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No. 71926-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RSD AAP LLC,

Plaintiff/Appellant,

v.

ALYESKA OCEAN, INC.; JEFF HENDRICKS AND JANE DOE HENDRICKS, individually and as a marital community,

Defendants/Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY

In April 2012 Mr. Hendricks—the Manager and Managing General Partner of the Partnership—obtained information about the opportunity to purchase, at a very attractive price, the 20.618% Partnership Interest of another Partner, Mark O'Brien, who was dying of lung cancer. The Partnership as a whole already had a contractual option to buy the O'Brien Interest and share in the opportunity pro rata. Mr. Hendricks made no effort to protect or enforce the Partnership's contractual right, and made no effort even to inform the Partnership that Mr. O'Brien was near death or that the O'Brien Interest was available for purchase.

Instead, Mr. Hendricks proceeded to purchase the O'Brien Interest for himself. In addition to doubling his stake in a very lucrative investment—from 20.618% to 41.236%—the purchase gave him a veto over all future Major Decisions of the Partnership, including any vote to remove him as Manager. Had the Partnership purchased the O'Brien Interest, all of the Partners would have shared in the economic benefits and retained meaningful voting rights on Major Decisions. As Mr. Hendricks explained at the time to another Partner, Matt Lieske, his motivation was to use this control to protect his employment and employment for "generations" of his family. Mr. Hendricks instructed Mr. Lieske to keep this information "confidential."

As Manager and Managing General Partner, Mr. Hendricks owed the core fiduciary duties of loyalty, good faith and care. Those duties required him to make a full and timely disclosure regarding the opportunity

to purchase the O'Brien Interest, and precluded him from exploiting the opportunity for himself absent such full disclosure and informed consent.

But Mr. Hendricks did exactly what his fiduciary duties prohibited. He withheld all information from the Partners until after he secured agreement with Mr. O'Brien for his own purchase of the O'Brien Interest. When he finally disclosed the information and asked for "consent," he: (1) failed to provide any material information regarding the transaction, including information regarding the attractive price or the Partnership's right to purchase; and (2) discouraged any dissent or even inquiry by making it clear that his private deal had already been agreed with Mr. O'Brien. He even went so far as to tell one Partner—Appellant RSD—that it would not receive any information regarding the O'Brien transaction unless and until it gave its blind consent to that deal.

The trial court granted summary judgment on RSD's fiduciary duty claim based on the plainly erroneous conclusion that because Mr. O'Brien complied with the technical requirements the Partnership Agreement imposed on him as seller, Mr. Hendricks necessarily complied with his separate fiduciary duties as Manager and Managing Partner. That decision should be reversed and this case remanded for trial on disputed issues of material fact.

II. ARGUMENT

A. RSD Is Entitled to a Trial on Its Claim that Ms. Hendricks Breached His Fiduciary Duties.

1. The Trial Court Erred in Conflating Mr. Hendricks' Broad Fiduciary Duties With the Narrower Contract Duties Imposed by Article VII.

In granting summary judgment in favor of Mr. Hendricks on all of RSD's claims, the trial court paid scant attention to RSD's claim for breach of fiduciary duty. It first concluded that summary judgment should be granted on RSD's breach of contract claim, because Mr. O'Brien complied with Section 7.1 of the Partnership Agreement when he sold his interest to Mr. Hendricks. VR 30-32. Upon reaching that conclusion the court simply held, without further analysis, that RSD's fiduciary duty claim failed for the very same reason:

> The plain language of the contract allows a selling partner to proceed under either 7.1 or 7.3 . . . They're sufficient in and of themselves. And as long as the selling partner complies with one or the other, they've met their obligations under the partnership agreement . . .
>
> . . .
>
> Under these circumstances I don't think that Mr. Hendricks breached his fiduciary duties owed to the partners or the partnership, and that claim has to fall as well.

Id. (emphasis added). Mr. Hendricks echoes that flawed reasoning, arguing that, because Mr. O'Brien complied with Section 7.1 by obtaining "consent" from other Partners, "[t]here is no basis for RSD's breach of fiduciary duty claims." Resp. Brief at 37. The trial court's reasoning, and Mr. Hendricks' argument, are incorrect.

As an undisputed fiduciary of RSD, Mr. Hendricks' duties went well beyond the specific duty to comply with Article VII of the Partnership Agreement:

> Fiduciary claims impose obligations beyond those expressly stated in the contract. They are not contractual provisions, and the extent of fiduciary duties cannot be ascertained by reference to contract interpretation.

Broad v. Rockwell Inter. Corp., 614 F.2d 418, 430 (5th Cir. 1980) (emphasis added); see also First Sealord Sur.v. Durkin & Devries Ins. Agency, 918 F. Supp.2d 362, 390 (E.D. Pa. 2013) (agent owes principal fiduciary duties "beyond those imposed by the contract"); In re Landamerica Financial Group, Inc., 412 B.R. 800, 813 (Brkcy. E.D. Va. 2009) ("Fiduciary duties create a special relationship of trust and good faith that goes beyond the duties set forth in an ordinary contract . . .").

2. Mr. Hendricks' Conduct Is Measured Against Traditional Fiduciary Standards That Were Not Reduced by RUPA.

a. Mr. Hendricks Owed Fiduciary Duties as Manager and Managing Partner.

Mr. Hendricks was the Manager and Managing Partner of the Partnership. When he solicited after-the-fact "consents" of the remaining Partners to his own purchase of the O'Brien Interest, Mr. Hendricks did so not in his capacity as "a" Partner but as the Manager and Managing Partner. CP 117 (Mr. Hendricks signed the May 15, 2012 letter and request for consent as "Managing Partner, Auriga/Aurora General Partnership").

Because of the special level of control he exercised over the Partnership and the interests of the general Partners, the law imposed on

Mr. Hendricks "the highest possible fiduciary duty." Triple Five of Minnesota, Inc. v. Simon, 404 F.3d 1088, 1097 (8th Cir. 2005) (emphasis added); see also McBeth v. Carpenter, 565 F.3d 171, 177 (5th Cir. 2009) ("[i]t is axiomatic that a managing partner in a general partnership, owes his co-partners the highest fiduciary duty recognized in the law"). Indeed, a managing partner bears "the burden of dispelling all doubts concerning the discharge of his duties." Bovy v. Graham, Cohen & Wampold, 17 Wn. App. 567, 571 (1977) (managing partners "occup[y] a higher fiduciary position" than general partners).

b. Mr. Hendricks Owed Fiduciary Duties as Attorney-in Fact.

Mr. Hendricks held a Power of Attorney as to each Partner, including RSD. While Mr. Hendricks argues that this authority was "mainly clerical," in fact he held the broad power to act as each Partner's "true and lawful attorney," and in that capacity

> to make, execute, sign, acknowledge, swear to, deliver, record and or file . . . all documents and instruments that may be necessary or appropriate to carry out . . . the Partnership Agreement and all amendments ... adopted in accordance with the terms thereof and all instruments which [Mr. Hendricks] deems appropriate to reflect changes and/or modifications of the Company, including the admission, deletion or substitution of Partners.

CP 244. Indeed, Mr. Hendricks had the power to officially "record" the results of his own malfeasance by amending Schedule A to the Partnership Agreement to reflect his now 41.236% interest. CP 65.

A holder of Power of Attorney has "the fiduciary duty of loyalty that accompanies that relationship." Keene v. Bd. of Accountancy, 77 Wn. App.

849, 858 (1995). "In the time-honored words of Justice Cardozo, [this] fiduciary relationship requires '[n]ot honesty alone, but the punctilio of an honor the most sensitive . . ." Id., quoting Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

Mr. Hendricks contends that the power of attorney is irrelevant because it "was never used in this transaction." Resp. Brief at 46. There is no factual basis for this assertion. Regardless, the point is that the power of attorney evidences the special trust and power of control that the partners placed in him in 1987—and allowed him to retain for 27 years and counting—to act in their interests with respect to the affairs of the Partnership. McBeth, 565 F.3d at 177 ("It is clear that the issue of control has always been the critical fact looked to by the courts in imposing this high level of responsibility" on a fiduciary). Mr. Hendricks was not permitted to treat that trust and control like a hat that he could remove when he wanted to exploit a particularly lucrative opportunity for himself.

3. RUPA Did Not Reduce Mr. Hendricks' Fiduciary Duties or Allow Him to "Write His Own Ticket" with Respect to the O'Brien Interest.

Mr. Hendricks argues that Washington's Revised Uniform Partnership Act ("RUPA") provides that a partner does not necessarily violate his or her fiduciary duties "merely because the partner's conduct furthers the partner's own interest." See RCW 25.05.165(5). This argument fails for several reasons.

First, RUPA did not even purport to alter or address the duties owed by managing partners or holders of power of attorney. See McBeth, 565

F.3d at 177 (managing partners continue to have trustee-like fiduciary duties after RUPA); In re Jones, 445 B.R. 677, 710 (Bkcy. Ct. N. D. Tex. 2011) (same). Second, RSD does not rely on the "mere" fact that Mr. Hendricks was "furthering his own interest" with respect to the O'Brien Transaction. Its claim is premised on the fact that his personal interest was in direct conflict with the Partnership's, and on the manner in which he pursued his interest. While RUPA clarified the rule that a partner does not ipso facto breach a fiduciary duty by pursuing his own interests, it continued the traditional rule that a partner must, in the process of pursuing any personal interests, abide by the duties of good faith, disclosure and loyalty. Uniform Partnership Act, Prefatory Note, p. 2 (1997) (under RUPA, "[p]rovision is made for the legitimate pursuit of self-interest, with a counterbalancing irreducible core of fiduciary duties") (emphasis added).

Mr. Hendricks contends that RUPA "represented a major departure from its predecessor, the Uniform Partnership Act (UPA)," in that it permits partners to "write their own ticket" in pursuit of their narrow individual interests. Resp. Brief at 39-40. This is not true. After RUPA as before, "[p]artners owe each other fiduciary duties and are obligated to deal with each other with candor and the utmost good faith." Bishop of Victoria Corp. Sole v. Corp. Bus. Park, LLC, 138 Wn. App. 443, 458 (2007), citing Bovy v. Graham, 17 Wn. App. 567, 570 (1977).

In Bishop of Victoria the court explained the extensive fiduciary duties that continue to govern partners' behavior toward one another and toward the partnership:

> A partner owes a fiduciary duty of loyalty and care to both the partnership and to other partners. RCW 25.05.165. A partner owes a duty of loyalty to avoid secret profits, self-dealing, and conflicts of interest. RCW 25.05.165(2)(a)-(c). A partner must avoid self-dealing by refraining from dealing with the partnership on behalf of a party having an interest adverse to the partnership. RCW 25.05.165(2)(b). And a partner must avoid conflicts of interest in refraining from competing with the partnership. RCW 25.05.165(2)(c) . . .
>
> . . .
>
> The good faith obligation of a fiduciary relationship requires a partner to abstain from concealment concerning partnership matters . . . Each member of the partnership is required to fully disclose all known information that is significant and material to the affairs or property of the partnership . . . Partners are confidential agents of each other and have a right to know all that the other partner knows and are required to fully disclose all material facts that relate to partnership affairs.

Id. at 456-58. Indeed, perhaps anticipating the "anything goes" argument advanced by Mr. Hendricks, the drafters of RUPA were careful to note that "RUPA continues the traditional rule that a partner is a fiduciary" and "ensure[s] a fundamental core of fiduciary responsibility" among partners. Uniform Partnership Act, § 103 cmt. 4 (1997) (emphasis added).[1]

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[1] The phrase on which Mr. Hendricks relies—"write their own ticket"—appears in Horne v. Aune, 130 Wn. App. 183, 200-201 (2005). It does not suggest that partners may disregard their core duties of loyalty, disclosure and good faith. Rather, it means that partners may draft their own agreement, and "with few exceptions" that agreement controls. Id. The Legislature has decided what those "exceptions" are: "The partnership agreement may not . . . (c) Eliminate the duty of loyalty . . . [or] (e) Eliminate the obligation of good faith and fair dealing . . ." RCW 25.05.015(b)(2). These are the very duties on which RSD relies. Further, the Partnership Agreement does not purport to eliminate or even limit those duties in any event.

4. RSD Raised a Triable Issue of Fact Regarding Mr. Hendricks' Breach of His Fiduciary Duties.

a. Mr. Hendricks Breached His Duty of Loyalty by Usurping a Partnership Opportunity.

As a fiduciary Mr. Hendricks' duty of loyalty prohibited him from taking for himself an opportunity that belonged to the Partnership. RCW 25.05.165(2). Mr. Hendricks argues that the opportunity to purchase the O'Brien Interest was not technically a "partnership opportunity." Resp. Brief at 43-44. The trial court granted judgment on RSD's fiduciary duty claim without addressing whether the evidence raised a triable issue as to the application of the partnership opportunity doctrine. VR 30-32.

Whether a particular transaction presents a partnership opportunity "depends upon the facts and circumstances of each particular case." Wagner v. Foote, 128 Wn.2d 408 (1996), citing Equity Corp. v. Milton, 221 A.2d 494, 497 (S. Ct. Del. 1966) ("The determination of this question is always one of fact to be determined from the objective facts and surrounding circumstances.") (emphasis added); Noble v. Lubrin, 114 Wn. App. 812, 818 (2003).[2]

> It is only when the undisputed facts show that the opportunity bears no logical or reasonable relation to the existing or prospective business activities of the corporation, that the opportunity may be considered noncorporate as a matter of law" such that summary judgment is proper.

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[2] See also Alexander v. Sturkie, 909 S.W.2d 166, 170 (Tex. App. 1995); citing Sladen v. Rowse, 347 A.2d 409, 412 (R.I.1975) (question of corporate opportunity "depends in each instance upon the facts and circumstances of the particular case"); Weiss v. Kay Jewelry Stores, Inc.,470 F.2d 1259, 1270 (D.C. Cir. 1972) (under Delaware law the determination of corporate opportunity "is always one of fact to be determined from the objective facts and surrounding circumstances").

Alexander, 909 S.W.2d at 170.

Viewing the evidence in the light most favorable to RSD, this Court must reverse the trial court's grant of summary judgment. A reasonable fact-finder could readily conclude that the Partnership had a stated policy favoring repurchase of a deceased Partner's interests. Indeed, that policy is expressed in the written terms of the Partnership Agreement, Section 8.2:

> Upon the death, incompetence or withdrawal of any Partner . . . the Partnership may elect to (but need not) liquidate the interest of the withdrawing, deceased or incompetent Partner and cause the Partnership to purchase [that] interest . . .

CP 74. The Offering Memorandum prepared by Mr. Hendricks to market the Partnership interests to potential investors in 1987 called attention to this policy as well. CP 23 ("Purchase of Interests . . . Upon the withdrawal, death or incapacity of a Partner . . . the Partnership may elect to purchase the interest of the withdrawing, deceased or incompetent Partner at 100% of its value"). And in 1991 the Partnership did purchase the three percent interest of a withdrawing Partner—Steve Carr—pursuant to Section 8.2. CP 53. At a minimum RSD raised a triable issue of fact as to whether the opportunity to purchase the shares of a deceased Partner bore a "logical or reasonable relation to the existing or prospective business activities of the corporation." Alexander, 909 S.W.2d at 170.

Mr. Hendricks contends that the opportunity to purchase the O'Brien Interest was not a "partnership opportunity" because the "the partnership was not in [the] business" of buying its own shares. Resp. at 44. That merely begs the question. An opportunity to repurchase shares is in

the partnership's "line of business" if and when the partnership has a policy favoring such repurchase. Equity Corp., 221 A.2d at 497. RSD presented ample evidence that such a policy existed.

Mr. Hendricks contends that RSD's argument is undermined by the court's refusal to apply the partnership opportunity doctrine in Equity Corp. However, the plaintiffs' only evidence in Equity Corp. was that the corporation had repurchased shares only on a few occasions; the court held that this history "falls far short of establishing for Equity a corporate policy" to repurchase shares. Equity Corp., 221 A.2d at 497-98. Mr. Hendricks relies on other cases, in which the courts held that the particular evidence presented failed to establish that an opportunity to repurchase shares was a corporate opportunity.[3] Here, by sharp contrast, the Partnership had an explicit repurchase policy built into its organizational charter and in place throughout its 27-year existence. CP 23, 74.

b. Mr. Hendricks Breached His Duty of Loyalty By Behaving as a Party "Having an Interest Adverse to the Partnership."

Assuming for the sake of argument that the opportunity to purchase the O'Brien Interest was not a "partnership opportunity" for purposes of RCW 25.05.165(2)(a), Mr. Hendricks nonetheless breached his duty of loyalty by acting as "a party having an interest adverse to the partnership"

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[3] See Katz Corp. v. T.H. Canty and Co., 362 A.2d 875, 979 (Conn. 1975) (evidence of a long-abandoned "informal" unwritten agreement among directors failed to establish current policy under corporate opportunity doctrine); Bisbee v. Midland Linseed Products Co., 19 F.2d 24, 27 (8th Cir. 1927) (refusing to apply corporate opportunity doctrine under particular facts of the case, but observing that opportunity to repurchase share may be a corporate opportunity under other circumstances).

with respect to the O'Brien Interest. RCW 25.05.165(2)(b). There is no dispute that the Partnership had an "interest" in purchasing Mr. O'Brien's share for itself. There is no dispute that Mr. Hendricks had a necessarily conflicting personal interest in securing the 20.618% O'Brien Interest all for himself. Mr. Hendricks resolved that inherent and obvious conflict by: (1) doing nothing to protect the interests of the Partnership; and (2) exploiting his private information to secure the O'Brien Interest for himself, before even informing the Partnership that the interest was available for purchase.

c. Mr. Hendricks' Defalcations Are Highlighted and Exacerbated—Not Cured—by "Consents" He Obtained After the Fact from Some Partners.

1) The So-Called "Consents" Are Ineffective as Waivers or Ratifications.

Mr. Hendricks argues that any duty to disclose was removed by the fact that some of the other Partners eventually "consented" to his purchase of the O'Brien Interest. However, Mr. Hendricks' fiduciary duty, as Partner, Managing Partner and attorney-in-fact, was to disclose all material information in a timely fashion. That means at a minimum providing the remaining Partners with full information, and a fair opportunity to pursue their interests and/or the interests of the Partnership, before he secured a deal for his own sole benefit.[4] RUPA explicitly requires as much. RCW 25.05.015(2)(c)(ii) (authorization or ratification of partner conduct that

[4] Mr. Hendricks makes much of his "offer" to share information with any Partner who expressly asked for it. However, Mr. Hendricks was careful to ensure that this offer came after he had already reached an agreement with Mr. O'Brien to purchase the shares for himself. CP 117. Further, the "ratification" statute requires "full disclosure," not a carefully couched offer to disclose, let alone an offer to disclose preceded by a representation that such a request would be futile in any event. Id.

would otherwise violate fiduciary duty must come "after full disclosure of all material facts"). Mr. Hendricks does not even argue that he obtained valid authorization or ratification under this provision, and for good reason: he never obtained consent from "[a]ll of the partners," and the consents he did obtain came without any disclosure, let alone "full disclosure of all material facts." Bishop of Victoria, 134 Wn. App. at 458.[5]

2) Mr. Hendricks' Acted in Bad Faith in Securing the So-Called "Consents" Without Disclosing Any Material Facts.

Mr. Hendricks' attempt to obtain consents without disclosure of material information, and his decision to withhold his request for consent until after he reached an agreement with Mr. O'Brien, do more than render the consents ineffective. They evidence hisbad faith.

> Partners are confidential agents of each other and have a right to know all that the other partner knows and are required to fully disclose all material facts that relate to partnership affairs.

Bishop of Victoria, 138 Wn. App. at 458. Accordingly, to defeat RSD's fiduciary duty claim, what Mr. Hendricks "need[s] to show is that [he] did not fail to disclose material information relevant to the [transaction]." Diamond Parking, Inc. v. Frontier Bldg. Ltd. Partnership, 72 Wn. App. 314, 320 (1993). A fact is "material" for purposes of a partner's fiduciary duty if it "is one that might be expected to have induced action or forbearance by

[5] In addition, because fiduciary duties are not limited to the duty to technically comply with a contract, Mr. Hendricks should have abstained from voting to approve his own purchase of the O'Brien Interest, even if the express terms of the Partnership Agreement only required that the Selling Partner—Mr. O'Brien—not vote. See Opening Brief at 32.

the other partners." Id. What is material depends on the context and the partners' respective knowledge and information. Id.

In April 2012 Mr. Hendricks discovered that Mr. O'Brien was terminally ill and had "only weeks to live." CP 55. At approximately the same time, he learned that Mr. O'Brien wished to explore selling his Partnership interest prior to his death, and that he was willing to sell it for $4 million, far less than its market value. CP 55. Mr. Hendricks had no reason to believe that the other Partners knew this information.

Mr. Hendricks knew that this information was "material" to the conduct of the affairs of the Partnership, in at least these respects:

- Mr. O'Brien's death would present the Partnership with the opportunity to purchase his 20.618% interest, under Section 8.2, and share pro rata in that interest. CP 74.[6]
- Under Section 7.3 of the Partnership Agreement, each Partner would have the individual right to participate in the purchase of the O'Brien Interest at a two-thirds discount, should Mr. O'Brien decide to sell that interest prior to his death. CP 71.
- If Mr. Hendricks obtained the O'Brien Interest for himself, he would hold a 41.236% interest in the Partnership, giving him the power to block any vote that required a two-thirds majority, including a vote to eliminate him as Manager. CP 68.

Rather than share any of this important information with his Partners, Mr. Hendricks decided to act quickly, and without disclosure, to secure the opportunity for himself. He negotiated terms with Mr. O'Brien's

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[6] The evidence shoes that Mr. Hendricks had section 8.2 specifically in mind, and knew it was "material" to the sale of the O'Brien Interest, while he was negotiating with Mr. O'Brien and at the same time withholding all information regarding the availability of the O'Brien Interest from the other Partners. See Opening Brief at 34-35 & CP 213 (Mr. Hendricks warned his accountant that his purchase of the O'Brien Interest might "collapse" if Mr. O'Brien became aware of the Partnership's right to repurchase upon his death under Section 8.2).

advisors, and came to an agreement with Mr. O'Brien to purchase the O'Brien Interest at a bargain price. It was not until after he secured an agreement with Mr. O'Brien that Mr. Hendricks disclosed any of this information to his Partners. CP 117.

Mr. Hendricks' failure to disclose became an outright refusal to disclose when he explicitly told RSD that it was entitled to information related to the O'Brien Transaction only if it first "consented" to Mr. Hendricks' purchase of the O'Brien Interest. CP 211 (Hendricks' response to RSD's request for information: "If you are agreeable to the transaction between Mark and I, you are welcome to any of its details.") (emphasis added). RSD did not agree to Mr. Hendricks' demand for blind consent, and Mr. Hendricks proceeded to withhold that information until after Mr. O'Brien died and Mr. Hendricks executed his option. CP 180.

Mr. Hendricks attempts to rationalize this instance of bad faith by arguing that RSD had no need for the information once Mr. Hendricks had secured two-thirds consent on May 31, 2012, because its vote wouldn't matter. However, on June 6, 2012 Mr. Hendricks provided a detailed response to a request for information that another Partner (Matt Lieske) made after May 31. CP 125-126.[7] Mr. Hendricks argues that his failure to disclose should be excused because RSD did not make timely "inquiries" regarding that transaction. This is simply false. The timeline of RSD's

[7] The obvious explanation for Mr. Hendricks' decision to respond differently to these two requests for information is that Mr. Lieske's request—but not RSD's—was accompanied by a statement that he would approve the transaction. Id. at 126. Of course, that is not a good faith basis for a Managing Partner to discriminate in the discharge of his duties.

demands for information and assertion of its rights demonstrates that RSD acted promptly and diligently in this regard. See Appendix A.

3) Mr. Hendricks Acted in Bad Faith by Telling the Partners that He Had Already Made an Agreement with Mr. O'Brien, at the Same Time That He First Disclosed the Opportunity and Asked for Consent.

In his letter to the Partners dated May 15, 2012, Mr. Hendricks simultaneously did the following: (1) first informed them of the news about Mr. O'Brien's impending death and desire to sell his interest; (2) informed them that he and Mr. O'Brien had already made an agreement that Mr. Hendricks would purchase the O'Brien interest for himself; and (3) asked them to "consent" to that already-completed agreement.

> It is with great sadness to inform you that our partner, Mark O'Brien, is in a final stage of lung cancer that has also spread to his lymph nodes . . . Mark and I have agreed that after his death, my corporation, Alyseka Ocean Inc., would purchase Mark's corporate interest in the partnership.

CP 117 (emphasis added).[8]

By presenting his purchase of the O'Brien Interest as a fait accompli at the same time as he first disclosed the opportunity and sought consent, Mr. Hendricks was attempting to stack the deck in favor of obtaining those consents, and to discourage the other Partners from making inquiries to explore their own and/or the Partnership's interest in that opportunity. That manipulative approach is inconsistent with his duties as a Partner,

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[8] Mr. Hendricks' declaration confirms this: "On May 15, 2012, I wrote to all partners and advised that Mark and I had agreed to sell his 20.618% interest to me. I told the partners that they were free to call me if they had any questions about the agreement." CP 55 (emphasis added).

Managing Partner and attorney-in-fact, to act in "utmost good faith" towards the other Partners. Compare Diamond Parking, 72 Wn. App. at 320-21 (general partners did not breach fiduciary duty to limited partner with regard to vote to amend partnership agreement, where general partner disclosed all material information, and even provided free legal counsel to limited partners, prior to vote).

4) The Bad Faith of Mr. Hendricks' Handling of the Sale of the O'Brien Interest Is Highlighted by Comparison to His Good Faith Management of a Prior Sale of a Partner's Interest.

In 1988 a Partner named Biernes RSW Trawlers informed Mr. Hendricks that it wished to sell its 5% interest and withdraw from the Partnership. CP 204. Mr. Hendricks dutifully informed the remaining Partners of Biernes' desire to sell the interest, and informed them that two potential investors were interested in buying it. Id. He disclosed the price at which the proposed sale would take place. Id. Most importantly, he explicitly and clearly informed the Partners that they had the option under the Partnership Agreement to purchase the shares, rather than consent to the sale to the potential investors:

> I want all the partners to be immediately aware of this development and that we have an option to purchase the share ourselves according to our partnership agreement.

Id. (emphasis added). Only after all of the Partners had the opportunity to consider and reject the option to purchase—with the benefit of knowing the price term—did Mr. Hendricks request that they waive it. Id.[9]

The bad faith conduct that Mr. Hendricks exhibited towards his Partners in 2012 after learning that Mr. O'Brien was dying and wished to sell his 20.618% share, bears no resemblance to his conduct in 1988. See Appendix B. What explains the radical shift in Mr. Hendricks' approach to "managing" a potential sale of a Partner's interest? The Partnership Agreement hadn't changed, nor had Mr. Hendricks' fiduciary duties.

RSD argued, and a reasonable fact-finder could conclude, that in 2012 Mr. Hendricks saw an opportunity for personal enrichment in buying for himself the 20.618% O'Brien Interest, that perhaps he did not see in the opportunity to purchase the 5% Biernes Interest. The evidence demonstrates that in 2012 Mr. Hendricks saw the chance to secure long-term employment with the Partnership for himself and his family, by doubling his ownership interest from 20.618% to 41.236%. With 41.236% he can block any Partnership vote that requires two-thirds consent, including any vote that would remove him as Manager and/or Managing Partner. CP 68. In an email to a Partner named Matt Lieske regarding the O'Brien Transaction, Mr. Hendricks explained:

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[9] In his Response Brief Mr. Hendricks insists that in "***none***" of the prior sales of partnership interests did the parties disclose to the other Partners the "terms of the transactions." Resp. Brief at 43. This is patently false. CP 204 (Mr. Hendricks discloses that Biernes sale would proceed at "book value" of $140,000 to $150,000); CP 91 (price of Partnership's repurchase of Carr Maritime interest in 1991 was disclosed as $269,000).

> A last comment on [my] motivation is you, Tod [Hendricks] and I and others have a long term interest in the [Partnership] because it represents employment for our generations of family which we must protect.

CP 126 (emphasis added). Tellingly, Mr. Hendricks instructed Mr. Lieske to "hold this information confidential," presumably confidential from the other Partners who are outside the Hendricks' family circle.[10] Id.

d. Mr. Hendricks' Cannot Argue that RSD Was Required to Deal Directly With Mr. O'Brien.

Mr. Hendricks insists that RSD's claims fail because it communicated with Mr. Hendricks regarding the transaction, rather than directly with Mr. O'Brien, the Selling Partner. Resp. Brief at 11-12. This is a specious argument. First, as he had with every other sale or transfer of a Partner's interest, Mr. Hendricks as Managing Partner "managed" all communications regarding the O'Brien Transaction and instructed the Partners to communicate through him. CP 237 (Manager has duty to "provide all notices required or advisable" under the Partnership Agreement); CP 117. He cannot contend that, in this instance, communications should have gone directly to (the sick and dying) Mr. O'Brien. Second, if Mr. Hendricks believed that RSD was required to contact Mr. O'Brien directly, his duty was to inform RSD of that requirement and facilitate that contact.

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[10] By far the largest Partner standing outside the Hendricks family circle is RSD, which holds a 20.618% interest (the next largest hold just 5.1546%). CP 54. It is perhaps not surprising then that Mr. Hendricks reserved his sharpest tactics—outright refusal to provide information regarding the O'Brien Transaction—for RSD.

B. Material Issues of Fact Precluded Summary Judgment on Whether Mr. Hendricks Complied Even With His Own Incorrect Reading of Article VII.

Mr. Hendricks contends that Article VII of the Partnership Agreement provided two alternatives for a Partner who wished to sell his or her partnership interest:

- Section 7.1, which states that a Partner may sell with "prior written consent" of two-thirds of the non-selling Partners; or
- Section 7.3, which requires Partners to provide notice before "accepting" an offer to buy their interest and triggers the other Partners' right of first refusal.

CP 70-71. In its Opening Brief RSD demonstrated that, even if this were the correct reading of Article VII, it was entitled to a trial because: (1) its right of first refusal under Section 7.3 was triggered before Mr. Hendricks obtained two-thirds written consent under Section 7.1; and (2) once triggered that right could not be "removed" without its express consent.

The trial court found that Section 7.3 was never triggered, because: (1) Mr. O'Brien was not legally bound to sell his interest to Mr. Hendricks until he executed the Option Agreement; and (2) he did not execute the Option Agreement until May 31, 2012. That was error.

1. RSD Raised a Triable Issue of Fact as to When Mr. O'Brien Executed the Option Agreement.

The written Option Agreement is plainly dated "May 24, 2012," and states that it was "executed" on May 24, 2012. CP 122, 123. Mr. Hendricks' declaration states that the execution did not take place until May 31, 2012. CP 56. In the face of this material conflict—between the contemporaneous and disinterested testimony of the document itself, and

Mr. Hendricks' self-serving testimony two years after the fact—the trial court erred by finding that the "uncontroverted evidence" was that Mr. Hendricks signed on May 31. VR 31.

2. RSD Raised a Triable Issue as to When Mr. O'Brien "Accepted" Mr. Hendricks' Offer.

Mr. Hendricks' own clear written admissions establish that Mr. O'Brien "agreed" to accept his offer to purchase the O'Brien Interest prior to May 15, 2012. CP 55, 117. And, as explained above, the contract document reflects that Mr. O'Brien entered the agreement on May 24, 2012. CP 122, 123. As such, Section 7.3.1 was triggered on or before May 24, and required that the non-selling Partners receive "written notification" of the proposed transaction, and an opportunity to review the terms to decide whether to exercise their right of first refusal before any sale proceeded. CP 71. They were denied that right.

The trial court held that Section 7.3.1 would not have been triggered until May 31, 2012, when Mr. O'Brien (according to the trial court) executed the Option Agreement and became "bound" thereby. However, by its express terms Section 7.3.1 requires that the right of first refusal process be implemented before the selling partner "accepts" an offer to buy his or her interest. CP 71 (emphasis added). Because Mr. O'Brien had "agreed" to sell his interest to Mr. Hendricks on or before May 15, 2012 or (at the latest) May 24, 2012, by definition he had "accepted" Mr. Hendricks' offer by that time. Further, the fact that the parties dated their Option Agreement "May 24, 2012," and explicitly affirmed that the agreement was "entered

into" on that date, is strong evidence that Mr. O'Brien had "accepted" Mr. Hendricks' offer by then.

Mr. Hendricks argues for the first time on appeal that Section 7.3.1 would not have been triggered until June 6, 2012, when he actually paid Mr. O'Brien the $200,000 "option money." Resp. Brief at 30. But the cases Mr. Hendricks cites merely stand for the proposition that option contracts must be supported by consideration.[11] Mr. Hendricks' May 24, 2012 promise to pay the option money upon execution was sufficient consideration. CP 121; see *Restatement (Second) Contracts* § 71.[12]

C. Material Issues of Fact Precluded Summary Judgment on Whether Section 7.3 Trumped Section 7.1.

In its Opening Brief RSD argued that summary judgment was inappropriate because its proffered interpretation of Article VII was at least a reasonable one, in light of the text and relevant extrinsic evidence of the parties' intent. Opening Brief at 36-48. Mr. Hendricks contends that Washington law forbids a court to use extrinsic evidence to contradict or modify the express words of a contract when the meaning of those words is clear. This argument is a red herring. RSD proffered extrinsic evidence to elucidate the meaning of the express contract terms, which are at a minimum reasonably susceptible to RSD's interpretation. Extrinsic evidence may be used for this purpose. Berg v. Hudesman, 115 Wn.2d 657,

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[11] See Saunders v. Callaway, 42 Wn. App. 29, 37 (1985); Hill v. Corbell, 33 Wn.2d 219, 223 (1949); Baker v. Shaw, 68 Wn. 99, 103 (1912).

[12] Further, as discussed above, the "trigger" for the right of first refusal process under Section 7.3.1 is the selling partner's "acceptance" of an "offer" to purchase his or her interest. CP 71. "Acceptance" of an offer is a separate event from payment of consideration. Mr. O'Brien accepted the offer on or before May 24, 2012. The fact that the consideration was paid after that does not change the acceptance date.

669 (1990) ("parol evidence is admissible . . . for the purpose of ascertaining the intention of the parties and properly construing the writing."). While Berg has been clarified, it has not disturbed. See Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503 (2005).

III. CONCLUSION

For the foregoing reasons, RSD requests that this Court reverse the trial court's grant of summary judgment on all claims, and remand this case for trial on the disputed factual issues.

RESPECTFULLY SUBMITTED this 3rd day of November, 2014.

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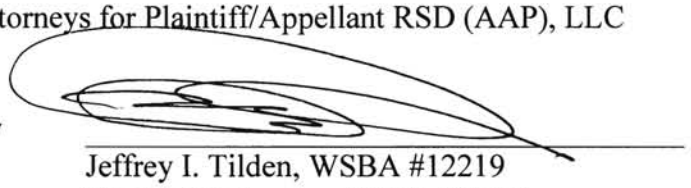
By 

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Appendix A - Chronology of Events

April 24, 2012	Mr. Hendricks learns that Mr. O'Brien is: (1) suffering from late stage terminal lung cancer and has only weeks to live; and (2) interested in arranging for the sale of his 20.618% Partnership Interest upon his death. CP 55, 134 Mr. Hendricks offers to purchase Mr. O'Brien's interest, without sharing the information with the Partners. Negotiations between Mr. Hendricks and Mr. O'Brien begin. CP 55, 134
April 27, 2012	Mr. Hendricks writes to his accountant, expressing concern that his purchase of the O'Brien Interest might "collapse" if it occurs to Mr. O'Brien or his advisors that he could obtain a much higher price for his interest if the Partnership purchased it under Section 8.2 of the Partnership Agreement. CP 213.
May 10, 2012	Mr. Hendricks formally offers Mr. O'Brien $4 million for his interest, plus $500,000 for anticipated profits from Partnership operations, plus a $200,000 "option" payment. CP 55, 121-23.
May 15, 2012	Mr. Hendricks writes to the remaining Partners, telling them for the first time that: (1) Mr. O'Brien is in the final stage of lung cancer; (2) he desired to sell his 20.618% interest; and (3) he had already "agreed" to sell his interest to Mr. Hendricks. Mr. Hendricks does not disclose the price or any other information regarding the proposed transaction. Mr. Hendricks solicits the "consent" of the Partners to the agreement he had already reached with Mr. O'Brien. CP 117.
May 24, 2012	Mr. Hendricks and Mr. O'Brien execute the Option Agreement. CP 121, 123.
May 31, 2012	Mr. Hendricks claims that, by this date, he had received the "consents" of two-thirds of the non-selling Partners. Mr. Hendricks claims that Mr. O'Brien did not execute the Option Agreement until this date, contradicting the date of the agreement itself ("May 24, 2012") and the statement on the agreement that

	"the Parties have caused this Agreement to be effective and executed the date first written above," which date is "May 24, 2012." CP 56, 121, 123 (emphasis added).
June 4, 2012	A Partner (Matt Lieske) writes to Mr. Hendricks, asking what the price term is for his purchase of the O'Brien Interest. CP 126.
June 6, 2012	Mr. Hendricks responds to Mr. Lieske's request, explaining how he arrived at a purchase price. Mr. Hendricks explains that his "motivation" for obtaining the O'Brien Interest is to secure employment "for our generations of family which we must protect." Mr. Hendricks instructs Mr. Lieske to keep this information regarding his motivation "confidential." CP 125-26.
Sometime Between June 4 and 14, 2012	RSD contacts Mr. Hendricks' attorney to request information regarding the proposed O'Brien Transaction. CP 180.
June 15, 2012	Mr. Hendricks, through his attorney, informs RSD that he will not provide any information regarding his purchase of the O'Brien Interest, because he had already obtained the consent of two-thirds of the non-selling Partners on May 31, 2012. CP 180.
June 20, 2012	Mr. Hendricks writes to RSD, explaining that he will provide the requested information only if RSD first agrees to consent to his purchase of the O'Brien Interest: "If you are agreeable to the transaction between Mark and I, you are welcome to any of its details." CP 134 (emphasis added). CP 134.
July 9, 2012	Mr. O'Brien dies.
July 10, 2012	Mr. Hendricks finally provides RSD with information regarding his purchase of the O'Brien Interest. CP 180.
August 8, 2012	Within the period specified in the Partnership Agreement (30 days from receipt of notice and disclosure of information regarding the proposed transaction), RSD notifies Mr. Hendricks that it is exercising its option to participate in the purchase of the O'Brien Interest. CP 57, 72.

Appendix B

Comparison of

Mr. Hendricks' Management of Biernes and O'Brien Transfers

Biernes Transfer	O'Brien Transfer
Mr. Hendricks "immediately" informs the remaining Partners that Biernes wants to sell its interest. CP 204.	Mr. O'Brien withholds from the remaining Partners Mr. O'Brien's expressed interest in selling his interest, until after he secures the opportunity for himself. CP 117.
Mr. Hendricks "immediately" informs the remaining Partners that they have the "option" to purchase the Biernes interest, and to deny that opportunity to the potential new investors. CP 204.	Despite the fact that 24 years have passed since the Partnership Agreement was signed, and that during those 24 years the Partners had relied on Mr. Hendricks exclusively to manage the Partnership, Mr. Hendricks never informs the remaining Partners of their option to purchase the O'Brien Interest, and instead tells them—in his very first communication regarding the matter—that his purchase of that interest has already been agreed between he and Mr. O'Brien. CP 117.
Mr. Hendricks discloses the price at which Biernes would sell its interest to the new investors, allowing them to analyze their purchase option prior to consenting to allow the sale to the new investors to proceed. CP 204.	Mr. Hendricks fails to disclose the price he would pay for the O'Brien Interest, requiring Partners to make a specific request for such information. CP 117. Mr. Hendricks explicitly refuses to disclose any material information to RSD, unless RSD first consents to the O'Brien Transaction. CP 211. Mr. Hendricks withholds all material information from RSD until after he exercises his private option to buy the O'Brien Interest. CP 180.