



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
April 14, 2014

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:)	Case No.: 12-12779-MKN (Lead)
)	Chapter 11
LAS VEGAS BILLBOARDS, LLC,)	
)	Jointly Administered Under
Debtor.)	Case No.: 12-12780-MKN
)	Date: April 2, 2014
)	Time: 9:30 a.m.

ORDER ON EMERGENCY MOTION TO ENFORCE SETTLEMENT AGREEMENT AND COUNTERMOTION FOR SPECIFIC PERFORMANCE¹

On April 2, 2014, the court heard the Emergency Motion to Enforce Settlement Agreement (“Enforcement Motion”) brought on behalf of LED Ventures, LLC, along with the Countermotion for Specific Performance (“Countermotion”) brought on behalf of Las Vegas Billboards, LLC. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On March 12, 2012, Las Vegas Billboards, LLC (“LVB” or “Debtor”) filed a voluntary Chapter 11 petition. A separate Chapter 11 petition was filed by Seiler, Inc., denominated Case No. 12-12780-LBR, and both proceedings were jointly administered.

On July 19, 2013, Debtor filed a motion to approve certain settlement agreements (“Settlement Motion”) and related matters involving a variety of parties, including LED Ventures, LLC (“LEDV”). (ECF No. 548). A copy of a “Settlement Agreement and Mutual

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court.

1 Release,” signed by the settling parties and their counsel (“Settlement Agreement”), was
2 attached as Exhibit “1” to the Settlement Motion. On August 21, 2013, a hearing on the
3 Settlement Motion was conducted. On August 23, 2013, an order approving the Settlement
4 Motion (“Settlement Order”) was entered. (ECF No. 584).

5 On November 21, 2013, Debtor filed a motion seeking to voluntarily dismiss the Chapter
6 11 proceeding. (ECF No. 614). On December 23, 2013, an order was entered dismissing the
7 proceeding and approving the release of certain funds held in escrow. (ECF No. 624). On
8 February 10, 2014, the bankruptcy case was closed. (ECF No. 629).

9 On March 11, 2014, LEDV filed a motion to reopen the bankruptcy case. (ECF No.
10 630).² On March 12, 2014, an order was entered reopening the case. (ECF No. 634). Upon the
11 reopening of the case, LEDV filed the instant Enforcement Motion seeking to enforce certain
12 provisions of the Settlement Agreement. (ECF No. 636).³ LEDV alleges that pursuant to the
13 Settlement Agreement, it entered into a certain Asset Purchase Agreement (“APA) dated
14 December 18, 2013, to sell certain billboards to a third party.⁴ LEDV further alleges that as a
15 result of delays caused by Debtor’s breach of the Settlement Agreement, the sale price for the
16 billboards had to be reduced and the closing date for the sale had to be extended to March 11,
17 2014 pursuant to an amendment to the APA (“APA Amendment”).⁵ LEDV maintains that in
18 response to the APA Amendment, the Debtor has interfered with the sale by submitting a
19 separate, insufficient Loan and Purchase Agreement (“L&P Agreement”) as an alleged exercise
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22 ² Along with its motion to reopen, LEDV filed the Omnibus Declaration of Sean A. Cash
23 (“Omnibus Cash Declaration”) (ECF No. 632), as well as the Declaration of Ogonna M. Atamoh
24 (“First Atamoh Declaration”) (ECF No. 633).

25 ³ The Enforcement Motion is accompanied by the Declaration of George Garcia (“First
26 Garcia Declaration”) (ECF No. 637), as well as a further Declaration of Ogonna M. Atamoh
27 (“Second Atamoh Declaration”) (ECF No. 638).

28 ⁴ A copy of the APA is attached as Exhibit “5” to the Omnibus Cash Declaration.

⁵ A copy of the APA Amendment is attached as Exhibit “8” to the Omnibus Cash
Declaration.

1 of a right of first refusal (“ROFR”)⁶ under the APA. LEDV specifically seeks an order “finding
2 that LVB breached Section 3(m) of the Settlement Agreement for failure to match the Buyer’s
3 offer in the APA, as amended.” The Enforcement Motion was scheduled to be heard on an
4 expedited basis on April 2, 2014, pursuant to an order shortening time. (ECF No. 642).⁷

5 On March 27, 2014, Debtor filed opposition (“Opposition”) to the Enforcement Motion.
6 (ECF No. 646).⁸ In its Opposition, Debtor included the Countermotion to enforce the ROFR
7 through entry of an order requiring LEDV to sell the billboards to the Debtor to facilitate
8 completion of the L&P Agreement.

9 On March 31, 2014, LEDV filed a reply (“Reply”). (ECF No. 656).⁹

10 On April 8, 2014, after the matters were taken under submission, a “Supplemental
11 Declaration Ray Koroghli” was filed by the Debtor. (ECF No. 662). As of the date of this
12 Order, no objection to the court’s consideration of the untimely document (“Second Koroghli
13 Declaration”) has been filed by LEDV.

14 **THE SETTLEMENT AGREEMENT, THE APA, AND THE L&P AGREEMENT.**

15 The instant dispute is based on the parties interpretation of the language of the Settlement
16

17 ⁶ A copy of the L&P Agreement is attached as Exhibit “2” to the Second Atamoh
18 Declaration. The L&P Agreement was accompanied by a transmittal letter from Debtor’s
19 counsel dated March 7, 2014, asserting that the agreement represents the Debtor’s exercise of the
20 ROFR as permitted by the Settlement Agreement (“ROFR Letter”). That ROFR Letter also is
included as part of Exhibit “2” to the Second Atamoh Declaration.

21 ⁷ The order shortening time was obtained through an ex parte request filed by LEDV.
22 (ECF No. 639). That request was supported by another Declaration of Ogonna M. Atamoh
23 (“Third Atamoh Declaration”). (ECF No. 640).

24 ⁸ The Opposition is accompanied by the declarations of Scott A. Marquis (“Marquis
25 Declaration”) (ECF No. 647), David L. Harris (“DL Harris Declaration”) (ECF No. 648), Chad
26 Harris (“C Harris Declaration”) (ECF No. 649), Jim Wilkins (“Wilkins Declaration”) (ECF No.
27 650), Ray Koroghli (“First Koroghli Declaration”) (ECF No. 651), and John M. Netzorg
28 (“Netzorg Declaration”) (ECF No. 652).

⁹ The Reply is accompanied by a supplemental declaration from George Garcia (“Second
Garcia Declaration”) (ECF No. 657), as well as by declarations from Max Drachman
 (“Drachman Declaration”) (ECF No. 658) and Jeffrey J. Whitehead (“Whitehead Declaration”)
(ECF No. 659).

1 Agreement, the APA, and the L&P Agreement.

2 **A. The Settlement Agreement.**

3 As part of the settlement between the parties, certain assets were assigned to LEDV
4 described in Section 3(b) of the Settlement Agreement as “the Black Bongo, Paradise, and Oasis
5 billboard structures, panels, ground leases, permits, and all other rights or interests specified..., or
6 are necessary to operate Black Bongo, Paradise, and Oasis.” Section 3(b)(4) particularizes that
7 the assigned assets include “All state and local licenses, authorizations or permits to construct,
8 maintain and operate the [billboards], excluding any non-transferable licenses not specifically
9 related to the [billboards] such as LVB’s County and State business licenses...”

10 Section 6(a)(5) of the Settlement Agreement provides that LEDV “intends to move
11 expeditiously to market and sell” the subject billboards.

12 Section 3(m) of the Settlement Agreement is entitled “Right of First Refusal” and states
13 that the Debtor:

14 shall have a right of first refusal on LEDV’s intended sale of its
15 billboards. LEDV will give LVB written notice via email to Scott
16 Marquis, Esq.... and David Harris... and provide **a full and**
17 **complete copy of the all documents exchanged between LEDV**
18 **and the offeror** after redacting the offeror’s identity (which
19 specifically identifies the precise offer **deemed acceptable by**
20 **LEDV** by overnight delivery to the office of Marquis Aurbach
21 Coffing (Notice). **LVB shall not interfere or in any way disrupt**
22 **any efforts by LEDV to sell any of its billboards.** LVB will
23 have the right of first refusal and may exercise its right to **match**
24 **any such offer** by sending written acceptance of such offers in its
25 entirety within fifteen (15) calendar days after LVB receives
26 Notice. LVB shall thereafter have thirty (30) calendar days from
27 its acceptance to close. In the event LVB agrees to accept an offer,
28 but fails to timely close on that offer, LVB shall forfeit any further
rights of first refusal. However, if LVB does not accept an offer,
and such offer does not close, then LVB’s right of first refusal
shall remain valid and enforceable.

(Emphasis added).

Section 11 of the Settlement Agreement is entitled “Entire Agreement” and state as
follows:

The Parties acknowledge that they have read this
Agreement and the exhibits in their entirety, fully understand its
contents and effect, and agree to the same after having been
provided an opportunity to consult with an attorney of their

1 choosing on the terms and conditions set forth herein. **There are**
 2 **no representations, covenants, warranties, promises,**
 3 **agreements, conditions, or undertakings, oral or written,**
 4 **between the Parties other than as set forth herein.** The Parties
 5 each acknowledge that they have not relied upon any inducements
 or representations on the part of another Party, or any agent on
 behalf of another Party, in entering into this Agreement. This
 Agreement may not be modified except by a written instrument
 duly executed by the parties.

6 (Emphasis added).

7 Section 14 of the Settlement Agreement is entitled “Integration and Amendment” and
 8 states that “This Agreement represents the full and **complete integration of the agreement**
 9 between the parties and is the complete expression thereof.” (Emphasis added).

10 **B. The APA.**

11 Section 2.2 of the APA describes the assets being sold to include, inter alia, “(a)
 12 The billboard structures identified as the Black Bongo, Paradise, and Oasis billboard
 13 structures,..., together with all lighting, components, fixtures, parts, appurtenances, and
 14 equipment attached to or made a part thereof...” “(b) All leases, licenses, easements, contracts,
 15 air rights, encroachment rights, other rights of ingress or egress, and all other grants of the right
 16 to place, construct, own, operate or maintain [the billboards]...” and “(d) All state and local
 17 licenses, authorizations or permits to construct, maintain and operate [the billboards].”

18 Section 2.6 of the APA addresses the purchase price to be paid for the sale of the
 19 billboards. Section 2.6(a) provides for a total purchase price of \$4.5 million, with \$500,000 to
 20 be paid as a deposit, and the balance of \$4,000,000 to be paid upon close of escrow. Section
 21 2.6(c) requires the \$500,000 deposit to be paid to the escrow agent within forty-eight (48) hours
 22 after execution of the APA. The APA Amendment reduced the total purchase price from \$4.5
 23 million to \$4.2 million, but not the amount of the deposit. The APA Amendment also changed
 24 the deadline to close the sale from February 4, 2014, to March 11, 2014.

25 Section 2.6(b) of the APA is entitled “Evidence of Funds” and states as follows:

26 Upon signing this Agreement, Buyer shall provide to Seller
 27 **evidence of funds on hand in an account in Buyer’s name in a**
 28 **chartered banking institution in an amount sufficient to pay**
the entire balance of the Purchase Price. If upon signing this
 Agreement, Buyer fails to provide to Seller evidence of funds on

1 hand in an account in Buyer's name in a chartered banking
2 institution in an amount sufficient to pay the entire balance of the
3 Purchase Price, Seller may, but shall not be obligated to terminate
4 this Agreement by giving written notice to Buyer. If Seller elects
5 to terminate this Agreement as provided herein, neither Seller nor
6 Buyer will have any further obligation under this Agreement.

7 (Emphasis added).

8 Section 9.1 of the APA provides that the agreement may be terminated if the Debtor
9 successfully exercises the right of first refusal under Section 3(m) of the Settlement Agreement,
10 or if LEDV and the buyer consent to termination of the agreement. Additionally, the APA may
11 be terminated by the buyer or by LEDV if certain other conditions are not met.

12 Section 9.3 of the APA addresses the disposition of the \$500,000 deposit in the event of
13 termination. If the Debtor successfully exercises the right of first refusal or the parties consent to
14 termination of the APA, the deposit is returned to the buyer. If LEDV terminates the APA
15 without fault of the buyer, the deposit is returned to the buyer along with a \$25,000 break up fee.
16 If the buyer terminates the APA without fault of LEDV, the deposit may be retained by LEDV as
17 its sole remedy.

18 Section 11.8 of the APA provides that it is "a complete and exclusive statement of the
19 terms of the agreement between the Parties...[and that it] **may not be amended except by a**
20 **written agreement** executed by the Party to be charged with the amendment." (Emphasis
21 added).

22 **C. The L&P Agreement.**

23 Recital "A" to the L&P Agreement incorporates by reference the assets identified
24 in the APA and identifies the buyer as Oasis Las Vegas, LLC ("Oasis LV").

25 Section 1 of the L&P Agreement provides for the Debtor to sell to Oasis LV the rights to
26 the billboards that the Debtor will acquire from LEDV.

27 Section 2 of the L&P Agreement is entitled "Terms and Conditions" and provides in
28 pertinent part as follows:

(b) Buyer shall loan to Seller the total sum of FOUR MILLION TWO HUNDRED THOUSAND AND NO/100 DOLLARS U.S. (\$4,200,000.00 U.S.) (The "Funds") for the sole purpose of allowing Seller to exercise its ROFR as set forth

1 **in the Settlement to purchase the Purchased Assets.** Buyer
2 expressly acknowledges and agrees that pursuant to said ROFR,
3 Buyer must pay \$500,000.00 into escrow on behalf of the Seller, as
4 Seller's deposit, no later than Monday, March 10, 2014 or the date
5 upon which escrow is opened whichever comes later. Further
6 Buyer expressly acknowledges that it will pay the remaining
7 \$3,700,000.00 into escrow within thirty days of March 7, 2014 to
8 allow Seller to close escrow on the Purchases Assets.

9 (d) Seller acknowledges that **Buyer is obtaining the funds**
10 **from Northern Trust Bank (the "Northern Loan") pursuant to**
11 **a bank approval obtained by Buyer on March 6, 2014** and that
12 all the costs Northern Loan including points, bank's attorney's fees
13 and other Northern Loan related expenses shall be charges paid as
14 expenses from the billboards.

15 (f) As of the date of closing of this Agreement and on the
16 same date and time that Seller receives title to the Billboard
17 Assets, **Seller shall assign...all of its right, title, and interest in**
18 **and to the Billboard Assets...to Buyer**...consistent with the
19 assignment provisions of the APA in full satisfaction of the loan of
20 \$4,200,000.00.

21 (h) As of the date of closing of this Agreement, **the**
22 **Management Agreement**...for the Billboard Assets entered
23 **between Buyer and Seller, wherein Seller will be defined as the**
24 **Operator of the Purchases Assets, will become effective.**

25 (k) **Seller shall be provided with two (2) options to**
26 **repurchase the Paradise and Black Bongo billboard**
27 **locations**...as follows upon two (2) days' written notice to Buyer:
28 (i) Payment of THREE MILLION SEVEN HUNDRED
THOUSAND AND NO/100 DOLLARS U.S. (\$3,700,000.00) no
later than one (1) year from the date of closing of this Agreement
between Seller and Buyer ("Option No. 1"); or (ii) Pay of THREE
MILLION EIGHT HUNDRED THOUSAND AND NO/100
DOLLARS (\$3,800,000.00 U.S.) no later than eighteen months
from the date of closing of this Agreement between Seller and
Buyer ("Option No. 2"). Pursuant to Option No. 2, shall provide
no less than 60 days' written notice and remit ONE HUNDRED
THOUSAND AND NO/100 DOLLARS (\$100,000.00) to Buyer to
exercise the same. Option No. 2 shall automatically terminate
upon default by Seller under the Management Agreement
discussed herein. Option No. 2 shall not be assignable in any
event independent of the Management Agreement and Buyer must
provide written approval of any contemplated assignee, subject to
qualifications related to management of billboards and significant
experience related to the same. In no event shall these options
ever be interpreted as an equitable mortgage. **Buyer shall retain**
full title to the Oasis billboard location, upon execution of this
Assignment Agreement and Bill of Sale, and Seller shall have
no right whatsoever to own or purchase that billboard under
the terms set forth in this Section.

(l) **Buyer shall retain full title to the Oasis Billboard,**

1 upon execution of the Assignment Agreement and Bill of Sale, and
 2 Seller shall have no right to obtain any ownership interest. **Seller**
 3 **and Buyer are executing a Management agreement** however, in
 4 no event will the Management Agreement or this Agreement
 5 provide Seller with any ownership, preemptive or option rights in
 6 the Oasis Billboard after closing.

(m) Seller shall pay all attorneys fees incurred by Buyer in
 5 review of this Agreement, Seller's ROFR discussed herein, and the
 6 Management Agreement, up to a maximum amount of SIX
 7 THOUSAND AND NO/100 DOLLARS U.S. (\$6,000.00). **If the**
 8 **loan needed to obtain the Purchased Assets is not completed by**
 9 **Buyer, this Agreement will be considered null, void, and**
 10 **without further legal effect**, and Buyer shall pay its own
 11 attorneys fees as well as any other costs or expenses incurred in
 12 investigating the transaction contemplated hereunder.

13 (Emphasis added).

14 Section 6 of the L&P Agreement is entitled "Default" and provides as follows:

15 In the event that Seller defaults in regard to any obligation of
 16 Seller hereunder, Buyer may terminate this Agreement, but only
 17 upon Seller's failure to cure said default within 30 days of receipt
 18 of written notice by Buyer of that default; except under
 19 circumstances where Seller is in monetary default for which the
 20 cure period shall be ten (10) days upon receipt of written notice by
 21 Buyer of that monetary default. **In the event of monetary default**
 22 **by Seller**, Seller shall be obligated to pay for Buyer's costs of
 23 collection, including reasonable attorney's fee directly related to
 24 said default.

25 (Emphasis added).

26 DISCUSSION

27 Both sides to the instant dispute assert that their counterpart has failed to comply with
 28 ROFR requirements of Section 3(m) of the Settlement Agreement.¹⁰ LEDV asserts that the L&P
 Agreement does not match the terms of the APA and therefore is not a valid exercise of the
 ROFR.¹¹ Debtor, on the other hand, asserts that LEDV did not provide it with copies of all the

29 ¹⁰ Debtor attempts to argue that LEDV is not complying with the ROFR requirement
 30 based, in part, on earlier settlement drafts and discussions that preceded the Settlement
 31 Agreement. See DL Harris Declaration at ¶¶ 29-32. Reference to such drafts and discussions
 32 are immaterial in view of the above-quoted language of Sections 11 and 14 of the Settlement
 33 Agreement.

34 ¹¹ The parties also dispute whether the Debtor violated the Settlement Agreement by
 35 failing to provide current permits necessary to operate and sell the subject billboards. LEDV
 36 maintains that it was required to reduce the purchase price from \$4.5 million to \$4.2 million as a

1 documents exchanged with its buyer in compliance with Section 3(m). Moreover, Debtor asserts
2 that the Evidence of Funds requirement in Section 2.6(b) of the APA is an unreasonable
3 provision inserted in bad faith. As a consequence, Debtor maintains that the L&P Agreement is
4 a proper exercise of the ROFR under the APA.

5 As to the first argument raised by the Debtor, Section 3(m) of the Settlement Agreement
6 plainly requires, among other things, for LEDV to give written notice to the Debtor's counsel
7 and its principal of any intended sale of the billboards and to "provide a full and complete copy
8 of all documents exchanged between LEDV and the offeror after redacting the offeror's identity
9 (which specifically identifies the precise offer deemed acceptable by LEDV) by overnight
10 delivery to the office of Marquis Aurbach Coffing." Presumably, only authorized
11 representatives of LEDV and the buyer, as well as those involved in the transaction, would have
12 personal knowledge of the documents exchanged. LEDV represents that all documents
13 exchanged between LEDV and the buyer in connection with both the APA and the APA
14 Amendment were provided to Debtor's counsel. See Second Atamoh Declaration at ¶¶ 17-24.
15 Counsel for the Debtor emailed to LEDV's counsel on February 21, 2014, an acknowledgment
16 that hand delivery of the documents would constitute proper notice under Section 3(m) of the
17 Settlement Agreement. Id. at Exhibit "3." No one disputes that a hand delivery of documents
18 occurred. See Marquis Declaration at ¶ 56. As none of the declarations submitted by the Debtor
19 includes a witness having personal knowledge of the documents exchanged between LEDV and
20 its buyer, the court gives weight to the uncontroverted testimony of LEDV's counsel.¹²

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22 result of the permits being out of compliance with local law. See Omnibus Cash Declaration at
23 ¶¶ 53-54. It also maintains that it expended \$28,886.87 in costs and government fees to bring the
24 billboards into compliance. See First Garcia Declaration at ¶¶ 43-46; Second Garcia Declaration
25 at ¶¶ 17-23. Debtor disputes whether compliance was required by the Settlement Agreement, see
26 Marquis Declaration at ¶¶ 10-17, and whether all or some of the billboards in fact were
27 noncompliant. Compare DL Harris Declaration at ¶¶ 12-20 with Wilkins Declaration at ¶¶ 4-12.
28 As it appears that compliance has been reached, there is no need to resolve the issue as between
LEDV and the Debtor prior to a sale of the billboards.

¹² Debtor raises several arguments concerning the identity of the buyer under the APA.
See C Harris Declaration at ¶¶ 17-24; Marquis Declaration at ¶¶ 75-76. The argument is, of
course, contrived at best given that Section 3(m) of the Settlement Agreement specifically

1 As to the second argument raised by the Debtor, the Evidence of Funds requirement in
2 Section 2.6(b) of the APA obviously is not mirrored in the L&P Agreement. That provision
3 expressly states that “Upon signing this Agreement, Buyer shall provide to Seller evidence of
4 funds on hand in an account in Buyer’s name in a chartered banking institution in an amount
5 sufficient to pay the entire balance of the Purchase Price.” The record establishes that the buyer
6 under the APA provided to LEDV evidence of the funds necessary to complete the transaction
7 under the original APA within 48 hours of executing that document, see Whitehead Declaration
8 at ¶ 7, and has deposited into escrow with Chicago Title the full amount required to close the
9 sale under the APA Amendment, i.e., \$4.2 million. Id. at ¶ 8.

10 The relevant language of the L&P Agreement does not require proof of such funds.¹³ In
11 fact, the latter agreement is not even between LEDV and the Debtor, but rather an agreement
12 between the Oasis LV and the Debtor to obtain funds from Oasis LV to be used for the Debtor’s
13 purchase of the billboards from LEDV. As indicated from the above-quoted provisions of the
14 L&P Agreement, it is structured for Oasis LV to borrow funds from Northern Trust to pay the
15 \$4.2 million purchase price under the APA Amendment.¹⁴ In pertinent part, Section 2(b) of the
16 L&P Agreement provides that Oasis LV “...expressly acknowledges and agrees that pursuant to
17 said ROFR, [Oasis LV] must pay \$500,000.00 into escrow on behalf of the Seller, as Seller’s
18 deposit, no later than Monday, March 10, 2014 or the date upon which escrow is opened
19 whichever comes later. Further [Oasis LV] expressly acknowledges that it will pay the remaining
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21 _____
22 provides for the identity of the offeror to be redacted.

23 ¹³ Indeed, the ROFR Letter acknowledges that the Debtor is seeking to alter the terms of
24 the APA by changing the escrow holder and by substituting the evidence of funds requirement in
25 Section 2.6(b). See ROFR Letter at 1 n.1. Debtor asserted that the changes are immaterial.

26 ¹⁴ Debtor would then acquire the billboards from LEDV and assign them to Oasis LV in
27 satisfaction of the loan. Thereafter, Debtor would manage the billboards for a fee as well as a
28 share of the advertising contracts. For up to eighteen months, Debtor also would have the right
to purchase the Paradise and Black Bongo billboards from Oasis LV for a specific price, but
Oasis LV would retain all rights to the Oasis billboard. The transaction obviously preserves for
the Debtor a long-term business opportunity that would be lost if the sale under the APA and
APA Amendment is concluded.

1 \$3,700,000.00 into escrow within thirty days of March 7, 2014 to allow Seller to close escrow on
2 the Purchases Assets.” In pertinent part, Section 2(d) then provides that Oasis LV “...is
3 obtaining the funds from Northern Trust Bank (the “Northern Loan”) pursuant to a bank
4 approval obtained by Buyer on March 6, 2014 and that all the costs Northern Loan including
5 points, bank’s attorney’s fees and other Northern Loan related expenses shall be charges paid as
6 expenses from the billboards.”

7 Unlike Section 2.6(b) of the APA, Sections 2(b) and 2(d) of the L&P Agreement do not
8 require Oasis LV to provide evidence of funds available to complete the purchase of the
9 billboards from LEDV. In fact, Section 2(d) is the equivalent of a recital indicating that Oasis
10 LV is attempting to obtain a loan from Northern Trust to fund the balance of the purchase price.
11 Unlike the evidence of funds provided by the buyer under the APA and, more important, the
12 buyer’s actual deposit of the full purchase price into escrow, Oasis LV’s ability to perform under
13 the L&P Agreement depends on its ability to close a loan transaction with Northern Trust. As to
14 the latter, Oasis represents that Northern Trust is its current mortgage lender and “...has
15 committed to finance this transaction as well” apparently as reflected by certain correspondence.
16 See First Koroghli Declaration at ¶ 7 and Exhibit “A.”¹⁵ That correspondence is addressed “To
17 whom it may concern” and is dated 3/5/14 (“Northern Trust Letter”). That letter is signed by an
18 individual named Matt Rechner, who apparently is a senior vice president and banking practice
19 lender with Northern Trust, and states as follows: “This letter serves as bank confirmation that
20 the Oasis Las Vegas, LLC partnership holds and has access to significant liquidity in excess of
21 the purchase price contemplated for funding of the acquisition of the subject billboards, leases
22 and other assets in Las Vegas, Nevada.” On its face, the language of the Northern Trust Letter
23 does not commit Northern Trust to loan any funds to Oasis LV.¹⁶ Four weeks have elapsed since
24

25 ¹⁵ Counsel for Oasis LV apparently relies on the same Northern Trust Letter in asserting
26 that his client “had obtained the loan commitment” before the L&P Agreement was executed.
See Netzorg Declaration at ¶ 8.

27 ¹⁶ LEDV also argues that the obligations under the L&P Agreement are illusory due to
28 the attorneys fees language of Section 2(m) together with the default language in Section 6.
According to Section 2(m), if Oasis LV fails to obtain the loan to complete the purchase of the

1 that letter was dated, and no additional correspondence or communication from Northern Trust
2 has been offered expressing an intention to loan \$4.2 million or any other sum to Oasis LV.
3 More important, the record does not include a declaration from the letter's author or anyone else
4 from Northern Trust attesting to any commitment to fund a loan to fulfill the purchase price
5 reflected in the APA Amendment.¹⁷

6 "The purpose of a right of first refusal...is to allow the holder of the right to be notified
7 when the owner intends to sell or has accepted an offer, which, in most cases, will be
8 presumptively the fair market value of the property and to allow the holder to purchase the
9 property under identical terms." 77 Am. Jur.2d, Vendor and Purchaser, § 34 (2nd ed. 2014). A
10 ROFR may be enforced by an order of specific performance. See Rinstone v. Enterprise Bank &
11 Trust, 2012 WL 1681986 at *3 (D. Ariz. 2012). See generally 25 WILLISTON ON CONTRACTS §
12 67:85 (4th ed. 2013). ROFR provisions are fully enforceable under Nevada law under general
13 contract principles. See, e.g., Crow-Spieker #23 v. Robert L. Helms Const. and Development
14 Co., 731 P.2d 348 (Nev. 1987) (plain language of contract did not trigger right of first refusal).

15 The party who gives a ROFR must receive a bona fide offer and its decision to accept the
16 offer must be in good faith. See 3 CORBIN ON CONTRACTS § 11.4 (Matthew Bender 2013).

17 Generally, precision in the terms required to be matched is necessary to prevent the grantor from
18 _____

19 billboards, the L&P Agreement "will be considered null, void, and without further legal effect"
20 and Oasis LV would have to pay its attorneys fees otherwise covered by the Debtor.
21 According to Section 6, the Debtor's defaults under the L&P Agreement creates certain rights in
22 favor of Oasis LV, but none in the event of a default by Oasis LV. In other words, if the Debtor
23 is allowed to proceed under the L&P Agreement and the transaction does not close, LEDV could
24 lose its cash buyer under the APA with no or little recourse against the Debtor or Oasis LV.

25 ¹⁷ As previously mentioned, Debtor submitted an additional declaration from Oasis LV
26 after the evidentiary record was closed, indicating that it could close the transaction within two
27 weeks if allowed to do so. The representative of Oasis LV attests, in pertinent part, that "After
28 checking with our lender, and reviewing our own cash position, Oasis could close this
transaction within two (2) weeks of this Court's order authorizing LVB to proceed with its right
of first refusal." Second Koroghli Declaration at ¶ 4. As previously discussed, the Northern
Trust Letter was not a loan commitment and the latest declaration from Oasis LV does not
evidence that a loan commitment has been received. Indeed, there is still no declaration from a
representative of Northern Trust establishing such a commitment. Rather, it appears that Oasis
LV is counting on its "own cash position" to fund all or part of the purchase price.

1 effectively extinguishing the ROFR by including vague terms that cannot be ascertained or met
2 by the holder of the ROFR. See generally 77 Am. Jur.2d, supra, § 35. Additionally, a grantor of
3 an ROFR may not include peculiar terms of burdensome conditions that make compliance
4 impossible. See Davis v. Iofredo, 713 N.E.2d 26, 28 (Ohio App.8 Dist. 1998). Likewise,
5 precision in the acceptance of the terms is necessary to prevent the holder of the ROFR from
6 impeding the marketability of the property. See 77 Am. Jur.2d, supra, at § 35. A holder's
7 exercise of a ROFR cannot be conditional, see, e.g., Christian v. Edelin, 843 N.E.2d 1112, 1115
8 (Mass.App.Ct. 2006) (offer containing a mortgage contingency is not the same as a cash offer),
9 just as the exercise of an option cannot be equivocal. See United States v. T.W. Corder, Inc.,
10 208 F.2d 411, 413 (9th Cir. 1953) (notice of exercise of an option must be unconditional and in
11 exact accord with the terms of the option); Gershenvorn v. Walter R. Stutz Enterprises, 72 Nev.
12 293, 306, 304 P.2d 395, 401 (Nev. 1957) (notice of exercise of option insufficient to constitute
13 acceptance of uncertain terms). Where the good faith of the terms required to be matched are
14 challenged, the grantor of the ROFR must provide a reasonable justification for insistence upon
15 the terms. See Prince v. Elm Inv. Co., Inc., 649 P.2d 820, 825 (Utah 1982). Compare West
16 Texas Transmission, L.P. v. Enron Corp., 907 F.2d 1554, 1563 (5th Cir. 1990) (“...the owner of
17 the property subject to a right of first refusal remains master of the conditions under which he
18 will relinquish his interest, as long as those conditions are commercially reasonable, imposed in
19 good faith, and not specifically designed to defeat the preemptive rights.”).

20 In the instant case, the Evidence of Funds requirement in Section 2.6(b) of the APA
21 appears to be consistent with standards in the industry. The uncontroverted testimony from
22 LEDV's broker is that “it is common and customary to require a potential buyer to provide proof
23 of funds in the form of a line of credit, bank statement reflecting the balance in a bank account,
24 or letter from a bank confirming the potential buyer has the financial wherewithal to close the
25 deal based upon proof of funds.” See Drachman Declaration at ¶5. Additionally, the
26 uncontroverted testimony from LEDV's broker is that “it is customary and common in the
27 industry to require proof of funds from the potential buyer at or around the time the letter of
28

1 intent is submitted or offer to purchase is signed by the prospective buyer.” *Id.* at ¶ 6.¹⁸

2 In stark contrast, and as previously discussed, Section 2(b) and Section 2(d) of the L&P
3 Agreement reflect no such requirements. And as previously noted at 17, Debtor still has not
4 provided proof of funds sufficient to complete the purchase transaction, either from its own cash
5 resources or through a commitment from Northern Trust.

6 There is no dispute that the APA was transmitted to the Debtor on or about December 19,
7 2013, *see* Omnibus Cash Declaration at ¶ 51, and that the Debtor conveyed its intention not to
8 exercise the ROFR through an email of its counsel transmitted on January 6, 2014. *Id.* at ¶ 52
9 and Exhibit “7” thereto.¹⁹ Although Debtor’s counsel previously transmitted emails questioning
10 the necessity for the Evidence of Funds requirement, *see* Marquis Declaration at ¶ 38 and
11 Exhibits “8” and “9,” the presence of the requirement is not mentioned in the January 6, 2014
12 email as being a factor in the Debtor’s decision not to exercise the ROFR at a time when the
13 proposed purchase price was even higher. The court concludes that the Evidence of Funds
14 requirement is commercially reasonable and not designed to defeat the ROFR provided by
15 Section 3(m) of the Settlement Agreement.

16 Under these circumstances, LEDV’s inclusion of the Evidence of Funds requirement is in
17 good faith.

18 CONCLUSION

19 The court having concluded that the Evidence of Funds requirement of Section 2.6(b) of
20 the APA is a material term included in good faith, the court also concludes that the L&P
21 Agreement does not match the terms of the APA and does not constitute a valid exercise of the
22 ROFR. The court is satisfied that the buyer under the APA has deposited into escrow funds
23 sufficient to complete the sale transaction.

24
25 ¹⁸ Nothing in the Marquis Declaration, DL Harris Declaration, C Harris Declaration,
26 Wilkins Declaration, First Koroghli Declaration, or Netzorg Declaration contradicts Drachman’s
27 testimony.

28 ¹⁹ Exhibit “7” is a copy of an email dated January 6, 2014, from Debtor’s counsel to
LEDV’s counsel stating, in pertinent part, that “LVB is not going to exercise the right of first
refusal on the offer as it was written and presented to LVB...”

1 The court will grant the Enforcement Motion and will authorize the sale under the APA
2 and APA Amendment to close at or after 12:00 p.m. (noon), Pacific Daylight Time, on April 17,
3 2014. Debtor's Countermotion accordingly will be denied.

4 **IT IS THEREFORE ORDERED** that the Emergency Motion Enforce Settlement
5 Agreement, brought by LED Ventures, LLC, Docket No. 636, be, and the same hereby is,
6 **GRANTED AS FOLLOWS: THE PARTIES TO THE ASSET PURCHASE**
7 **AGREEMENT, DATED AS OF DECEMBER 18, 2013, AS AMENDED, ARE**
8 **AUTHORIZED TO COMPLETE THE SALE TRANSACTION AT OR AFTER 12:00**
9 **P.M. (NOON), PACIFIC DAYLIGHT TIME, ON APRIL 17, 2014.**

10 **IT IS FURTHER ORDERED** that the Countermotion for Specific Performance,
11 brought by Las Vegas Billboards, LLC, Docket No. 646, be, and the same hereby is, **DENIED.**

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13 Notice and Copies sent through:

14 CM/ECF ELECTRONIC NOTICING AND/OR
15 BNC MAILING MATRIX

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