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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMTAX HOLDINGS 279, LLC, an Ohio limited liability company; AMTAX HOLDINGS 123, LLC, an Ohio limited liability company,

Plaintiffs-counter-defendants - Appellants,

v.

MONTALVO ASSOCIATES, LLC, a California limited liability company;

Defendant-counter-claimant - Appellee,

and

AFFORDABLE HOUSING ACCESS, INC., a California corporation,

Defendant-Appellee,

v.

TAXCREDIT HOLDINGS III, LLC, a Delaware limited liability company; TCH II PLEDGE POOL, LLC, a Delaware limited liability company,

Counter-defendants - Appellants.

No. 22-55688

D.C. No. 3:20-cv-02478-BEN-AGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding
Argued and Submitted October 5, 2023
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: COLLINS, MENDOZA, and DESAI, Circuit Judges.
Partial Dissent and Partial Concurrence by Judge Collins.

In this contract dispute between the general partners and the limited partners of two partnerships formed to develop affordable housing projects in San Jose, California, the district court granted summary judgment awarding declaratory relief to the general partners. The limited partners appeal, and we affirm in part, reverse in part, and remand.

I

Because the affordable housing partnerships at issue here were structured to take advantage of certain tax credits, and because that tax-law backdrop frames the parties' dispute, we begin with a brief overview of the relevant tax provisions before turning to the specifics of this case.

A

The federal "Low-Income Housing Tax Credit" ("LIHTC") program gives investors the opportunity to earn tax credits in exchange for capital contributions to the development and long-term operation of low-income housing. *See* Internal Revenue Code ("I.R.C.") § 42. Under the statute, state housing credit agencies can be "authorized to carry out" the program, *see id*. § 42(h)(8)(A), and in California the authorized agency is the "California Tax Credit Allocation Committee" ("CTCAC") established under § 50199.8 of the California Health and Safety Code.

The LIHTC program provides tax credits to low-income housing projects over

an initial "compliance period" of 15 years. *See* I.R.C. § 42(i)(1); *see also id*. § 42(c)(1). That period is extended for an additional 15 years unless terminated in accordance with the statute. *Id*. § 42(h)(6)(D) (defining this as the "extended use period"). In particular, during the final year of the 15-year compliance period, "the taxpayer [may] submit[] a written request to the [state] housing credit agency to find a person to acquire the taxpayer's interest in the low-income portion of the building." *Id*. § 42(h)(6)(I). If the taxpayer makes such a written request, the state housing credit agency has one year to present the taxpayer with a "qualified contract for the acquisition of the low-income portion of the building by any person who will continue to operate such portion as a qualified low-income building." *Id*. § 42(h)(6)(E)(i)(II); *id*. § 42(h)(6)(F) (describing the requirements of such a "qualified contract"). If the state housing credit agency fails to produce a qualified contract within that one-year period, then (subject to any "more stringent" requirements in state law or an applicable agreement) the extended use period "shall terminate" and the housing project will, as a result, no longer be subject to the LIHTC program's requirements. *Id*. § 42(h)(6)(E)(i)(II); *see also id*. § 42(h)(6)(B).

B

The two low-income housing developments at issue here are each governed by limited partnership agreements: the "Lucretia Avenue" agreement governs the "Villa Solera Project" and the "Evans Lane" agreement governs the "Las Ventanas

Project." Plaintiffs AMTAX Holdings 279, LLC and AMTAX Holdings 123, LLC (collectively "AMTAX") are respectively the "Investor Limited Partners" in these partnerships; Defendant Montalvo Associates, LLC ("Montalvo") is the "Administrative General Partner" of both partnerships; and Defendant Affordable Housing Access, Inc. ("AHAI") is a "Co-Managing General Partner" of both. AMTAX contributed the bulk of the capital for the projects in exchange for most of the federal tax credits generated. AHAI has generally delegated its rights to Montalvo, and Montalvo manages the projects and earns fees in the process.

As the end of the 15-year compliance periods for these two projects grew nearer, a dispute arose among the partners as to a possible sale of the projects. That dispute centers on the following three subsections of Section 7.4, which are identically worded in the two partnership agreements:

> I. If requested to do so by the Investor Limited Partner at any time after the completion of the fourteenth year of the compliance period (as defined in Section 42(i)(l) of the [Internal Revenue] Code), the General Partner shall submit a written request to the Credit Agency to find a Person to acquire the Partnership's interest in the low-income portion of the Project and/or take such other action permitted or required by the Code as the Investor Limited Partner may reasonably request to effect a sale of the Project or to terminate the extended use commitment of Section 42(h)(6)(B) of the Code to the extent such action is not violative of any restrictive covenants applicable to the Project.
>
> J. Subject to compliance with Section 42 of the Code and the rules of the Agency, upon completion of the Compliance Period, the General Partners shall have the option (the "Option") to purchase the interest of the Investor Limited Partner in the real estate, fixtures and personal property of the Partnership (the "Interest") for a period of twenty-four (24) months. The

> General Partner may exercise the Option upon written notice to the Investor Limited Partner at any time after the end of the Compliance Period (the "Option Period"). In the event the General Partners exercise the Option, their [*sic*] must pay to the Investor Limited Partner the Option Price (as defined herein) in cash. The Option Price shall equal the greater of (i) the fair market value of the Interest, without offset for any lack of control or inability to control management of the Investor Limited Partner, (fair market value shall be determined by two independent MAI appraisers: one selected by the General Partners and one by the Investor Limited Partner. If such appraisers are unable to agree on the value, they shall jointly appoint a third independent MAI appraiser whose determination shall be final and binding), or (ii) an amount determined by the Partnership Accountants, which is sufficient to pay (a) all outstanding indebtedness secured by the Apartment Complex and (b) distribute to the Investor Limited Partner cash proceeds sufficient to enable the Investor Limited Partner to pay, on an after tax basis, any taxes projected to be imposed on the Investor Limited Partner as a result of the sale pursuant to the Option. However, in no event shall the Option Price be at an amount less than the Exit Tax Distribution.
>
> K. Subject to the Option in Section 7.4J above, the Limited Partner shall have the option to force a sale of its interest in the real estate, fixtures and personal property comprising the Apartment Complex (the "Limited Partnership Option") for a period of twenty-four (24) months following the close of the Compliance Period as determined by the Code. Such sale shall be executed at fair market value, as determined under Section 7.4J. In the event that the Investor Limited Partner exercises the Limited Partnership Option, the General Partners shall have a "Right of First Refusal" to purchase the Partnership Interest.

During the partners' discussion of a possible sale of AMTAX's interests, Montalvo ultimately gave formal written notice in July 2020 that it was exercising its option to buy out AMTAX's interests in both properties under Section 7.4J. AMTAX responded by (1) delivering its appraisal of the Villa Solera Project, in accordance with the process described in Section 7.4J; and (2) noting that, because the separate compliance period for the Las Ventanas Project had not yet expired,

Montalvo's Section 7.4J option with respect to that property was not operative. Montalvo responded with an appraisal for the Villa Solera Project that it had received in June, which was more than $20 million lower than AMTAX's. Given this difference in valuations, AMTAX repeatedly asked Montalvo over the next several months to work together to resolve the difference under the process set forth in Section 7.4J. When Montalvo failed to meaningfully respond, AMTAX sent Montalvo a letter stating that it was exercising "its right under Section 7.4I of the Partnership Agreement" to require Montalvo to "effect a sale" of the Villa Solera Project. At the same time, AMTAX sent a separate letter invoking the same asserted right to require a sale of the Las Ventanas Project. Montalvo responded with letters taking the position that AMTAX's effort to invoke Section 7.4I was not controlling, given Montalvo's earlier invocation of Section 7.4J.

C

AMTAX filed suit against Montalvo and AHAI, seeking declaratory relief supporting its interpretation of Section 7.4I of the partnership agreements. Montalvo (but not AHAI) counterclaimed for declaratory relief against AMTAX and two other AMTAX-related limited partners. Montalvo and AHAI moved for summary judgment, and in its opposition to that motion, AMTAX submitted certain extrinsic evidence in support of its construction of the partnership agreements.

The district court granted summary judgment to Montalvo and AHAI with

respect to the declaratory relief requested by AMTAX, and it partially granted the relief sought by Montalvo in its counterclaims. Specifically, the district court rejected AMTAX's claims in their entirety, holding that Section 7.4I did "not provide [AMTAX] the right to force a sale of the partnerships' properties." As to Montalvo's counterclaims, the court held that Montalvo had successfully invoked its rights under Section 7.4J as to the Villa Solera Project, but that the attempted invocation of Section 7.4J as to the Las Ventanas Project had been premature. Finally, the court denied Montalvo's request for declaratory relief concerning the completion of the appraisal process.

AMTAX timely appealed from the district court's final judgment. We have jurisdiction under 28 U.S.C. § 1291.

II

The district court erred by failing to consider AMTAX's proffered extrinsic evidence. Under California contract law, "the first question to be decided is whether the disputed language is 'reasonably susceptible' to the interpretation urged by [a] party." *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 132 Cal. Rptr. 2d 151, 157 (Ct. App. 2003) (quoting *Oceanside 84, Ltd. v. Fid. Fed. Bank*, 66 Cal. Rptr. 2d 487, 492 (Ct. App. 1997)). If the disputed language is not reasonably susceptible to such an interpretation, "the case is over." *Id.* In making this determination, however, "court[s] must provisionally receive any proffered extrinsic evidence which is

relevant to show whether the contract is reasonably susceptible of a particular meaning." *Morey v. Vannucci*, 75 Cal. Rptr. 2d 573, 578 (Ct. App. 1998). Even where the language of a contract appears to be "plain and unambiguous on its face," extrinsic evidence remains admissible as long as it "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968). Courts applying California contract law therefore must first consider extrinsic evidence regarding a contract's meaning (without admitting it) and determine whether the contract's language would be "reasonably susceptible" to the reading in support of which the extrinsic evidence is proffered. If it would, the evidence must be admitted. *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Ct. App. 1992).

When a trial court determines that the language of a contract is unambiguous without explicitly considering extrinsic evidence that might render the contract reasonably susceptible to an alternative interpretation, an appellate court will assume that it did not consider that evidence. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1223 (9th Cir. 2008). This is especially true when the trial court explicitly considers certain pieces of extrinsic evidence but not others. *Id*. This does not mean that a trial court must accept the interpretation for which a piece of evidence is proffered. It only means that a trial court cannot end its analysis by

concluding that contractual language is unambiguous on its face when evidence has been proffered which, if admitted, might call such a conclusion into question. *Id*.

Though it engaged in a brief analysis interpreting the partnership agreement, the district court ultimately denied AMTAX's requested relief "due to the clear and unambiguous language" of Section 7.4I without addressing certain pieces of extrinsic evidence that AMTAX proffered in support of its reading. These were (1) restrictive covenants that the parties executed in 2002 waiving their rights to take the properties through the qualified contract process; and (2) a 2012 internal email from Alexis Grant, Montalvo's corporate representative, expressing agreement with the interpretation now advanced by AMTAX.[1] These pieces of evidence are pertinent to AMTAX's arguments that (1) Montalvo's interpretation would render

[1] Although "[t]he parties' undisclosed intent or understanding is irrelevant to contract interpretation," *Iqbal v. Ziadeh*, 215 Cal. Rptr. 3d 684, 689 (Ct. App. 2017), "'[t]he practical interpretation of [a] contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them,'" *Southern Cal. Edison Co. v. Superior Ct.*, 44 Cal. Rptr. 2d 227, 234 (Ct. App. 1995) (quoting 3 Corbin on Contracts § 558, p. 256 (1960)). In ensuing litigation, "'one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention.'" *Id.* An internal Montalvo memo from "before any controversy has arisen" fits this characterization and is distinguishable from retrospective testimony about intent. *Id*.; *see also DVD Copy Control Ass'n., Inc. v. Kaleidescape, Inc.*, 97 Cal. Rptr. 3d 856, 873 (Ct. App. 2009) (quoting *Southern Cal. Edison Co.*, 44 Cal. Rptr. 2d at 234) (treating a company's internal memoranda as admissible evidence of a contract's meaning). AMTAX's proffered 2021 deposition of Alexis Grant, however, is inadmissible evidence of Montalvo's "undisclosed intent."

Section 7.4I superfluous and (2) Montalvo itself interpreted Section 7.4I consistent with AMTAX's interpretation prior to any dispute.

Under *Halicki*, a trial court's failure to consider extrinsic evidence is analytical error even in cases where the consideration of the extrinsic evidence at issue does not ultimately lead to a different reading than the trial court adopted. 547 F.3d at 1223–24. "Whether contractual language is ambiguous is a question of law." *Am. Alt. Ins. Corp. v. Superior Ct.*, 37 Cal. Rptr. 3d 918, 923 (Ct. App. 2006). Reviewing the language of the partnership agreement de novo, we find that Section 7.4I is reasonably susceptible to multiple interpretations. Even if the agreement was unambiguous, however, the district court still erred in reaching that conclusion without considering pieces of evidence that were relevant to support AMTAX's proposed reading.

Having determined that the district court erred by failing to admit extrinsic evidence to aid its interpretation of a contract, we may proceed to interpret the contract itself. *Halicki*, 54 F.3d at 1223–1224. Remand is appropriate where there is a dispute as to the *credibility* of extrinsic evidence, but where, as here, both parties agree on the underlying facts, the contract's meaning remains a question of law that we may resolve. *Brown v. Goldstein*, 246 Cal. Rptr. 3d 161, 172–73 (Ct. App. 2019). We therefore proceed to interpret Section 7.4I de novo, taking into account the evidence that the district court failed to consider.

III

The district court held that Section 7.4I does not give AMTAX "the right to force a sale of the partnerships' properties." We disagree.

Under Section 7.4I, AMTAX has three options. First, it can ask Montalvo to ask the state credit agency to find a buyer for the low-income portion of the project under 26 U.S.C. § 42(h)(6)(E)(i)(II). Second, it can ask Montalvo to "take such other action" to "effect a sale of the Project," subject to the low-income housing restrictions. Third, it can ask Montalvo to take "such other action" to terminate the project's low-income housing restrictions.[2]

Montalvo argues that Section 7.4I *only* allows AMTAX to use the "qualified contract" process under 26 U.S.C. § 42(h)(6). In other words, Montalvo reads option two (selling the project) to mean the same thing as option one (asking the credit agency to find a buyer for the low-income portion of the project). *See* 26 U.S.C. §§ 42(h)(6)(E)(i)(II), (h)(6)(F). The dissent similarly contends that "effect a sale of a project" just means Montalvo must take any necessary steps to "consummate" the qualified contract process under the first option in Section 7.4I. But that reading would render the "effect a sale of the Project" option superfluous. Section 7.4I's plain language requires that, if AMTAX requests it, Montalvo must: (1) ask the

[2] This third option would require that Montalvo first complete option one (ask the credit agency to find a buyer for the low-income portion of the project), and that the credit agency fail to find a buyer within one year. 26 U.S.C. §§ 42(h)(6)(E)(i)(II), (h)(6)(I).

credit agency to find a buyer under the qualified contract process, "and/*or*" (2) take "such other action . . . to effect a sale of the Project." We must give meaning to these two distinct options. *See, e.g.*, *State Comp. Ins. Fund v. Dep't of Ins.*, 314 Cal. Rptr. 3d 78, 87 (Ct. App. 2023) ("Courts must interpret contractual language in a manner which gives force and effect to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." (emphasis in original) (quoting *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 80 Cal. Rptr. 2d 329, 349 (Ct. App. 1998))).[3]

The district court held that this interpretation of Section 7.4I would nullify Sections 7.4J and 7.4K. Not so. Section 7.4J allows Montalvo to buy AMTAX's interest in the project for a limited time after the 15-year compliance period, and Section 7.4K allows AMTAX to sell its interest in the project (subject to Montalvo's right of first refusal) for the same limited period. Those sections thus give AMTAX a short window to exit the partnership while allowing Montalvo to keep managing the project. For its part, Section 7.4I gives AMTAX three options involving the *partnership's* interest—including selling the entire project—"at any time" after the compliance period. Each of these Sections operates independently and under different time frames. And there are multiple scenarios in which AMTAX's sale

[3] This reading does not mean the second option under Section 7.4I is an "unconditional" right to force a sale. Because the sale must be "permitted . . . by the Code," the property must be sold subject to the low-income housing restrictions.

option under Section 7.4I can coexist with Montalvo's purchase option under Section 7.4J. Indeed, this case is a perfect example. After Montalvo exercised its option under Section 7.4J but failed to complete the appraisal process, AMTAX invoked its right to request a sale of the project under Section 7.4I.[4]

What's more, the extrinsic evidence the district court disregarded supports AMTAX's interpretation. For example, in the internal pre-litigation email, Montalvo's agent, Alexis Grant, summarized AMTAX's options under Section 7.4I: "[t]he bottom line is at the completion of year 14, . . . [AMTAX] can ask [Montalvo] to contact [CTCAC] to request a replacement for them OR reasonably request a sale of the properties OR request a termination of the extended use agreement." The email emphasized each "or" in Section 7.4I, suggesting Montalvo understood that AMTAX had three distinct rights under Section 7.4I—including asking Montalvo to sell the project. There is also extrinsic evidence that the parties waived their rights to take the projects through the qualified contract process when they entered their partnership. This supports AMTAX's reading of Section 7.4I. If, as Montalvo maintains, Section 7.4I only allowed AMTAX to pursue the qualified contract process under 26 U.S.C. § 42(h)(6), then Section 7.4I would be void in its entirety from the start. *See* Cal. Civ. Code § 3541 ("An interpretation which gives effect [to

[4] Ironically, by adopting Montalvo's interpretation, the district court nullified Section 7.4I.

a contract provision] is preferred to one which makes [the provision] void.").

In sum, Section 7.4I allows AMTAX to request that Montalvo sell the project on the open market with all restrictive covenants in place.

IV

Finally, the district court did not err by finding that it lacked the power to unilaterally appoint AMTAX's desired appraiser.

According to California law, appraisal agreements such as the one at issue here are treated as a form of arbitration agreement and are therefore subject to the same rules. *Lambert v. Carneghi*, 70 Cal. Rptr. 3d 626, 631–32 (Ct. App. 2008). California law provides that, "[i]f the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed." Cal. Civ. Code § 1281.6. But "[i]n the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement shall appoint the arbitrator." *Id*. Under such circumstances, the court selects a neutral arbitrator according to a set process whereby it identifies multiple potential candidates from pre-provided lists and gives the parties an opportunity to jointly select one. *Id.* Only if this process fails can the court itself unilaterally appoint a nominee. *Id*.

Even assuming that AMTAX's request for appointment of a third appraiser—

which was made only in a footnote of its summary judgment brief—constituted a "petition" of the sort referred to in § 1281.6 of the California Civil Code, the district court would nevertheless have been bound to follow the process that § 1281.6 lays out. We therefore affirm the district court's finding that it lacked authority to unilaterally provide AMTAX's requested relief.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

AMTAX Holdings 279, LLC v. Montalvo Assocs., No. 22-55688

COLLINS, Circuit Judge, dissenting in part and concurring in part:

I disagree with the majority's interpretation of Section 7.4I of the parties' agreements, which in my view clearly relates only to what happens if AMTAX invokes the "qualified contract" process set forth in § 42(h)(6) of the Internal Revenue Code ("I.R.C." or "Code"). Based on the latter reading, I would affirm the district court's judgment to the extent that it holds that Section 7.4I does not grant AMTAX a freestanding right to force a sale of the properties, and I dissent from the majority's contrary conclusion. I concur, however, with the majority's decision to the extent that it affirms the district court's denial of AMTAX's request that the court appoint a third appraiser to serve under Section 7.4J of the agreements.

I

The language of Section 7.4I makes clear that that provision simply sets forth the obligations of the "General Partner"—*i.e.*, Montalvo Associates, LLC ("Montalvo")—in connection with the invocation of the statutory process set forth in § 42(h)(6) of the Code for terminating, with respect to the properties, the requirements of the "Low-Income Housing Tax Credit" ("LIHTC") program.

As explained in the memorandum disposition, the process under § 42(h)(6) has three elements. First, the Code provides that, after the completion of 14 years

of the 15-year compliance period, a taxpayer can "submit[] a written request to the [state] housing credit agency to find a person to acquire the taxpayer's interest in the low-income portion of the building." I.R.C. § 42(h)(6)(I). Second, the state agency then has one year to locate a buyer and present a "qualified contract for the acquisition of the low-income portion of the building by any person who will continue to operate such portion as a qualified low-income building." *Id*. § 42(h)(6)(E)(i)(II). Third, if the state agency fails to present such a "qualified contract," then the requirements of the LIHTC program terminate with respect to that property. *Id*. § 42(h)(6)(B), (h)(6)(E)(i)(II).

The language of Section 7.4I exactly tracks these three elements and sets forth the obligations that Montalvo has in connection with each of them. First, if after 14 years the relevant Investor Limited Partner—*i.e.*, AMTAX Holdings 279, LLC or AMTAX Holdings 123, LLC (collectively "AMTAX")—decides to invoke the § 42(h)(6) process, then Montalvo, as the Administrative General Partner, "shall submit a written request to the Credit Agency to find a Person to acquire the Partnership's interest in the low-income portion of the Project." That tracks the statutory process set forth in § 42(h)(6)(I) for submitting such a "written request" "after the 14th year of the compliance period." I.R.C. § 42(h)(6)(I). Second, if the state agency presents a qualified contract that will result in a sale, the General Partner will obviously need to take appropriate steps to *consummate* that sale, and

Section 7.4I therefore unsurprisingly says that Montalvo must "take such other action permitted or required by the Code as [AMTAX] may reasonably request to effect a sale of the Project."[1] Third, if the state agency fails to present a qualified contract and the LIHTC obligations will therefore be terminated, Montalvo must "take such other action permitted or required by the Code . . . to terminate the extended use commitment of Section 42(h)(6)(B) of the Code to the extent such action is not violative of any restrictive covenants applicable to the Project." The entire subsection begins and ends with the "Code" process under § 42(h)(6), and it sets forth Montalvo's obligations in triggering that process and in effectuating whichever outcome results from that process.[2]

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[1] The majority is therefore wrong in suggesting that, under this reading of Section 7.4I, the "written request" obligation would be "the same thing" as the "effect a sale" obligation. *See* Memo. Dispo. at 12. The majority also notes that these two obligations are connected by "and/or," *see id*., but that simply reflects the fact that the state agency may or may not succeed in presenting a qualified contract that would trigger that further obligation.

[2] I therefore disagree with the district court's conclusion that Section 7.4I's reference to the obligation to "take such other action permitted or required by the Code as [AMTAX] may reasonably request to effect a sale of the Project" refers to an obligation *of the state agency*. Two points refute this reading. First, the lack of the word "to" before "take such other action" confirms that the proper grammatical reading is that the "General Partner *shall submit* a written request . . . and/or *take* such other action," not that there will be a "written request to the Credit Agency *to find* a Person . . . and/or [*to*] *take* such other action." Second, the district court's reading makes no sense, because the state agency's obligation is to "find a person to acquire the taxpayer's interest in the low-income portion of the building" and to "present" a qualified contract, not to actually effectuate the sale itself. I.R.C. § 42(h)(6)(E)(i)(II), (h)(6)(I). The actual sale would need to be accomplished with

The majority nonetheless concludes that buried within Section 7.4I's references to the Code process is a grant to AMTAX of a freestanding and unconditional right to force Montalvo to sell the property at any time after the expiration of the compliance period.[3] For multiple reasons, this reading of Section 7.4I is wrong.

First, in setting forth certain obligations of the "General Partner," Section 7.4I takes the form of a *single* sentence that begins with the triggering phrase, "If requested to do so by the Investor Limited Partner at any time after the completion of the fourteenth year of the compliance period (as defined in Section 42(i)(l) of the [Internal Revenue] Code), ..." By referring to the "fourteenth year of the compliance period" as defined in I.R.C. § 42(i)(1), Section 7.4I is obviously setting forth rights that apply if, "after the 14th year of the compliance period[,] the taxpayer submits a written request to the housing credit agency to find a person to

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the assistance of the General Partner, which is what Section 7.4I is obviously referring to when it states that the "General Partner shall . . . take such other action permitted or required by the Code as the Investor Limited Partner may reasonably request to effect a sale of the Project."

[3] The majority contends that its reading of Section 7.4I does not in fact confer an "unconditional" sale right, because the sale must in any case be "permitted . . . by the code." *See* Memo. Dispo. at 13 n.3. That observation is entirely irrelevant. The point is not that the *sale* itself would be unconditional, but that AMTAX's *right to force* the sale would be unconditional. The majority has no response to that point, which is incontestable: the majority's reading of Section 7.4I creates a right of sale that is unencumbered by the sort of highly reticulated procedures described in either (1) I.R.C. § 42(h)(6); or (2) Sections 7.4J and 7.4K.

acquire the taxpayer's interest in the low-income portion of the building." I.R.C. § 42(h)(6)(I). Accordingly, *all* of the rights set forth in Section 7.4I are subject to that initial triggering phrase, and this underscores that what follows is not a freestanding and unconditional right to require Montalvo to effect a sale, but rather a set of obligations that arise in connection with the process triggered by the written request described in I.R.C. § 42(h)(6)(I).

Second, the phrase at issue states that the General Partner shall "take such other action *permitted or required by the Code* as the Investor Limited Partner may reasonably request to effect a sale of the Project." That is a further textual clue that the referenced obligation to "effect a sale" is one that arises in connection with the processes described in the "Code," rather than out of an unconditional and freestanding right to force a sale.

Third, the referenced obligation to "effect a sale" is paired with an alternative obligation to "take such other action permitted or required by the Code as the Investor Limited Partner may reasonably request . . . *to terminate the extended use commitment of Section 42(h)(6)(B) of the Code*." This language again tethers the entire sentence to the § 42(h)(6) process that follows a "written request" as described in § 42(h)(6)(I).

Fourth, the highly reticulated procedures set forth in Sections 7.4J and 7.4K, which address a potential sale of AMTAX's interest in the properties, would not

make a great deal of sense if Section 7.4I were construed as conferring on AMTAX an unconditional and freestanding right to force a sale of the properties. I agree that the majority's reading does not render Sections 7.4J and 7.4K *entirely* superfluous, but—especially given all of the textual points I have noted—it is simply unreasonable to read Section 7.4 as conferring on AMTAX two separate sale-related rights, one of which is highly circumscribed and the other of which is plenary.

Fifth, the free-floating sale obligation that the majority reads into Section 7.4I has no terms about pricing, which stands in sharp contrast to the qualified-contract process under § 42(h)(6) and the sales processes described in Sections 7.4J and 7.4K. The reading of Section 7.4I that I have described does not present a similar issue, because any such "sale" would be pursuant to the qualified contract process and therefore subject to § 42(h)(6)(F)'s pricing provisions.

The majority claims that AMTAX's extrinsic evidence supports its reading of Section 7.4I, but that is wrong. AMTAX's contention that the properties are subject to recorded conditions that preclude invocation of the qualified contract process is simply irrelevant to the meaning of Section 7.4I. A side agreement that effectively bars invocation of a contract provision may render that provision inoperative, but it does not change the obvious meaning of that provision, nor does it somehow trigger an obligation on the part of courts to contort the provision so as

to try to make it operative.[4] And the fact that a Montalvo employee once misread Section 7.4I in a purely internal email that lacked any meaningful analysis cannot overcome the overwhelming weight of the textual analysis set forth above.[5]

Accordingly, I would affirm, on these distinct grounds, the district court's bottom-line conclusion that Section 7.4I does "not provide [AMTAX] the right to force a sale of the partnerships' properties."

II

I concur in Section IV of the memorandum disposition, which holds that AMTAX is not entitled to a court order directly appointing a third appraiser to serve as the tie-breaker under Section 7.4J.

* * *

For the foregoing reasons, I respectfully dissent in part and concur in part.

[4] For similar reasons, AMTAX is wrong to the extent that it rests its construction of Section 7.4I on subsequent changes in California law that assertedly preclude invocation of the § 42(h)(6) process.

[5] Because I think that the extrinsic evidence on which AMTAX relies thus makes no difference, I do not have any occasion to address whether the majority is correct in chastising the district court for having failed to explicitly take it into account.