71926-2 71926-2

NO.
71926-2-I

DIVISION ONE OF THE COURT OF APPEALS AT SEATTLE
STATE OF WASHINGTON

RSD (AAP), LLC,

Plaintiff/Appellant,

v.

ALYESKA OCEAN LLC; JEFF HENDRICKS and JANE DOE HENDRICKS, individually and as a marital community,

Defendants/Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SKAGIT COUNTY WASHINGTON
HONORABLE SUSAN COOK

BRIEF OF RESPONDENTS

HOLMES, WEDDLE & BARCOTT, P.C.
Counsel for Defendants/Respondents

Douglas M. Fryer
WSBA No. 01852
Lafcadio Darling
WSBA No. 29963
2415 T. Avenue, Suite 205
Anacortes, Washington 98221
360-293-6407

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES ..... **PAGE**

Rules

STATUTES ..... **PAGE**

Statutes

OTHER AUTHORITIES ..... **PAGE**

Other Authorities

I. INTRODUCTION

Plaintiff RSD APP LLC (RSD) and defendant Alyeska Ocean, Inc. (AOI) are members of the Auriga/Aurora General Partnership. AOI is wholly-owned by defendant Jeff Hendricks. RSD has challenged the validity of AOI's July 2012 acquisition of the partnership interest formerly held by another partner, O'Brien Maritime, Inc. AOI properly purchased the O'Brien interest in accordance with the unambiguous terms of the Partnership Agreement, having obtained the consent of two-thirds of the partners having the right to vote on the transaction.

Although RSD has asserted more than one legal theory to support its claim, it is clear that the entire action rises or falls on whether RSD had a right of first refusal and properly exercised that right. In its complaint, RSD stated that an order declaring the existence of a right of first refusal "would conclusively resolve the current controversy between the parties with regard to this dispute." **CP 298**. AOI agrees that this is the threshold and decisive issue. The trial court properly ruled that the right of first refusal never came into play. Moreover RSD failed to even follow the required

contract procedure to invoke such a right when it did not initiate any contact with O'Brien Maritime.

RSD claims breach of fiduciary duty by Hendricks and AOI for delay in disclosure of the terms of the O'Brien acquisition and an alleged loss of a partnership opportunity to acquire the O'Brien share. However the terms of the acquisition were irrelevant unless the right of first refusal arose in this instance, and opportunities of the Partnership are limited to its business—the operation of fishing vessels, not acquisition of its own shares.

The Superior Court properly granted summary judgment dismissing RSD's complaint.

II. ISSUES ON APPEAL

1. Did AOI properly acquire the O'Brien partnership interest in accordance with Section 7.1 of the Partnership Agreement by obtaining consent of two-thirds of the partners, excluding selling partner? Were the consents indisputably given before O'Brien Maritime encumbered its partnership share?

2. Does Section 7.3 of the Partnership Agreement trump Section 7.1 such that any sale is subject to a right of first refusal, or is it merely an alternative method of transferring partnership interests?

3. After conceding in the trial court that AOI had obtained the consent of two-thirds of the partners on May 31, 2012, may RSD now contend for the first time on appeal that the consents were defective because not in writing?

4. Did RSD make any showing that the line of business of the partnership was purchasing its own shares so as to create an opportunity for the partnership when the O'Brien interest was available?

5. If the selling partner was the exclusive partner to whom notice of the exercise of a right of first refusal must be sent, did RSD waive any rights it may have had by having no contact with O'Brien Maritime, Inc.?

III. COUNTERSTATEMENT OF THE CASE

The Auriga/Aurora General Partnership was formed in February 1988 to own and operate two fishing vessels which were renamed AURIGA and AURORA.[1] There were initially 15 partners holding various percentages of interests. **CP 54**. Defendant Jeff Hendricks, who has significant fisheries experience, was the organizer of the Partnership. **CP 50, 51**. Hendricks advanced the money necessary for acquisition of the vessels and negotiated financing for the conversion of the vessels and the marketing of the vessels' product. **CP 51**. Hendricks acted through his wholly-owned corporation Alyeska Ocean, Inc. (AOI). **CP 50**. Under the terms of both the Partnership Agreement and a separate Management

[1] Prior to the formation of the Partnership, a joint venture was established with several owners holding interests in the vessels as tenants in common. The owners of those interests exchanged their tenancy in common interests for partnership interests in the Partnership under the terms of the Partnership Agreement.

Agreement, AOI acted as the manager of the Partnership. **CP 51**. All partners were family or friends of Hendricks with experience in vessel construction or the fishing industry itself; each partner held their interest through a closely held corporate entity. **CP 51, 52**. One of the original partners was Robert E. Resoff, a long-time partner of Hendricks in another vessel; Resoff held his interest in this partnership through Robert Resoff, Inc. **CP 52**. Resoff died in 2002 and George Steers, attorney with the Stoel Rives law firm of Seattle, became President of Robert Resoff, Inc. **CP 52**. The Resoff interest in the Partnership was transferred in 2005 to a residuary trust and then in 2010 transferred to Plaintiff RSD, a subsidiary owned and managed by Robert Resoff, Inc., with Steers acting as spokesman for Resoff, Inc. and RSD. **CP 52, 53**.

The Partnership has been successful and has generated a profit each year since its formation. **CP 52**. In explaining why RSD wanted to increase its investment in this case Steers testified:

> it's a well-managed fishery and it's a well-managed company. And I think it's kind of a compliment to Jeff that we're as interested. **CP 268**.[2]

---

[2] The wide-ranging tort allegations mounted by RSD on appeal are somewhat undermined by Steers admitted respect for Hendricks. In a letter to counsel for Hendricks following RSD's assertion of a right of first refusal, Steers also said "I don't want to have an adversarial relationship with Jeff." **CP 35**.

A. Relevant Terms of the Agreement

The Partnership Agreement, adopted in 1988, has never been amended. The Agreement and its accompanying Offering Memorandum were drafted at the request of Hendricks by Steers' law partner, Ken Johnson. **CP 204, 223**. The provisions of the Partnership Agreement which are pertinent here are contained in Article VII:

> 7.1 Transfer Prohibited.
>
> 7.1.1 No Partner may, without the prior written consent of the Partners holding at least two-thirds interest in the Partnership (excluding the transferring Partner's interest), directly or indirectly *sell*, lease, transfer, assign, give, pledge, hypothecate *or otherwise encumber* or permit or suffer any encumbrance of all or any part of his interest in the Partnership, with or without consideration, except as provided in this Article VII and Section 8.2.
>
> * * *
>
> 7.3 Right of First Refusal. Notwithstanding the provisions of 7.1.1, a Partner *may* sell his interest in the Partnership upon compliance with the conditions of 7.1.2 and the following conditions:
>
> 7.3.1 In the event a Partner or Partners (the "Selling Partner") either (i) receives a bona fide non-collusive offer to purchase his interest in the Partnership, and the Selling Partner desires to accept it, or (ii) decides to sell or contract to sell his interest in the Partnership, he shall, prior to accepting such offer or entering into an unconditional agreement for sale, afford to the other Partners (the "Option Partners") written notification of such intentions, which notice shall specify the terms and conditions of the conveyance proposed, the purchase price therefor, the manner in which

such purchase price is to be paid and all other material terms and conditions of the transaction....

7.3.2 After receiving such notification, the Option Partners shall have a period of *30 days* within which they may, *by affording written notification to the selling Partner*, elect to purchase the Partnership interest of the Selling Partner upon the same terms and conditions contained in the Selling Partner's notice....

7.3.3 In the event the Option Partners elect to purchase the Partnership interest on the terms and conditions stated in the selling Partner's notification, the Selling Partner may thereupon (i) *elect not to sell* his interest in the Partnership, or (ii) convey his interest in the Partnership to the Option Partners....(emphasis supplied). **CP 70-73**.

The Partnership Agreement is a fully integrated contract, controlled by Washington law. **CP 77**.

B. Prior History of Partnership Transfers

In the 25-year history of the Partnership there have been several sales or transfers of Partnership interests approved by the two-thirds majority process. **CP 52-54**. These past transfers include three sales and two transfers to trusts. The Partnership also failed to approve a transfer in 1997 of partner Mark O'Brien's share to his ex-wife when his marriage was dissolved. **CP 53**. Among the transfers approved by two-thirds of the partners was a transfer from Robert E Resoff, Inc. first to a residuary trust and

later to RSD, the current partner. ***Id.*** No partner, including Resoff or RSD, has ever attempted to use the Section 7.3 sale process or asserted a right of first refusal on any transfer until now. **CP 54.**

Prior to 2005, these sales and transfers were accomplished with a simple consent or, in the case of the O'Brien divorce in 1997, disapproved by the use of a yes/no ballot. In 2005, Robert Resoff, Inc. sought partnership approval of the transfer of its interest to a residuary trust under the Resoff will. **CP 53, 96**. Mr. Steers' law partner, John Veblen, produced a draft approval form which included the words: "**To the extent** any such transfer may create any right of first refusal under the terms of the AURIGA/AURORA General Partnership Agreement, such right is hereby released and waived." ***Id.*** (emphasis added).

1. AOI / O'Brien Transaction

On April 24, 2012, Hendricks contacted partner Mark O'Brien and offered to purchase O'Brien's partnership interest.[3] During that conversation, Hendricks learned for the first time that O'Brien had terminal cancer. **CP 55.** O'Brien considered the proposal and

[3] The O'Brien partnership interest was held by O'Brien Maritime, Inc., a wholly-owned, single purpose entity. For the sake of simplicity, we will refer to Mark O'Brien and O'Brien Maritime interchangeably as "O'Brien."

asked for a price offer. ***Id.*** On April 30 Hendricks sent the Partnership's first quarter financials to Clayton Lynch, O'Brien's CPA, along with a history of distributions and an EBITDA (earnings before interest, taxes and depreciation) calculation; Hendricks said he had purchased his father's and step-father's partnership shares based on 7 times EBITDA and that he had suggested to O'Brien a purchase on the same basis. **CP 112**. Lynch responded on May 10 and said he had spoken with Bryce Morgan, Hendricks' CPA, and that the two of them had discussed an option arrangement for one year. ***Id.*** Lynch said if the option were exercised after O'Brien's death he would avoid most of the taxes on the sale. **CP 115**. On May 11 Hendricks made a proposal to Lynch to buy the O'Brien interest for $4-million plus $500,000 for partnership funds held in reserve for distribution and vessel maintenance. **CP 55, 115**. AOI's price offer to O'Brien was based partly on what Hendricks had paid for his mother's and his step-mother's interests in 2011, and partly on what Bryce Morgan had valued the O'Brien interest; Morgan's valuation was $3,482,478. ***Id.*** Hendricks suggested to Lynch that either his attorney or O'Brien's attorney could draft an option agreement. **CP 115**. On May 11 Hendricks

told Lynch the preferred way to buy the interest would be to buy the partnership interest rather than the shares of O'Brien corporation. **CP 115**.

On May 15, Hendricks on behalf of AOI notified the partners of O'Brien's illness and requested their consent to his acquisition of the O'Brien interest. In the written notice to the partners, Hendricks indicated that any partner was free to inquire about the proposed sale agreement, otherwise to please sign the consent form which was attached. **CP 117-119**. At the time the notice was mailed there were twelve partners. **CP 54**.

By May 21 the attorneys for O'Brien Maritime and AOI had agreed on a form of option agreement to be executed. **CP 56**. By May 31, AOI had obtained the consent of two-thirds of the partners, excluding selling partner O'Brien **CP 56**. The option was executed on May 31 by O'Brien and his wife and dated "as of May 24" on the first page and on the signature page "effective and executed the date first above written". **CP 56, 121, 123**. The agreement as finalized granted a two-year option and called for a payment of $200,000 as consideration upon the execution of the agreement; the option could be exercised any time within that two

year period but only within 30 days after the death of O'Brien. ***Id.*** AOI did not actually pay the consideration for the option until June 6, when it wired the $200,000 to O'Brien's bank. **CP 56**.

Despite Hendricks' offer to the partners to answer questions about the purchase, only one partner (Matt Lieske) inquired by June 4. Lieske said he was mailing in his approval and asked Hendricks what value he placed on the Partnership. **CP 56, 125, 126**. Hendricks replied the same day, saying he placed a $20-million value on the Partnership for the purposes of valuing a less-than-controlling interest and gave his analysis. ***Id.***

On June 8, not having heard from RSD, Hendricks inquired of Twig Mills of the Washington Trust Bank, who was the designated contact for RSD, as to what had happened to the consent that Hendricks had sent to RSD. ***Id.,*** **CP 128**. Mills replied the same day saying he had forwarded the consent to Steers and the other RSD managers and that the managers were meeting on June 14 with the consent on the agenda. ***Id.*** On June 20 Steers wrote to counsel for AOI, Doug Fryer, and asked for a complete description of the terms of the transaction. **CP 130**. Fryer responded the next day saying all partners, with the exception of RSD and the

transferring partner, had given written consent to AOI acquiring an option and accordingly the right of first refusal did not apply. **CP 133**. Attached was a memorandum from Hendricks which offered to RSD to supply the details requested if RSD consented to the transaction. **CP 134**. Steers insisted on obtaining the information and received it by letter from Fryer dated July 10. **CP 136, 139**.

On July 9 Mark O'Brien died, which triggered the 30-day period for AOI to exercise the option, and AOI proceeded to do so following notice on July 10 to all partners including RSD. ***Id.*** The sale closed on August 1, when AOI sent the balance of the purchase price. **CP 57, 143**. On August 8 Steers notified AOI that RSD had "elected to purchase the interests of O'Brien Maritime, Inc. on the same terms and conditions as set forth in the Agreement dated May 12, 2012 (sic) which was provided to us by you on July 10, 2012." **CP 147**.

At no time did RSD contact the Selling Partner, O'Brien or O'Brien's representatives, as required of a Partner wishing to exercise a right of first refusal under Section 7.3 of the Partnership Agreement. **CP 39, 46, 47**. Steers acknowledged on deposition

that it was the duty of the Selling Partner—not the Purchasing Partner—to provide notice of any offer if any right of first refusal had been triggered. **CP 48**. Steers wrote to Fryer on September 27, 2012 and said:

> If we are correct in our interpretation of the Agreement, Mark [O'Brien] breached the agreement by failing to offer his interests to everyone in the manner provided in the agreement. We have to consider the necessity of filing a claim against his estate within the time required to preserve that claim. I don't want to do that, but his estate may need to be a party to any proceedings ... to interpret the agreement. **CP 35**.

Suit was initiated by RSD against AOI, Hendricks and his wife on February 13, 2013. **CP 291**. The complaint sought declaratory and equitable relief and stated that "Plaintiff requests that the Court enter an order declaring that Plaintiff is entitled to participate in that purchase [the O'Brien interest] pursuant to Section 7.3 of the Partnership Agreement. Such an order would conclusively resolve the current controversy between the parties with respect to this dispute." **CP 298**.

RSD did not join O'Brien Maritime in the litigation and no other partner intervened. Following discovery, AOI/Hendricks filed a motion for summary judgment on March 10, 2014. **CP 1**. RSD did not seek further discovery and requested that the trial court enter

partial summary judgment in its favor on the issue of the right of first refusal. **CP 154, 176**. Oral argument was conducted on April 10 (**RP 1-32**) and the trial court granted AOI/Hendricks' motion that day. **RP 30-32**, **CP 286**. RSD filed a motion for reconsideration on April 21, 2014 (Clerk Dkt. 27) and on May 9, 2014 filed a notice of appeal from the grant of summary judgment. The motion for reconsideration was denied on May 30, 2014 (Clerk Dkt. 38) but no appeal taken from that order.[4]

IV. SUMMARY OF ARGUMENT

The Partnership Agreement is unambiguous on its face, is integrated and requires no extrinsic evidence for its interpretation. It plainly allows a transfer of a partnership interest if two-thirds of the non-selling partners consent; it is undisputed that AOI obtained the consent of two-thirds of the non-selling partners with respect to the O'Brien transaction. Because AOI's acquisition of the O'Brien interest was properly approved by two-thirds of the non-selling partners under Section 7.1 of the Partnership Agreement, the procedure outlined in Section 7.3 does not apply and no right of

---

[4] A copy of the Skagit County Superior Court Docket for this matter has been submitted herewith as Appendix A.

first refusal was ever arose.

Not only does Section 7.1 apply on its face, but the Partnership Agreement is structured so that the consent of two-thirds of the partners can effect major changes, including modification of the Agreement itself. *See* Partnership Agreement Article VI, 6.1.2-3. **CP 67**. Therefore, it is consistent with the other provisions of the Agreement that the consent of two-thirds of the partners would be sufficient to effectuate the sale or transfer of a partnership interest from one existing partner to another.

As is evident from the plain language of the Partnership Agreement, the sale of a Partnership interest is an alternative process. If two-thirds of the non-selling partners agree, the selling partner may transfer its interest (Section 7.1.1). If not, the selling partner must notify the Partnership of a proposed sale and give the non-selling, or "Option", partners a right of first refusal, by which they may elect to purchase the selling partner's interest on the same terms as the proposed sale (Section 7.3). RSD has instituted this action claiming that the right of first refusal under Section 7.3 trumps any sale, even one authorized under Section 7.1 by a two-thirds Partnership majority. The contract language does not

support RSD's position. Moreover RSD has given no valid explanation as to why it did not follow the required contract procedure for exercising a right of first refusal, which would have required RSD to notify the selling partner O'Brien, not AOI as purchasing partner.

Even if one looks beyond the plain language of the Agreement, the propriety of the AOI/O'Brien transaction is further supported by the effectiveness of prior transfers made using Section 7.1. In the history of the Partnership there have been a number of sales and transfers approved by two-thirds of the non-selling partners, and in ***none*** of those instances did a partner assert a right of first refusal under Section 7.3. Also, the procedure outlined in Section 7.3 was never followed in cases where two-thirds approval was sought.

RSD contends AOI had a fiduciary duty to disclose details of the proposed purchase before proceeding with the transaction. However, neither the Partnership Agreement nor the Management Agreement impose this duty of disclosure, nor is there such a duty under Washington's version of the Revised Uniform Partnership Act ("RUPA"), RCW 25.05 *et seq.* RSD's breach of fiduciary duty claim depends entirely on the existence of a right of first refusal, for there

would be no purpose in requiring disclosure of terms of a proposed sale unless there was, in fact, a right of first refusal allowing the Option Partners to purchase the interest under the same terms.

In the trial court RSD challenged the approval process, contending that Hendricks and O'Brien must have agreed on the transaction before the two-thirds consent had been given because the effective date of their written agreement of May 24 pre-dated May 31 on which AOI had received two-thirds' consent. **CP 171, 172.** RSD conceded to the trial court that AOI had two-thirds consent by May 31 but suggested Hendricks and O'Brien had "probably" entered into an unconditional agreement by May 15. **CP 170, RP 22.** On appeal, RSD contends for the first time there was no *written* consent by the partners and that AOI and O'Brien did indeed have all terms of a definitive, unconditional agreement agreed upon by May 15. These arguments are without merit. The only complaint RSD made about the written consents in the trial court was that they were undated. The belated contention that a definitive agreement existed by May 15 is not supported by either the record or the authorities cited.

RSD's claim that AOI breached its fiduciary duties by not

regarding the acquisition of the O'Brien interest as a Partnership opportunity likewise must fail, as the partnership was not in the business of acquiring its own shares.

Moreover, even if it had a right of first refusal, RSD was required under 7.3 to send a notice to O'Brien (not AOI) and then O'Brien, upon receiving RSD's notice, had the right to elect not to sell. Since RSD never contacted O'Brien it is unknown if O'Brien would have ever consented to a sale to RSD. By inaction RSD waived any purported right of first refusal.

V. STANDARD OF REVIEW

In reviewing an order on summary judgment, the appellate court engages in the same inquiry as the trial court. *Washington Federation of State Employees v. Office of Financial Management,* 121 Wn.2d 152, 157 (1993). To effectuate that principle, the appellate court should only consider evidence and issues called to the attention to the trial court. *Id.*

Summary judgment should be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). After the moving party

submits affidavits showing the absence of a material issue of fact, the nonmoving party must set forth specific facts rebutting these contentions and show that a genuine issue of material fact exists. *See Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13 (1986)). The party opposing summary judgment must submit "competent testimony setting forth specific facts, as opposed to general conclusions to demonstrate a genuine issue of material fact." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555 (1993).

In Washington interpretation and construction of an unambiguous contract is a question of law that is properly resolved on summary judgment. *Renfro v. Kaur*, 156 Wn. App. 655 (2010); *Dice v. City of Montesano*, 131 Wn. App. 675 (2006). Interpretation is the determination of the meaning of specific words; construction is the determination of the legal consequences of the expressions in a contract. *Berg v. Hudesman,* 115 Wn.2d 657 (1990). Extrinsic evidence may be used only to determine the meaning of specific words, but if the contract is subject to only one reasonable interpretation, it cannot be changed by using extrinsic evidence. *Hearst v. Seattle Times Co.,* 154 Wn.2d 493 (2005).

VI. ARGUMENT

A. The Clear Language of the Partnership Agreement is Dispositive of RSD's claims

1. Unambiguous Contractual Language Shows That Section 7.1 Applies To The O'Brien Transfer And Approval Was Obtained

"Summary judgment as to a contract interpretation is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning." *GMAC v. Everett Chevrolet, Inc*, 179 Wn. App. 126, 135 (2014) "Whether a contract is ambiguous is a question of law" and "a contract provision is *not* ambiguous merely because the parties to the contract suggest opposing meanings." *Id.* (*citing Syrovy v. Alpine Res., Inc.,* 68 Wn. App. 35, 39 (1992) and *Mayer v. Pierce County Med. Bureau, Inc.,* 80 Wn. App. 416, 421 (1995)).

Here, the Partnership Agreement is subject to only one reasonable interpretation. The words are not used as terms of art or trade which require explanation, but rather have a plain meaning. The language is clear in the controlling contract provision, Section 7.1.1: "No Partner may sell...without the prior written consent of the Partners holding at least a two-thirds interest in the Partnership (excluding the transferring Partner's interest)..." Thus, with two-thirds

consent a Partner "*may*" sell (permissive and allowing discretion). That is the plain and common-sense meaning, and leaves no room for ambiguity.

RSD relies on the provisions in Section 7.3, which sets forth a right of first refusal under certain conditions. Yet there is no statement in that provision that it overrides 7.1. Rather, 7.1 makes it clear that reference to the other parts of Article VII is required only if two-thirds have not consented. Section 7.3 states "**Notwithstanding** the provision of 7.1.1, a partner **may** sell his interest in the Partnership..." Again the language is permissive, allowing discretion in using this method, and not requiring a two-thirds vote of approval. The term "Notwithstanding" simply means "despite" and allows for another method of sale. This definition is accepted by RSD. RSD Opening Brief at p. 40 (citing *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 162 (1993)). In other words, despite the general prohibition against a sale without two-thirds consent, a sale *may* still occur without such consent if the Section 7.3 procedure is followed.

Under the Section 7.3 method of sale, the other partners have 30 days to exercise a right to match the offer by notice to the selling partner, and the selling partner is then allowed to refuse sale by

withdrawing the offer. Since AOI had obtained the consent of two-thirds of the non-selling partners under Section 7.1, the procedure outlined in Section 7.3 had no applicability here and no offer under Section 7.3 was ever made.

Where parties intend to make a right of first refusal provision applicable to all sales or transfers of partnership interests, they can do so by using mandatory language in their partnership agreement. For instance, in *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Limited Partnership*, 840 F. Supp. 770 (D. Or. 1993), the parties entered into a partnership agreement that provided as follows:

> Before the General Partner or any Limited Partner sells, exchanges, transfers or assigns all or any part of its Partnership Interest to a non-Affiliate of such Partner, it ***shall*** offer, by giving written notice to the General Partner, that interest to all of the other Partners for the price at which and the terms under which such non-Affiliate has offered in writing to pay for such interest. (emphasis supplied)

Id. at 773-76 (enforcing right of first refusal).

In contrast, Section 7.3 of the Partnership Agreement states only that a partner "may" sell his interest in accordance with the right of refusal procedure outlined therein. Thus, the Agreement here created two alternate methods of selling or transferring partnership

interests, rather than making the right of first refusal mandatory for all transfers.

It is undisputed that all partners except RSD consented to the O'Brien sale, satisfying the two-thirds consent requirement. Under section 6.1.3 (xi) of the Agreement, that same two-thirds' consent would have been sufficient to amend the Agreement itself to ratify the transaction. **CP 67, 68**. The symmetry of the two provisions, 6.1.3 and 7.1, show a consistent intent to permit specified major decisions to be made if two-thirds of the partners approve. It is proper in construing a contract, to consider the entire agreement as a whole. *Quellos Group LLC v. Federal Ins. Co.*, 177 Wn. App. 620, 634 (2013). If the entire agreement can be amended by a two-thirds vote, a sale of an interest upon a two-thirds vote is consistent with that power.

RSD argues (at p. 16) that Section 7.2 of the Agreement, which allows a partner to transfer his interest to a wholly-owned corporation, does not require compliance with 7.3, and that 7.2 would have been unnecessary if there were an independent right to sell with two-thirds consent. This is nonsensical. Section 7.2 actually supports AOI's interpretation of the contract since it

provides another alternative method of transfer without the necessity of obtaining two-thirds approval under Section 7.1.

2. Extrinsic Evidence Is Not Admissible To Vary The Terms of the Agreement

This is a case where the plain language of the contract does not require interpretation since the language is clear. RSD cites *Berg v Hudesman,* 115 Wn.2d 657, 669 (1990) and *Brown v. Scott Paper Worldwide,* 143 Wn.2d 349 (2001) Opening Brief at p. 37. But these cases do not support RSD's argument. *Berg* pointed out that extrinsic evidence could be used to interpret the meaning of words themselves, such as terms of art or technical language, when such words were not in common use. 115 Wn.2d at 669. *Brown* had to do with whether an existing employee handbook was part of a non-integrated employment agreement. 143 Wn.2d at 362-364. What RSD seeks here is not to define uncertain words but to change and modify the contract language, which these cases do not endorse. Moreover, *Berg* has been significantly clarified by our Supreme Court in response to arguments (such as those made by RSD) that extrinsic evidence must be considered and can change a contract's meaning. The subsequent case law—which RSD ignores—makes clear that RSD's argument is incorrect. In *Hollis v. Garwall,*

Inc., 137 Wn.2d 683, 693 (1999), the court said:

> Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule announced in *Berg* has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis held that extrinsic evidence cannot vary, contradict or modify the written words of a contract. *Id.* at 695. That decision was followed by *Hearst Communication v. Seattle Times*, 154 Wn.2d 493, 503 (2005), which held that extrinsic evidence is admissible only to show "the meaning of *specific words and terms used* and not to vary, contradict or modify the written word." (emphasis in original). The court then said:

> We generally give words in a contract their ordinary, usual and popular meaning unless the entirety of the agreement clearly indicates a contrary intent.[citing cases]. We do not interpret what was intended to be written but what was written. (*Id.*)

These and other cases are crystal-clear that a court may interpret a clear and unambiguous contract as a matter of law without considering extrinsic evidence. The ordinary-meaning principle is based on common experience; in everyday life people understand and apply plain English and that is how contracts are read.

RSD does not seek to define uncertain words or explain why

contract terms should be given a different meaning from what is plain and ordinary. Rather, RSD seeks to use extrinsic evidence to stave off summary judgment, claiming that later events or other documents should be used to contradict the clear meaning of Section 7.1.

3. Extrinsic Evidence Does Not Support RSD's Argument

Even if extrinsic evidence were necessary and considered, summary judgment for AOI/Hendricks would still be appropriate. RSD relies on the partnership's original Offering Memorandum (**CP 223-234**) which mentions a right of first refusal. That memorandum (drafted along with the Partnership Agreement by Mr. Steers' law partner Ken Johnson) states:

> PROSPECTIVE INVESTORS SHOULD READ AND FAMILIARIZE THEMSELVES WITH THE PROVISIONS OF EACH OF THE AGREEMENTS CONTAINED AS EXHIBITS TO THIS MEMORANDUM. THE FOLLOWING DISCUSSION SUMMARIZES CERTAIN PROVISIONS OF THE AGREEMENT AMONG CO-OWNERS, THE GENERAL PARTNERSHIP AGREEMENT, THE MANAGEMENT AGREEMENT AND POWER OF ATTORNEY. THIS SUMMARY DOES NOT, HOWEVER, DESCRIBE MANY OF THE SIGNIFICANT TERMS OF THOSE AGREEMENTS. EACH POTENTIAL PURCHASER IS THEREFORE URGED TO CAREFULLY READ AND STUDY THESE AGREEMENTS IN THEIR ENTIRETY PRIOR TO INVESTING IN THE COMPANY

CP 227. (emphasis in original). The draft Partnership Agreement

was attached to the Offering Memorandum. **CP 226**.

More importantly, whatever is said in the Memorandum, it cannot alter or supplement the terms of the later Agreement. Not only are the investors clearly on notice that the Offering Memorandum is just a summary, but they are instructed to read the proposed agreement before investing. When the Partnership Agreement was executed it contained an integration clause which acknowledges that it is the entire agreement and "supersedes all previous communications, representations or agreements, either verbal or written." **CP 77** (Partnership Agreement at Art. 12.3).

The history of transfers and sales of interests during the life of the partnership, if considered, also do not support RSD's view but rather bolster AOI's interpretation. All prior transfers or proposed transfers have been on a two-thirds consent or ballot. No partner (including RSD) has at any time sought to invoke a right of first refusal, nor has any partner (including RSD) claimed Section 7.3 trumps the two-thirds consent process until now. **CP 54**.

RSD contends the Biernes' transaction can be used as evidence to interpret the contract to support its position. Not only is this evidence unnecessary for contract interpretation, but it does

not suggest an overriding right of first refusal. To the contrary, the Biernes' sale went through on a two-thirds partner approval without the selling partner giving any notice under Section 7.3 and without anyone offering or claiming a right of first refusal. **CP 52, 88**. Further, any evidence that at the time Hendricks subjectively considered it a partnership opportunity may not be considered in interpreting the contract. *See Go2 Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 84 (2003) (quoting *Bort v. Parker,* 110 Wn. App. 561, 574 (2002) ("Admissible extrinsic evidence does *not* include ... evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term.")

The express waiver of a right of first refusal inserted in the consent form in 2005 by RSD attorney Veblen suggests nothing more than a lawyer's natural caution and desire to ensure that an approved transfer is "bullet-proof." **CP 53, 96**. While there is certainly nothing wrong with including such a waiver in the consent form, the inclusion of this language does not shed any light on whether and when a right of first refusal may arise. Moreover, the language of this waiver drafted by one partner's attorney (and 17 years after the agreement was signed) obviously cannot modify or

vary the pre-existing contract language. *Hearst*, 154 Wn.2d at 503.

The only logical interpretation of the interplay between Sections 7.1 and 7.3 (that is consistent with the plain language of the agreement) is that they provide different methods for effecting a sale or transfer of partnership interests, either by consent or, if consent is not obtained, by use of the right of first refusal procedure.

4. The Undisputed Facts Are That Consent Was Timely Obtained And Right of First Refusal Did Not Arise Under Section 7.3

RSD now claims the evidence shows a *final* agreement to sell was made on May 15th, well before the consents were received. Opening Brief at p. 22. This was not raised until oral argument and then only as a suggestion:

> (Mr. Brown): "Mr. O'Brien accepted Mr. Hendricks' offer, and entered into an unconditional agreement for the sale of his interest on May 24, 2012. He actually probably did it on May 15, Mr. Hendricks sends a notice saying that Mr. O'Brien and I have agreed to this sale of the O'Brien interest, but at the very latest, on May 24th." **RP 22**.

RSD's argument was then only that on May 15 an "agreement" triggered the right of first refusal, not that a final or definite agreement had already been reached. **RP 21-23**. Now, RSD contends there is evidence of a binding contract on May 15. Opening Brief at p. 21.

Not only was this an argument not clearly raised before the trial court, but it is not supported by the case RSD cites. *Morris v. Maks*, 69 Wn. App. 865, 869 (1993), states that informal writings may constitute a contract even when a more formal contract is contemplated only when (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. There is no such evidence here. A formal agreement was contemplated and the draft of that agreement was not resolved by the lawyers until May 21. **CP 56**. Hendricks clearly contemplated the consent of the required number of partners as a condition precedent when he sent out the consent form. Finally what was ultimately agreed was not an outright sale but an option that AOI could never have exercised if O'Brien had recovered and lived two more years. And the option itself was not binding on O'Brien until he received and accepted the $200,000 consideration on June 6 (see discussion, *infra*).

As a back-up to their argument that there was a binding agreement on May 15, RSD argues that O'Brien had encumbered his interest by May 24 based on the "effective" date on the option

agreement, even though it undisputed that the O'Briens did not sign the agreement until May 31 when two-thirds consent was obtained. This argument must also fail. It simply makes no sense to hold that O'Brien is bound to a writing prior to the time he signed it because it contains an earlier effective date. The trial court made this point at oral argument. **RP 31**. Moreover, since the Partnership Agreement required two thirds consent to authorize the transaction, it could not be a legally binding encumbrance until those consents were received.

5. The Option Was Not Binding on O'Brien Until June 6

Regardless of when O'Brien or AOI signed the agreement, or its effective date, Washington law is clear that O'Brien's interest was not actually encumbered until June 6, 2012. RSD's argument regarding the timing of the option agreement and two-thirds consent treats the option as if it were a purchase and sale agreement. Not so, as the legal effect of an option is quite different. Even the trial court may have misunderstood the status of the option because RSD in its opposition to summary judgment had mistakenly stated that the payment of the consideration for the option was made on the date the option was executed. **CP 171**. In

fact, AOI did not pay the consideration until June 6, six days after it was due. **CP 56, 121**. As a result O'Brien was not legally bound—and its partnership interest not encumbered—until O'Brien received and accepted the late payment on June 6.

In an option contract, the person granting the option parts with only the right not to withdraw the offer for a specified time. *Pardee v. Jolly*, 163 Wn.2d 558, 573 (2008); and being a one-sided contract, it is strictly enforced, including application of the rule that time is of the essence. *Id.*; *Andersen v. Brennan*, 181 Wash. 278, 281 (1935). To be enforceable, an option must be supported by consideration. *Saunders v. Callaway*, 42 Wn. App. 29, 37 (1985). An offer in an option given without consideration may be withdrawn at any time. *Hill v. Corbett*, 33 Wn.2d 219, 223 (1949); *Baker v. Shaw*, 68 Wash. 99, 103 (1912). Here the agreed consideration was not only absent until June 6 but AOI was late in making this payment, time being of the essence. Because an option agreement has no force until consideration is actually paid, O'Brien unquestionably did not encumber its partnership interest until June 6 – a week after two-thirds partner consent was obtained.

While the trial court did not state that this principle formed a

basis for its ruling, that is irrelevant since summary judgment may be sustained upon any theory established by the pleadings and supported by the proof, regardless of the theory applied below. *Wendle v. Farrow,* 102 Wn.2d 380, 382 (1984); *see also Pacific Marine Ins. Co. v. State ex rel Dept. of Revenue*, -- Wn. App. --, 329 P. 3d 101 (2014) ("We may affirm the superior court's summary judgment decision on any ground supported by the record.").

6. Construction of the Agreement Should Harmonize Sections 7.1 and 7.3

According to RSD, because Hendricks' May 15 letter stated that he had "agreed" with O'Brien to purchase his interest, Section 7.3 was automatically triggered and the right of first refusal irrevocably arose, even though two-thirds approval under 7.1 was sought and obtained for this transfer. If this argument were correct, it would be impossible for any partner to ever make a transfer or sale under Section 7.1 with two-thirds approval because, according to RSD, any "agreement" to terms even in principle regarding a sale would itself trigger Section 7.3 and implicate a right of first refusal. Such a construction would read Section 7.1 out of the Agreement as there would never be a circumstance where two-thirds of the

partners would approve an encumbrance or sale. The Court should give meaning to each provision and harmonize them if possible: "[A] court must construe the entire contract together so as to give force and effect to each clause." *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 797 (1994).

The cleanest way to give effect to both provisions is to find that Section 7.3 applies to cases where the seller cannot or chooses not to obtain two-thirds approval. This is also consistent with the past practice of the partners (including RSD/Resoff) which made and approved several prior transfers or sales—the terms of which had been agreed by the selling partner—without following the Section 7.3 process. Under RSD's reading, this would have been impossible.

7. RSD's Argument About Written Consent Is Not Before The Court and Cannot Be Sustained In Any Event

On appeal, RSD now argues that the partners' consent to the O'Brien-AOI transaction may not be valid because the consents were not shown to be in writing. Opening Brief at 23-24. RSD argues that the trial court committed a "manifest error" because the record did not support its finding that there was written consent. RSD goes on to say that "[i]t is unlikely that the lack of record

evidence of written consent is simply an oversight by Mr. Hendricks," clearly implying that no written consents have been shared, or that none exist. *Id.* at 23, n. 2.

First, this argument should not be considered since it was not raised below. The rules are clear that "[u]pon review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12; *see also Douglas v. Jepson,* 88 Wn. App. 342, 347 (1997) ("When reviewing a summary judgment order, this court ... only considers evidence and issues raised below.") "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Wash. Fed'n of State Employees,* 121 Wn.2d at 156-57. AOI's procurement of two-thirds consent was a central issue to this dispute and RSD could easily have raised the written-consent issue below, but it chose not to do so. Accordingly, RAP 9.12 precludes consideration of this argument on appeal.

Even if the Court were to consider this argument, the existing record shows that there was no factual dispute that consent was in writing. The consents were indisputably sent to the partners in

written form on May 15, 2012. **CP 56**. The document was entitled "Consent and Waiver" and had a signature blank for each partner but not a blank for the date they would sign. **CP 118-119**. In his affidavit in support of the motion Hendricks said he had the "consent" of two-thirds of the partners, obviously referring to the written consents. **CP 56**. RSD conceded that consent was achieved on May 31 in its summary judgment response ("Mr. Hendricks did not secure two-thirds consent until May 31, 2012." **CP 170**) and at oral argument ("Mr. Hendricks did not secure the two-thirds consent until a week later [than May 24]." **RP 22**). Both parties referred to the written consent forms as "the consents." On June 8 Hendricks asked Twig Mills, the trust officer for RSD, as to the status of the "consent I mailed out" and Mills replied in his email of June 8, 2012 says "I forwarded the consent and cover letter to George Steers and the other LLC managers." **CP 128**. On June 21, 2012, counsel for AOI advised George Steers that "As I explained last week all partners, with the exception of RSD (AA), LLC and the transferring Partner, gave written approval to the acquisition by Alyeska Ocean of that option... ." **CP 133**. RSD did

not challenge this statement or object to this letter below. [5] RSD's contention in the trial court was only that the written consent forms were undated: "Mr. Hendricks produced no evidence of the dates on which the Consents and Waivers [the title to the document] were executed other than his own statement." **CP 118, 170**. In summary, all evidence in the record indicates that AOI received timely written consent, and RSD has come forward with no contradictory evidence.

Finally, RSD's infers that the written consents have been withheld or were unavailable to RSD. Even though this was not an issue on summary judgment (and therefore not considered by the trial court) RSD now charges that AOI's failure to include the consent forms in the record was "unlikely...an oversight[.]" While RSD's brief complains that the consents are not part of the appellate record, RSD cannot candidly deny that it actually received the written consents in discovery months before the summary judgment motion and could have included these same

---

[5] Documents will support a summary judgment if not objected to in the trial court. *Townsend v. Columbia Operations,* 667 F.2d 844,849 (9 Cir.1982); As with any other rule of evidence, an objection to a document must be timely or it will be deemed waived. *10A Federal Practice, section 2722,* Wright & Miller (3d ed.)

consents in the record at its option.

B. RSD's Wide-Ranging Tort and Breach Claims Are Baseless

1. If Section 7.1 Consent Was Validly Given, There Is No Basis For RSD's Breach Of Duty Claims

RSD makes a number of accusations about AOI's practices in relation to this transaction. RSD claims that AOI and Hendricks did not make required disclosures and/or engaged in conduct inconsistent with AOI's fiduciary duties as a manager. None of these allegations are material to what it identifies as the "conclusive" issue – whether RSD had a right of first refusal in relation to this transaction.

2. In the absence of a right of first refusal there was no duty to disclose the details of the transaction

RSD contends that AOI and Hendricks in the capacity of a fiduciary had a duty to disclose the details of AOI's offer to O'Brien to the other partners. However nothing in the Partnership Agreement or the Management Agreement impose such a duty of disclosure absent a right of first refusal. In addition, under Washington's Revised Uniform Partnership Act, the fiduciary duties of partners are specifically and narrowly defined, and do not include a duty to disclose this type of information. The statute

makes clear that a partner does not violate a duty under the statute or under a partnership agreement "merely because the partner's conduct furthers the partner's own interest." RCW 25.05.165(5).

Apart from the duty to disclose the details of a proposed sale or transfer of partnership interest under Section 7.3—which applies only when the right of first refusal arises—neither the Partnership Agreement nor the Management Agreement require a general partner or managing partner to disclose the detailed terms of such a transaction to the other partners. Neither of these contracts includes specific definitions or descriptions of what constitutes a partner's fiduciary duty. In the absence of a provision in the Partnership Agreement, RUPA provides guidance. The statute is a "gap filler" in that it only governs partnership affairs to the extent not otherwise agreed to by the partners in the partnership agreement. *Horne v. Aune*, 130 Wn. App. 183, 200-201 (2005); RCW 25.05.015.

With regard to the conduct of partners, the statute provides:

> (1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section
>
> (2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(4) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

As Washington courts have acknowledged and legal scholars have discussed in the years before and after adoption of RUPA, this uniform statute represented a major departure from its predecessor, the Uniform Partnership Act (UPA), particularly with respect to fiduciary duties. Whereas the theory of partnerships had previously

been based on the fiduciary concept and was characterized by the duty of loyalty owed by partners to the partnership and each other, the RUPA reflected a shift to a more contractual theory of partnerships, under which the self interests of partners are recognized and the parties are permitted to define the scope of their fiduciary duties and, to the extent permitted under the statute, waive them. *See J Cleome v. AT & T Wireless Services, Inc.*, 162 Wn.2d 102 (2007) (Madsen, J concurring):

> RUPA represents a major overhaul in the nature of the fiduciary duties imposed on partners. There are two general views of the partnership relation, one emphasizing the fiduciary nature of the relationship and the other emphasizes the contractual nature of the relationship. ..... RUPA represents a major shift away from the fiduciary view and toward the "libertarian" or "contractarian" view by (a) expressly limiting fiduciary duties (b) sanctioning a partner's pursuit of self-interest, and (c) allowing partners to waive most fiduciary duties by contract.

See also Horne, 130 Wn. App. at 200-01 ("With few exceptions, not applicable here, partners may 'write their own ticket.'"); *Diamond Parking v. Frontier Building L.P.*, 72 Wn. App. 314, 317 (1993)("A partnership agreement is the law of the partnership."); Callison & Sullivan, PARTNERSHIP LAW & PRACTICE § 12:10 (2013) ("Unless egregious circumstances are present, partners should be recognized as bargaining at arms' length in connection with

partnership formation, and bargaining positions taken by partners to further their individual interests should not be considered a breach of fiduciary duty to their copartners.")

AOI had no duty to disclose the details of the O'Brien transaction. Although not before the Court, O'Brien also had no such duty since the right of first refusal procedure under Section 7.3 was not used. Here, the price and terms were irrelevant because they had no impact on the other partners or the partnership's business.

It bears noting that even though AOI had no duty to disclose the terms of the proposed partner-to-partner acquisition, Hendricks nevertheless offered to discuss the proposed transaction and provide additional details about it to any partners who inquired. One partner made such an inquiry, and was given information about the valuation of the company and the offering price for the O'Brien interest. RSD, on the other hand, made no such inquiries, despite being afforded the time and opportunity to learn more about the transaction. Instead, RSD waited until after AOI had already obtained the consent of two-thirds of the non-selling partners to make such an inquiry. At that juncture, there was no reason to disclose such information, given that AOI had already obtained the

consents it needed, but it offered to do so if RSD tendered its own consent, and later did provide the information even though RSD never did consent.

Washington's RUPA specifically provides that merely because partners act in their own interests, they do not violate the duty of loyalty. RCW 25.05.015(1)(5). This has long been the law. More generally, if partners have equal facilities for investigation there is no relief for the failure to inquire in the absence of fraud, overreaching, undue influence or reliance on fiduciary relations. *Elmore v. McConaghy*, 92 Wash. 263 (1916). In this case RSD was on notice of the requested consent to the O'Brien transaction on May 15 and failed to ever inquire of O'Brien as to the proposed terms (which it was free to do). Instead it inquired of AOI but the terms were simply irrelevant to the requested consent.

The instant case is not one where Hendricks acting through AOI sought to compete with the partnership, or to buy or sell any of its assets, or take unfair advantage. The fact that AOI's increase in partnership equity could have legal implications was apparent from the face of the Agreement itself and required no emphasis. *Diamond Parking,* 72 Wn. App. at 320 (holding that the legal implications of a

partnership amendment were for the partners to decide).

In addition, RSD's claim that AOI acted in breach of its duty by failing to disclose the details of the transaction is also inconsistent with the past dealings of the partners. As described, there have been several partner-approved sales and transfers of partnership interests. In ***none*** of these prior instances did the parties to the sale or transfer disclose the details or terms of their transaction to the other partners, and there has never been a claim (by RSD or anyone else) that partners are entitled to this information prior to giving consent. RSD's current claim that full disclosure of the terms of the transfer must be given before approval is a novel one that has no basis in the partnership agreement, partnership law or the past behavior of these partners, including RSD itself.

3. The O'Brien Transfer Was Not A Partnership Opportunity

The linchpin of RSD's claim of a breach of fiduciary duty is the contention that the availability of the O'Brien share was a partnership opportunity. Yet the cases RSD cites are decisively against its position. *Equity Corporation v. Milton,* 221 A. 2d 494 (Del. 1966), held that the acquisition of stock options for shares in a corporation by a corporate officer was not an opportunity denied

other shareholders. In affirming summary judgment, the court held "that the opportunity, itself, must fit into the business of the corporation or fit into an established corporate policy which the acquisition of the opportunity would forward." *Id.* at 497. A showing that the purchase of a few shares over several years fell far short of a policy of the corporation acquiring its own shares. This Court adopted the *Equity Corporation* rule that a corporate opportunity must be deemed to fall within the firm's "line of business." *Noble v. Lubrin*, 114 Wn. App. 812, 819-820 (2003). Further, "[w]hether an opportunity is a corporate one is a conclusion of law which we review de novo". *Id.* at 819.

Other cases apply the same reasoning. *See, e.g., Katz Corporation v. T.H. Canty and Company*, 362 A.2d 975, 979 (Conn. 1975) ("Plaintiff failed to establish that the corporation had an avowed business purpose in purchasing its own stock..."); *Bisbee v. Midland Linseed Products Co.*, 19 F.2d 24, 27 (8th Cir.1927) ("Each shareholder has the right to buy stock in the corporation, or in dealings with other shareholders as he sees fit..."). RSD has failed to establish that the partnership lost a business opportunity to buy its own shares. The partnership was not in that business.

C. RSD's Other Arguments Do Not Provide Support For Reversal of the Trial Court

RSD makes several additional arguments or points in its brief that are either irrelevant or unsubstantiated and so merit quick treatment in response and merit short shrift.

RSD suggests that AOI and Hendricks took advantage of his dying partner Mark O'Brien to obtain the O'Brien interest at a "bargain" price and/or to hide material facts from O'Brien or others. *See* Opening Brief at pp. 14-16. Aside from being irrelevant to the issues presented, this suggestion is contrary to the facts. O'Brien agreed to the option with AOI at arms' length on the advice, and with the active involvement, of both his CPA and attorney, who engaged in an informed discussion with AOI's representatives about the purchase. **CP 5, 55, & 114-115**.

The price formula used for this transfer was discussed and negotiated by the parties' representatives and mirrored the price paid by Hendricks for his family members' interests in the past. Whether the price agreed between AOI and O'Brien was low or high has no effect on RSD or the partnership as a whole and is thus totally irrelevant to the claims made.

RSD also emphasizes the power of attorney given by the

partners to AOI to argue that this somehow enhances AOI's duties to the partners or partnership. *See* Opening Brief at p. 29. This argument ignores that this power of attorney (a) was limited and mainly related to giving AOI clerical authority to file various documents and certificates such as those required by the Coast Guard and (b) was never used in relation to this transaction. This document has no effect on the partnership transfer at issue and cannot affect AOI's related duties to the partnership.

In its brief, RSD states what it feels is the purpose of Sections 7.1 and 7.3 and the intention of the drafters in including these terms, arguing that RSD's reading of the contract satisfies this purpose. Opening Brief at pp. 38, 39. Not only is this argument wholly speculative, but RSD's subjective understanding of contract terms or their purpose is immaterial to the construction and interpretation of an unambiguous and integrated contract. *Hearst*, *supra* 154 Wn.2d at 503, 504.

VII. CONCLUSION

Defendants/Respondents respectfully request this Court hold that RSD was not entitled to exercise, and did not attempt to properly exercise, a right of first refusal in relation to the O'Brien

transfer. The trial court's grant of summary judgment dismissing Appellant RSD's claims should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

Douglas M. Fryer, WSBA No. 01852
Lafcadio Darling, WSBA No. 14292
Counsel for Defendants/Respondents
2415 T. Avenue, Suite 205
Anacortes, WA 98221
360-293-6407

5728-26996

WASHINGTON COURTS

Superior Court Case Summary

Court: Skagit Superior
Case Number: 13-2-00279-8

Sub	Docket Date	Docket Code	Docket Description	Misc Info
	02-13-2013	FILING FEE RECEIVED	Filing Fee Received	240.00
1	02-13-2013	SUMMONS	Summons	
2	02-13-2013	SUMMONS	Summons	
3	02-13-2013	SUMMONS	Summons	
4	02-13-2013	COMPLAINT	Complaint For Declaratory & Equitable Relief	
5	02-13-2013	DEMAND FOR JURY-12 PERSON	Demand For Jury-12 Person	
	02-13-2013	JURY DEMAND RECEIVED - TWELVE	Jury Demand Received - Twelve	250.00
6	02-13-2013	NOTICE OF APPEARANCE ATD0001	Notice Of Appearance Fryer, Douglas M.	
7	03-04-2013	ANSWER & AFFIRMATIVE DEFENSE	Answer & Affirmative Defense	
8	03-07-2013	ACCEPTANCE OF SERVICE	Acceptance Of Service	
9	08-01-2013	NOTICE	Pltfs Notice/conflicts	
10	08-01-2013	NOTE FOR MOTION DOCKET-LATE FILING ACTION	Note For Motion Docket-incomplete No Trial Assignment Date	
11	08-06-2013	RESPONSE	Deft Response To Notice For Trial Assn & Notice Of Conflict Dates	
12	08-12-2013	ORDER SETTING TRIAL DATE JDG0002	Stip Order Setting Trial Date Judge Mike Rickert	05-12-2014CT
		ACTION	8 Days	
13	03-10-2014	MOTION FOR SUMMARY JUDGMENT	Defts Motion For Summary Judgment	
14	03-10-2014	DECLARATION	Declaration Of Douglas M Fryer In Suppt Of Defts Mtn For Sum/jgmt	
15	03-10-2014	DECLARATION	Declaration Of Lafcadio Darling In Suppt Of Defts Mtn For Sum/jgmt	
16	03-10-2014	DECLARATION	Declaration Of Jeff Hendricks In	

About Dockets

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Directions

Skagit Superior
205 W Kincaid St, Rm 202
Mount Vernon, WA 98273-4225
Map & Directions
360-336-9320[Phone]
360-336-9340[Fax]
[Office Email]
Visit Website

Disclaimer

What is this website? It is a search engine of cases filed in the municipal, district, superior, and appellate courts of the state of Washington. The search results can point you to the official or complete court record.

How can I obtain the complete court record?
You can contact the court in

APPENDIX A - Page 1 of 3

			Suppt Of Defts Mtn For Sum/Jgmt	
17	03-10-2014	NOTE FOR MOTION DOCKET-LATE FILING ACTION	Note/mtn Docket-error Week Day Fryer: Summary Jgmt	04-07-2014
18	03-11-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
19	03-12-2014	NOTE FOR MOTION DOCKET ACTION	Corrected Note For Mot/docket Fryer: Sum Jgmt	04-10-2014J1
20	03-31-2014	RESPONSE	Pltfs Memorandum In Response To Defts Mtn For Sum/Jgmt & In Suppt Of Pltfs Rqst For Summary Adjudication	
21	03-31-2014	DECLARATION	Declaration Of George W Steers In Suppt Of Pltfs Oppos' To Defts Mtn For Sumamry Jgmt	
22	04-07-2014	REPLY	Reply In Suppt Of Defts Mtn For Sum/Jgmt & Mtn To Strike	
23	04-07-2014	DECLARATION	Suppl Declaration Of Lafcadio Darling In Suppt Of Defts Mtn For Summary Judgment	
24	04-08-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
25	04-10-2014	SUMMARY JUDGMENT HEARING JDG0003	Summary Judgment Hearing Judge Susan K. Cook	
	04-10-2014	CD RECORD OF PROCEEDINGS	Cd Record Of Proceedings Es/cd 2	
26	04-10-2014	ORDER GRANTING SUMMARY JUDGMENT	Order Granting Deft's Summary Judgment Motion	
		JDG0003	Judge Susan K. Cook	
27	04-21-2014	MEMORANDUM	Pltf Memorandum In Supt Of Request For Reconsideration	
28	04-21-2014	DECLARATION	Dclr Of G Steers In Supt Of Pltf Mt For Reconsideration	
29	04-21-2014	DECLARATION	Dclr Of M Brown In Supt Of Pltf Mt For Reconsideration	
30	04-29-2014	OBJECTION / OPPOSITION	Defts Opposition To Pltfs Mtn For Reconsideration & Mtn To Strike	
31	04-30-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
32	05-06-2014	NOTICE	Notice Of Readiness For Ruling By	

which the case was filed to view the court record or to order copies of court records.

How can I contact the court?

Click **here** for a court directory with information on how to contact every court in the state.

Can I find the outcome of a case on this website?
No. You must consult the local or appeals court record.

How do I verify the information contained in the search results?
You must consult the court record to verify all information.

Can I use the search results to find out someone's criminal record?
No. The Washington State Patrol (WSP) maintains state criminal history record information. Click **here** to order criminal history information.

Where does the information come from?
Clerks at the municipal, district, superior, and appellate courts across the state enter information on the cases filed in their courts. The search engine will update approximately twenty-four hours from the time the clerks enter the information. This website is maintained by the Administrative Office of the Court for the State of Washington.

Do the government agencies that provide the information for this site and maintain this site:

- **Guarantee that the information is accurate or complete? NO**
- **Guarantee that the information is in its most current form? NO**

			Judge Cook Re Reconsideration	
33	05-08-2014	OBJECTION / OPPOSITION	Pltf Opposition To Deft Mtn To Strike	
34	05-09-2014	NOTICE OF APPEAL TO COURT OF APPEAL	Notice Of Appeal To Court Of Appeal	
35	05-14-2014	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
	05-14-2014	RECEIPT(S)	Receipt(s) F/coa Re: Naca	
36	05-14-2014	REPLY	Reply In Supt Of Mtn To Strike	
37	05-15-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
38	05-30-2014	COURT'S DECISION	Court's Decision Denying Reconsideration	
		JDG0003	Judge Susan K. Cook	
39	06-06-2014	APPELLATE FILING FEE	Appellate Filing Fee Received	290.00
40	06-09-2014	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers	
41	06-11-2014	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
	06-11-2014	RECEIPT(S)	Receipt(s) F/coa Re Dsgckp	
	06-11-2014	CLERK'S PAPERS - FEE ASSESSED	Clerk's Papers - Fee Assessed	-151.00
42	06-13-2014	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received	151.00
43	06-13-2014	DESIGNATION OF CLERK'S PAPERS	Supp'l Designation Of Clerk's Papers	
***	06-16-2014	VERBATIM REPORT OF PROCEEDINGS	Verbatim Report Of Proceedings (1 Vol 04-10-14)	
44	06-17-2014	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
	06-17-2014	RECEIPT(S)	Receipt(s) F/coa Re Designation Of Clerk's Papers	
	06-17-2014	CLERK'S PAPERS - FEE ASSESSED	Clerk's Papers - Fee Assessed	-3.45
45	06-17-2014	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted To Coa	
46	06-19-2014	RECEIPT(S)	Receipt(s) F/coa Re Verbatim Rpt	
47	06-20-2014	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received	3.45
48	09-16-2014	DESIGNATION OF CLERK'S PAPERS	Second Supplemental Designation Of Clerk's Papers From Mr. Fryer	
49	09-17-2014	LETTER	Letter F/clerk To Parties & Coa Designation Cannot Be Completed As	