FILED
SUPREME COURT
STATE OF WASHINGTON
4/19/2023
BY ERIN L. LENNON
CLERK

No. 101920-3

Court of Appeals No. 82840-1
(Consolidated with Nos. 82840-0, 82842-8 & 82843-6)

SUPREME COURT
OF STATE OF WASHINGTON

RALPH PALUMBO,

Petitioner,

v.

RICHARD WAKAZURU and KENNETH WAKAZURU,

Respondents.

RALPH PALUMBO'S PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Ralph H. Palumbo ("Palumbo" or "Petitioner") was disqualified by the trial court based on its decision that several voicemail messages he left for a witness before a deposition was sanctionable bad faith conduct. There are no factual disputes regarding what was said in those voicemails—the recordings are part of the record. Every statement Palumbo made describing the dispute in those voicemails was supported by evidence gathered during discovery, including extensive documentary evidence and prior deposition testimony. As part of describing the dispute, Palumbo also informed the witness that because he had been a partner in the venture, Palumbo's clients had said they felt obligated to share any recovery. This, too, was truthful. A month before, Palumbo's clients had testified at their depositions they intended to share any proceeds with all partners, including the witness.

Notwithstanding that every statement Palumbo made was supported by evidence, the Court of Appeals ("COA") affirmed the trial court's ruling that Palumbo had engaged in sanctionable bad faith conduct. The COA, however, held that a lesser sanction than disqualification should have been considered. It also ruled the trial court had erred by disqualifying Palumbo's co-counsel when there was no basis for imposing any sanction against them.

The COA applied the wrong standard for reviewing whether Palumbo's voicemails constituted sanctionable bad faith. The bad faith ruling should be reversed. Where, as here, the pertinent facts—the content and context of the voicemails are undisputed, the issue of whether those facts constitute sanctionable bad faith under a court's inherent powers is an issue of law. The COA should have (but did not) reviewed that issue *de novo*. Instead, it improperly utilized the deferential substantial evidence standard. Accurately and truthfully summarizing a client's position to a witness is not (and cannot

be) sanctionable bad faith. Nor does that change if the client's position is that, because the witness was a partner, the client feels obligated to share some proceeds with him.

The erroneous decision darkly stained the storied 45 plus year career of a distinguished trial lawyer. It is at odds with both several published COA decisions, as well as the Supreme Court decision *In re Firestorm 1991,* 129 Wn.2d 130, 916 P.2d 411 (1996). Review (and reversal) are warranted.

II. CITATION TO COURT OF APPEALS DECISION

Review is sought of an unpublished Division One opinion entitled *Michael S. Ota, et al. v. Richard M. Wakazuru, et al.*, No. 82840-1-I. That decision (*see* Appendix Exhibit 1) was rendered on February 13, 2023, in a consolidated appeal filed by the Otas (Palumbo's clients), Palumbo, and the Otas' other trial counsel.

III. ISSUES PRESENTED FOR REVIEW

A. Did the COA ignore precedent and apply the wrong standard of review regarding whether there was sanctionable bad faith conduct?

B. Did the COA (and the trial court) erroneously not consider Palumbo's motive and intent—as is required under *Firestorm*?

C. Did the COA erroneously conflate conduct deemed improper with sanctionable bad faith conduct?

IV. STATEMENT OF THE CASE

Although the following Statement of the Case is somewhat detailed, three things are most significant regarding this petition.

First, the witness at issue, Michael G. Ota ("Michael G") had been a partner in the venture that was the subject of the litigation. The existence of the partnership venture, and Michael G's interest in it were supported by extensive

documentary evidence, the parties' deposition testimony, and other witness deposition testimony.

Second, Palumbo's clients, Stacey Ota[1] and Connie Ota (the "Otas") both maintained that, because Michael G had been a partner, they felt obligated to share a portion of a recovery with Michael G. Indeed, only a month before Palumbo's voicemails to Michael G, Stacey had testified in his deposition that he still maintains that Michael G had an interest in their partnership and that he had told Michael G he would protect that interest. CP 272 ¶¶ 2-3, 279:17-283:5. Connie Ota also had testified at her deposition that Michael G had an ownership interest in their partnership. CP 273 ¶ 4, 289:10-15, 290:4-11, 292:3-12.

Third, prior to leaving the voicemails, Palumbo was told that Michael G was willing to speak with him, and based on the

[1] Stacey Ota's real name is Michael S. Ota. He goes by "Stacey," and to avoid confusion with his father, Michael G, he is referred to herein as "Stacey Ota."

evidence and discovery, Palumbo expected Michael G would take the position he held an interest in the family partnership and the venture.

In sum, and as discussed in detail below, when Palumbo left the voicemails summarizing the claims and stating his clients felt obligated to share any recovery (i) he was accurately and truthfully summarizing the claims, (ii) he was accurately and truthfully stating his clients belief about sharing any recovery, and (iii) there was extensive documentary and deposition testimony supporting the Otas' claims, including evidence showing that Michael G had in fact had an interest in the venture.

A. Background Regarding the Ota-Wakazuru Dispute.

In 2006, the Ota family (Stacey Ota, his father Michael G, and his wife Connie Ota) and Rick and Ken Wakazuru, the owners of Poulsbo RV, orally agreed to form a partnership to develop land the Otas owned in Sumner, Washington (the "Property") into an RV dealership. CP 2, 26, 189:21-190:5.

Title to the Property at that time was held by Michael G and his ex-wife Ann Hemmings. The Ota family and the Wakazurus agreed to buy out Hemmings' one-third Property interest for $1.67 million. CP 194-201. The Wakazurus contributed $1 million to the purchase for a 20 percent interest in the venture. To avoid triggering an excise tax, the partners agreed that the Otas would sign a $1 million promissory note that they were not expected to pay and the Wakazurus would later contribute to the venture. CP 2-3, 94, 110 ¶ 14, 178:22-180:9 (J. Elliott Dep.: "It was never a loan."); 189:21-190:5, 203-08, 338.

In 2006, the family created Generation V, LLC ("Gen V") to hold their interest in the Property and the Ota-Wakazuru venture. CP 273-74 ¶¶ 7-8, 296-336.[2] Gen V's members were Stacey Ota and Dan Schenk (Connie's brother), who held common units, and Michael G who held preferred units entitling him to the first $80,000 each year after the Property

[2] A signed copy of the 2008 Gen V Operating Agreement, which was subsequently produced, is Appendix Exhibit 2.

was developed. *Id.*; Appendix Exhibit 2. In 2008, Michael G signed a notarized Statutory Warranty Deed conveying the Property to Gen V. CP 94, 210-13, 292:3-12. From 2009 through 2012, the Otas filed Federal Tax Returns for Gen V prepared by Loren McCann, their family accountant. CP 737 ¶ 17, 741-805. These facts—which Palumbo was very much aware of when he left the voicemails—are supported by Gen V's Certificate of Formation, Operating Agreements, the 2008 Statutory Warranty Deed, Gen V's tax returns, and the Gen V Schedule K-1s for each of its members: Michael G, Stacey Ota and Dan Schenk.

For the reasons explained below, in 2012 the Otas transferred the Property's title ownership from Gen V to the Wakazurus to hold the Property for the Ota-Wakazuru venture, just as the Otas and Gen V had previously held title for the venture. CP 272 ¶ 2, 279:17-25. To develop the Property, the partners first had to resolve wetlands violations, and they had to obtain federal, state and local permits. *See* CP 738 ¶ 18, 807-

849. From March 2006 to September 2012, Stacey and Connie Ota managed the day-to-day maintenance, working with attorneys and consultants to resolve the wetlands violations and obtain permits. CP 3 ¶ 12, 5 ¶¶ 18, 20, 16 ¶ 3.8. The Wakazurus paid the real estate taxes and Local Improvement District fees. CP 3 ¶ 13, 424 at p. 98:12-25-99:1-11.

In 2012, a bitter dispute arose between Stacey and Connie Ota, and Michael G over properties used in the family's sod farming business. The Otas were concerned that because of that dispute and Michael G's financial problems, Michael G would encumber or otherwise jeopardize the Property to the detriment of the Ota-Wakazuru venture. As a result, they and Rick Wakazuru decided to transfer title to the Wakazurus so they could continue their years long plan to jointly develop the Property. CP 112:5-10, 191:14-19. At the Wakazurus' suggestion, rather than a formal sale, the parties structured the transaction on paper as a purported foreclosure of the Promissory Note and a deed in lieu of foreclosure transfer.

The parties' intent to nonetheless continue their partnership was established by not only the testimony of Palumbo's clients, but also that of Jim Elliott, the former Poulsbo RV Manager (and Ken Wakazuru's son-in-law) who had for ten years worked with the Wakazurus and the Otas to develop the Property. CP 99, 176-86. Regarding the deed in lieu, Jim Elliott testified: "*Like I said, nothing changed—nothing changed. We were still trying to get the entitlements taken care of, the wetlands mitigated.*" CP 184:9-15 (emphasis added). Stacey and Connie continued to be involved just as they had been before the deed in lieu transfer. *Id.* 18-22 ("Yeah, nothing changed.").

The Wakazurus now claim the deed in lieu transferred ownership free of any interest the Otas' had. But Rick Wakazuru admitted that, as of 2012, "because of the all the environmental issues," the Otas "had yet to do a joint venture roll up with the [Wakazurus] LLC." He further admitted that Michael G was facing financial difficulties in early 2012, and

that the Otas told him they were concerned the Wakazurus' interest could be negatively impacted if Michael G continued to hold the title. Rick Wakazuru also admitted that principal and interest on the Promissory Note in June 2012 was approximately $1.7 million, and that the Property was worth approximately $5.5 million then. Most significantly, asked whether after the forbearance agreement he agreed the Wakazurus would hold the property in furtherance of the plan to jointly develop it, Rick Wakazuru testified "it was just for *the ownership*, not—at that point there was—there was no dealership talk." CP 112:5-10, 191:14-19 (emphasis added).

Five years later, in 2017 the Wakazurus sold the Property keeping for themselves the sale proceeds. With respect to the Wakazurus' failure to share the Sumner Property sale proceeds with the Otas, Jim Elliott testified:

> I had no reason to believe that they [the Otas] wouldn't have got exactly what they were supposed to get over the 10, 12 years that we did this. So I'm -- I'm pretty -- I'm pretty surprised and pretty shocked that we're even having a

> conversation about them not getting whatever their share of this was. I don't understand -- I don't understand why -- I don't even understand why we're in.

CP 185:17-25.

B. <u>Michael G's Deposition</u>.

In April 2021, approximately two months before trial, the Wakazurus noted the deposition of Michael G. During his deposition, Michael G testified he had not talked to Stacey and Connie Ota for more than 10 years: "I never want to speak to my son or daughter-in-law again. End of story." CP 150:23-25. He described Stacey and Connie as "[g]reed[y]," "devious," "no good people," "untruthful," and "crooked." CP 51 at p. 29:11-13, 59 at p. 63:6-7, 71 at p. 110:18-19, 72 at p. 113:22-23, 82 at p. 153:24-154:2, 96, 151:22-23. Michael G's antipathy toward his son and daughter-in-law is clear from his statement to Palumbo at the deposition: "Hope you lose. I got to go."

Michael G's testimony was favorable to the Wakazurus. He testified that he never reached an agreement with Stacey Ota

and the Wakazurus to share profits from development of the Property. CP 55 at p. 45:6-16. That testimony conflicts with both Rick Wakazuru's and Jim Elliott's testimony to the contrary. Michael G initially testified that he would never have purchased Hemmings' interest in the Property for $1.67 million (CP 122:3-14); he denied that the Wakazurus contributed $1 million toward the purchase of Ann Hemmings' interest in exchange for a 20 percent interest (CP 164:8-165:4); and he testified that he had never seen the $1 million Promissory Note before and claimed that "all this was done behind my back," (*id.*) despite the fact that it is his signature on the Promissory Note. Then he contradicted many aspects of his initial testimony. He later admitted that the Wakazurus were not expecting the $1 million dollars to be paid back; he acknowledged that the $1 million dollars provided by the Wakazurus "was money [for Defendants] to be part owners of the property" and to avoid paying the excise tax. CP 126:15-23.

Michael G testified that he recognized the name Gen V, but despite the extensive contrary documentary evidence, he claimed he "was no party to this;" and he believed Gen V never existed. CP 131:3-132:15.

Michael G also initially testified that his conveyance of the Property to Gen V "never happened" and that he did not think the signature on the deed was his. CP 133:8-24. But when confronted by the fact his signature on the deed was notarized by his then-attorney, Mary Urback, Michael G recanted his prior testimony admitting that he had signed the deed. CP 157:4-14, 158:5-9.

C. Palumbo's Voicemails Prior to Michael G's Deposition.

Prior to Michael G's deposition, at the request of Stacey and Connie Ota—and only after Michael G had (through his wife) indicated a willingness to talk with Stacey and Connie's lawyers (CP 339, 343, 344)—Palumbo left two voicemail messages for Michael G. Michael G never called Palumbo back. In the voicemails, Palumbo summarized his clients'

claims against the Wakazurus. And he outlined generally his clients' claims: that the Otas and Wakazurus had agreed to a partnership in which the Ota family would have 80 percent and the Wakazurus 20 percent; that the Otas had formed Gen V to hold the Ota family interest; that Stacey and Connie had said they felt obligated to share any recovery along the lines of the Gen V interests; that the Property had been worth around $5 million at the time of the deed in lieu but the note balance was only around $1.7 million; and that the Otas were seeking damages that could be in the range of $3 to $5 million. Palumbo's voicemails did not suggest that Michael G should testify falsely. Nor did they condition Stacey and Connie Otas' commitment to share on the substance of Michael G's deposition testimony.[3]

[3] The COA's decision, which is in the Appendix, quotes verbatim much of the content of the voicemails. The full text of the voicemails are at CP 61 at p. 71:5-74:7 and 64.

Michael G testified that, while the voicemails did not mention the content of his testimony, he viewed Palumbo's and the Ota family members' communications as an attempt to bribe him. CP 60-70. Yet Michael G admitted Palumbo never said in the voicemails that he expected (or even wanted) him to testify any way other than truthfully. When specifically asked whether Palumbo said anything about having an expectation that he would testify untruthfully, the most Michael G could say was: "I think *maybe* you made inferences that *I could have taken* it the way that I've taken it." (Emphasis added.) CP 153:25-154:1.

Palumbo, however, explained:

> My goal in leaving the voicemail was to encourage Michael G. to speak with me so that I could understand his testimony, in the same way that many witnesses have during my years of practice. I was hoping that he would allow me to interview him so that I could understand his testimony; provide background information to him about the case so he would understand the basis for the claims; and, potentially, show him documents that would familiarize him with the facts and refresh his memory of events that occurred years ago. All of this is standard practice and none of it would have been for the purpose

of having him do anything other than testify knowledgeably, accurately, and truthfully. In my voicemail I also indicated that I was willing to have Michael G.'s wife, Lori join the call as well as my partner, Lynn Engel, who was deeply involved in the case.

In the voicemail, I referenced Michael G.'s potential financial interest in the case. Michael G.'s interest was reflected in tax returns and partnership K-1 statements that had been issued for years, some of which had been provided to Michael G. As a result, when I made reference to his interest, I assumed that this was not new information to him. I believe that assumption was entirely reasonable. In my voicemail I also stated that "I can assure you that given the fact that your son and -- and his wife have said from the beginning they feel an obligation to share proceeds with you, I'm happy to talk with you about that and pin them down on that on that commitment . . ." The reason that I made this statement is because it was unclear how the distribution provisions of the Generation V Operating Agreement would apply to a lawsuit settlement or judgment.

I thought it was important to mention Michael G.'s interest because I was well aware of the ill will between the parties and I did not want Michael G. to think that my clients were not going to honor any legal obligation they had to him. I was concerned that Michael G. believed that my clients would not honor that obligation and that that belief might have contributed to the parties' poor relationship.

I did not suggest, nor did I in any way, shape, or form state to Michael G., that he should testify in a misleading,

> incorrect, or false fashion. I have never done that and I never would. Nor did I state or suggest that Michael G.'s interest was in any way dependent on what he said or did not say at his deposition. As noted above, the plaintiffs already had acknowledged his interest in their depositions, so that fact was a matter of established record, irrespective of whatever he might say at his deposition.

CP 735 ¶ 7-736 ¶ 10.

Nor was the timing of the voicemails untoward. Neither the Otas nor their counsel had attempted to contact Michael G earlier because his decade-long estrangement from Stacey and Connie Ota was so severe that they thought it unlikely Michael G would speak to them. CP 273 ¶ 5. Only after the Wakazurus subpoenaed him and the Otas learned Michael G had spoken to the Wakazurus' counsel was the decision made to try to contact him. *Id.* ¶ 6.

D. The Trial Court Disqualifies All Three of the Otas' Counsel. The Court of Appeals Reverses Disqualification of Two of the Attorneys But Affirms the Holding That Palumbo Engaged in Sanctionable Bad Faith Conduct.

Without holding a hearing (despite both sides requesting one), and based solely on Michael G's testimony and the text

and timing of the voicemails, the trial court granted the Wakazurus' motion for sanctions and disqualified all three of Otas' counsel.

The trial court Order, entered one month before trial, besides disqualifying Palumbo, also disqualified the Otas' other counsel, Lynn Engel and Josh Krebs. The Order also directed the Wakazurus' counsel to refer the matter to the Bar Association's disciplinary counsel for further investigation and to refer the matter to the police/prosecutors for potential criminal investigation.[4] CP 574.

The Otas and all three of their counsel appealed the trial court's Order to the Court of Appeals. The COA reversed the disqualification of all three counsel, holding (i) that there had been no showing that Lynn Engel or Josh Krebs had done anything warranting any sanctions, and (ii) that the trial court

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[4] Neither the police nor the prosecutor's office have initiated any investigation since the matter was referred to them approximately two years ago. The Bar Association's inquiry is stayed.

needed to consider whether a lesser sanction was warranted regarding Palumbo. Employing the wrong review standard, and not following other published Washington precedent, the COA erroneously affirmed the holding that Palumbo had engaged in sanctionable bad faith conduct.[5]

V. ARGUMENT

A. In Refusing to Review the Trial Court's Bad Faith Determination *De Novo*, the Court of Appeals' Opinion Conflicts With Decisions From This Court and From Other Appellate Courts. RAP 13.4(b)(1) & (2).

The COA erroneously treated the issue of what constitutes sanctionable bad faith exclusively as a factual issue. Whether a party acts in bad faith presents a mixed question of fact and law. *See e.g.*, *Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 102, 332 P.3d 1136 (2014) (citing *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013), *rev.*

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[5] The COA also denied the Otas' request to reassign this matter to a new judge on remand. The Otas have filed a Petition for Review regarding that aspect of the COA decision. Palumbo joins in the Otas' Petition for Review.

denied. 180 Wn.2d 1016, 327 P.3d 55 (2014)). That is, the court must apply "legal precepts"—the definition of sanctionable bad faith—to the facts at issue. *Faulkner*, 183 Wn. App. at 102 (quoting *Francis*, 178 Wn. App. at 52). Whether the underlying facts amount to sanctionable bad faith is a legal question reviewed *de novo. Id*.

The facts here were uncontested. Palumbo left the voicemails—they said what they said—and their content was both accurate and well-supported by evidence. The Otas had explained at length in their briefing below that while they contested certain "findings," they did so only in an abundance of caution because the trial court had imbedded legal conclusions in what it labeled "findings." Ota Reply at 7-8. But the COA failed to review the trial court's bad faith determination *de novo*. Indeed, it failed to even address this issue. This creates a conflict with published appellate precedent warranting this Court's review.

In *Faulkner*, the issue was whether an agency had acted in bad faith regarding its document production obligations. The court noted that whether the agency acted in bad faith "presents a mixed question of law and fact, in that it requires the application of legal precepts (the definition of 'bad faith') to the factual circumstances (the details of the PRA violation)." *Faulkner* at 101-02. The court also stated:

> When underlying facts are uncontested, we apply de novo review to ascertain whether the facts amount to bad faith.

Id. at 102 (citing *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 52, 313 P.3d 457 (2013). *See also Adams v. Dep't of Corr.*, 189 Wn. App. 925, 939, 361 P.3d 749 (2015) (quoting *Francis'* statement that bad faith presents a mixed question of law and fact).

Here, regarding Palumbo, the facts regarding what he said to Michael G, and when he said it, are not contested. They are in the voicemails. Nor is it contested that what Palumbo said in the voicemails was established by the evidence and true.

Palumbo's clients were, in fact, claiming Michael G had been a Gen V partner; Gen V's tax returns and corporate records did, in fact, show Michael G had been a partner; and the Otas had both testified they felt obligated to share a portion of any recovery with Michael G. The issue here then was a legal one: does the timing and the content of the voicemails amount to sanctionable bad faith under a court's inherent authority? That legal issue the COA should have, but did not, review *de novo*.

The COA's use of the wrong review standard also is at odds with *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) ("*Firestorm*"). Like this case, *Firestorm* involved a court's inherent authority "to fashion and impose appropriate sanctions…" *Id.* at 139, 916 P.2d at 416. There it was a Civil Rule that set forth the "legal precept." The Supreme Court expressly held that whether the Civil Rule had been violated was a question of law to be reviewed *de novo*. *Id.* at 135, 916 P.2d at 414. Here the "legal precept" is what constitutes

sanctionable bad faith. That is a legal issue that the COA should have reviewed *de novo*.

The COA here held that "the finding that Palumbo's statements to Michael established bad faith" is reviewed for substantial evidence. No. 82840-1-I at 16. To the extent it addressed the review standard, it held that "even when the superior court judge rests its ruling entirely in written submissions, the substantial evidence standard of review is appropriate when the matter turns on credibility determinations and a factual finding of bad faith." No. 82840-1-I at 10 (citing *Marriage of Rideout*, 150 Wn. App. 337, 351, 77 P.3d 1174 (2003)). *Rideout* applied substantial-evidence review to factual findings giving rise to the bad faith determination, not to the legal precept of what constitutes sanctionable bad faith. 150 Wn. App. at 353-55. In this way, *Rideout* is consistent with *Faulkner* and *Francis*, *supra*. But the issue here is the next step—applying *de novo* review to the legal question whether the facts found constitute sanctionable bad faith under a court's

inherent authority. The COA failed to do so, contrary to *Faulkner*, *Francis*, *Firestorm* and other appellate authority.

B. By Not Addressing Palumbo's Motive or Intent, the Appellate Opinion Is in Conflict With *Firestorm.* RAP 13.4(b)(1).

In *Firestorm*, as here, the trial court disqualified counsel without considering lesser sanctions. *Firestorm* at 142, 916 P.2d at 417. *Firestorm* notes that disqualification largely was limited to where counsel wrongfully accessed an opponent's privileged information—a consideration not present here. More importantly, *Firestorm* requires consideration of counsel's intent and motive. *Id.* at 142-43, 916 P.2d at 418 (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993)).

Although the attorneys in *Firestorm* had engaged in misconduct (a Civil Rule violation), the court considered whether their intent and motive were reasonable. *Id.* at 144. That is—conduct alone cannot justify the sanction—what matters is their motive.

Here, the trial court declined to even hold a hearing. The COA noted that was "very unusual" since the trial court directed a report to the prosecutor's office and disciplinary authorities. No. 82840-1 at 13-14. Yet the COA ignored Palumbo's belief that Michael G would likely take the position that he continued to have an interest in the venture. Palumbo had no reason to believe Michael G was going to dispute his interest in Gen V, or that the Ota-Wakazuru partnership continued notwithstanding the deed in lieu transaction. Just the opposite. Palumbo had the Gen V tax returns and operating agreements showing Michael G as a partner. Palumbo also had taken Jim Elliott's deposition, who testified the deed in lieu did not change anything regarding the Ota-Wakazuru venture. And Palumbo knew his clients had reaffirmed that, because Michael G had been a partner, they intended to share any recovery with him. There was no evidence that, prior to Michael G's deposition, Palumbo had any reason to believe that Michael G's

views were not aligned with his clients. The COA's failure to consider these facts was contrary to *Firestorm*.

C. By Conflating Conduct Deemed Improper With Sanctionable Bad Faith, the Court of Appeals Decision Is at Odds With *Andren*. RAP 13.4(b)(2).

The trial court, citing *Andren v. Dake*, 14 Wn. App. 2d 296, 321, 472 P.3d 1013 (2020), held that "inappropriate and improper conduct" was sufficient to establish sanctionable bad faith. *Andren* did hold that the finding of "inappropriate and improper" conduct there was "tantamount to a finding of bad faith." But in *Andren* the "inappropriate and improper" conduct was an attorney's repeated, "rampant," and continuing violations of trial court evidentiary rulings despite multiple warnings to stop. It is one thing to hold that repeated violations of express court orders despite warnings is bad faith warranting sanctions. It is something very different, however, where (as here) no Civil Rules were violated, and the lower courts did not

find any RPC violations, violations of prior court orders, or continuing wrongful conduct after multiple warnings.

Andren also involved only monetary sanctions. The court was not even addressing lesser sanctions. Here, the most severe sanctions possible were sought: dismissal or disqualification. When such severe sanctions are at issue, rather than monetary sanctions, any wrongful conduct, without more, is not sanctionable bad faith.

By conflating the conduct found objectionable with sanctionable bad faith, the COA erred.

VI. CONCLUSION

Review should be accepted. The COA's decision conflicts with published appellate precedents.

I certify that this document contains 4,748 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 19th day of April, 2023.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 19th day of April, 2023, a true copy of the foregoing was served on each and every attorney of record herein via E-Service:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 19th day of April, 2023.

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APPENDIX

EXHIBIT 1

FILED
2/13/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL S. OTA and CONNIE OTA, a married couple, Appellants, v. RICHARD M. WAKAZURU and KENNETH WAKAZURU, Respondents.	No. 82840-1-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — This matter comes before us under discretionary review after the trial court found appellants' counsel engaged in bad faith by attempting to influence a witness with a financial incentive prior to his deposition with the respondents. Though substantial evidence supports the trial court's finding of bad faith as to the counsel who engaged in the relevant acts, the trial court imposed the drastic sanction of disqualifying all three of appellants' counsel without a record of having considered lesser sanctions. Accordingly, we reverse the order disqualifying all three attorneys and remand for the trial court to consider possible lesser sanctions as to the counsel the trial court found acted in bad faith.

Citations and pin cites are based on the Westlaw online version of the cited material

FACTS

In March 2020, Michael S. Ota (Stacey)[1] and Connie Ota (Connie), a married couple (collectively the Otas), filed a complaint[2] against Richard Wakazuru and Kenneth Wakazuru (collectively the Wakazurus). The Otas' attorneys were Ralph Palumbo, Lynn Engel, and Joshua Krebs. At issue in the underlying case is whether Stacey and the Wakazurus had entered into a business partnership to develop real property into an RV dealership with Stacey receiving 80 percent interest in the business and the Wakazurus receiving 20 percent.

According to the Otas, in 2006, Stacey, his father Michael G. Ota (Michael), and the Wakazurus discussed potentially developing real property in Sumner, Washington into an RV dealership. The Wakazurus already owned an RV business. The property was owned by Michael and his ex-wife. The Wakazurus loaned $1 million to Michael and Stacey who signed a promissory note so that Michael could purchase his ex-wife's interest in the property and possess the full title.

The Otas claim that the Wakazurus gave the loan in exchange for 20 percent interest in a partnership between them and Stacey and Michael to work together to develop the property as an RV dealership and share in any profits

[1] We refer to the parties by their first or middle names for clarity because some parties share the same first and last names.

[2] The complaint alleges breach of agreement, breach of fiduciary duty, breach of good faith and fair dealing, promissory estoppel, and unjust enrichment.

derived therefrom. Stacey claims at that time he held approximately 82 percent of the remaining 80 percent interest.

In 2008, Michael, who held title to the property, executed a deed to Generation V, LLC (Gen V). In June 2012, Stacey and Michael entered into a forbearance agreement acknowledging they were in default on the promissory note and agreeing to provide a first lien deed of trust on the property as security and delaying collection on the note to end of August. In September, Michael executed a quitclaim deed to R & K West Valley Highway Investments LLC[3] in lieu of foreclosure and believed he was giving up any interest he had in the property. Michael moved to Arizona and did not speak with Stacey or Connie for about a decade. The two admittedly have been estranged. Gen V[4] dissolved in 2012.

The Otas claim Stacey in coordination with the Wakazurus had convinced Michael to convey the property to avoid exposing it to Michael's financial obligations and destroy the partnership's development plans. The Otas claim that after this transaction, Michael was "no longer participating in the Partnership," leaving Stacey with all 80 percent interest in any profits derived from the property and the Wakazurus holding the remaining 20 percent. The Otas claim they continued day-to-day maintenance of the property as well as significant issues relating to regulatory and wetlands issues.

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[3] The Wakazurus assigned their interest in the property to R & K West Valley Highway Investments, LLC.

[4] Appellants concede they are not able to locate an executed copy of the Gen V Operating Agreement. Only an unsigned, undated draft operating agreement is in the record.

The Wakazurus, who deny ever agreeing to be in a business partnership with Stacey, sold the property in September 2017 for about $6.5 million and paid Stacey a total of $125,000 for "his efforts on the Property, and in recognition of the longstanding family relationships of certain of the parties." The Otas filed their lawsuit in March 2020.

On March 25, 2021, the Wakazurus served Michael with a subpoena duces tecum for his deposition and the production of documents. They scheduled his deposition for April 9, 2021. Following the subpoena, Connie called Michael prior to his deposition, but he did not answer. On March 26, Connie left the following voicemail:

> Hey, [Michael], it's Connie again. Just give me a call and see if I can get in touch with you this afternoon. I left Lori a message as well. I'm calling in regards to a matter in one of the parcels in Sumner that we believe you and all of us still have ownership in. So we thought that it would be wise to discuss with you and Lori. So if you could give us a call back that would be great. And it's Connie calling in regards to the parcel of land in Sumner that we believe you guys have an ownership interest in as well.

Prior to the subpoena, Connie and Stacey had never indicated to Michael that they believed he still had an ownership interest in the Sumner property.

On March 27, the Otas' children flew to Arizona to see their grandfather, Michael, and his wife Lori Ota (Lori) and urged Michael to talk to the Otas' attorney, Palumbo. Michael had not seen his grandchildren in over 10 years. According to Michael's grandson, Susumu Ota (Susumu), Michael agreed that the Otas' attorneys could call Michael. Michael's recollection differed. He said his grandchildren flew to Arizona to see him unannounced and wanted Michael to talk to Palumbo. However, according to Michael, "[W]e just said we didn't want

to get involved. Bridges have been burned and I actually never want to speak to my son again. That's how contentious everything was." But Michael also testified that he told his grandsons he would "think about" talking to Palumbo.

After the visit, Michael's grandchildren continued to call and leave voicemails for him requesting that he discuss the lawsuit with Palumbo.

On April 1, Susumu exchanged text messages with Lori, Michael's wife, who wrote, "if the attorneys want to call that's fine" and that Michael "is willing to hear from the attorneys. And we can go from there."[5] Palumbo called Michael and left a voicemail identifying himself as the Otas' attorney and that he wanted to talk to Michael. This was the first in about four voicemails Palumbo left for Michael.

On April 6, three days before Michael's deposition, Palumbo left Michael a voicemail that said the following in relevant part:

> I can tell you that Stacey and Connie have told us from the very beginning that if we can win this case, they feel an obligation to share some of the settlement or judgment with you along the lines of the – the split in the Gen V, LLC. I have no idea what happened between you and your son and I'm sure there's nothing I can do to repair it, but if you would be willing to talk with me, I would really appreciate it. . . .
>
> And then the – my partner who's been working on all this, Lynn Engel, is intimately involved and she knows a lot of the details and we would – we would really appreciate the opportunity to talk with you and I can assure you that given the fact that your son and – and his wife have said from the beginning they feel an obligation to share proceeds with you, I'm happy to talk with you about that and pin them down on that – on that commitment because my view of this is that the Wakazurus screwed the Ota family. They screwed you, they screwed Stacey, they screwed Dan – Connie,

[5] Screenshots of the text messages was submitted as exhibits to Susumu's declaration in support of the Otas' opposition to the motion for sanctions and was considered by the trial court.

> they screwed Dan, and they absolutely should not be permitted to get away with what they – what they did and we – we've been looking at how much money your family should have received and we think it's in the 3 to $5 million range, we're still working on that.
>
> But there's no question in my mind that they made a deal with all of you to have a partnership in which you would have – your family would have 80 percent, they would have 20 percent. They made payments on the property, which would be like capital contributions, so their percentage probably is a bit larger than 20 percent and we're still working on figuring out how much money your family put into it and how much money they did.
>
> I'm absolutely confident that when you were convinced to voluntarily transfer the property to the Otas – or to the Wakazurus, they had made a commitment that they would hold the property and honor your family's share in the – in the property, which they didn't do. The closest we can tell the property at that point in time was worth about $5 million.
>
> The debt on the promissory note, which was never a promissory note, was a million seven. So even if that was a legitimate promissory note, there was no way under any kind of legal proceeding that they – that they could have recovered more than 1.7 million, and instead, your family voluntarily gave them property worth $5 million and it – without your cooperation and – and Stacey and Connie encouraging you to do this, they never would have gotten the property. And even if you had to pay the million seven debt, you would have been a hell of a lot better off doing that and keeping a piece of property that was worth at least $5 million and I think probably more.
>
> So that's a very, you know, short view, contrary to what – what they claim. Gen V, LLC was formed, it filed tax returns, you signed a deed transferring the property to Gen V, LLC, which you would not have done but for the promises that the Wakazurus were making to you, he and Connie.

The next day, two days before Michael's deposition, Lori received text messages from Susumu, and Michael received multiple voicemails from Palumbo.[6] Susumu followed up with a text message to Lori trying to schedule a conference call with the attorneys, but Lori wrote, "I'm really sorry but there is

[6] It is not apparent from the record the chronological order of the text messages as compared to the voicemails from Palumbo on April 7, 2021.

nothing I can do. What your family did to him is just unforgivable and that's a fact we have accepted to live with" and that there was nothing else she could do at that point. That same day, Palumbo called Michael and left a voicemail stating, "I think that we can work out something that's to your benefit. I know this is a difficult relationship you have with your son and Connie, but we are very – very willing to try to collect money on your – on your behalf as well as [the Otas']." Palumbo followed up the same day with another voicemail telling Michael that his grandsons were thinking about again flying down the next day to talk before the deposition. He stated, ". . . I just wanted to let you know that they're thinking about it so you could call them and say not to bother, but it'd really be I think helpful, certainly helpful for me and I think helpful for you and Lori if we talked before Friday."

Michael had Lori call Palumbo. Lori was very angry and told Palumbo to stop calling and they did not want to talk to them, and she told him that they did not want the grandkids to fly down again.

Michael testified at his deposition, which was held April 9, that he understood Palumbo's voicemails to be "shady" and a "pay for play" scheme, i.e., to constitute a bribe. He also testified that, although the voicemails do not mention the specific desired content of his testimony, he believed the voicemails were intended to convey to him the talking points the Otas and their attorneys wanted him to testify to, and if he did, he would be financially rewarded.

On April 16, the Wakazurus filed a motion for sanctions and provided a transcription of Michael's deposition, which included the transcription of

Palumbo's voicemails. They requested the trial court dismiss the Otas' complaint, disqualify the Otas' counsel, and other sanctions the court deemed appropriate. The Otas opposed the motion, contending that the Wakazurus had "not submitted any evidence that Plaintiffs intended to influence Michael G.'s testimony or made any suggestion or request about the content of Michael G.'s testimony." All parties requested oral argument. The court did not grant the requests for oral argument and entered its ruling based on the pleadings.

On April 30, the court entered its findings of facts, conclusions of law, and order on defendants' motion for sanctions. The court found that the voicemails appeared to show Palumbo communicated the intent to share proceeds of this lawsuit with Michael if the Otas prevailed, and that Palumbo assured Michael that he would "pin" the Otas on such a commitment. The court also made a finding of bad faith:

> Here, serious and apparently factually based allegations are made that plaintiffs' counsel attempted to influence the judicial process by inducing [Michael] to testify favorably for plaintiffs and was told of a potential share of any settlement or judgment. The amount mentioned could be viewed as a substantial financial incentive. The Court also notes the direct contacts by plaintiff [Connie] and [Michael]'s grandchildren to persuade [Michael] to speak with Mr. Palumbo. The Court believes that a showing of bad faith has been made.

The court ordered that the Otas' counsel be disqualified from the case and ordered defense counsel to make a referral to the WSBA disciplinary counsel and to police/prosecutors for further investigation. The court stayed the lawsuit stating it would review the status of these referrals and any ensuing

investigations at the end of September 2021. At the time the court entered its order, the trial had been scheduled for June 7.

The Otas and Palumbo filed a motion for reconsideration and clarification. In addition to Palumbo denying he acted improperly, he also asked the court to clarify whether it was disqualifying only him based on the court's language in the order using "counsel" in the singular, or whether the court was disqualifying co-counsel Engel and Krebs as well. Wakazuru responded to the motion asking the court to disqualify all three attorneys because Krebs' declaration in support of the motion for reconsideration stated that he listened to the voicemails Palumbo left for Michael and they were "consistent" with what the three attorneys agreed should have been communicated. The trial court denied the motion for reconsideration and clarified that its previous sanctions order disqualified plaintiffs' counsel, which encompassed Palumbo, Engel, and Krebs.

The Otas and each of the disqualified attorneys filed motions for discretionary review. This court consolidated the motions. A commissioner of this court granted discretionary review.

DISCUSSION

Standard of Review

The parties agree that the trial court's ultimate decision to impose the sanction of disqualification is reviewed for abuse of discretion. Hedger v. Groeschell, 199 Wn. App. 8, 14, 397 P.3d 154 (2017). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable

grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

However, the parties disagree over the standard applied to reviewing the underlying factual basis of the trial court's decision to sanction. The appellants contend that this court's review is de novo because the trial court based its decision solely on the written record, which the appellate court is as well positioned to review and render a decision on. The respondents contend that the trial court's findings should be reviewed for substantial evidence. Under the circumstances of this case, we agree with the respondents. "We review a trial court's challenged findings of fact for substantial evidence." Andren v. Dake, 14 Wn. App. 2d 296, 306, 472 P.3d 1013 (2020).

We recognize that where "the record at trial consists entirely of written documents and the trial court therefore was not required to 'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,' the appellate court reviews de novo." Dolan v. King County, 172 Wn. 2d 299, 310, 258 P.3d 20 (2011) (internal quotation marks omitted) (quoting Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994); see also Robinson v. Am. Legion Dep't of Wash., Inc., 11 Wn. App. 2d 274, 286 n.4, 452 P.3d 1254 (2019).

However, even when the superior court judge rests its ruling entirely on written submissions, the substantial evidence standard of review is appropriate when the matter turns on credibility determinations and a factual finding of bad faith. In re Marriage of Rideout, 150 Wn. 2d 337, 351, 77 P.3d 1174 (2003).

This court has applied such a standard even in a non-family case scenario. Robinson, 11 Wn. App. 2d at 286 (applying substantial evidence review to a written record while recognizing that whether a person acted in good faith is an inherently factual issue).

"'When jurisdiction is . . . conferred on a court or judicial officer all the means to carry it into effect are also given.'" State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000) (second alteration in original) (quoting RCW 2.28.150). In turn, in such situations, "'[d]ecision*s* either denying or granting sanctions . . . are *generally* reviewed for abuse of discretion.'" Id. (emphasis added) (second alteration in original) (quoting Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). We cannot envision a scenario where an appellate court is in a better position than a trial court to consider in the first instance the factual scenario and circumstances underlying a decision to sanction a party's counsel. In the instant case, the court's finding of bad faith is inherently a factual finding and, by rejecting appellant's general denial of attempting to influence Michael, the trial court made a credibility determination.

Finally, "[t]here is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." Andren, 14 Wn. App. 2d at 306 (quoting State v. Merrill, 183 Wn. App. 749, 755, 335 P.3d 444 (2014)). Substantial evidence is defined as a "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing Wenatchee Sportsmen Ass'n v.

Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). "If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently." Sunnyside Valley Irrig., 149 Wn.2d at 879-80. "The label applied to a finding or conclusion is not determinative; we 'will treat it for what it really is.'" Nguyen v. City of Seattle, 179 Wn. App. 155, 163, 317 P.3d 518 (2014) (quoting Para–Med. Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987)).

Challenged Findings of Fact

The appellants challenge multiple findings of fact. First, they challenge finding of fact 4, which provides the following:

> [Michael] is plaintiff [Stacey's] father, and plaintiff [Connie's] father in law. Prior to [Michael's] deposition being noted, the parties seem to agree that plaintiffs had not made any efforts to contact [Michael] for many years. [Michael] apparently knew nothing about this lawsuit, despite the fact that plaintiffs alleged he was one of four partners to their alleged partnership, until defense counsel called him in March 2021 following the plaintiffs' depositions. Prior to his deposition being noted by defendants for April 7, 2021,[7] the record indicates that plaintiffs had not communicated to [Michael] an intent to "share proceeds" of this lawsuit, and the Court has some difficulty understanding [Connie's] voicemail to [Michael] shortly before his scheduled deposition that the plaintiffs believed [Michael] owned an interest in real property involved in this lawsuit given the allegations in Plaintiffs' [sic] complaint.

Specifically, they contend that the court erred in finding that the court had "'some difficulty understanding' why the Otas believed [Michael] has an interest in real property involved in the underlying lawsuit." Appellants question the court's determination that Connie's voicemail was suspect despite it being consistent

[7] The deposition was actually held on April 9, 2021.

with earlier depositions given by Stacey and Connie that Michael was part of the partnership and that agreeing to the forbearance agreement was a way to protect everyone's interest, including Michael's. Whether the Otas' have consistently maintained that the reason Stacey convinced his father to enter into such an agreement in order to protect Michael's interest does not change the fact that 1) the Otas claimed in their complaint that after the forbearance transaction, Michael was "no longer participating in the Partnership," leaving Stacey with all 80 percent interest in any profits derived from the property and the Wakazurus holding the remaining 20 percent, and 2) it was not until the day after the Wakazurus served a subpoena on Michael that Connie communicated to Michael that she and Stacey believed Michael "still" had ownership in one of the parcels in Sumner.

Insofar as the court's comment as to its own observation may constitute a finding of fact, it is supported by the record as to why the court had "some difficulty understanding" Connie's voicemail given the Otas' complaint. It is arguable whether the court's difficulty in understanding was an expression of skepticism or a genuine question of confusion. We note that while any lack of clarity may have been resolved by a holding a hearing, this court will not substitute its judgment for that of the trial court in this situation. Sunnyside, 149 Wn.2d at 879-80.

Appellants next challenge finding of fact 7, arguing the court erred in finding that "'actions by plaintiffs' counsel seriously concern the Court and need to be referred to appropriate authorities." While we note it is very unusual to

include such directives in a court order imposing sanctions, particularly when a trial court has not conducted a hearing of any kind, this is not a finding of fact and the appellants do not challenge the court's authority to request defense counsel to make referrals to WSBA or police/ prosecutors for further investigation. We need not address it any further.

Appellants also challenge finding of fact 8, contending that the "court erred in finding that it need only consider 'bad faith' to disqualify the Otas' entire legal team and that bad faith requires nothing more than 'inappropriate and improper conduct.'" However, finding of fact 8 provides the following:

> The Court has the inherent authority to "enforce order in the proceedings before it" and to "provide for the orderly conduct of proceedings before it." State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000) (citing RCW 2.28.010(2)-(3)). The Court may, under its inherent authority to control litigation, fashion and impose appropriate sanctions. In re Firestorm, 129 Wn.2d 130, 139, 916 P .2d 411 (1996). In articulating sanctions under its inherent authority, this Court must make a finding of bad faith. Hedger v. Groeschell, 199 Wn. App. 8, 14, 397 P.3d 154 (2017) (citing S.H., 102 Wn. App. at 475). A party may demonstrate bad faith by inappropriate and improper conduct. Andren v. Dake, 14 Wn. App 2d 296, 321, 472 P.3d 1013 (2020) (citing S.H., 102 Wn. App. at 475).

The court merely provided case law to support its findings; it itself is not a finding of fact.

Appellants next challenge finding of fact 10, which states, "The Court has the authority and a duty to see to the ethical conduct of lawyers in proceedings before it and, upon proper grounds, can disqualify an attorney. Hahn v. Boeing

Co., 95 Wn.2d 28, 34, 621 P.2d 1263 (1980). Proper grounds are present here. This is an accurate statement of the law. We address below the appellants challenge of other findings related to bad faith.

Bad Faith

Appellants contend that the trial court applied the wrong legal standard of bad faith and substantial evidence does not support the court's finding of bad faith. We disagree that the trial court imposed the incorrect legal principles in this situation and disagree that there are no sufficient facts to justify the trial court's finding of bad faith.

The trial court cited Andren, which explicitly stated, "[A] trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith." Andren, 14 Wn. App. 2d at 321 (citing S.H., 102 Wn. App. at 475). Further, it added,

> "The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Sanctions may be appropriate if an act affects "the integrity of the court and, [if] left unchecked, would encourage future abuses."

Andren, 14 Wn. App. 2d at 321 (alteration in original) (internal quotation marks omitted) (quoting S.H., 102 Wn. App. at 475). The Otas fail to distinguish Andren.

Appellants also cite to Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004); and MacDonald v. Korum Ford, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) to argue that the trial court did not consider the proper objective standard, and that

it only ruled that bad faith means nothing more than "inappropriate and improper conduct." In the context of considering CR 11 sanctions, those cases discuss that courts should employ an objective standard in evaluating an attorney's conduct.

Contrary to the Otas' argument, the record establishes that the trial court did not base its ruling only on Michael's subjective belief rather than an objective inquiry. While the trial court mentioned Michael's subjective understanding of the voicemails, the court expressly enumerated and considered the whole record in making its determination, including objective evidence—the statements contained in Palumbo's voicemails and the text messages.

The next inquiry is whether substantial evidence supports the finding that Palumbo's statements to Michael established bad faith.

Appellants assert that Palumbo's calls were consistent with standard practice. They argue it was reasonable for them to believe that Michael had an interest in Gen V and thus an interest in the lawsuit, that the Otas intended to honor that interest if they prevailed, and that Michael agreed to receive their phone call.

Appellants appear to believe that the determination of whether the conduct constituted bad faith turns on whether the Otas reasonably believed that Michael had an interest in the lawsuit. The Otas misconstrue the trial court's concern. The concern is not whether counsel had a basis to support its legal theory or the decision to reach out to Michael prior to his deposition. The concern expressed

by the trial court is what was conveyed to Michael, how it was conveyed, and when it was conveyed.

Appellants contend that Palumbo "never even mentioned [Michael's] potential testimony, much less suggested that he should testify in any certain way" or "suggest that [Michael's] interest in any lawsuit proceeds depended on his deposition testimony, but simply stated the Otas' intent to honor his interest." Appellants challenge finding of fact 9, which provides:

> Here, serious and apparently factually based allegations are made that plaintiffs' counsel attempted to influence the judicial process by inducing [Michael] to testify favorably for plaintiffs and was told of a potential share of any settlement or judgment. The amount mentioned could be viewed as a substantial financial incentive. The Court also notes the direct contacts by plaintiff [Connie] and [Michael's] grandchildren to persuade [Michael] to speak with [Palumbo]. The Court believes that a showing of bad faith has been made.

Specifically, appellants challenge the court's language, "The amount mentioned could be viewed as a substantial financial incentive."

The trial court's presentation of Palumbo's statements must be viewed in context and not in isolation. The trial court noted the multiple statements of concern. Palumbo told Michael he thinks the lawsuit could be worth around 3 to 5 million dollars. In the messages left for Michael, the court noted the following statements by Palumbo:

> (1) "I think that we can work out something that's to your benefit"; (2) "we are very – very willing to try to collect money on your – on your behalf as well as theirs"; (3) and "it'd be really be helpful for me and I think helpful for you and Lori [Michael's wife] if we talked before Friday [the date of Michael's deposition]."

Additionally, Palumbo said, "I can tell you that Stacey and Connie have told us from the very beginning that if we can win this case, they feel an obligation to share some of the settlement or judgment with you. . ." This statement communicated to Michael that his chance of receiving money is dependent on the Otas winning their case against the Wakazurus.

As the trial court noted, these statements were made in the context of Palumbo sharing with Michael the Otas' theory of why they should win the case that involved how Palumbo viewed Michael's own interactions with the Wakazurus. Palumbo said, 1) "[The Wakazurus] made a deal with all of you to have a partnership in which you would have – your family would have 80 percent, they would have 20 percent", 2) "when you were convinced to voluntarily transfer the property to the Otas – or to the Wakazurus, they had made a commitment that they would hold the property and honor your family's share in the – in the property, which they didn't do", and 3) "Gen V, LLC was formed, it filed tax returns, you signed a deed transferring the property to Gen V, LLC, which you would not have done but for the promises that the Wakazurus were making to you, he and Connie."

The trial court further alluded to how unexpected this contact was. Michael had no recollection of ever talking to Stacey and the Wakazurus to develop the property as an RV dealership. Michael denied ever discussing verbally or in writing a profit-sharing arrangement. The trial court also emphasized the peculiar timing of this contact. Appellants failed to provide any

explanation as to why it was urgent to let Michael know before the deposition that if the Otas obtained a judgment or settlement, Michael would get a share.

In context, substantial evidence supports the court's finding that "[t]he amount mentioned could be viewed as a substantial financial incentive" for Michael to testify at the deposition consistent with Palumbo's version of events.

Substantial evidence supports the trial court's finding of bad faith as to Palumbo.

Disqualification

Appellants next contend that the trial court erred by not considering lesser sanctions before disqualifying all three counsel. We agree.

A trial court has "the authority and duty to see to the ethical conduct of attorneys in proceedings before it" and, on proper grounds, has the power to disqualify counsel. Hahn, 95 Wn.2d at 34. "'[A] trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith.'" Andren, 14 Wn. App. 2d at 321 (quoting S.H., 102 Wn. App. at 475). However, "[d]isqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary." Matter of Firestorm 1991, 129 Wn.2d 130, 140, 916 P.2d 411 (1996) (citing MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712, 718 (D.Conn.1991)).

In Firestorm, our Supreme Court concluded that the trial court erred in imposing the sanction of disqualification under CR 26 when an attorney engaged in ex parte contact with an opposing party's expert witness. 129 Wn.2d at 140. It

reasoned that the facts did not support disqualification because the expert did not have access to privileged information—he was not an integral employee of the company involved in litigation, and he was not privy to litigation strategy. Id. at 141.

The Firestorm court applied a Fisons analysis. Id. at 142 (citing Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d at 355-56). It explained that the Fisons court set forth principles trial courts should follow in fashioning appropriate sanctions under CR 26:

> First, *the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed.* The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.
>
> The purposes of sanctions orders are to deter, to punish, to compensate and to educate.

Firestorm, 129 Wn. at 142 (emphasis added) (citing Fisons, 122 Wn.2d at 355-56)). The court noted that discovery sanctions in general are meant to prevent attorney misconduct, and to the extent possible, individual parties should not be penalized for their attorneys' misconduct in the discovery process. Id. at 143. The Firestorm court held that the trial court failed to follow the guidelines set forth by Fisons, and the record did not reveal whether the court considered any other sanctions before disqualifying counsel—it noted that the court made no findings either way on this issue. Id. But the Supreme Court determined that after considering sanctions in light of the facts of that case, disqualification was not the least severe sanction adequate to serve the purpose of sanctions in that case.

Id. at 145. It accordingly reversed the trial court's order of disqualification and ordered reinstatement of counsel. Id. It ordered that on remand, the trial court must fashion an appropriate remedy consistent with the principles and guidelines set forth in the opinion. Id.

This court followed suit in Foss, adopting the principles of Firestorm and Fisons. Foss Mar. Co. v. Brandewiede, 190 Wn. App. 186, 189, 359 P.3d 905 (2015). In Foss, the trial court disqualified counsel based on an attorney's access to privileged information through discovery under CR 26(b). Foss, 190 Wn. App. at 189. We determined the trial court failed to consider on the record the principles and guidelines set forth in Firestorm and Fisons regarding (1) prejudice, (2) counsel's fault, (3) counsel's knowledge of privileged information, and (4) possible lesser sanctions. Id. In regard to the fourth factor, we noted that the "harsh sanction of disqualification of counsel should be imposed only if it is the least severe sanction adequate to address misconduct in the form of improper access to privileged information." Id. at 197. We further explained that "[n]o one factor predominates or has greater importance than others" and "[a]t a minimum, the record must permit us to evaluate the trial court's consideration of those four factors." Id.

Although the context in which the court disqualified counsel in Firestorm and Foss were different than the basis for disqualification in the instant case, we see no reason why the underlying principles and guidelines that relate to the severity of the sanction—disqualification of counsel—would not similarly apply

here.[8] While the instant case does not involve a discovery violation under CR 26 and does not involve concerns about obtaining privileged information, it does concern the integrity of the court and, if left unchecked, would encourage future abuses.

Because we recognize that disqualification of counsel should be imposed only when absolutely necessary as it is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel, when a trial court disqualifies counsel it must consider lesser sanctions in order to determine that disqualification is absolutely necessary. Appellants argue that the sanction of disqualification was far too severe because it forced the Otas to hire an entirely new legal team and recreate years of work at considerable time and expense weeks before trial.[9]

Following the applicable principles and guidelines from Fisons and Firestorm, the court should impose the least severe sanction that would be adequate to serve the purpose of the particular sanction. The sanction should ensure that the wrongdoer does not profit from the wrong. The wrongdoer's lack

[8] The Otas also cite to Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) (fashioning a three-part test based on Fisons that the court must consider on the record before imposing severe discovery sanctions under CR 37(b)). Under Burnet, before a trial court imposes a severe sanction, it should consider on the record (1) whether a lesser sanction would probably suffice, (2) whether the violation was willful of deliberate, and (3) whether the violation substantially prejudice the opposing party. Id. The Burnet analysis applies when severe sanctions are imposed for discovery violations and when a trial court excludes untimely evidence submitted in response to summary judgment motions. Keck v. Collins, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015).

[9] The trial court stayed the matter until at least September 30, 2021. The case remains stayed pending this appeal.

of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

Though the court entered written findings and conclusions identifying specific grounds it relied on as it related to Palumbo's actions, it made no mention of whether it considered lesser sanctions. Because there was no oral argument below, the record does not permit us to otherwise evaluate whether the trial court considered lesser sanctions. See Foss, 190 Wn. App. at 197 (holding that at a minimum, the record must permit us to evaluate the trial court's consideration of the factors outlined in Firestorm and Fisons).

Additionally, we note that the court's findings focused entirely on Palumbo's actions alone. It was only after the appellants submitted a motion for reconsideration and clarification the Wakazurus argued and the trial court clarified that disqualification of counsel should also apply to Krebs and Engel based on a declaration from Krebs. In his declaration in support of opposition to the motion for sanctions, Krebs stated, "I have listened to Ralph Palumbo's voicemail messages to Michael G. I believe Ralph Palumbo's messages are consistent with what he, Lynn Engel and I agreed we should communicate." The court did not enter any findings related to Krebs or Engel in its initial findings, nor did the court make additional findings when it clarified that the disqualification of counsel included Krebs and Engel.

Krebs testified that the purpose of calling Michael "was first to explain the facts of [the Otas'] case and offer to provide him with any documents that might refresh his memory so that he could testify truthfully and accurately." However,

Palumbo's voicemails did not just generally discuss the Otas' case, or share the fact that he generally believed that Michael also had an interest in the case, or offer to provide specific documents to refresh Michael's memory. Palumbo's voicemails went much further.

The record is unclear on how Krebs' admission that Palumbo's messages were "consistent" with what the three attorneys agreed should be communicated sufficiently imputes Palumbo's conduct to Krebs and Engel. Specifically, the record is unclear on why Palumbo's statements and timing of those statements support imposing the most severe sanction of disqualifying Krebs and Engel. We reverse the order disqualifying Krebs and Engle because no findings support either acted in bad faith.

Appellants argue that, even if the voicemails were improper, the Wakazurus were not prejudiced because they did not "profit" from the alleged "wrong." Specifically, they argue there was no prejudice because the Otas did not gain an advantage from the alleged misconduct. Certainly, in certain scenarios, a trial court could consider the fact that a party benefited from bad faith conduct when determining sanctions, which would suggest that the opposite is true as well. But that does not mean that a court should not impose any sanctions. The purposes of sanctions are to deter, punish, compensate and educate. Fisons, 122 Wn.2d at 356. "[A]ttempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding, necessarily have as their purpose and it is their natural tendency to obstruct

justice. They are offenses against the very object and purpose for which courts are established." State v. Stroh, 91 Wn.2d 580-582, 588 P.2d 1182 (1979).

Appellants argue that nothing in the record supports Palumbo trying to "influence" Michael's testimony because they were simply reiterating what the Otas' presented to be true. It is true that nothing in the record suggested that prior to Michael's deposition, Palumbo knew that Michael denied ever having agreed verbally or in writing to a profit-sharing agreement with the Wakazurus. At the same time, Palumbo's voicemails suggested that he was not interested in finding out what Michael's position was, but instead suggested what it should be in order for the Otas to win their case and share their settlement or judgment with Michael.

However, despite substantial evidence supporting the finding of bad faith as to Palumbo, because the trial court did not expressly consider possible lesser sanctions, we also reverse the trial court's disqualification order as to Palumbo.

Reassignment

The Otas request this court reassign this matter to a different judge on remand. However, the Otas have not established prejudice sufficient to justify reassignment. To justify reassignment to a new judge, a party must "submit proof of actual or perceived bias to support an appearance of partiality claim." GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 154, 317 P.3d 1074 (2014). Imposing sanctions is not enough to rise to the level of bias or perceived bias. We deny the Ota's request to reassign this matter to a different judge on remand.

CONCLUSION

Substantial evidence supports a finding of bad faith only as to Palumbo. Even with that finding, we conclude the trial court's order of disqualification does not satisfy the applicable principles and guidelines of Fisons and Firestorm. We therefore reverse the trial court's order of disqualification as to all three counsel. On remand, any order of disqualification will require, at minimum, the consideration and analysis of possible lesser sanctions as to Palumbo.[10]

Colum, J.

WE CONCUR:

Díaz, J.

Smith, A.C.J.

[10] Because we reverse the order of disqualification, we need not consider the Wakazurus' request for attorney fees under RAP 18.1(a).

EXHIBIT 2

LIMITED LIABILITY COMPANY OPERATING AGREEMENT

OF

GENERATION V, LLC

a Washington Limited Liability Company

Dated and Effective

as of

July ___, 2008

OPERATING AGREEMENT

OF

GENERATION V, LLC

This Operating Agreement ("Agreement") of GENERATION V, LLC, a limited liability company organized pursuant to the Washington Limited Liability Company Act, is entered into and shall be effective as of July ___, 2008.

ARTICLE 1: DEFINITIONS

For purposes of this Agreement, unless the context clearly indicates otherwise, the terms of this Agreement shall have the meanings ascribed in Appendix I.

ARTICLE 2: FORMATION

2.1 **Agreement.** For and in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Persons executing this Agreement hereby agree to the terms and conditions of this Agreement, as it may from time to time be amended according to its terms. It is the express intention of the initial Members that this Agreement shall be the sole agreement of the parties with respect to the matter covered herein, and, except to the extent a provision of this Agreement expressly incorporates federal income tax rules by reference to sections of the Code or Regulations or is expressly prohibited or ineffective under the Act, this Agreement shall govern, even when inconsistent with, or different than, the provisions of the Act or any other law or rule. To the extent any provision of this Agreement is prohibited or ineffective under the Act, this Agreement shall be considered amended to the smallest degree possible in order to make the Agreement effective under the Act. In the event the Act is subsequently amended or interpreted in such a way as to make any invalid provision of this Agreement valid, such provision shall be considered to be valid from the effective date of such interpretation or amendment.

2.2 **Name.** The name of the Company is Generation V, LLC and all business of the Company shall be conducted under that name or under any other name or designation selected by the Company (to the extent permitted by applicable law).

2.3 **Term.** The Company shall have perpetual existence, and no date for dissolution of the affairs of the Company has been established. The term may be altered by amendment to this

Agreement and the Certificate of Formation, and the Company may be sooner dissolved and its affairs wound up in accordance with the Act or this Agreement.

2.4 **Registered Agent and Office.** The Company's initial registered agent and the address of its initial registered office in the State of Washington are as follows:

Name	Address
Mark Albertson	Albertson Law Group 124 Fourth Avenue South, Suite 200 Kent, Washington 98032

The registered office and registered agent may be changed from time to time by filing an amendment to the Certificate of Formation.

2.5 **Principal Office.** The Principal Office of the Company shall be located at 23051 Military Road South, Kent, Washington 98032, or at such other address as the Company may determine from time to time.

ARTICLE 3: NATURE OF BUSINESS

The Company may engage in any lawful business permitted by the Act or the laws of any jurisdiction in which the Company may do business, including, without limitation, the business of owning, improving, developing, leasing, selling, and investing in real property both in and outside the State of Washington, and any ancillary activities; and the ownership of interests in any independent entity engaging in any of such activities. The Company shall have the authority to do all things necessary or convenient to accomplish its purpose and operate its business as described in this Article 3. The authority granted to the Members hereunder to bind the Company shall be limited to actions necessary or convenient to the business of the Company, as it may exist from time to time.

ARTICLE 4: LIABILITY OF UNIT HOLDERS TO THIRD PARTIES

Except as otherwise provided herein, the debts, obligations, and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the Company; and no Unit Holder of the Company shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Unit Holder or Manager of the Company.

ARTICLE 5: INDEPENDENT ACTIVITIES OF UNIT HOLDERS

5.1 **Competition Agreement.** Except as provided in any other written agreement by or among the Company and its Unit Holders, Unit Holders shall be entitled to enter into transactions that may be considered to be competitive with, or a business opportunity that may be beneficial to, the Company, it being expressly understood that some of the Unit Holders may enter into transactions that are similar to the transactions into which the Company may enter. Notwithstanding the foregoing, Unit Holders shall account to the Company and hold as trustee for it any property, profit, or benefit derived by the Unit Holders, without the consent of the other Unit Holders, in the conduct and winding up of the Company business or from a use or appropriation by the Unit Holders of Company property including information developed exclusively for the Company and opportunities expressly offered to the Company.

5.2 **Unit Holders Transacting Business with the Company.** A Unit Holder does not violate a duty or obligation to the Company merely because the Unit Holder's conduct furthers the Unit Holder's own interest. A Unit Holder may lend money to and transact other business with the Company. The rights and obligations of a Unit Holder who lends money to or transacts business with the Company are the same as those of a person who is not a Unit Holder, subject to other applicable law. No transaction with the Company shall be voidable solely because a Unit Holder has a direct or indirect interest in the transaction if either (i) the transaction is fair to the Company, or (ii) the disinterested Manager(s) or disinterested Unit Holders know of the material facts of the transaction and of the Unit Holder's interest, and authorize, approve, or ratify the transaction.

ARTICLE 6: NAMES AND ADDRESSES OF UNIT HOLDERS

The names and addresses of the initial Unit Holders are set forth on the attached Schedule I and incorporated herein by this reference. Such Schedule may be amended or restated from time to time.

ARTICLE 7: MANAGEMENT RIGHTS AND DUTIES

7.1 **Original Manager.** All initial decisions concerning the business affairs of the Company shall be made by Michael Stathis Ota, who is hereby designated as the initial Manager of the Company. As used herein the term "Manager" shall mean the initial Manager and any duly elected replacement manager or managers.

7.2 **Term.** Each Manager shall have management authority until the earliest of: (i) the Dissociation of the Manager as a Member; (ii) removal of the Manager as a Member; or (iii) election of a replacement for the Manager.

7.3 **Management.** The business and affairs of the Company shall be managed exclusively by the Managers. Except as otherwise expressly provided in this Agreement, the initial Manager and any subsequently elected Managers shall have full and complete authority, power and discretion to manage and control the business, affairs and Properties of the Company, to make all decisions regarding those matters, and to perform any and all other acts or activities customary or incident to the management of the Company's business, including, but not limited to:

7.3.1 institution, prosecution, defense, compromise and settlement of any Proceeding in the Company's name (including without limitation any Proceeding related to permitting or improvement of any Company real property);

7.3.2 purchase, receipt, lease or other acquisition, ownership, holding, improvement, use, and other dealing with, Property (including without limitation real property), wherever located;

7.3.3 sale, conveyance, improvement, mortgage, pledge, lease, exchange, and other disposition of Property, including real property;

7.3.4 entering into contracts and guaranties; incurring of liabilities; borrowing Money, issuance of notes, bonds, and other obligations; and the securing of Company obligations by mortgage or pledge of any of its Property or income;

7.3.5 lending of Money, investment and reinvestment of the Company's funds, and receipt and holding of Property as security for repayment, including, without limitation, loaning Money to, and otherwise helping Unit Holders, employees and agents;

7.3.6 conduct of the Company's business, the establishment of Company offices, and the exercise of the powers of the Company within or without the State of Washington;

7.3.7 appointment of employees and agents of the Company, the defining of their duties and the establishment of their compensation;

7.3.8 making of donations for the public welfare or for religious, charitable, scientific, literary or educational purposes;

7.3.9 payment or donation, or any other act that furthers the business and affairs of the Company;

7.3.10 payment of compensation to any or all Unit Holders and employees on account of services rendered to the Company, whether or not an agreement to pay such compensation was made before such services were rendered;

7.3.11 purchase of life insurance for any of the Company's Unit Holders or employees, for the benefit of the Company;

7.3.12 participation in partnership agreements, joint ventures, or other associations of any kind with any Person, including any merger, share exchange, or affiliate relationship with any other Person or entity;

7.3.13 indemnification of any Unit Holder or other Person;

7.3.14 the degree to which the Company should retain Reserves for anticipated or unanticipated expenses; and

7.3.15 whether and when the Company shall redeem Preferred Units as provided in Article 18 below.

Only those actions and decisions expressly reserved to the Members hereunder (including in Article 8 below) shall require approval by the Members. Unless authorized to do so by this Agreement, no Unit Holder, employee or other agent of the Company shall have any power or authority to bind the Company in any way, to pledge its credit or to render it liable for any purpose, all of the foregoing being the sole prerogative of the Managers.

7.4 **Limitation On Liability; Indemnification.** No Unit Holder or Manager shall be liable, responsible or accountable in damages or otherwise to the Company or other Unit Holders for any act or omission by any such Person performed in good faith pursuant to the authority granted to such Person by this Agreement or in accordance with its provisions, and in a manner reasonably believed by such Person to be within the scope of the actual authority granted to such Person and in the best interest of the Company; provided that such act or omission did not (a) constitute fraud, intentional misconduct, bad faith or gross negligence; (b) involve intentional misconduct or knowing violation of law by the Unit Holder or Manager, or constitute conduct which violates Section 605 of the Act; or (c) involve a transaction from which the Unit Holder or Manager personally received a benefit in Money, property, or services to which the Unit Holder or Manager was not legally entitled.

The Company shall indemnify and hold harmless each Unit Holder and Manager, and each director, officer, partner, employee or agent thereof, against any liability, loss, damage, cost or expense incurred by them on behalf of the Company or in furtherance of the Company's interests without relieving any such Person of liability for the matter designated (a) through (c) in the immediately preceding paragraph. No Unit Holder shall have any personal liability with respect to the satisfaction of any required indemnification of the above-mentioned Persons.

Any indemnification required to be made by the Company shall be made promptly following the fixing of the liability, loss, damage, cost or expense incurred or suffered by a final judgment of any court, settlement, contract or otherwise. In addition, the Company may advance funds to a Person claiming indemnification under this Section 7.4 for legal expenses and other costs incurred as a result of a legal action brought against such Person if (i) the legal action relates to the performance of duties or services by the Person on behalf of the Company, (ii) the legal action is initiated by a party other than a Unit Holder, and (iii) such Person undertakes to repay the advanced funds to the Company if it is determined that such Person is not entitled to indemnification pursuant to the terms of this Agreement.

7.5 **Removal; Vacancies; Change in Number of Managers.** Any duly elected Manager may be removed at any time, with or without cause. A special meeting of the Members must be called to consider the issue of removal of the Manager and the motion to remove the Manager can only be passed by an affirmative vote of Members owning a Majority Interest. The removal of a Manager who is also a Unit Holder shall not affect the Manager's rights as a Unit Holder and shall not constitute a withdrawal of a Unit Holder. The number of Managers may be changed, and any Manager may be replaced, by the vote of Members holding a Majority Interest.

7.6 **Manager's Standard of Care.** A Manager's duty of care in the discharge of the Manager's duties is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. In discharging its duties, a Manager shall be fully protected in relying in good faith upon the records required to be maintained under Article 12 and upon such information, opinions, reports or statements by any other Managers, Members, or agents, or by any other person, as to matters the Manager reasonably believes are within such other person's professional competence and who has been selected with reasonable care by or on behalf of the Company, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or losses of the Company or any other facts pertinent to the existence and amount of assets from which distributions to Unit Holders might properly be paid.

7.7 **Majority Vote.** If at any time there is more than one Manager of the Company, decisions of the Managers shall be made by vote, agreement or consent of such Managers. Except as otherwise expressly provided herein, any act or decision of the Company made by more than one Manager as to which there is less than unanimous consent of the Managers shall be decided or determined by majority vote of the then acting Managers. For purposes of such decisions or determinations, the Managers shall each be entitled to one equal vote.

ARTICLE 8

RIGHTS AND OBLIGATIONS OF UNIT HOLDERS

8.1 **Limitation of Liability.** Each Unit Holder's liability shall be limited as set forth in this Agreement and the Act. Unit Holders shall not be personally liable for any debts, obligations or liabilities of the Company beyond their respective Capital Contributions, except as otherwise provided by law or this Agreement

8.2 **Decisions Reserved to Members.** The following matters must be approved by Members owning a Majority Interest:

(a) Sale, exchange, or other disposal of all, or substantially all, of the Company Property;

(b) Removal of a Member from the Company, and elimination of such Member's management right (such removal shall require a special meeting as provided in Article 9);

(c) Removal or replacement of a Manager as described in Section 7.5 above;

(d) Admission of a new Member as provided in Article 14 below; and

(e) Any other matter reserved to a vote of the Members as provided herein.

8.3 **Inspection of Records.** Upon reasonable request, each Unit Holder shall have the right to inspect and copy at such Unit Holder's expense, during ordinary business hours, the records required to be maintained by the Company pursuant to Section 12.4.

8.4 **No Priority and Return of Capital.** Except for the preferences afforded Preferred Units herein, or as expressly provided in Article 11, no Unit Holder shall have priority over any other Unit Holder, either as to the return of Capital Contributions or as to Net Profits, Net Losses or distributions; provided, that this Section 8.4 shall not apply to loans made by a Unit Holder to the Company.

8.5 **Withdrawal of Unit Holder.** Except as expressly permitted in this Agreement, no Unit Holder shall voluntarily resign or otherwise withdraw as a Unit Holder. Unless otherwise approved by Members holding a Majority Interest, a Unit Holder who resigns or withdraws shall be entitled to receive only those distributions to which such Person would have been entitled had such Person remained a Unit Holder and only at such times as such distribution would have been made had such Person remained a Unit Holder. Except as otherwise expressly provided herein, a resigning or withdrawing Unit Holder shall become an Economic Interest Owner only. The remedy for breach of this Section 8.5 shall be monetary damages which may be offset against distributions by the Company to which such Person would otherwise be entitled.

8.6 **No Compensation.** No Unit Holder shall receive any compensation for acting in his or her capacity as a Unit Holder and performing all rights and responsibilities attendant thereto. This paragraph does not apply to situations where a Unit Holder also serves the Company in other capacities.

ARTICLE 9: MEETINGS OF MEMBERS

9.1 **Meetings; Location.** There shall be no regularly-scheduled annual meeting of the Members. Special meetings of the Members, for any purpose or purposes, may be called by any Manager or by Members holding at least twenty percent (20%) of the Units held by Members. The Managers or the Members may designate any place, either within or outside the State of Washington, as the place of meeting for any meeting of the Members.

9.2 **Notice of Meetings.** Written Notice stating the place, day and hour of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called shall be delivered not less than ten (10) nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the Managers or the Members calling the meeting, to each Member entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered two calendar days after being deposited in the United States Mail, addressed to the Member as specified in Section 20.4 with postage thereon prepaid.

9.3 **Record Date.** For the purpose of determining Members entitled to notice of or to vote at any meeting of Members or any adjournment thereof, or Members entitled to receive payment of any distribution, the date on which notice of the meeting is mailed or the date on which the resolution declaring such distribution is adopted, as the case may be, shall be the record date for such determination of Members. When a determination of Members entitled to vote at any meeting of Members has been made as provided in this Section, such determination shall apply to any adjournment thereof.

9.4 **Quorum.** The holders of fifty percent (50%) or more of the Units of the Company, represented in person or by proxy, shall constitute a quorum at any meeting of Members. In the absence of a quorum at any such meeting, a majority of Units held by Members so represented at the meeting may adjourn the meeting from time to time for a period not to exceed sixty (60) days without further notice. However, if the adjournment is for more than sixty (60) days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each Member of record entitled to vote at the meeting. At such adjourned meeting at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the meeting as originally noticed. The Members present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal during such meeting of that number of Units whose absence would cause less than a quorum.

9.5 **Manner of Acting.** If a quorum is present, the affirmative vote of Members holding more than fifty percent (50%) of the Units present or represented at the meeting shall be the act of the Members, unless the vote of a greater or lesser percentage is required by this Agreement or the Act.

9.6 **Proxies.** At all meetings of Members a Member may vote in person or by proxy executed in writing by the Member. Such proxy shall be filed at the Principal Office before or at the time of the meeting. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy.

9.7 **Action by Members Without a Meeting.** Action required or permitted to be taken at a meeting of Members may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken, signed by Members entitled to vote thereon and delivered to the Principal Office for inclusion in the Company's minutes. Action taken under this Section 9.7 is effective when that percentage of the Units of the Company required by this Agreement or the Certificate of Formation of the Company for passage of the action described therein have signed such consents, unless such consents specify a different majority requirement. The record date for determining Members entitled to take action without a meeting shall be the date the first Member signs a consent. Nothing contained in this Section shall change the percentage of Units required to vote affirmatively on any matter.

9.8 **Waiver of Notice.** When any notice is required to be given to a Member, a waiver thereof in writing signed by the Member entitled to such notice, whether before, at, or after the time stated therein, shall be equivalent to the giving of such notice.

ARTICLE 10: CAPITALIZATION AND CAPITAL ACCOUNTS

10.1 **Company Capitalization.** Subject to the rights of the Members to establish additional classes or categories of Units, total equity ownership of the Company shall consist of two (2) classes of Units, which shall be collectively referred to herein as the "Units." Such Units shall reflect total ownership of the Company; shall be collectively entitled to all Distributions, including Distributions in connection with any dissolution of the Company; and shall collectively carry the entire Management Right of the Company. The Units include:

10.1.1 Voting Units. The Voting Units shall be the common Units of the Company, and Members who own Voting Units shall hold the entire Management Right. Any reference in this Agreement to approval of any act or decision by the owners of Units shall be interpreted as meaning only Members owning Voting Units. Only Voting Unit Holders may be Members. Holders of Voting Units shall be entitled to all Distributions (including liquidating distributions) approved in accordance with this Agreement and applicable law, subject to prior payment of the Preferred Unit Holders as provided in Section 10.1.2.

10.1.2 Preferred Units. Preferred Units confer payment rights and preferences as described herein. Preferred Units carry no voting or other Management Right. Each Preferred Unit is hereby conclusively and permanently valued at One Thousand Dollars ($1,000.00). In the event of either (i) redemption of any Preferred Units as provided in Article 18 below, or (ii) a Distribution in connection with liquidation of the Company as provided in Section 15.3.3 below, Preferred Unit Holders shall be entitled to be paid One Thousand Dollars ($1,000.00) per Preferred Unit redeemed or retired (or, if in the event of liquidation insufficient funds remain to pay the entire value, then the Preferred Unit Holders shall receive a pro rata share based upon the total number of Preferred Units held and outstanding). Additionally, if and to the extent cash is available for distribution as provided in Article 11 below, each Preferred Unit Holder shall be entitled to an annual payment equal to one hundred dollars ($100.00) per Preferred Unit owned (herein, the "Preferred Premium"). The Preferred Premium shall be prorated for any partial year on the basis of the number of days elapsed, and if insufficient funds are available to pay the entire Preferred Premium in any calendar year, then the available funds shall be distributed evenly among the Preferred Units. The Unit Holders acknowledge and agree that the Preferred Premium shall be non-cumulative: if in a given calendar year insufficient funds are available for distribution to pay any or all of the Preferred Premium, the unpaid Preferred Premium for that year shall be cancelled as of the close of the calendar year (or as of the Company's close of its books for calendar year, if later), and the Preferred Unit Holders shall have no further right to receive any payment on account thereof. Subject to the Managers' rights to change such schedule in their reasonable discretion, it is presumed that the Preferred Premium shall be paid, if at all, at or promptly after calendar year-end. Preferred Unit Holders shall be entitled to no distributions other than as expressly provided in this paragraph.

10.1.3 Unit Holder Loans. Unless all Preferred Unit Holders have consented thereto, no repayment by the Company of any loan from a Unit Holder shall occur in any calendar year until after the full Preferred Premium for that year has been paid. The Company shall include language consistent with this paragraph in any documents memorializing loans from Unit Holders.

10.2 **Initial Contributions.** Each Initial Unit Holder shall make the Capital Contribution described for that Unit Holder on Schedule I at the time and on the terms specified on Schedule I and shall perform that Unit Holder's Commitment. The value of each Unit Holder's Initial Capital Contribution shall be as set forth on Schedule I. No interest shall accrue on any Capital Contribution and no Unit Holder shall have the right to withdraw or be repaid any Capital Contribution except as provided in this Agreement.

10.3 **Additional Contributions.** Other than the Initial Capital Contributions, no Unit Holder shall have any obligation to make any additional contribution, except as may subsequently be agreed by all Unit Holders.

10.4 **Enforcement of Commitments.** In the event any Unit Holder fails to perform the Unit Holder's Commitment, such failure shall constitute an Event of Default and the Managers shall give the Unit Holder a Notice of the failure to meet the Commitment. If the Unit Holder fails to perform the Commitment (including payment of any costs associated with the failure to meet the Commitment and interest on such obligation at the Default Interest Rate) within ten Business Days of the giving of Notice, the Managers may take such action, including but not limited to enforcing the Commitment by arbitration or by action in a court of appropriate jurisdiction in the state in which the Company's Principal Office is located, as they deem appropriate. The Members may elect to allow the other Unit Holders to contribute the amount of the unpaid Commitment in proportion to such Unit Holders' Sharing Ratios, and to contribute additional amounts equal to any amount of the Commitment not contributed. The Contributing Unit Holders shall be entitled to treat the amounts contributed pursuant to this section as a loan from the Contributing Unit Holders bearing interest at the Default Interest Rate secured by the Delinquent Unit Holder's interest in the Company. Until they are fully repaid, the Contributing Unit Holders shall be entitled to all Distributions to which the Delinquent Unit Holders would have been entitled. Notwithstanding the foregoing, no Commitment or other obligation to make an additional contribution may be enforced by a creditor of the Company unless the Unit Holder expressly consents to such enforcement or to the assignment of the obligation to such creditor.

10.5 **Maintenance of Capital Accounts.** The Company shall establish and maintain Capital Accounts for each Unit Holder. The value of each Holder's Initial Capital Contribution shall be credited to that Unit Holder's Capital Account. Each Unit Holder's Capital Account shall be increased by (1) any additional Money actually contributed by the Unit Holder after full payment of each Unit Holder's Initial Capital Contribution, (2) the fair market value of any Property contributed, as determined by the Company and the contributing Unit Holder at arm's length at the time of contribution (net of liabilities assumed by the Company or subject to which the Company takes such Property, within the meaning of § 752 of the Code), and (3) the Unit Holder's share of Net Profits and of any separately allocated items of income or gain except adjustments of the Code (including any gain and income from unrealized income with respect to accounts receivable allocated to the Unit Holder to reflect the difference between the book value and tax basis of assets contributed by the Unit Holder). Each Unit Holder's Capital Account shall be decreased by (1) the amount of any Money distributed to the Unit Holder by the Company, (2) the fair market value of any Property distributed to the Unit Holder (net of liabilities of the Company assumed by the Unit Holder or subject to which the Unit Holder takes such Property within the meaning of § 752 of the Code), and (3) the Unit Holder's share of Net Losses and of any separately allocated items of deduction or loss (including any loss or deduction allocated to the Unit Holder to reflect the difference between the book value and tax basis of assets contributed by the Unit Holder).

10.6 **Distribution of Property.** If the Company at any time distributes any of its Property in-kind to any Unit Holder, the Capital Account of each Unit Holder shall be adjusted to account for that Unit Holder's allocable share (as determined under Article 11 below) of the

Net Profits or Net Losses that would have been realized by the Company had it sold the Property that was distributed at its fair market value immediately prior to distribution.

10.7 **Sale or Exchange of Interest.** In the event of a sale or exchange of some or all of a Unit Holder's Interest in the Company, the Capital Account of the transferring Unit Holder shall become the capital account of the acquiring Unit Holder, to the extent it relates to the portion of interest transferred.

10.8 **Compliance with Section 704(b) of the Code.** The provisions of this Article 10 as they relate to the maintenance of Capital Accounts are intended, and shall be construed, and, if necessary, modified to cause the allocations of profits, losses, income, gain and credit pursuant to Article 11 to have substantial economic effect under the Regulations promulgated under § 704(b) of the Code, in light of the distributions made pursuant to Article 11 and the Capital Contributions made pursuant to this Article 10. Notwithstanding anything herein to the contrary, this Operating Agreement shall not be construed as creating a deficit restoration obligation or otherwise personally obligating any Unit Holder to make a Capital Contribution in excess of the Initial Contribution.

ARTICLE 11: ALLOCATIONS AND DISTRIBUTIONS

11.1 **Allocations of Net Profits and Net Losses from Operations.** Except as may be required by § 704(c) of the Code, and this Agreement (including those provisions relating to payment of the Preferred Premium), net profits, net losses, and other items of income, gain, loss, deduction and credit shall be apportioned among the Unit Holders in proportion to their Sharing Ratios.

11.2 **Qualified Income Offset.** In the event any Unit Holder, in such capacity, unexpectedly receives an Offsettable Decrease, such Unit Holder will be allocated items of income and gain (consisting of a pro rata portion of each item of income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible.

11.3 **Interim Distributions.** From time to time, the Managers shall determine in their reasonable judgment to what extent, if any, the Company's cash on hand exceeds its current and anticipated needs, including, without limitation, needs for operating expenses, debt service, acquisitions, and Reserves. For purposes of this determination, the Managers shall determine the level of required Reserves, as provided in Section 7.3.14 above. To the extent such excess exists, the Managers shall pay the Preferred Premium (or such prorated portion thereof as may be appropriate) and, if an excess exists after payment of the Preferred Premium, the Managers may make distributions to the Unit Holders in accordance with their Sharing Ratios. Such distributions shall be in cash or Property or partly in both, as determined by the Managers. The ratio of cash to Property in any distribution need not be proportionate among Unit Holders.

11.4 **Limitations on Distributions.** No distribution shall be declared and paid unless after the distribution is made, the assets of the Company are in excess of all liabilities of the Company, except liabilities to Unit Holders on account of their Capital Accounts.

ARTICLE 12: ACCOUNTING, BOOKS, AND RECORDS

12.1 **Accounting Principles.** The Company's books and records shall be kept, and its income tax returns prepared, under such permissible method of accounting for a limited liability company, consistently applied, as the Members determine is in the best interest of the Company and its Unit Holders.

12.2 **Accounting Period.** The Company's accounting period shall be the calendar year or whatever fiscal year the Managers determine to be in the best interest of the Company.

12.3 **Records, Audits and Reports.** At a minimum the Company shall keep at its principal place of business the following records:

12.3.1 A current list of past and present Unit Holders, setting forth the full name and last known mailing address of each Unit Holder and former Unit Holder;

12.3.2 A copy of the Certificate and all amendments thereto;

12.3.3 Copies of this Agreement and all amendments hereto;

12.3.4 Copies of the Company's federal, state, and local tax returns and reports, if any, for the three most recent years;

12.3.5 Minutes of every meeting of the Members and any written consents obtained from Members for actions taken by Members without a meeting; and

12.3.6 Copies of the Company's financial statements for the three most recent years.

12.4 **Tax Matters Partner.** One or more of the Managers shall also be the *tax matters partner* of the Company pursuant to § 6231(a)(7) of the Code. Michael Stathis Ota shall act as tax matters partner until his replacement is named. The tax matters partner shall take such action as may be necessary to cause each other Member to become a *notice partner* within the meaning of § 6223 of the Code. The tax matters partner may not take any action contemplated by §§ 6222 through 6232 of the Code without the consent of the majority of Members. The Company shall indemnify and reimburse the tax matters partner for all reasonable expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Unit Holders

attributable to the Company. The payment of all such expenses shall be made before any distributions are made to Unit Holders and such expenses shall be taken into consideration for purposes of determining distributable cash or any discretionary Reserves are set aside by the Members. Neither the tax matters partner nor any Unit Holder shall have any obligation to provide funds for such purpose. The provisions for exculpation and indemnification of the Unit Holders set forth in Article 7 of this Agreement shall be fully applicable to the Manager acting as tax matters partner for the Company.

12.5 **Returns and Other Elections.** The Managers shall cause the preparation and timely filing of all tax and information returns required to be filed by the Company pursuant to the Code or any jurisdiction in which the Company does business. Copies of such returns, or pertinent information therefrom, shall be furnished to the Unit Holders within a reasonable time after the end of the Company's fiscal year.

ARTICLE 13

TRANSFERABILITY

13.1 **General Restriction; Exceptions.** Except as otherwise expressly provided in this Agreement, no Unit Holder shall have the right to:

13.1.1 sell, assign, transfer, exchange or otherwise transfer for consideration, or

13.1.2 gift, bequeath or otherwise transfer for no consideration whether or not by operation of law, except in the case of bankruptcy, all or any part of its Ownership Interest.

The foregoing restriction shall not apply to any of the following permitted transfers: (i) any pledge of Units made by a Unit Holder pursuant to a bona fide loan transaction which creates a mere security interest; (ii) any repurchase of Units by the Company; (iii) any bona fide gift (provided, however, that no Unit Holder may gift any Units without the prior written consent of Members owning a Majority Interest, which consent shall not be unreasonably withheld, conditioned or delayed); or (iv) any transfer to a member of the Unit Holder's family or to any trust for the benefit of any such family members or the Unit Holder ("family" includes any spouse, lineal ancestor or descendant, brother or sister); provided, that the transferring Unit Holder shall inform the Company of any such transfer prior to effecting it, and the pledgee, transferee or donee shall furnish the Company with a written agreement to be bound by and comply with all provisions of this Agreement to the same extent as if he, she or it were an original Unit Holder hereunder.

13.2 **Treatment of Interests.** Unless otherwise provided herein:

13.2.1 A Unit Holder ceases to be a Unit Holder and to have the power to exercise any rights or powers of a Unit Holder upon assignment of all of his, her or its Ownership Interest.

13.2.2 The pledge of, or granting of a security interest, lien, or other encumbrance in or against, any or all of the Ownership Interest of a Unit Holder shall not be deemed to be an assignment of the Unit Holder's Ownership Interest, but a foreclosure or execution sale or exercise of similar rights with respect to all of a Unit Holder's Ownership Interest shall be deemed to be an assignment of the Unit Holder's Ownership Interest to the transferee pursuant to such foreclosure or execution sale or exercise of similar rights;

13.2.3 The death of a Unit Holder who is an individual shall be deemed to be an assignment of that Unit Holder's entire Company interest to his or her personal representative, subject to all of the terms and conditions of this Agreement;

13.2.4 Where the Ownership Interest is held in a trust or estate, or is held by a trustee, personal representative, or other fiduciary, the transfer of the Ownership Interest, whether to a beneficiary of the trust or estate or otherwise, shall be deemed to be an assignment of such Ownership Interest, but the mere substitution or replacement of the trustee, personal representative, or other fiduciary shall not constitute an assignment of any portion of the Ownership Interest; and

13.2.5 Where the Ownership Interest is held in a corporation, limited liability company or other, similar entity, except for transfers among existing stockholders, general partners or members, as the case may be, the cumulative (e.g., in one or more sales or transfers, by operation of law or otherwise) transfer of an aggregate of more than fifty percent (50%) of the capital Units, membership units, or other ownership interests (except as the result of transfers by gift or inheritance permitted hereunder), shall be deemed an assignment of the Ownership Interest.

13.3 **First Refusal Rights**

13.3.1 A Unit Holder desiring to sell all or any portion of its Ownership Interest to a third-party purchaser shall obtain from such third-party purchaser a bona fide written offer to purchase such Interest. Such Unit Holder shall give written Notice to the other holders of Units in the same class (Voting or Preferred) and the Managers of its intention to transfer such Interest. Such Notice shall set forth the complete terms of the written offer to purchase and the name and address of the proposed third-party purchaser. For purposes of this Section 13.3, only holders of Voting Units shall be eligible to purchase Voting Units and only holders of Preferred Units shall be eligible to purchase Preferred Units offered for sale by any other Unit Holder.

13.3.2 The other Unit Holders entitled to notice shall, on a basis pro rata to their Units or (if different) on a basis pro rata to the Units of those remaining Unit Holders exercising their first refusal rights, have the first right to purchase all (but not less than all) of the interests proposed to be sold by the selling Unit Holder upon the same terms and conditions stated in the Notice given pursuant to Section 13.3.1 by giving written Notice to the other Unit Holders and the Managers within ten (10) days after such Notice from the selling Unit Holder. The failure of a Unit Holder to so notify the other Unit Holders and the Managers of its desire to exercise its first refusal rights within said ten (10) day period as required by this Section 13.3.2 shall result in the termination of such Unit Holder's first refusal rights as to that proposed sale.

13.3.3 Within ten (10) days after expiration of the ten (10) day period specified in the preceding paragraph, the Managers shall notify those Unit Holders electing to exercise their first refusal rights of any Units that the other Unit Holders did not elect to purchase. Those Unit Holders exercising first refusal rights in accordance with the preceding paragraph shall then notify the Managers and the other purchasing Unit Holders whether they elect to purchase such remaining Units, which shall be allocated pro rata or in such other manner as the purchasing Unit Holders shall agree. If no such notification is received by the Managers from any such Unit Holders in accordance with this paragraph, no Unit Holder shall have any further first refusal rights with respect to such Units.

If Unit Holders have elected to purchase all of the Units offered by the selling Unit Holder, the selling Unit Holder shall sell such Units upon the same terms and conditions specified in the Notice required by Section 13.3.1, and the purchasing Unit Holders shall have the right to close the purchase within thirty (30) days after receipt of notification from the Managers that such Unit Holders have elected to purchase the selling Unit Holder's Units.

If Unit Holders do not elect to purchase all of the Units offered by the selling Unit Holder in accordance with this Section 13.3, then the selling Unit Holder may sell such Units to the third party purchaser in accordance with the terms and conditions upon which the purchase is to be made as specified in the notice under Section 13.3.1. However, if such sale is not completed within sixty (60) days following expiration of the other Unit Holders' first refusal rights under this Section 13.3, then the selling Unit Holder shall not be entitled to complete the sale to such third-party purchaser and the selling Unit Holder's Units shall continue to be subject to the rights of first refusal set forth in this Section 13.3 with respect to any proposed subsequent transfer.

13.3.4 Upon the purchase or the gift of an Ownership Interest or an Economic Interest, and as a condition to recognizing the effectiveness and binding nature of any sale or gift and (subject to Section 13.4 below) substitution of a Person as a new Unit Holder, the Members may require the transferring Unit Holder and the proposed purchaser, donee or successor-in-interest, as the case may be, to execute, acknowledge and deliver to the Company

such instruments of transfer, assignment and assumption and such other agreements and to perform all such other acts that the Members may deem necessary or desirable to:

(i) constitute such Person as a Unit Holder;

(ii) confirm that the Person desiring to become a Unit Holder has accepted, assumed and agreed to be subject and bound by all of the terms, obligations and conditions of this Agreement (whether such Person is to be admitted as a new Member or will merely be an Economic Interest owner);

(iii) maintain the status of the Company as a partnership for federal tax purposes; and

(iv) assure compliance with any applicable state and federal laws, including securities laws and regulations.

13.4 **Transferee Not Member in Absence of Consent**

13.4.1 Notwithstanding anything to the contrary in this Article 13, if the assignment (including without limitation any deemed assignment pursuant to Section 13.2), sale or gift of a Member's Ownership Interest or Economic Interest to a transferee or donee which is not a Member immediately prior to the sale or gift is not approved in writing by Members owning a Majority Interest, in their sole discretion, then the proposed assignee, transferee or donee shall have no Management Right or other right to participate in the management of the business and affairs of the Company or to become a Member, in which event such transferee or donee shall be merely an Economic Interest Owner.

13.4.2 Promptly following any sale or gift of a Member's Economic Interest which does not at the same time transfer the balance of the rights associated with such Person's Ownership Interest, the Company shall purchase from such Person, and such Person shall sell to the Company for a purchase price of $1, all such remaining rights and interests retained by such Person which immediately prior to such sale or gift were associated with the transferred Economic Interest, including any Management Right. The acquisition by the Company of such transferor's rights shall not cause a dissolution of the Company but the transferor shall no longer be a Member.

ARTICLE 14: ADDITIONAL MEMBERS

Unit Holders and additional Persons may become Members only if a special meeting of the Members is called to consider the action. The meeting shall be called in accordance with the notice requirements of Article 10. A Person may only become a new Member by:

- the affirmative vote of Members holding a Majority Interest;
- contributing capital in an amount determined by the Members; and
- signing an original of this Agreement.

ARTICLE 15: DISSOLUTION AND TERMINATION

15.1 Dissolution

15.1.1 **Events of Dissolution.** The Company shall be dissolved upon the occurrence of any of the following events:

15.1.1.1 in the case of the voluntary dissolution of the Company, by the unanimous written agreement of all Members; or

15.1.1.2 upon a Person ceasing to be a Unit Holder by the occurrence of any of the events of dissociation specified in RCW 25.15.130, unless all remaining Members consent to continue the business of the Company within ninety (90) days following the occurrence of such event described in RCW 25.15.130.

15.1.2 **Automatic Meeting.** If an event of dissolution occurs pursuant to RCW 25.15.130, a special meeting of the Members must be called and held on the third Saturday following the event of dissolution. The Members shall comply with Article 9 notice requirements.

15.2 **Allocation of Net Profit and Loss in Liquidation.** The allocation of Net Profit, Net Loss and other items of the Company following the date of dissolution, including but not limited to gain or loss upon the sale of all or substantially all of the Company's assets, shall be determined in accordance with the provisions of Article 11.

15.3 **Winding up, Liquidation and Distribution of Assets.** Upon dissolution, the Managers shall immediately proceed to wind up the affairs of the Company, unless the business of the Company is continued as provided in Section 15.1.1.3. The Managers shall sell or otherwise liquidate all of the Company's assets as promptly as practicable except to the extent the Managers may determine to distribute any assets to the Unit Holders in kind and shall apply the proceeds of such sale and the remaining Company assets in the following order of priority:

15.3.1 Payment of creditors, excluding Unit Holders who have made loans to the Company or are otherwise creditors, in satisfaction of liabilities of the Company, other than liabilities for distributions to Unit Holders;

15.3.2 To establish any reserves that the Managers deem reasonably necessary for contingent or unforeseen obligations of the Company and, at the expiration of such period as the Managers shall deem advisable;

15.3.3 By the end of the taxable year in which the liquidation occurs or, if later, within ninety (90) days after the date of such liquidation, to the Preferred Unit Holders in the amount of (i) any unpaid Preferred Premium (as described in Section 10.1.2 above), plus (ii) one thousand dollars ($1,000.00) per Preferred Unit held;

15.3.4 Repayment of any loans from Unit Holders to the Company; and

15.3.5 By the end of the taxable year in which the liquidation occurs or, if later, within ninety (90) days after the date of such liquidation, to the Unit Holders in proportion to the positive balances of their respective Capital Accounts, determined after taking into account all Capital Account adjustments for the taxable year during which the liquidation occurs (other than those made pursuant to this Paragraph 15.3.4).

15.4 **Restoration of Negative Capital Account Balance on Liquidation.** Notwithstanding anything to the contrary in this Agreement, upon a liquidation within the meaning of Regulation Section 1.704-1(b) (2) (ii) (g), if any Unit Holder has a negative Capital Account balance (after giving effect to all contributions, distributions, allocations and other Capital Account adjustments for all taxable years, including the year during which such liquidation occurs), such Unit Holder shall have no obligation to make any Capital Contribution to the Company, and the negative balance of such Unit Holder's Capital Account shall not be considered a debt owed by such Unit Holder to the Company or to any other Person for any purpose whatsoever.

15.5 **Return of Contribution Nonrecourse Against Other Unit Holders.** Except as provided by law or as expressly provided in this Agreement, upon dissolution each Unit Holder shall look solely to the assets of the Company for the return of its Capital Contribution. If the Property remaining after the payment or discharge of liabilities of the Company is insufficient to return the contributions of Unit Holders, no Unit Holder shall have recourse against any other Unit Holder.

ARTICLE 16: DEFAULT

16.1 **Events of Default.** The occurrence of any of the following events shall constitute an event of default ("Event of Default") hereunder:

16.1.1 the failure of any Unit Holder to perform its Commitment as provided in Article 10;

16.1.2 any sale, assignment, transfer or mortgage by a Unit Holder of all or any part of its Ownership Interest or Economic Interest, or the withdrawal of a Unit Holder from the Company, except as may be permitted by this Agreement;

16.1.3 a general assignment by a Unit Holder for the benefit of creditors;

16.1.4 the appointment of a receiver, trustee or like officer, to take possession of the Ownership Interest or Economic Interest of a Unit Holder which remains undischarged for a period of thirty (30) days from the date of its imposition;

16.1.5 the bankruptcy of a Unit Holder or a Unit Holder utilizing the protection afforded by statute for insolvent companies;

16.1.6 the occurrence of any intentional misconduct or knowing violation of law by a Unit Holder that damages, or in the reasonable opinion of the remaining Members may damage, the Company;

16.1.7 breach by any Unit Holder of any other provision of this Agreement.

If at any time a Unit Holder shall have committed an Event of Default, any non-defaulting Member shall, after Notice specifying the Event of Default ("Default Notice"), be entitled to exercise (in addition to any other rights and remedies hereunder) the rights and remedies specified in Section 16.2.

In the event that a defaulting Unit Holder shall dispute any matters alleged in any Default Notice, it shall give Notice to the other Unit Holders, specifying in reasonable detail its reasons for such dispute ("Dispute Notice"), on or before the first Business Day which is at least 14 days after receipt of such Default Notice, failing which the defaulting Unit Holder shall be deemed to have admitted the matters alleged in the Default Notice. In the event that the defaulting Unit Holder delivers a Dispute Notice within the time provided and the Unit Holders have not resolved any differences between them within 14 days thereafter, the matters in dispute shall be submitted to dispute resolution as provided in Article 20 herein.

16.2 **Remedies on Default.** If as a result of dispute resolution pursuant to Article 20 or otherwise it shall be determined that the defaulting Unit Holder was in material default as alleged in the Default Notice, any non-defaulting Member shall thereupon be entitled to exercise any of the following rights and remedies (in addition to any other rights and remedies hereunder):

16.2.1 take or bring any proceedings in the nature of specific performance, injunction or other equitable remedies, it being acknowledged by the Unit Holders that damages at law may be an inadequate remedy for a default under this Agreement;

16.2.2 remedy such default, and any amounts expended to remedy such default and any expenses (including legal fees, whether incurred to bring any legal proceeding for the recovery of any such amounts from the defaulting Unit Holder or otherwise) incurred by the

non-defaulting Unit Holder, together with interest thereon compounded monthly at the Default Interest Rate from the date such expense is incurred until paid, shall be due and payable by the defaulting Unit Holder forthwith after written demand;

16.2.3 dissolve, wind up or terminate the Company in accordance with this Agreement; or

16.2.4 exercise any other rights and remedies which may be available in this Agreement, at law and/or in equity in respect of such default.

ARTICLE 17: OPTION TO PURCHASE - BUY/SELL

17.1 **Option to Purchase.** Each Voting Unit Holder hereby irrevocably grants to the other Voting Unit Holders an option to purchase its Ownership Interest or Economic Interest (exclusive of any Preferred Unit interest) on the following terms and conditions and agrees that the provisions of this Article 17 shall be deemed to be a term of each such option to purchase. Any Voting Unit Holder ("Offeror") who is not in default within the meaning of Article 16 may, at any time with or without a reason, give Notice ("Initial Notice") to the other Voting Unit Holder(s) ("Offeree(s)"), specifying a per-Unit purchase price to be paid for a Voting Unit Holder's Ownership Interest or Economic Interest, whereupon the following provisions shall apply:

17.2 **Notice of Election to Sell.** The Offeree(s) may, by written notice given to the Offeror within 60 days following receipt of the Initial Notice, elect either:

17.2.1 that the Offeror shall be deemed to have offered to sell its entire Ownership Interest, at the per-Unit purchase price specified in the Offeror's Initial Notice, provided that the Offeree(s) shall be deemed to have accepted the Offer so made to it; or

17.2.2 that the Offeree(s) shall thereupon be deemed to have offered to sell its (their) entire Ownership Interest(s) at the per-unit purchase price specified in the Offeror's Initial Notice, provided that the Offeror shall be deemed to have accepted the Offer so made to it.

17.3 **Failure to Give Notice.** If an Offeree fails to give the notice contemplated in Subsection 17.1 above, the Offeree shall thereupon be deemed to have offered to sell its entire Interest and the Offeror shall be deemed to have accepted the Offer so made to it.

17.4 **Pro Rata Purchase.** If any Offer hereunder is made to more than one Offeree, and if each Offeree wishes to purchase the interest of the Offeror, the Offerees shall be entitled to purchase components of the Offeror's Interest in proportion to the then existing Economic Interests of the Offerees unless otherwise agreed as between the Offerees. If one Offeree wishes to sell its Ownership Interest to the Offeror and another Offeree wishes to purchase the Offeror's Ownership Interest by itself, the Offeror shall sell its entire Ownership Interest to the purchasing Offeree

pursuant to the terms and conditions contained herein and the Offeree wishing to sell its interest to the Offeror shall not sell and shall retain its Ownership Interest.

17.5 **Scope of Offer to Sell; Terms.** An Offeror may make an offer to one or more Offerees. Only an Offeree may respond to the offer made by the Offeror. If the Initial Notice specified purchase terms, such terms shall control. If the Initial Notice does not specify purchase terms, then the method of payment shall be as set forth in Section 19.4 below. No portion of this Article 17 shall apply to any Preferred Units. The terms of this Article 17 shall have no application to Preferred Units.

ARTICLE 18: REDEMPTION OF PREFERRED UNITS

Preferred Units shall be redeemable by the Company at any time and from time to time, in any full-Unit denomination or denominations, with or without cause, upon thirty (30) days advance notice to any Preferred Unit Holder. The purchase price shall be One Thousand Dollars $1,000.00) per Preferred Unit, all of which shall be paid in cash on the date of transfer specified in the Company's notice of intent to purchase. If at the time of redemption, or at any time in the calendar year during which the redemption occurs, the Company pays a Preferred Premium, the seller of the redeemed Preferred Units shall be entitled to a pro rata portion of the Preferred Premium applicable to the redeemed Units, based upon the number of days elapsed through the effective date of the redemption. Each Preferred Unit Holder hereby grants to the Company the irrevocable, absolute right to redeem its Preferred Units in accordance with this Article 18, and agrees to execute and endorse such certificates and documents as may be reasonably requested by the Company to reflect redemption of the Preferred Units. While the terms of Article 19 are not directly applicable to Preferred Unit Holders, the redemption right described in this Article 19 shall expressly survive the death, disability, bankruptcy, or insolvency of a Preferred Unit Holder.

ARTICLE 19: MANDATORY OFFER TO SELL

19.1 **Purchase Event.** For purposes of this Agreement, any one of the following events shall constitute a "Purchase Event":

(a) Death. The death of a Voting Unit Holder, provided that the date of the Purchase Event for purposes of this Agreement shall be deemed to be the date on which the Company and the other Unit Holders receive notice of the appointment and qualification of the deceased Voting Unit Holder's personal representative. The personal representative of the deceased Voting Unit Holder shall be obligated to give such notice as soon as practicable.

(b) Disability. The permanent disability of a Voting Unit Holder, where "permanent disability" is defined as the Voting Unit Holder's inability through physical or mental illness or other cause, to perform the majority of his or her usual duties as an employee, Member, or Manager of the Company for an aggregate of six months during any 12-month period or for a period of six consecutive months or more; provided, however that under no circumstances will a Voting Unit Holder be deemed permanently disabled unless he or she also qualifies as such under the terms of the disability insurance policy, if any, covering him or her and owned by the Company. The date of the Purchase Event for purposes of this Agreement shall be the date on which the Voting Unit Holder's disability is established in accordance with the foregoing criteria.

(c) Bankruptcy or Attachment. The insolvency of a Voting Unit Holder or the making of an assignment for the benefit of creditors by a Voting Unit Holder, or the filing of a petition in bankruptcy by or against a Voting Unit Holder, or all or part of a Voting Unit Holder's Ownership Interest becomes subject to any attachment, levy, execution, or other judicial seizure or in the event that Ownership Interest is subject to a judicial sale under the laws of any local, state or federal government, or if any of the Ownership Interest is to be transferred out of a Unit Holder's name by any legal action brought by any person, including the spouse or former spouse of said Unit Holder, or by reason of the death of said spouse.

19.2 **Obligation of Unit Holder; Purchase Right.** Upon the occurrence of any Purchase Event, the estate of the deceased, disabled, dispossessed, or insolvent Voting Unit Holder, as the case may be (in each case, the "Seller"), shall be deemed to have offered for sale to the Company all of the Voting Units and the entire Ownership Interest held by Seller (the "Seller's Interest"). Within 60 days after the date on which the value of the Seller's Interest is finally determined pursuant to Section 19.3(a), below, the Company shall have the right, but not the obligation, to accept such offer as to all, but not less than all, of the Seller's Interest and tender performance thereunder by giving written notice to the Seller. If the option is not exercised by the Company within such 60-day period, then the other Voting Unit Holders (other than the Seller) shall have an option to purchase all, but not less than all, of the Seller's Interest within a period of an additional 30 days following the expiration of the Company's 60-day offering period, and shall exercise such option by giving written notice thereof to Seller during such 30-day period. If the total number of Units that all other Voting Unit Holders desire to purchase exceeds the number of Seller's Units, each such other Voting Unit Holder shall have the right to purchase, up to the total number of Seller's Units set forth in his or her notice, that fraction of the available Seller's Units, the numerator of which is the number of Units owned by the purchasing Voting Unit Holder and the denominator of which is the number of Units owned by all Voting Unit Holders who elect to purchase. If the Company or the other Voting Unit Holders exercise their right to purchase the Seller's Interest, closing of the purchase shall occur within 15 days after the date that the Company or the other Voting Unit Holders, as applicable, give notice to Seller. If such option is not exercised by the Company or the other Voting Unit Holders within its respective period, then the Seller shall have the right to retain the Seller's Interest or to sell, assign, transfer, or dispose of the Seller's Interest to third parties, subject to the

terms of this Agreement (or, in the event of death, to convey the Seller's Interest pursuant to the deceased Voting Unit Holder's will or the laws of intestacy).

19.3 **Purchase Price.** The price at which the Seller's Interest shall be purchased and sold pursuant to Section 19.2 above shall be as set forth in this Section 19.3. The parties acknowledge and agree that such price may or may not necessarily reflect the fair market value of the Voting Units transferred, but is an agreed-upon measure of the valuation and is fair and binding on each Unit Holder and the Company, unless the parties mutually agree otherwise.

(a) Determination of Unit Value. At least once each calendar year, the Members shall meet to discuss and mutually agree upon the fair value of the Voting Units of the Company on a per-Unit basis, which shall take into account discounts for minority interests, lack of control or the lack of marketability of such Units. Each such valuation shall be documented by a properly executed consent to action or minutes of the meeting and shall be binding upon all Unit Holders for purposes of this Agreement until a subsequent valuation is adopted. The Members currently intend to make such valuation determination in the fourth quarter of each year, or such other time(s) as they may mutually agree. Upon the occurrence of any Purchase Event, the most recently agreed-upon value shall be used in determining the purchase price; provided, however, that in the event that (i) the date of the last agreed-upon valuation was more than 12 months prior to the date of the Purchase Event, or (ii) there has occurred a material change in the business, financial condition or prospects of the Company since the date of the last agreed-upon valuation (exclusive of the death, disability or other event which constituted the Purchase Event), then any Member may elect to have the fair value of the Units determined by a qualified independent appraiser chosen by the Company, and reasonably acceptable to the party requesting the appraisal; provided further, that the party electing for the appraisal shall pay one-half of all appraisal costs (with the Company paying the remaining portion). The appraiser shall consider and apply any discounts for minority interests, lack of control, or the lack of marketability of such Units.

(b) Purchase Price. The purchase price for the Seller's Units shall be the per-Unit value determined pursuant to Section 19.3(a) above, multiplied by the number of Units to be purchased.

19.4 **Method of Payment.** The purchase price for the Seller's Interest to be paid to Seller at closing of the sale (and, where applicable, the payment to be made pursuant to Article 17) shall be paid as follows, unless mutually agreed otherwise by Seller and the purchasing party:

(a) By a down payment in cash of ten percent (10%) of the purchase price (or such greater amount as may be determined in the sole discretion of the purchasing Unit Holder or the Company, or such greater amount determined pursuant to Section 19.5 below regarding life insurance proceeds); and

(b) By execution and delivery of a promissory note in the principal amount of the purchase price less the down payment in Section 19.4(a). The note shall initially bear interest from the closing date of the sale at a rate equal to the long-term annual Applicable Federal Rate as determined for purposes of Section 1274(d) of the Code ("AFR"), for the month during which the note is executed, plus three percent (3%) per annum. The interest rate shall be adjusted annually, on each anniversary of the note, to the AFR for the month during which the adjustment occurs, plus three percent (3%) per annum, and interest shall accrue at such rate until the next adjustment date. The note shall be payable in equal quarterly payments of principal and accrued interest thereon over a ten-year period, and all outstanding principal and interest shall be due and payable on the tenth anniversary of the date of the note. The note shall give the purchaser the option of prepayment in part or in full at any time. Such note shall provide for the acceleration of the due date of all installment payments upon default in the payment of any installment or interest thereon, shall provide for an increase in the interest rate by two percentage points upon default, and shall provide that the maker shall pay reasonable attorneys' fees incurred in collection.

19.5 **Insurance**. The Company may, but is not required to, insure the life of each or any Unit Holder in such sum as the Company may determine feasible, naming Company as an owner and beneficiary of such policies. All insurance policies, whether owned on the date hereof or acquired after the date hereof, shall be listed on a schedule and attached hereto (provided, that failure to so list such policies shall not affect application of this Section 19.5 to such policies or their proceeds). The following provisions shall be applicable with respect to any life insurance owned by the Company:

(a) In the event of purchase of a Unit Holder's Units pursuant to Section 19.1(a) as a result of the death of an insured Unit Holder, the proceeds of such insurance shall be applied to the payment of the purchase price owed by the owner of the policy for the Units of the insured Unit Holder, up to the full amount of such proceeds.

(i) In the event such proceeds are less than the full purchase price for the Units, it is understood and agreed that the net amount of such proceeds shall constitute a down payment against the purchase price under Section 19.4(a).

(ii) In the event such proceeds exceed the purchase price, such excess shall belong to the owner of the policy and not to the estate of the insured Unit Holder.

(b) In the event any Voting Unit Holder sells his or her Units to the Company or the other Unit Holder pursuant to the terms of this Agreement other than in the case of death, it is understood and agreed that the then cash surrender value of any insurance held on the life of such selling Unit Holder for the purpose of providing funds for the purchase of his or her Units may constitute the down payment on the purchase obligation of the owner of the policy pursuant to Section 19.4(a); provided, that the available insurance proceeds shall not reduce the minimum down payment required by such section. The selling Unit Holder shall have the option of

requesting either that the policy be cashed and the proceeds thereof applied against such purchase obligation or that the policy be assigned to him or her and the purchase price be reduced by an amount equivalent to the cash surrender value of the policy.

(c) Insurance proceeds from any policies on the life of the selling Unit Holder purchased pursuant to this Section shall not be taken into account in determining the value of any Units pursuant to Section 19.3(a) above.

19.6 **Interest of Spouses.** The interests of Spouses of Unit Holders shall be treated as follows.

(a) **Interest of Spouse Subject to Agreement.** Any property interests now owned or hereafter acquired in a Ownership Interest by the spouse of any Unit Holder ("Spouse") shall be subject to the terms of this Agreement and shall be subject to the same restrictions on disposition described in this Agreement as if such interests constituted Units owned by a Unit Holder; provided that any such interest of the Spouse of any Unit Holder may be transferred to such Unit Holder. Notwithstanding any other provision of this Agreement to the contrary, this Agreement does not in any way provide for any right of any Spouse to purchase or to elect to purchase any Units (or any property interest therein).

(b) **Marriage Dissolution.** If any Spouse of a Unit Holder has any beneficial interest in the Unit Holder's Ownership Interest (including any community property interest), then in the event of a dissolution, divorce, annulment or other termination of marriage of such Unit Holder and Spouse (each, a "Marriage Termination") other than by reason of death, the Spouse hereby agrees to release, convey and/or transfer whatever interest such Spouse may have in the Ownership Interest to such Unit Holder upon the Marriage Termination, and as part of any property settlement pursuant to the Marriage Termination, the Spouse shall be compensated for such interest by such Unit Holder. In the event the parties cannot agree as to the value of such interest of the Spouse, the value of any Units in which such Spouse has an interest shall be determined in accordance with Section 19.3(a), and payment shall be made in accordance with Section 19.4 or as otherwise decreed by a court of competent jurisdiction.

(c) **Signature of Spouses.** The Unit Holders' Spouses by signing this Agreement hereby consent and agree to the terms of, and to be bound by, this Agreement and specifically to the provisions of this Section 19.6. Notwithstanding the foregoing, the absence of a Spouse's signature hereto shall not alter the effectiveness hereof or the enforceability of the provisions contained herein as against any Unit Holder or the Company.

19.7 **Closing Procedures.** If and to the extent that any closing term is not specified for any transfer pursuant to this Agreement, the parties shall employ a commercially reasonable term consistent with traditional practice in King County, Washington. In the event the parties are unable to agree on any such term, the escrow agent closing the transaction shall have the authority to establish the term in a manner consistent with the preceding sentence.

19.7.1 Any selling Unit Holder pursuant to Article 17, 18 or 19 shall:

(a) transfer and convey its Ownership Interest or Economic Interest to the buyer(s) free and clear of all liens or encumbrances thereon;

(b) execute and deliver such conveyance and transfer documents and deeds as may be reasonably necessary (to be determined by the buyer acting reasonably) to transfer and convey to the buyer all of the selling Unit Holder's interest.

19.7.2 Any buyer pursuant to Article 17 or 19 shall:

(a) use its best efforts to deliver to the seller at the closing, an absolute release, executed by each lender to the Company or person holding a mortgage or security interest against the interests being purchased, of any and all liability of the seller (and of any affiliate of or person related to the seller which is acting as a guarantor of such seller with respect thereto) with respect to such loan or mortgage; and

(b) indemnify, hold harmless and defend the seller (and any affiliate of or person related to the seller which is acting as a guarantor of Company debts) from all Company liabilities and obligations.

19.7.3 If the selling Unit Holder(s) shall fail or refuse at the closing of any transaction pursuant to Article 17 or 19 to execute and deliver to the buyer, all documents necessary to effect the closing, the interest of the selling Unit Holder(s) shall, on the written election of the buyer(s), be deemed to have been transferred and conveyed to the buyer(s) without the necessity of any documents of transfer having been executed by the selling Unit Holder(s), and, the selling Unit Holder(s) hereby appoint the buyer(s) and any of its (their) agents, officers or employees as the selling Unit Holder's agent and attorney-in-fact, with full power and authority to execute any and all documents which the buyer(s) reasonably deem necessary, to evidence the transfer of the interest of the selling Unit Holder(s) to the buyer(s), all without affecting any other rights and remedies of the buyer(s) hereunder.

ARTICLE 20: MISCELLANEOUS PROVISIONS

20.1 **Dispute Resolution.** Except as otherwise expressly provided herein, any disagreement or dispute between or among Unit Holders arising under or in connection with this Agreement shall be resolved by the procedures specified in this Section 20.1.

20.1.1 Unaided Negotiations. If any dispute arises hereunder or any Unit Holder believes that any other Unit Holder has breached any term of this Agreement, it shall provide written notice describing the dispute or the perceived breach (the "First Notice") to the allegedly breaching Unit Holder. The Unit Holder receiving such notice shall respond in

writing to the First Notice within fourteen (14) days after receipt (the "Second Notice"). If the dispute is not promptly resolved, the parties shall meet within fourteen (14) days to discuss and negotiate in good faith the resolution of any outstanding dispute. The location of the meeting shall be chosen by the Unit Holder responding to the First Notice. The Default Notice and Dispute Notice described in Section 16.1 herein shall constitute a First Notice and Second Notice, respectively, for purposes of this Section 20.1.

20.1.2 Mediation. If the procedure outlined in Section 20.1.1 fails to bring about a prompt resolution of the dispute, then within thirty (30) days following the meeting described in Section 20.1.1, any interested Unit Holder may initiate a voluntary, non-binding mediation conducted by a mutually acceptable mediator at Judicial Dispute Resolution ("JDR") in Seattle, Washington. Each Unit Holder participating in the mediation shall bear its own costs and expenses (including attorneys' fees) and its proportionate share of any other costs, fees, or expenses associated with the mediation and shall endeavor in good faith to resolve the dispute. The mediation shall be held in Seattle, Washington.

20.1.3 Arbitration. In the event the Unit Holders are unable to resolve any outstanding disagreement or dispute as provided above, then the parties agree that the outstanding disagreement or dispute will be settled by binding arbitration. The arbitration will be conducted in accordance with the Rules of Practice & Procedure for Arbitration of JDR in effect when the arbitration begins and shall be conducted by a single arbitrator experienced in the matters at issue and selected by the parties. The substantially prevailing Unit Holder at any such arbitration shall have the right to recover from the other Unit Holder reasonable expenses and attorneys' fees incurred at the arbitration and in any effort to have the award enforced. The judgment or award rendered by the arbitrator may be entered in any court having competent jurisdiction in accordance with RCW Chapter 7.04. The arbitration shall be held in Seattle, Washington.

20.2 **Costs of Legal Actions and Proceedings.** Except as otherwise provided herein, in any dispute between the Parties arising out of or under this Agreement, whether or not arbitration or litigation is commenced, the nonprevailing party shall pay the prevailing party's reasonable attorneys' fees, accounting fees and other costs.

20.3 **Notices.** Any notice, demand, or communication required or permitted under this Agreement (a "Notice") shall be deemed to have been duly given if delivered personally to the party to whom directed or, if mailed three business (3) days after the date of mailing by registered or certified mail, postage and charges prepaid, addressed (a) if to a Unit Holder, to the Unit Holder's address specified on attached Exhibit A, (b) if to the Company or the Managers, to the address specified in Section 2.5.

20.4 **Governing Law.** This Agreement shall be construed and enforced in accordance with the internal laws of the State of Washington, without regard to its conflict of laws provisions.

20.5 **Amendments.** This Agreement may not be amended except by the unanimous written agreement of all of the Members.

20.6 **Headings.** The headings in this Agreement are inserted for convenience only and shall not affect the interpretations of this Agreement.

20.7 **Waivers.** The failure of any Person to seek redress for violation of or to insist upon the strict performance of any covenant or condition of this Agreement shall not prevent a subsequent act, which would have originally constituted a violation, from having the effect of an original violation.

20.8 **Rights and Remedies Cumulative.** The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy shall not preclude or waive the right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

20.9 **Severability.** If any provision of this Agreement or the application thereof to any Person or circumstance shall be invalid, illegal or unenforceable to any extent, the remainder of this Agreement and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law.

20.10 **Heirs, Successors and Assigns.** Each of the covenants, terms, provisions and agreements herein contained shall be binding upon and inure to the benefit of the parties hereto and, to the extent permitted by this Agreement, their respective heirs, legal representatives, successors and assigns.

20.11 **No Partnership Intended for Nontax Purposes.** The Members have formed the Company under the Act, and expressly do not intend hereby to form a partnership under either the Washington State Uniform Partnership Act nor the Washington State Uniform Limited Partnership Act. The Unit Holders do not intend to be partners one to another, or partners as to any third party. To the extent any Unit Holder, by word or action, represents to another person that any other Unit Holder is a partner or that the Company is a partnership, the Unit Holder making such wrongful representation shall be liable to any other Unit Holder who incurs personal liability by reason of such wrongful representations.

20.12 **Creditors.** None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Company, nor is any provision of this Agreement intended in any manner to benefit any Person who or which is not a party to or signatory of this Agreement.

20.13 **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

20.14 Investment Representations. The Units have not been registered under the Securities Act of 1933, the Securities Act of Washington or any other state securities laws (collectively, the "Securities Acts") because the Company is issuing the Units in reliance upon the exemptions from the registration requirements of the Securities Acts, and the Company is relying upon the fact that the Units are to be held by each Unit Holder for investment. In the event certificates representing Units hereunder are issued, each such certificate shall bear a legend stating in substance that the Units represented thereby are subject to the terms of this Agreement and that a copy of this Agreement is available from the Managers of the Company.

20.15 Prior Agreements. This Agreement shall be the only operating agreement of the Company. All prior operating agreements (whether styled operating agreements, member agreements, company agreements, or otherwise) are hereby terminated and superseded by this Agreement.

EXECUTED on the date set forth beside my signature below.

_____ _____, 2008
Michael G. Ota

_____ _____, 2008
Michael S. Ota

_____ _____, 2008
Daniel L. Schenk

Signatures of Spouses:

_____

Printed Name:_____

Date:_____

_____

Printed Name:_____

Date:_____

_____

Printed Name:_____

Date:_____

SCHEDULE I

COMMON VOTING UNITS		
Member Name	**Initial Capital Contribution**	**Units Issued**
Michael S. Ota	See below	82,000
Daniel L. Schenk	See below	18,000

PREFERRED UNITS		
Member Name	**Initial Capital Contribution**	**Units Issued**
Michael G. Ota	See below	800

The Initial Capital Contribution of Michael G. Ota shall consist of _____ Dollars ($_____) cash, plus the real property legally described in the attached Exhibit A (the "Real Property"). Such Initial Capital Contribution shall be made in a combination of cash, property and other valuable consideration to the Company. The Members and initial Manager acknowledge that the net value of the Real Property and other capital contributed by Michael G. Ota is equal to the value of the Preferred Units to be issued to Michael G. Ota. The nature and value of any other non-cash consideration shall be subject to approval by the Managers of the Company. The Initial Capital Contribution shall be made in full not later than one (1) year from the Effective Date of the Agreement.

Michael S. Ota and Daniel L. Schenk shall make to cash capital contribution. Their Units are issued in anticipation that they shall facilitate improvement of the Real Property and resulting appreciation in its value.

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APPENDIX I

DEFINITIONS

For purposes of this Agreement, unless the context clearly indicates otherwise, the following terms shall have the following meanings:

1.10 **Act.** The Washington Limited Liability Company Act (RCW Ch. 25.15).

1.11 **Business Day.** Any day other than Saturday, Sunday or any legal holiday observed in the State of Washington.

1.12 **Capital Account**. The account maintained for a Unit Holder determined in accordance with Article 10.

1.13 **Capital Contribution**. Any contribution of Property, services or the obligation to contribute Property or services made by or on behalf of a Unit Holder or assignee.

1.14 **Certificate**. The Certificate of Formation of the Company as properly adopted and amended from time to time by the Members and filed with the Secretary of State.

1.15 **Code.** The Internal Revenue Code of 1986, as amended, or corresponding provisions of subsequent superseding federal revenue laws.

1.16 **Commitment**. The Capital Contributions that a Unit Holder or assignee is obligated to make.

1.17 **Company**. Generation V, LLC, a limited liability company formed under the laws of the State of Washington, and any successor limited liability company.

1.18 **Default Interest Rate.** The lower of (a) the highest legal rate of interest or (b) the long-term annual Applicable Federal Rate as determined for purposes of Section 1274(d) of the Code ("AFR"), plus five percent (5%) per annum.

1.19 **Distribution.** A transfer of Property to a Unit Holder on account of an Ownership Interest.

1.20 **Dissociation**. Any event listed in RCW 25.15.130 which causes a Person to cease to be Unit Holder.

1.21 **Dissolution Event.** An event, the occurrence of which will result in the dissolution of the Company under Article 15 unless the Members agree to the contrary.

1.22 **Economic Interest**. A Voting Unit Holder's share of Net Profits, Net Losses, and other tax items of the Company and distributions of the Company's assets pursuant to this Agreement and the Act. Economic Interest does not include any right to participate in the management or affairs of the Company, including the right to vote on, consent to or otherwise participate in any decision of the Members.

1.23 **Initial Capital Contribution.** The Capital Contribution agreed to be made by the Initial Unit Holders as described in Article 10.

1.24 **Initial Unit Holders.** Those persons identified on Schedule I attached hereto and made a part hereof by this reference who have initially executed this Agreement.

1.25 **Majority.** The affirmative vote or consent of Members holding a Majority Interest.

1.26 **Majority Interest.** At any time, more than fifty percent (50%) of the then outstanding Voting Units held by Members.

1.27 **Management Right.** The right of a Member to participate in the management of the Company, including the rights to information and to consent or approve actions of the Company. Only Members shall have Management Rights.

1.28 **Member.** Each Person who executes a counterpart of this Agreement as a Member and each Person who may hereafter become a Member (including a Substitute Member). If a Person is a Member immediately prior to the acquisition by such Person of an Economic Interest, such Person shall have all the rights of a Member with respect to such Economic Interest. Preferred Unit Holders are not Members, and shall have no right to participate in Company management.

1.29 **Operating Agreement.** This Agreement including all amendments adopted in accordance with this Agreement and the Act.

1.30 **Ownership Interest.** All of a Unit Holder's rights in the Company, including the Unit Holder's Economic Interest and Management Right, if applicable.

1.31 **Money.** Cash or other legal tender of the United States, or any obligation that is immediately reducible to legal tender without delay or discount. Money shall be considered to have a fair market value equal to its face amount.

1.32 **Net Losses.** The losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.33 **Net Profits.** The income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

1.34 **Person.** Any individual or Entity permitted to be a Unit Holder of a limited liability company under the laws of the State of Washington.

1.35 **Property.** Any property, real or personal, tangible or intangible, including Money, and any legal or equitable interest in such property, but excluding services and promises to perform services in the future.

1.36 **Regulations.** The proposed, temporary and final Treasury regulations promulgated under the Code and the corresponding sections of any regulations subsequently issued that amend or supersede such regulations.

1.37 **Reserves.** Funds which are set aside in any fiscal period or amounts allocated during such period to reserves which shall be maintained in amounts deemed sufficient for working capital and to pay taxes, insurance, debt service and other costs or expenses incident to the ownership or operation of the Company's business.

1.39 **Sharing Ratio.** With respect to any Voting Unit Holder, a fraction (expressed as a percentage), the numerator of which is the total of the Voting Unit Holder's Capital Account and the denominator of which is the total of all Capital Accounts of all Voting Unit Holders and assignees.

1.40 **Substitute Member.** An assignee who has been admitted to all of the rights of membership pursuant to this Agreement.

1.41 **Taxable Year.** The taxable year of the Company as determined pursuant to § 706 of the Code.

1.42 **Unit Holder.** A Person who owns any Units, whether Preferred Units or Voting Units; provided, that where the context requires or where expressly stated in the Agreement, the term Unit Holder may refer only to Voting Unit Holders.

1.43 **Units.** The fractional interests in the Company held by any Unit Holder or Economic Interest holder under this Agreement as reflected in attached Schedule I, as amended from time to time. Units consist of Preferred Units, which have no Management Right; and Voting Units, which carry the entire Management Right.

20.14 Investment Representations. The Units have not been registered under the Securities Act of 1933, the Securities Act of Washington or any other state securities laws (collectively, the "Securities Acts") because the Company is issuing the Units in reliance upon the exemptions from the registration requirements of the Securities Acts, and the Company is relying upon the fact that the Units are to be held by each Unit Holder for investment. In the event certificates representing Units hereunder are issued, each such certificate shall bear a legend stating in substance that the Units represented thereby are subject to the terms of this Agreement and that a copy of this Agreement is available from the Managers of the Company.

20.15 Prior Agreements. This Agreement shall be the only operating agreement of the Company. All prior operating agreements (whether styled operating agreements, member agreements, company agreements, or otherwise) are hereby terminated and superseded by this Agreement.

EXECUTED on the date set forth beside my signature below.

_____ _____, 2008
Michael G. Ota

_____ _____, 2008
Michael S. Ota

_____ _____, 2008
Daniel L. Schenk

BYRNES KELLER CROMWELL LLP

April 19, 2023 - 4:53 PM

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