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.
_____/

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 MANAGEMENT, INC.'S MOTION FOR SUMMARY JUDGMENT ON COUNT I

THIS MATTER came before the Court on (i) Defendants HK Aswan, LLC ("HK Aswan"), HallKeen Management, Inc. ("HallKeen Management"), and Aswan Village Associates, LLC's ("Owner" or "AVA") (collectively, "Defendants") Motion for Summary Judgment ("Defs. Mot.") against Plaintiff Opa-Locka Community Development Corporation ("OLCDC" or "Plaintiff"); (ii) OLCDC's Renewed Motion for Partial Summary Judgment ("OLCDC Renewed Mot."); (iii) OLCDC's Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment ("OLCDC MJP"), and (iv) Defendant HallKeen Management's Motion for Summary Judgment on Count I ("HKM Mot.") against OLCDC. Based upon the Court's review of the motions, the supporting exhibits, deposition and other

transcripts, the applicable portions of the record, argument of counsel, and being otherwise duly advised in the premises, the Court makes the following findings:

Findings of fact

This matter concerns an affordable housing apartment complex located in Opa-locka, Florida, which is known as Aswan Village Apartments ("**Aswan Village**"), and a right of first refusal granted thereon to OLCDC. OLCDC is a South Florida-based 501(c)(3) nonprofit corporation whose mission is to transform under-resourced Florida communities into desirable, engaged neighborhoods by improving access to, among other things, affordable housing. In 2000, OLCDC joined Banc of America Community Development Corporation ("**BACDC**") in forming the Company for the purpose of acquiring, developing, and operating Aswan Village as affordable housing, and to finance those activities through participation in the Low Income Housing Tax Credit ("**LIHTC**") program, 26 U.S.C. § 42 *et seq.* ("**Section 42**").

In 2003, after Aswan Village qualified for the allocation of tax credits, OLCDC and BACDC restructured the Company to admit Banc of America Housing Fund ("**BOA**"), as tax credit investor, and Aswan Development Associates, LLC ("**ADA**"), as the Class A Member. Contemporaneously, OLCDC and BACDC withdrew from the Company and were admitted to ADA, leaving BOA and ADA as the only members of the Company. The Company also entered into a First Amended and Restated Operating Agreement, which includes several amendments (the "**Amended Operating Agreement**"). In accordance with OLCDC's mission and Section 42's aims, BOA and ADA expressly agreed in the Amended Operating Agreement that the Company and Aswan Village would be operated in compliance with Section 42 to "[p]rovide quality affordable housing and combat further community deterioration."

Consistent with that mission, in connection with this Amended Operating Agreement, OLCDC bargained for, and the Company agreed to, a Right of First Refusal Agreement under Section 42 (the "**ROFR**"). It provides, in relevant part:

> Right of First Refusal. After the end of the Compliance Period, 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 (if it then qualifies as an organization described in Section 42(h)(5)(c) of the Code) (the "Buyout"), at a price (the "Buyout Price") [set forth in Section 42(i)(7) of the Code]; provided, however, that such right of first refusal shall be conditioned upon an agreement by Purchaser to maintain the Project for low-income use for at least fifteen (15) years after the later of the end of the Compliance Period (but in no event can such low-income use terminate before the end of the Extended Use Period) under Section 42 of the Code . . . . In the event that Purchaser does not purchase the Company Property on the terms set forth above, then the right of first refusal granted herein shall lapse. ***

HKM is a Massachusetts-based, for-profit corporation that operates collectively as an owner and investor and manager of affordable housing. In 2014, after the Credit Period was over and BOA had received all of its bargained-for tax credits, BOA sold its tax credit investor position. Specifically, HKM, through its specially created affiliate, HKA, acquired all of BACDC's ownership interests in ADA for between $250,000 - $400,000. As a result, HKA became ADA's 51% owner and the Company's Manager. HKA then caused ADA to redeem all of BOA's interests in the Company, leaving ADA as the sole member of the Company and HKA as the controlling member of ADA and the Company. OLCDC retained its 49% position in ADA.

HKM then caused HKA to engage HKM to act as the Company's Management Agent. As such, HKM manages Aswan Village's day-to-day operations and is compensated for those services accordingly. As the Company's Management Agent, HKM is empowered with the managerial powers delegated to it by HKA. When HKM caused HKA to purchase BACDC's interests in 2014, it sought to eliminate the ROFR, but OLCDC refused. Thus, when ADA's

operating agreement was amended (the "**ADA Agreement**") to allow HKA's admission into ADA, the parties expressly maintained OLCDC's ROFR as a "distinct right" in their agreements. As a compromise, the parties agreed to add Section 10 to the ADA Agreement, which the parties refer to as the "forced sale provision." It provides, in relevant part:

> From and after the end of the Compliance Period . . . , OLCDC shall have the right to direct [HKA] to cause [the Company] to put [Aswan Village] on the market for sale . . . . [The Company] will, in accordance with Section 14.02 (Right of First Refusal) of the [Amended] Operating Agreement first offer the Project for sale to OLCDC. If, after having directed [HKA] to cause [the Company] to put the Project on the market for sale, OLCDC elects to exercise its right of first refusal, then OLCDC agrees that . . . OLCDC shall purchase all of the Interests owned by HKA in ADA . . . .

Absent the invocation of this Section 10 right under the contractually agreed-upon circumstances, Defendants recognize that, because of the ROFR, they have "no real equity" in the Company and Aswan Village and have "no value except through operating cash flow." Accordingly, when Defendants consummated the aforementioned transaction to acquire BOA's position in the Company, they paid no more than $400,000 because OLCDC's ROFR preserved all of Aswan Village's equity for OLCDC, which is precisely its intent of the ROFR and consistent with the policy goals and objectives of Section 42 and LIHTC program in general. It is undisputed true that 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.

It is important for this Court to detail how the Low Income Housing Tax Credit ("LIHTC") Program works. As set forth in Section 42, the LIHTC program is a federal subsidy program specifically designed to promote the nationwide development and preservation of rental housing that is affordable to low and moderate income households. The LIHTC program subsidizes low-income housing by: (1) making available to a "qualified low-income housing project" tax credits, which provide a dollar-for-dollar income tax reduction; and (2) permitting

institutional investors with large, annual, and predicable income tax obligations (known as "tax credit investors"), such as banks, to acquire these tax credits in exchange for providing capital necessary to develop the project. *Low Income Housing Tax Credit: The Role of Syndicators*, U.S. Government Accountability Office, GAO 17 285R, at 1, 4 (February 16, 2017), https://www.gao.gov/assets/690/ 682890.pdf (hereinafter, "***The Role of Syndicators***"). In the typical case, this is accomplished by the tax credit investor's equity investment into a partnership or similar "pass-through" tax entity—in this case, a limited liability company—created for the purpose of developing the apartment complex. *The Role of Syndicators*, at 1; *The Low-Income Housing Tax Credit Program at Year 25: An Expanded Look at Its Performance*, Cohn Reznick LLP at 67 (December 2012), *available at* https://www. cohnreznick.com/insights/lihtc-program-year-25-expanded-look-at-performance. In return for the infusion of capital—which is combined with debt necessary to finance the development—the tax credit investor, which consequently holds almost all of the equity in the entity (usually 99 percent or more), is allocated a commensurate amount of the tax benefits flowing from operations of the apartment complex, including the LIHTC tax credits and other tax losses and deductions. Through this framework, Section 42 advances the deliberate policy choice to *replace* a typical equity investor's expectations of "economic cash flow or appreciation" from the apartment complex *with* a comparable or better return on investment "almost solely derived from tax benefits."

To ensure low-income housing is not immediately converted to market-rate housing, the LIHTC program staggers the allocation of the tax credits over a period of ten years, known as the Credit Period. Further, to avoid recapture of the tax credits after they have been allocated, the owner of an affordable housing must continue to comply with rent affordability restrictions for a contemporaneously running period of fifteen years, known as the Compliance Period. Moreover,

for any LIHTC project allocated tax credits after 1989—as is the case here—the owner of the project must also agree to comply with the affordability restrictions for an additional fifteen years after the Compliance Period, known as the Extended Use Period, meaning affordability restrictions remain in place for a total of thirty years following the apartment complex being placed into service.

But the LIHTC program's aim of creating and preserving low-income housing does not end at thirty years. Rather, the LIHTC program seeks to preserve low-income housing in perpetuity by creating a special role for nonprofits, like OLCDC, whose missions are not to profit from a sale of the low-income housing project, but to continue to develop and preserve the low-income housing in perpetuity for the betterment of the public and the community in which project is located. Specifically, the LIHTC program, which is administered locally by the Florida Housing Finance Corporation, requires each State to set aside at least ten percent of its allocable tax credits—the obtainment of which is highly competitive—for projects developed and operated in conjunction with a qualified nonprofit organization, such as OLCDC.

In addition, and as particularly relevant here, Section 42 expressly authorizes the owners of the apartment complex to grant a "qualifying nonprofit organization" a "right of first refusal" to facilitate the inexpensive transfer of the project "after the close of the compliance period" for a statutorily-defined, below-market "minimum purchase price." 26 U.S.C. § 42(i)(7)(A). In doing so, Section 42(i)(7) creates "a safe harbor for property owners," without which longstanding tax law would operate to "disqualify[] them from the tax credits that are the key economic incentive for their investment in affordable housing." The expectation is for the properties to remain with the nonprofit owners in perpetuity and to continue to be operated as affordable housing.

In October 2018, in response to an article regarding Miami's drinking water, HKM and HKA unilaterally commenced discussions regarding the sale of Aswan Village, engaged brokers to obtain broker opinions of value for Aswan Village, concluded that Aswan Village had substantial equity, and conducted potential disposition analyses regarding Aswan Village. (Documenting Defendants' impression that they should "sell [their] Miami area properties ASAP" and that, accordingly, they "should find out quickly" what they "could sell them for"). There is no dispute that Defendants were aware of the existence of OLCDC's "distinct" ROFR at all relevant times. There is also no dispute that Defendants engaged in a sequence of events to execute their "Florida recapitalization plan." This "recapitalization plan" included the ultimate fee simple sale of, or transfer of ownership interests in, Aswan Village and two other Florida LIHTC properties—Park City Apartments ("**Park City**") and Palmetto Park Apartments ("**Palmetto**")—to a new ownership entity.

Before Defendants approached OLCDC regarding the possible sale of Aswan Village, Park City and Palmetto, and before they informed OLCDC of their unilateral intentions and actions, Defendants had already begun soliciting proposals from third parties to acquire the three properties, including a third party known as Lincoln Avenue Capital ("**LAC**" or "Lincoln"). In fact, on April 15, 2019, LAC, a trade name for an affordable housing developer that conducts business through various entities, presented a letter of intent proposing two joint venture transactions regarding the "Aswan Village Apartments" to Mark Hess, Vice President of Acquisition and Development of HallKeen Management. ("LOI"). Mr. Hess had been communicating with Lincoln's representatives regarding Lincoln's interest in the Property for the purpose of presenting Lincoln's proposal to HK Aswan and OLCDC so they, as members of

ADA, could consider the joint venture transactions proposed. The LOI expressly acknowledges its preliminary, nonbinding nature. In material part, the LOI states on the first page:

> [T]his Letter of Intent, outlining certain terms under which Lincoln Avenue Capital (the 'Buyer') intends to negotiate a mutually acceptable Purchase and Sale Agreement ('PSA') for the purchase of the above captioned real estate . . . . This letter shall not create any binding obligations on any party hereto, and completion of the transaction remains subject to the successful negotiation and execution of a PSA between the parties.

Id.

The LOI proposed two alternative joint venture structures. The first structure, which contemplated "closing directly into the tax credit partnership," listed a sales price of $21,000,000. *Id*. The second structure, which contemplated "closing into bridge partnership prior to tax credit partnership," listed a price of $20,370,000. *Id*.

On March 6, 2019, Mark Hess updated the HKM "Investment Committee" regarding the "proposals" "we recently solicited . . . to dilute our equity interests in the 3 Florida deals." In providing this update, Mr. Hess remarked: "Please see the DRAFT Roseview outline pitched below. One nice thing about this structure is that it may appear relatively innocuous to OLCDC . . .." (*Id*.) Additionally, as reflected in a March 13, 2019 e-mail, LAC wrote to Defendants: "Per our conversation yesterday, enclosed in this email is a LOI from Lincoln Avenue Capital for the "HallKeen Florida assets (Park City Apartments, Aswan Village Apartments, and Palmetto Park Apartments)."

At this time, Defendants did <u>not</u> understand OLCDC to have decided to buyout HKA's interests under Section 10 of the ADA Operating Agreement commenting internally on March 14, 2019: "If we pick our timing and go to OLCDC with 10/10 on with 20% we may be able to sell this [LAC] Aswan deal to Willie." This reflected Defendants' understanding on March 4, 2019 that "[Aswan Village] is still the trickiest because we need to meet OLCDC objectives and

they, so far, are resisting a sale or fixing up any portion of their interest." The undisputed evidence of record establishes that, on March 18, 2019, OLCDC did not request or otherwise cause Defendants to solicit any proposals. Indeed, the undisputed evidence of record is that Defendants had been working to not only solicit proposals to sell Aswan Village prior to this time, but they were concurrently soliciting proposals to sell Park City and Palmetto as well. There is no dispute that Defendants "disclose[d] having 5 proposals" to sell all three LIHTC properties, which included Aswan Village, and declared that they would "make a final decision on April 3 and then inform [OLCDC] of what the deal is."

It is undisputed that, on April 4, 2019, Defendants requested that the combined LOI for all three properties—that Defendants had solicited on March 12 and received on March 13—"be structured as 3 standalone offers," acknowledging that there were "different parties with different interests invested in each deal." Defendants further requested that LAC confirm that it did "not need the offers to be interdependent." On April 8, 2019, after a self-described "productive call" with LAC, Mark Hess informed the "Investment Committee" that it could "Expect 3 standalone LOIs this week" and also noted that LAC had "increased" the "Park City offer by $850k to $14.35 million."

On April 9, 2019, before Defendants had received the updated LOIs from LAC, Mr. Hess instructed another individual to begin assembling various environmental due diligence documents "[i]n preparation for accepting LOI's on the Florida portfolio." On April 16, 2019, Defendants sent to OLCDC for "partner approval" an LOI from LAC that Defendants had executed, "acknowledged and accepted" on behalf of the Company, as the proclaimed "SELLER" of Aswan Village. In the e-mail forwarding the LOI, Defendants declared: "As you can see from the attached LOI, we have decided to go forward with Lincoln Avenue Capital . . .

the pricing came in a bit better than we expected with . . . $21,000,000 for Aswan." (*Id.*) Defendants then described what "will" happen as a result of the sale to LAC.

More specifically, Defendant "outlined the general structure of the transaction should [OLCDC] desire to proceed . . . as stated in the LOI." Defendant also informed Logan that any further discussions with Lincoln were conditioned upon OLCDC agreeing to terminate, or waive, its right of first refusal. Defendants also stated it was "anxious to keep the process moving with LAC," and consequently wanted OLCDC's own "decision" as to whether it would consent to the sale or buyout HKA. There is no dispute that, before sending the LOI to OLCDC on April 16, 2019, Defendants first returned an executed, "acknowledged and accepted" copy of the LOI to LAC.

Additionally, on April 16, 2019, Defendants updated one of the brokers, informing him that Defendants "are looking for partner consent right now to move forward with a J/V ownership/syndication on all 3 deals . . .." On April 22, 2019, Defendants contacted one of the unsuccessful prospective purchasers from whom Defendants had solicited a proposal. Defendant stated Defendants "executed an LOI with a J/V partner on the 3 properties last week" and "hope[d] to get to a [purchase and sale agreement] over the coming weeks." (Exhibit B to Renewed Motion) Defendants then thanked the prospective purchaser for its interest in the deals and indicated Defendants' "interest[] in finding a way to work with" the prospective purchaser "in the future." (*Id.*) That same day, Defendants informed LAC that due diligence documents would be "posted tomorrow."

On April 29, 2019, Defendants provided LAC with a draft purchase and sale agreement ("**PSA**") for Palmetto. Defendants then stated: "Once we have a sense of your comments on the Palmetto PSA, we can use this as a base form to quickly finalize [the Project] and Park. In the

meanwhile, we will start on the PSA exhibits." That same day, Defendants executed and returned engagement letters to Novogradac & Company LLP ("**Novogradac**") for the preparation of "sales projections" analyses "for Park and [Aswan Village]," which Defendants requested Novogradac "then forward . . . to our team so that we can help prepare the waterfall for the tiers."

On May 5, 2019, in response to a request for an update regarding apartment staff messaging, Defendants expressed: "Hopefully we will have Palmetto's signed PSA by Friday and the balance over the following week or two." The next day, May 6, 2019, OLCDC conveyed to Defendants the requisite "partner approval" to the LOI, subject to the exercise of OLCDC's ROFR, thus providing full ADA member approval to the sale. OLCDC made it clear that it did not intend to terminate or waive its right of first refusal. On May 7, 2019, after OLCDC provided the requested "partner approval" to the LOI, Defendants told LAC that they "were unable to secure our partner approvals" and "had to let the LOI lapse." Defendants argue that because OLCDC did not agree to terminate its preemptive right, Defendants informed Lincoln that "partner approval" had not been obtained to proceed with the LOI. Defendants take the position that HK Aswan and OLCDC, as the two members of ADA, failed to reach an agreement on how to proceed regarding the joint venture transactions proposed in the LOI.

Defendants refused to permit OLCDC to exercise its ROFR and/or close on the sale of Aswan Village pursuant to resulting option contract that arose when OLCDC exercised its ROFR. On June 5, 2019, OLCDC filed this Complaint. OLCDC alleges the Defendant's actions triggered its right to exercise its ROFR. OLCDC asks this Court to compel Owner to transfer title to the Property pursuant to and in accordance with the Agreement. Defendants argue that because no sale was ever scheduled to occur (nor did a sale in fact occur), Defendant was not

obligated to offer the Property to OLCDC for purchase because the ROFR was not triggered and remains unripe.

Legal Standard in Addressing a Motion for Summary Judgment

In accordance with Rule 1.510(c), Florida Rules of Civil Procedure, summary judgment will be ordered if the pleadings, depositions, affidavits, answers to interrogatories, and admissions filed together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). In simple terms, summary judgment is granted when there remains no issue of material fact to litigate. *ARC Foods, Inc. v. NGI Props.*, 724 So. 2d 663 (Fla. 2d DCA 1999). While the moving party has the initial burden of demonstrating the nonexistence of any genuine issue of material fact, the non-moving party must then counter with evidence sufficient to reveal a genuine issue. *Publix Supermarkets, Inc. v. Austin, et al.*, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995); *Golden Hills Golf & Turf Club, Inc. v. Spitzer, et al*., 475 So. 2d 254 (Fla. 5th DCA 1985).

Conclusions of law

Defendants contend that under Florida law there are two threshold conditions that must be met to trigger a right of first refusal: (i) the existence of a third-party offer to purchase the property at issue, and (ii) an owner's expressed willingness to accept such offer. Because the LOI is nonbinding by its own language, Defendants assert it cannot constitute an "offer" capable of "acceptance" and, therefore, cannot trigger OLCDC's right of first refusal. OLCDC, conversely, argues there is no requirement under Florida law of the existence of a third-party offer and that OLCDC's right is triggered at the moment Defendants manifested an intention to sell Aswan Village.

The parties do not dispute that the language of the Agreement is plain and unambiguous. The interpretation of an unambiguous contract involves a pure question of law. *Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. 3d DCA 1996); *Jaar v. Univ. of Miami*, 474 So. 2d 239, 242 (Fla. 3d CA 1985). Florida law clearly recognizes that "[a] right of first refusal is a contractual right." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1287 (Fla. 2008) ("*Old Port Cove*"). Therefore, like any contractual right, a court determines whether a right of first refusal was triggered by interpreting and enforcing the specific language of the parties' agreement creating the right. *See Robbinson v. Cent. Props., Inc.*, 468 So. 2d 986, 988 (Fla. 1985) (recognizing that, in interpreting a right of first refusal agreement, "the intention of the parties governs, and such intention will be determined from the language used when it is unambiguous").

The ROFR, at issue in this case, in relevant part, states:

> **Right of First Refusal.** After the end of the Compliance Period, the Company [Owner] 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 a price (the "Buyout Price") . . . .

OLCDC's interpretation of this language is that, in accordance with Section 42, its right to receive the "first offer[]" to purchase Aswan Village is triggered at the moment Defendants manifested an intention to sell Aswan Village. Defendant's interpretation of the ROFR is that it is triggered only after Defendant has entered into a binding contract with a third-party for the sale of Aswan Village "without first offering" it to OLCDC for purchase, at least, 45 days before any sale is to occur. Defendants argue because no sale was ever scheduled to occur (nor did a sale in fact occur), Owner was not obligated to offer the Property to OLCDC for purchase because the ROFR was not triggered.

Defendants contend that the ROFR must be interpreted strictly under Florida common law. Under Florida common law, Defendants argue, OLCDC's ROFR is only triggered if the Company had entered into a binding contract for sale and then failed to comply with the ROFR's 45-day notice provision. At minimum, Defendants further argue, Florida common law requires the receipt of an "enforceable offer" in order to trigger OLCDC's ROFR. Contrary to the position advanced by Defendants, it is the finding of the Court that under Florida law, "all the laws which subsist, at the time and place of the making of a contract . . . enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms . . . ." *Humphreys v. State*, 145 So. 858, 861 (Fla. 1933). Florida courts accordingly hold that the meaning of contractual terms and attendant rights are animated and defined by applicable law integrated into the contract. *See, e.g.*, *Gen. Dev. Corp. v. Catlin*, 139 So. 2d 901, 904 (Fla. 3d DCA 1962); *see also Coast Cities Coaches, Inc. v. Whyte*, 102 So. 2d 848, 852 (Fla. 3d DCA 1958) (stating that courts interpret contracts in accordance with the parties' intentions, considering "not only the words used in the contract but the obvious purpose intended to be accomplished by it").

Given the explicit references to Section 42 throughout the ROFR and the Amended Operating Agreement, there can be no dispute that Section 42 is directly incorporated into and is just as much a part of the plain language of those contracts as the other express words appearing therein. In addition to the text of the ROFR explicitly referencing Section 42, the ripening of OLCDC's "right of first refusal" is tied to the end of the Section 42 "Compliance Period"; the contractual "Buyout Price" is defined, not in accordance with price first offered by a third party, but in accordance with 26 U.S.C. § 42(i)(7); and the exercise of "such right of first refusal" is conditioned only upon OLCDC's agreement to continue to use the Project as affordable housing

for no less than the Extended Use Period as defined by Section 42. (Compl. ¶ 31-35 & Ex. A § 14.02, Ex. E § 1) Because the ROFR and the Agreement expressly refer to and incorporate Section 42, they must be interpreted accordingly. *See, e.g.*, *Humphreys*, 145 So. at 861; *Catlin*, 139 So. 2d at 904.

Defendants would have this Court not only read the ROFR isolated from the remainder of the parties' Amended Operating Agreement, which Defendants do not dispute is fashioned entirely around Section 42, but would have this Court ignore the replete references to Section 42 weaved into the ROFR itself. This Court finds this position unpersuasive.

The Court does not ignore and fully understands the common everyday definition of the word "sell" which means to "give or hand over (something) in exchange for money," *Sell*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010), or "to transfer (property) by sale," *Sell*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Defendant argues that the Court is not at liberty to rewrite the Parties' Agreement. *E.g., 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."); *Fernandez v. Homestar at Miller Cove, Inc.*, 935 So. 2d 547, 551 (Fla. 3d DCA 2006) ("[A] court is powerless to rewrite [a] contract to make it more reasonable or advantageous to one of the parties."). This Court accepts that it is unable to rewrite a contract to add language the parties did not contemplate at the time of execution. However, that is not what is occurring in this case.

The explicit references to Section 42 throughout the ROFR and the Amended Operating Agreement, commands that Section 42 is directly incorporated into and is just as much a part of the plain language of those contracts as the other express words appearing therein. In addition to the text of the ROFR explicitly referencing Section 42, the ripening of OLCDC's "right of first

refusal" is tied to the end of the Section 42 "Compliance Period"; the contractual "Buyout Price" is defined, not in accordance with price first offered by a third party, but in accordance with 26 U.S.C. § 42(i)(7); and the exercise of "such right of first refusal" is conditioned only upon OLCDC's agreement to continue to use the Project as affordable housing for no less than the Extended Use Period as defined by Section 42. (Compl. ¶ 31-35 & Ex. A § 14.02, Ex. E § 1). Therefore, it is the finding of this Court that the proper "context" in which to interpret a right of first refusal granted in accordance with Section 42 is, "as reflected in the language of the agreements," Section 42. *See Homeowner's Rehab*, 99 N.E.3d at 753, 755.

There is no genuine issue of fact regarding Defendants' intent to sell. First and foremost, Defendants executed the LOI—a document the chief purpose of which is to manifest the signatory's intent. *Midtown Realty, Inc. v. Hussain*, 712 So. 2d 1249, 1252 (Fla. 3d DCA 1998) (stating that a letter of intent memorializes the "preliminary understanding of the parties who intend to enter into contract"). Moreover, no other logical conclusion can be reached from Defendants' undisputed actions, such as, *inter alia*: following the execution of the LOI, which Defendants furnished to LAC before seeking partner approval from OLCDC, declaring to OLCDC that they had "decided to go forward" with the sale to LAC on those terms; thereafter requesting "partner approval," believing that such approval was all that was required "to move forward" with the sale and get to an executed PSA with LAC in mere "weeks"; before hearing from OLCDC, spending significant time and money proceeding with due diligence and the preparation of a PSA and sales disposition analysis in order to "quickly finalize" the sale of the Project for "a $21 million sale price"; and, after OLCDC exercised its ROFR, telling LAC they hoped to "reconstitut[e] the agreement." Defendants' manifest intent, willingness, and decision

to sell Aswan Village, as a matter of law, triggered OLCDC's right of first refusal to purchase at the Section 42 price.

Defendants' argument is that Andy Burnes—the manager of every asset HKM owns, including HKA, —expressly conditioned Defendants' decision to sell on OLCDC waiving its ROFR rights, and "[a]bsent OLCDC's consent to waiving its ROFR, no desire to sell existed" is unpersuasive and contradicted by the undisputed material facts. Specifically, consistent with Defendants' pleadings, 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." (Dep. Ex. 123; Burnes Dep. at 184:17-185:10; 186:3-8); Doc. No. 159 at pp. 10-11 n.12). And, decisively, rather than send an unexecuted LOI to OLCDC and expressly state that its decision to move forward was "conditioned upon" or "subject to" OLCDC's waiver of its ROFR rights, Defendants executed the LOI before they sent it to OLCDC for approval, and also sent an executed copy to LAC. Defendants undisputedly did not add a condition upon the decision they had already made. Therefore, Defendants' arguments fail, and this Court finds that OLCDC's consent provided full authto the LOI sufficient to trigger its ROFR.

Additionally, there is no genuine issue of fact regarding OLCDC's exercise of its ROFR."[O]nce [the Company] manifest[ed] a willingness to [sell]," OLCDC's right of first refusal was triggered, which, once exercised, created an option contract. *McDonald's Corp. v. Roga Enterprises*, Inc., No. 10-21706-CIV, 2010 WL 4384214, at *2 (S.D. Fla. Oct. 28, 2010) (quoting *Old Port Cove*, 986 So. 2d at 1285). "When there is an exercise of the option, a mutually binding and enforceable contract to purchase is created." *Id.* (quoting *Power v. Power*, 864 So. 2d 523, 524-25 (Fla. 5th DCA 2004). It is undisputed that OLCDC exercised its right of first refusal under the ROFR, thus creating an option contract that the OLCDC is entitled to

specifically enforce. Further, it is undisputed that, after OLCDC exercised the ROFR, Defendants have since refused to permit OLCDC to close on the sale of Aswan Village. Thus, the undisputed facts establish that OLCDC's right of first refusal ripened into an option contract, which OLCDC exercised, and which Defendants have consequently breached by refusing to perform thereunder. OLCDC is thus entitled to a summary judgment of specific performance.

Defendants argue that, even if this Court interprets the ROFR in light of Section 42, Section 42 does not support the manifest-intent-to-sell trigger for which OLCDC advocates. This Court disagrees. Section 42 does not merely acknowledge that rights of first refusal can be agreed to by parties in connection with the development of a LIHTC developments, as Defendants suggest. Rather, Section 42 alone makes possible these below-market, "minimum purchase price" rights of first refusal (Section 42 ROFRs) because, in the absence of Section 42's "safe harbor," such below-market rights of first refusal would place the tax credit investors tax credits at risk of recapture. *Homeowner's Rehab*, 99 N.E.3d at 755-56; *Riseboro Cmty. P'ship Inc. v. SunAmerica Hous. Fund No. 682*, 401 F. Supp. 3d 367, 375 (E.D.N.Y. 2019) (noting that Section 42(i)(7) expressly allow[s] [qualified nonprofit] organizations to have a ROFR to purchase projects at below market prices"). Put simply, these below-market, "minimum purchase price" rights of first refusal only exists because Section 42(i)(7) exists. Accordingly, as the *Homeowner's Rehab* court recognized, and this Court agrees, Defendants' argument "fails to acknowledge" that a Section 42 ROFR, such as the ROFR here, "is not purely a creation of the common law" but is granted pursuant to Section 42 and must therefore be interpreted in light of Section 42. Therefore, this Court concludes that, absent language expressly agreed to by the parties to the contrary, all that Section 42 requires as a trigger is a manifest decision to sell by the owner.

Turning to the ROFR here, like Section 42, there is no "binding contract," "enforceable offer" or other express triggering requirements found anywhere upon the face of the document. Rather, the ROFR simply affords OLCDC a "right of first refusal," prohibiting the Company from selling Aswan Village "without first offering" it to OLCDC for a period of 45 days at the Section 42 minimum purchase price. Therefore, interpreting the ROFR here in light of Section 42, as the plain language of the ROFR demands, and in the absence of any express, contractually agreed-to triggering requirements, this Court concludes that the ROFR is triggered, in accordance with Section 42, upon a manifestation of the Company's decision to sell.

Defendants, however, point to the *Homeowner's Rehab* court's affirmance of an "enforceable offer" requirement under the Section 42 ROFR there to argue that an "enforceable offer" requirement should be imposed on the ROFR here. Defendants' argument is misplaced. The ROFR *Homeowner's Rehab*, unlike OLCDC's ROFR, expressly required a third-party offer, the "terms of the proposed disposition" to the third party, and "whether the partner was willing to accept that offer." *Id.* at 750, 761-62. Consequently, finding no inconsistency between Section 42 and Congress's "decision to sell" requirement and the offer requirement expressly agreed to by the parties in their contract, the *Homeowner's Rehab* court upheld the parties' agreed-to offer requirement. The facts of this case command no similar finding.

Additionally, Defendants' reliance upon *Senior Hous. Assistance Group v. AMTAX Holdings 260, LLC* (hereinafter, *SHAG*), C17-1115 RSM, 2019 WL 1417299 (W.D. Wash. Mar. 29, 2019), which held that a bona fide, enforceable offer was required to trigger a Section 42 ROFR, is equally misplaced. The *SHAG* court's decision was rooted solely in what it deemed to be applicable Washington common law, not Section 42 or, at the very minimum, Florida common law. *Id.* at *9-10.

In sum, the Court agrees with OLCDC that the ROFR must be read and interpreted in light of Section 42. Conducting such analysis under the particular contractual language at issue here, the Court concludes that the plain and unambiguous language, which lacks any other triggering mechanisms requires only a manifest decision to sell to trigger OLCDC's ROFR rights.

Significantly, even if this Court were to read and interpret the ROFR in accordance with Florida common law, or any common law for that matter, the Court would reach the same result. In fact, well-settled common law, including Florida common law, is squarely in accord. As particularly relevant here, in *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, the Florida Supreme Court expressly concurred that, absent other express requirements, "a right of first refusal . . . "ripen[s] into an option depending on whether the owner decides to sell." 986 So. 2d 1279, 1285-87 (Fla. 2008). Florida common law similarly recognizes that, unless the specific language of the right of first refusal at issue requires it, there is "no requirements of a binding contract" to trigger a right of first refusal. *See, e.g.*, *Vietor v. Sill*, 243 So. 2d 198, 199 (Fla. 4th DCA 1971); *accord McDonald's Corp.*, 2010 WL 4384214, at *2 (reciting *Vietor* and holding that the owner's execution and transmittal of a non-binding letter of intent to the plaintiff would, if proven, "constitute a willingness to sell the [property] which triggered [its] right of first refusal," despite the defendant's contention that a non-binding letter of intent did not constitute an enforceable "offer") (emphasis added); *Vorpe v. Key Island, Inc.*, 374 So. 2d 1035, 1036 (Fla. 2d DCA 1979) (citing *Vietor* and concluding that a covenant providing "a right of first refusal for 30 days should [owner] have an opportunity to sell the real property" required a "manifested [] intention to sell" in order for the "right of first refusal" to be "activated").

Defendants nevertheless rely on *Old Port Cove* and other Florida cases such as *Central Properties, Inc. v. Robbinson*, 450 So. 2d 277 (Fla. 1st DCA 1984) to argue that this Court should impose a third-party "offer" requirement onto the ROFR here. However, the courts in those cases were discussing a very different type of right of first refusal. At issue in *Old Port Cove*, for example, was a right of first refusal that, by its express terms, only permitted the defendants to purchase the plaintiff's property "upon the same terms and conditions as are proposed for its sale" to a third party (a "**meet-and-match ROFR**"). 986 So. 2d at 1281. In light of the meet-and-match nature of that right, the Florida Supreme Court adopted the following widely accepted definition of such a meet-and-match ROFR:

> A right of first refusal is a right to elect to take specified property **at the same price and 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 **the offer**.

Id. at 1285 (quoting *Pearson v. Fulton*, 497 So. 2d 898, 900 (Fla. 2d DCA 1986)) (emphasis added). Such a meet-and-match ROFR, the Florida Supreme Court continued, therefore "ripens into an option once an owner manifests a willingness to accept a good faith offer." *Id*

Defendants rely upon this language to argue that the receipt of an "enforceable offer" is thus a triggering requirement imposed on all rights of first refusal under Florida common law. But in so arguing Defendants erroneously overlook the Florida Supreme Court's subsequent clarification in *Old Port Cove* that rights of first refusal "vary in form: some require offering the property at a fixed price (or some price below market value), while others . . . simply allow the holder to purchase the property on the same terms as a third party." *Id.* at 1285 (emphasis added). In other words, Defendants' argument entirely disregards *Old Port Cove's* own admonition that meet-and-match ROFRs, which by their express terms require a purchase "on the same terms as a third party" offer, are not the same as rights of first refusal that, as here,

proscribe the owner's ability to sell the property "without first offering" the property at a "fixed price" (a "**fixed-price ROFR**"). Defendants' legal theory is thus flawed.

Moreover, transposing this meet-and-match, third-party "offer" requirement onto a fixed-price ROFR, like OLCDC's ROFR, would be nonsensical. Specifically, unlike a fixed-price ROFR, which supplies its own terms of sale, a meet-and-match ROFR necessarily requires the receipt of a third-party offer in order to supply the terms on which the holder of the right is entitled to purchase the property. *Steinberg v. Sachs*, 837 So. 2d 503, 505-06 (Fla. 3d DCA 2003. Put another way, "without knowing the terms of the sale [offered by the third party], the [rightholder] could not meet the offer of [the third party] and thus could not properly exercise their right of first refusal." *E.g.*, *Tribble v. Reely*, 557 P.2d 813, 817 (Mont. 1976).

Conversely, in the context of a fixed-price ROFR (like OLCDC's), requiring such a third party offer would serve absolutely no purpose because a fixed-price ROFR supplies its own definite terms of sale (here, debt plus taxes). Thus, adding an "offer" requirement to OLCDC's ROFR where none is expressly included or supported, as Defendants urge, would only serve to make it nearly impossible for OLCDC to exercise its ROFR. *See Homeowner's Rehab*, 99 N.E.3d at 759, 761-62 & n.16 (refusing to interpret the right of first refusal in such a way that "the nonprofit developer could be denied any meaningful opportunity to acquire the property interest at the § 42 price").

Moreover, common law across the nation undermines Defendants' interpretation and supports OLCDC's interpretation. Universally consistent common law on rights of first refusal recognizes that the defining characteristic of the right is that its "binding effect" turns on whether "the offeror decides to sell." *Winberg v. Cimfel*, 532 N.W.2d 35, 39 (Neb. 1995) (quoting 11 Samuel Williston, A Treatise on the Law of Contracts § 1441A at 948-50 (3d ed. 1968)); *Barling*

v. Horn, 296 S.W.2d 94, 98 (Mo. 1956) (a right of first refusal "requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption, at the stipulated price") (quoting Vol. VI, American Law of Property, § 26.64, p. 507)) (emphasis added).

Lastly, Defendants' interpretation that the ROFR's 45-day notice period constitutes the ROFR's trigger fails. Contrary to Defendants' assertion, this notice period is a procedural safeguard providing the minimum amount of time that Defendants must afford OLCDC to consider whether to exercise its right; it cannot serve as the simultaneous trigger and breach of the ROFR, as Defendants urge. *See Riverside Surgery Ctr., LLC v. Methodist Health Sys., Inc.*, 182 S.W.3d 805, 807, 812 (Tenn. Ct. App. 2005).

Defendants' affirmative defenses are insufficient as a matter of law. For a plaintiff "to obtain a summary judgment when the defendant asserts affirmative defenses, the plaintiff must either disprove those defenses by evidence or establish the legal insufficiency of the defenses." *Bunner v. Florida Coast Bank of Coral Springs, N.A.*, 390 So. 2d 126, 127 (Fla. 4th DCA 1980). Here, OLCDC has carried its burden of disproving each of Defendants' affirmative defenses in both respects. The undisputed material facts conclusively establish that OLCDC did not force a sale of Aswan Village upon Defendants, did not engage in any wrongdoing, and did not trick Defendants. Quite the opposite, Defendants were aware at all times of the applicable rights and obligations, unilaterally solicited proposals for the sale of Aswan Village, and OLCDC merely sought to lawfully protect its interests and exercise its contractual rights. There is no material evidence of record to support Defendants' assertion that OLCDC's request for more information on March 18, 2019 caused Defendants to solicit proposals (Defendants, indeed, already had

them) and/or coerced Defendants to "decide[] to move forward" with LAC's LOI. Defendants' affirmative defenses thus fail as a matter of fact.

In addition, Defendants' affirmative defenses fail as a matter of law. First, Defendants' equity-based affirmative defenses, such as unclean hands, are insufficient as a matter of law because they do not apply to a claim for specific performance of a contract for real estate under Florida law. *E.g.*, *Florida Kelly Plantation v. Gilliam, Ltd.*, No. 3:11CV159/EMT, 2012 WL 13032897 at * 8-9 (N.D. Fla. Sept. 18, 2012) (quoting *Henry v. Ecker*, 415 So. 2d 137, 140 (Fla. 5th DCA 1982)). Second, there is no evidence in this record to suggest Plaintiff failed to satisfy any conditions precedent. (Aff. Defense II). Third, Defendants' recoupment defense is actually predicated on OLCDC obtaining specific performance; thus, it cannot serve to bar it. (Aff. Defense X) And fourth, Defendants' defense of breach of the implied covenant of good faith and fair dealing fails because the conduct about which Defendants complain—OLCDC's alleged acquiescence to Defendants' unilateral sales efforts—has no basis in the ROFR or in the Amended Operating Agreement. Instead, it is premised on an entirely separate contract—the ADA Agreement. (Aff. Defense XI). Defendants' assertion that OLCDC breached an implied covenant under a different contract cannot be used to bar OLCDC's claim for specific performance under the ROFR. *See Focus Mgmt. Group USA, Inc. v. King*, 171 F. Supp. 3d 1291, 1300 (M.D. Fla. 2016); *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 149 (Fla. 4th DCA 2005).

OLCDC is also entitled to summary judgment on each of Defendants' Counterclaims. First, Count I fails based on the undisputed failure to satisfy conditions precedent. *See, e.g.*, *Garcia v. Cosicher*, 504 So. 2d 462, 462 (Fla. 3d DCA 1987). Here, Defendants concede that OLCDC never "directed" HKA to cause the Company to place Aswan Village "on the market for

sale." (Burnes Dep. at 80:21-23; 85:1-18; Hess Dep. at 50:1-52:8; 66:15:67:8; 68:10-15.) Defendants, moreover, assert that they never even offered to sell Aswan Village to OLCDC. (Hess Depo. at 71:7-15; Compl., Ex. H). However, *all* of these things are **express conditions precedent** to HKA's rights under Section 10 of the ADA Agreement, which is the premise of its claim under Count I. Thus, Count I fails as a matter of law. *See Garcia*, 504 So. 2d at 462.

Count II (unjust enrichment) similarly fails based on (1) the undisputed existence of express contracts governing the same subject matter, and (2) the fact that HKA received exactly what it bargained for under those contracts.

Defendants do not dispute that a valid contract governs. Rather, they claim that OLCDC's ability to exercise the ROFR it bargained-for would confer an unjust windfall on OLCDC, thus overriding the ROFR. Defendants' argument fails. =. First, it is contrary to the settled foregoing Florida law. Second, it is undisputed that HKA attempted to obtain OLCDC's agreement to give up its ROFR in 2014. But OLCDC refused, and the ROFR remained. The compromise struck was the addition of a "distinct" forced sale right. HKA's attempt to now renege on its choice to allow the distinct ROFR to remain, after freely triggering it, and nevertheless force OLCDC to buyout HKA, would be anything but just. *See Mercer v. Lemmens*, 40 Cal. Rptr. 803, 806 (Cal. Ct. App. 1964) (refusing defendant's "bad faith" attempt to circumvent the agreed-upon ROFR due to the foreseeable appreciation of the at-issue property); *Schroeder v. Gemeinder*, 10 Nev. 355, 369 (1875) (same).

Accordingly, for the reasons set forth above,

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Summary Judgment against OLCDC is DENIED, and OLCDC's Renewed Motion for Partial Summary Judgment against Defendants is **GRANTED**;

2. Defendant HallKeen Management's Motion for Summary Judgment on Count I against OLCDC is DENIED;

3. OLCDC's Motion for Judgment on the Pleadings is **DENIED AS MOOT;**

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 07/07/20.

WILLIAM THOMAS
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.
Copies Furnished To:

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