OLCDC wants to stay in as a 10 percent partner, again. This is -- if you want to go forward, we're going to talk further with Lincoln, or -- or do you want to buy us out. It would be great to have you stay in. But regardless, we want to move forward with Lincoln on Park City and Palmetto.

So Mr. Burns was clearly saying, if you don't want to do anything, we're not going to do anything with Lincoln, because Mr. Burns and HK Aswan, they don't have the legal ability to purchase the property without the consent of OLCDC -- I mean, to sell the property.

THE COURT: Hold on. Mr. Solov, you just said that what he meant was in fact if you -- we don't -- if you don't decide to do anything, we are not going to go forward. You had to tell Mr. Logan -- Dr. Logan. I apologize, Dr. Logan. You had to tell Dr. Logan because, as with the Aswan property, there was a right of first refusal. So you couldn't do anything without telling him so that he could exercise that right. And regardless of what he did with regard to the right of first refusal as to Aswan, you were going to go forward with the other two properties, and I'm assuming they didn't have the same right of first refusal.

MR. SOLOV: Well, not only that, Your Honor, in the

operating agreements, Aswan Village Associates operating agreement for the fee simple owner, you cannot dispose of all of its property, it can't mortgage its property, it can't do all sorts of things without the consent of ADA, and ADA can't dispose of all its property without the consent of both members. And Mr. Burns understood, with or without regard to the right of first refusal, that OLCDC needed to be in agreement and the parties needed to be in the agreement, which is why, why, number one, the LOI said they would need to negotiate a right of first refusal -- excuse me -- a purchase and sale agreement.

THE COURT: Was Mr. Burns trying to get Mr. Logan to offer him $20 million for this property?

MR. SOLOV: No, not at all, no. Mr. Burns and Dr. Logan were having discussions for three months, where Dr. Logan was looking at purchasing -- Dr. Logan was interested in purchasing this 51 percent interest. Now, a purchase price hadn't been established, but the operating agreement that they have, which was amended in 2014 when HK Aswan came in, has a procedure for valuating this at fair market value. And the emails and discovery in this case reflected that Dr. Logan and their affordable housing consultant, Gus Dominguez, were looking at negotiating about $5.1 million, and they were trying to get a loan from Raza Funding in order to purchase this.

THE COURT: I understand that. You told me that. But you said to me at some point during your presentation, that part of this was triggered by the fact that Dr. Logan expressed an interest in buying out HK Aswan's 51 percent interest.

MR. SOLOV: Correct.

THE COURT: And that was why HK Aswan went out and said, well, how much is all this worth? And then once you found out how much it was worth, you sent a letter to Dr. Logan and said, oh, well, Lincoln Capital is willing to pay $21 million for the property. And if you're still interested in buying us out -- well, you weren't going to let him buy you out -- if the property worth $21 million, you're not going to let him buy you out for five, right? That's what he was offering you; you own 51 percent of it. Were you really going to sell the property for five? Or were you telling Mr. Logan, well, look, you wanted to buy us out -- and I'm asking, I'm asking a question. You wanted to buy us out, and we were discussion numbers of about 5 million, but the fair market value of the property according -- because Lincoln Capital is willing to pay us 21 million, do you still want to buy us out? Because if you want to still buy us out, I'm assuming that you would say, at that point, what you would be willing to sell your interest for.

MR. SOLOV: They were discussing -- I say they. Dr. Logan, the evidence, the testimony, and the email exchanges reflect that Dr. Logan and Mr. Burns were discussing OLCDC's purchase of this 51 percent interest for somewhere between 3 and $5 million as to be determined by an appraisal process for this ownership interest here, Your Honor. There are mortgages on the property. There's debt on the property. There's three or four mortgages. So at the end of the day, there was not -- this was not unencumbered property. There's a mortgage in favor of Dade County, there's a mortgage in favor of OLCDC, there's a mortgage in favor of Bank United. There's a lot of debt on the property. But the equity is what they were looking at, their portion of it and they had a portion of it. That's what they were talking about, Your Honor.

THE COURT: And I got to wrap this up. But Mr. Davenport spent a lot of time, and I'm not sure why, I'm curious to get your reaction to this. He spent a lot of time telling this Court about how you got involved in the property, and how your initial financial commitment to the property was, I don't know, $400,000, whatever the number was. And he's saying that -- he's suggested in there when he gave me a little of the history, he suggested in there that it's basically this old adage of what's been happening all around the country, I think he may have even

used that analogy, about, you know, these investors coming in, and they're basically monetizing the tax credits and then trying to take everything, all equity, everything they can out of the property, and then leaving the property.

Does that have any value to this Court's consideration in any way?

MR. SOLOV: Well, it has no value because it's not relevant to the facts and it's completely wrong. Because just in a nutshell, HallKeen and my clients, they own many, many properties in many states. Mr. Burns testified they buy the properties and invest in them for long terms, and they manage properties as well. And they're not an aggregator. It is Mr. Davenport's effort to mischaracterize our clients' business and construe them in a negative light to get some advantage from the Court. It's not true.

And what Mr. Burns testified as well is that when Bank of America wanted to get out, and the record is clear, there was no surplus cash, the property wasn't being run properly. And only after HK Aswan came in and had oversight, and only after HallKeen Management came to manage the property did it start having some positive cash flow resulting in money going to OLCDC as well as HK Aswan. But it has nothing to do with determining whether

the right of first refusal would be triggered. It has nothing to do whether -- if triggered, whether they lapsed or not.

And if I can just conclude in a moment, Your Honor?

THE COURT: Yes, sir.

MR. SOLOV: If I may.

Going back to the timeline, this is the timeline that Mr. Davenport showed you. You asked him some questions to this issue. When in this amorphous standard, this decision standard, which is an incorrect standard, unless you look at it in a context of right of first refusal with an offer, and then a willingness to accept that decision. But under Mr. Davenport's decision standard, if they knew on January 28, 2019, that the property was going to be sold, although that's not accurate, only one member wanted to sell, then it would have triggered the right of first refusal because they didn't exercise in 45 days.

They can't have it both ways, Judge. They can't come in here and say, oh, it was triggered here, it was triggered here, or it was triggered up here. It was triggered way back here, although we didn't know about it. If it's triggered on something that is amorphous intent or desire, and the document doesn't say that, then it would have been triggered in January when Dr. Logan and Gus Dominguez had a meeting with Mr. Burns, and they walked

away from that meeting clearly understanding that HK Aswan wanted to sell, although HK Aswan cannot sell without Opa-Locka Community Development Corporation.

THE COURT: I don't have much time, and you have a very brief time to the extent that you want to say anything else, but it's got to be very brief.

You don't have to say anything at all, by the way. I'm just giving you an opportunity, if you want to say something.

MS. RODRIGUEZ-TASEFF: He's on mute.

MR. DAVENPORT: I'll be brief. I understood your comments.

There was a slide offer that you asked some questions about, Your Honor, that Mr. Solov's presentation said something to the effect of offer plus willingness to accept equals triggering. You asked some questions along those lines.

The suggestion has been made many times in argument that Lincoln Avenue's letter of intent is not an offer. Lincoln Avenue told us it was an offer. They were asked about the purpose of signing the LOI, and he said it's industry standard, it makes the offer look more formal. So any time we're talking about a letter of intent and the suggestion that it's not an offer, it's just wrong. A letter of intent is an offer.

And in this particular instance, we have a letter of intent that has the detailed information in it for purposes of the parties making their subsequent binding and enforceable agreement.

And how do I know that the defendants understand that the Lincoln Avenue letter of intent is an offer? They hired Stearns Weaver to prepare a purchase and sale agreement based on the acceptance of the letter of intent. They knew it was an offer. They went to Mr. Solov's firm who drafted up a PSA. And when they presented it to Dr. Logan, they needed to make very clear what was going to happen. And they did so with the communication that crystalized what the decision was. We have decided to go forward, we're going to sell Aswan for $21 million.

So, you know, Your Honor has asked a lot of questions, and in my mind keyed in on the critical issues here. If Dr. Logan had not exercised, OLCDC would have lost its ROFR. Effectively what they're arguing is that OLCDC should have engaged in some bad faith, we should have said, yeah, go ahead, go ahead, we'll let this thing go all the way up to a closing, and on Day 44 we'll run into your court, Your Honor, and make them stop. Well, we all know what they would have argued had that occurred. They would have said bad faith, unclean hands, waiver, right. And we know this to be true because they tried to

set OLCDC up. They gave him a false choice. They said you want to stay in or buy us out. We have a ROFR. We have other options, sure. We have a ROFR, and it was triggered.

And with all due respect, no amount of argument, and no amount of advocacy can undo the overwhelming undisputed factual record in this case that OLCDC's ROFR was triggered on its plain terms, was triggered based upon the way Section 42 intended it to be. Florida common law, common law from other parts of the country.

And you asked some questions about if this is just, hey, we got some proposals, we're kicking in the tires, you know, words to that effect, you know, why was all of this done? You ended up on April 16, 2019, with this formalized offer, because this process began internally back in October. They did their diligence. They went through and kicked the tires. They hired Novogradac. They hired law firms.

We're not trying to have anything both ways. Our case has remained consistent from start to finish. With all due respect, the assertions that we're trying to mislead this Court, that we're trying to have it both ways, trying to change, trying to pivot -- we have been saying the same thing from the very beginning: OLCDC's right was triggered, and they exercised that right in a

timely way and we are trying to close on the ROFR.

THE COURT: The last question I have for you, Mr. Davenport is, I want to ask you the same question I asked Mr. Solov. There are cross-motions for summary judgment, you also have a motion for judgment on the pleadings.

My question is, do you believe that this case should be decided by this Court as a matter of law, whether you prevail or whether or not the defendants prevail, or do you believe -- Mr. Solov said that he believed there was some genuine issues of fact, if I were to accept your version of the law. How do you see this?

MR. DAVENPORT: I see this as liability turning on the decision you make -- not today, but whenever. I see it going either way. I'm not saying fact issues, if you're going to go their way or fact issues going my way. This is an issue of law, it has been from the very beginning, which is why we moved for a judgment on the pleadings.

THE COURT: Okay. Thank you all. And I need you to do a couple of things for me, please. I need you to submit your memorandums in Word format, and if you could email them to -- Andrew will give you the email address when I transfer to the next hearing. And you know what also would help me, I'm not going to require it, but it would help me if you all would also submit your PowerPoint

presentation. And you can do that in pdf format.

MR. SOLOV: Your Honor, we have uploaded, we also uploaded Friday afternoon a proposed order as well in Word.

THE COURT: Where did you send it?

MR. SOLOV: To courtMAP and to Andrew, but we'll double-check.

THE COURT: And can you make sure you to send it to Andrew just in case, because it hasn't been forwarded to me yet.

MR. SOLOV: Okay. Thank you.

MR. DAVENPORT: Thank you.

THE COURT: Thank you all. Everyone, have a good afternoon. I'm sorry for the long day.

(THEREUPON, THE PROCEEDINGS CONCLUDED.)

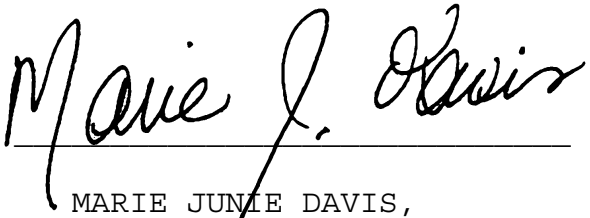
C-E-R-T-I-F-I-C-A-T-E

STATE OF FLORIDA
COUNTY OF DADE

I, MARIE JUNIE DAVIS, Court Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings, and that the transcript, pages 1 through 102, is a true and correct record of my stenographic notes.

I further certify that I am not a relative, employee, attorney or of any of the parties, nor relative or employee of such attorney or counsel, nor financially interested in the foregoing action

Dated this 21st Day of May, 2020, Miami-Dade County, Florida.



MARIE JUNIE DAVIS,
Court Reporter