No. 92650-6

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 71926-2-1

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

RSD AAP LLC,

Plaintiff/Appellant/Petitioner

vs.

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

Defendants/Respondents.

PETITION FOR REVIEW OF RSD AAP LLC

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I. INTRODUCTION

In 2012, the Managing Partner of the Partnership secretly negotiated and contracted to purchase an asset that the Partnership and all of the partners had a pre-existing right to purchase under their 1988 partnership agreement. The Managing Partner sought their consent but didn't disclose the purchase price, the value of the asset or the fact that both the Partnership and the partners had a pre-existing rights to the asset. And the Managing Partner counted his own vote—the largest vote in favor by far—in securing that consent. Washington law has not previously and should not now condone that behavior. The Court of Appeals' published opinion declares that it does. This Court should accept review and reverse the decision.

II. IDENTITY OF PETITIONER

Petitioner is RSD AAP LLC ("RSD"), the plaintiff in the trial court and the appellant in the Court of Appeals.

III. CITATION TO COURT OF APPEALS DECISION

RSD seeks review of the published September 21, 2015 decision of Division 1 of the Washington Court of Appeals, No. 71926-2-1. Appendix A. The Decision affirmed the Superior Court's grant of summary judgment dismissing all of RSD's claims. RSD moved for reconsideration of the Decision, which motion was denied on October 27, 2015. Appendix B. Review in the Court of Appeals has terminated.

IV. ISSUES PRESENTED FOR REVIEW

This Court should accept review to address the following issues:

1. Did the paid Managing Partner breach its common law and statutory duty of *affirmative* disclosure with regard to his exploitation of private information for private gain, when he failed to provide material information to the other partners and instead of affirmative disclosure merely said: "feel free to call if you have any questions"?

2. Did the paid Managing Partner breach his duty of *timely* disclosure with respect to issue 1?

3. Did the paid Managing Partner owe augmented fiduciary duties to the Partnership and the other partners arising from the entrustment to him of exclusive management powers and responsibilities?

4. Did the paid Managing Partner breach his duty of loyalty by failing to pursue the Partnership's contractual right to purchase an asset and instead, using his unique access to Partnership assets, including its records, negotiating for and purchasing the same asset for his own private benefit?

5. Was the Managing Partner and third-party manager of the Partnership entitled to vote to "approve" his own acquisition of an asset, when the Partnership and the remaining partners had a competing interest in acquiring the same asset?

6. Did AOI breach its statutory and common law duties of good faith and fair dealing in connection with the transaction?

7. Does the Right of First Refusal contained in the partnership agreement, under which each partner has a proportional right to share in

the purchase of a partnership interest, apply to the Manager's attempt to purchase the partnership interest of a withdrawing partner?

V. STATEMENT OF THE CASE

A. Overview

RSD brought this action to enforce its claim to a proportionate share of the 20.6186% interest of O'Brien Maritime, Inc. (the "O'Brien Interest") in the Auriga Aurora General Partnership (the "Partnership"). Respondent Alyeska Ocean, Inc. was and is the sole Manager of the Partnership (the "Manager"). It purchased the O'Brien Interest for its own private benefit for $4,000,000 (the "Disputed Purchase"). CP 121-23. The liquidation value of the O'Brien Interest at the time was $12,000,000. CP 125. RSD claims that the Manager holds the O'Brien Interest subject to a constructive trust for the benefit of all partners and the Partnership. CP 215-16.

B. The Manager

The Manager served under a Management Contract and was paid for its services.[1] It had "all the powers of a managing general partner under law." CP 69. The Manager's duties included, specifically, receiving and disbursing all funds, keeping the books and records and

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[1] AOI was designated "Manager" in the Partnership Agreement. Mr. Hendricks, AOI's sole shareholder, director and president, occasionally refers to himself as "general manager" of the Partnership. CP 121. For simplicity, RSD will use the term "Manager" to describe both Mr. Hendricks and AOI.

providing all notices "required or advisable in the discretion of the Manager pursuant to the Partnership Agreement." *Id.* They also included the duty "to conduct the ordinary and usual business and affairs of the Partnership with respect to managing . . . the Partnership." *Id.*

C. The Partners

In April of 2012, there were 13 partners in the Partnership. RSD, the Manager, and O'Brien each owned a 20.6186% interest; no other partner owned more than 5.2%. CP 54. O'Brien withdrew from the Partnership on July 9, 2012, when Mark O'Brien, its sole shareholder, died. CP 139.

D. The Manager's Disputed Purchase

In April of 2012 the Manager learned that Mr. O'Brien was dying and wished to sell the O'Brien Interest. CP 55. Motivated by what he described as his need to protect his continued employment, the Manager negotiated for and acquired the right to purchase the O'Brien Interest for himself. CP 125-26; Supplemental Appendix A. The Manager was aware that the Partnership already had the right to purchase the O'Brien Interest under the same circumstances (the "Partnership Option"). CP 213; Supplemental Appendix B. The Manager chose not to pursue the Partnership Option, and concealed its existence and implications from O'Brien and its advisors, lest any resulting "due diligence" become a "deal killer." *Id.*

E. The Manager's Efforts to Obtain Approval

Having obtained O'Brien's agreement, the Manager then sent notice by mail on May 15, 2012, to each of the partners other than O'Brien and asked each to sign a "Consent and Waiver" (the "Consent") under which they would (1) consent to the Manager's acquisition and exercise of an option to purchase the O'Brien interest at Mr. O'Brien's death and (2) waive any rights of first refusal the transaction might give rise to. The Consent made no mention of the Partnership Option or what would become of it. CP 117-19; Supplemental Appendix C.

Other than informing the partners for the first time that Mr. O'Brien was terminally ill and that he and O'Brien had been negotiating and had agreed to the Disputed Purchase, the Manager made *no* disclosure whatsoever regarding the transaction. *Id.* He did not provide the partners with copies of the Partnership Agreement they had signed in 1988 or describe the relevant provisions. He did not disclose the price he was paying for the O'Brien Interest or the value of the Partnership. He only said "feel free to call if you have questions." *Id.*

Each of the partners, other than RSD, signed and returned to the Manager the requested Consent without asking any questions.[2] The Manager also signed the Consent. The Manager's own vote of his

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[2] In this litigation the Manager described the other partners as his "friends and family." CP 51-52.

20.618% interest was necessary to achieve the percentage of votes he now claims he needed to approve the transaction.

F. RSD's Futile Efforts to Obtain Information from the Manager and to Share in the Disputed Purchase.

RSD did not sign the Consent and Waiver. CP 94; Supplemental Appendix D. Upon learning of the transaction,[3] RSD requested information about the price and terms. CP 130-31. The Manager failed and refused to provide it. Later, the Manager offered to provide it *if* RSD would *first* consent to the transaction. CP 134. Only after Mr. O'Brien had died four weeks later and the Manager had exercised its Option did the Manager provide a copy of the written Option Agreement with O'Brien. CP 139. RSD then made a timely election to exercise its right of first refusal.[4]

RSD believed the Right of First Refusal under Section 7.3 of the Partnership Agreement applied to the sale of the O'Brien Interest. On July 13, 2012, RSD wrote to the Manager informing him that, if he completed the Disputed Purchase RSD would consider that purchase to be made "on behalf of all partners entitled and electing to participate." CP 215-16.

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[3] RSD became aware of the notice when its president actually received the notice in early June. CP 180.

[4] The Manager now claims RSD was required to send the notice to O'Brien, but be never made that assertion when RSD contacted the Manager regarding the Disputed Purchase, and never provided O'Brien's official notice address, which was in the Partnership records that *he* maintained. Had RSD contacted the wrong person, it was certainly the Manager's duty to inform it of the mistake.

Nevertheless, the Manager closed its purchase on August 2, 2012, prior to the expiration of RSD's 30 day election period. CP 57.

With regard to a prior sale of a departing partner's five percent interest in 1988, the Manager took care to "immediately" remind the partners that they had "an option to purchase" the selling partner's interest, and provided the selling price. CP 204; Supplemental Appendix E.[5]

In the Option agreement, the Manager acknowledged that he used his position as Manager and his "full and complete access to all assets of the Partnership (including all its books, records and financial information)" to become "fully informed regarding the subject of this transaction." CP 122; Supplemental Appendix F.

VI. ARGUMENT IN SUPPORT OF GRANTING REVIEW

This Court should accept review of the published decision of the Court of Appeals (the "Decision") for the following reasons:

1. The Decision conflicts with RCW 25.05.160(3)(a) and *Crisman v. Crisman*, 85 Wn. App. 15 (1997), in failing to require *affirmative* disclosure of all material information by the Manager (and

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[5] The Manager's conduct was different from its past practice on other occasions when it learned that a partner wished to sell its interest or when a partner died. When Mr. Resoff died in 2002, the offer to purchase his 20.6186% interest was made by the Manager *on behalf of the Partnership*. CP 218. When Mr. Carr withdrew in 1991, the *Partnership* purchased his interest at an agreed price. CP 53. The difference in the Manager's behavior is explained by the fact that in these three prior instances, he did not have employment and pecuniary interests that conflicted with the interests of the Partnership *and the other partners.*

Managing Partner), and in instead holding that a mere "invitation" to the other partners to ask questions discharges the duty of disclosure.

2. The Decision conflicts with the settled law in other jurisdictions, and significantly dilutes a partner's duty of disclosure, in holding that a partner discharges his duty of disclosure by "eventually" disclosing material information, even *after* first exploiting that information for his own private benefit.

3. The Decision conflicts with *Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 571 n.3 (1977), and a number of additional published Washington decisions, in refusing to hold a *managing* partner to a higher duty than the non-managing partners.

4. The Decision conflicts with *In re Wilson's Estate*, 50 Wn.2d 840 (1957), regarding the circumstances under which a partner may pursue his own individual interests without violating the duty of loyalty, by ignoring the factors set forth in that case and deciding the issue based on novel and irrelevant considerations.

5. The Decision interprets RCW 25.05.165(5) as permitting a managing partner to pursue self-interest in a transaction even when its interest is adverse to that of the Partnership in the same transaction.

6. The Decision allows the managing partner to cast the deciding vote to approve a transaction in which he had a conflict of interest with the Partnership.

7. The Decision conflicts with *Obert v. Environmental Research and Dev. Corp.*, 112 Wn.2d 323 (1989) in confusing technical compliance with a contract with discharge of fiduciary duty.

8. The Decision conflicts with *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576 (1998), by failing to give meaning to every provision of the partnership agreement.

Taken alone or together, these issues are of substantial public interest and go to the heart of what it means to be a partner in a Washington partnership. *See J&J Celcom v. AT&T Wireless Services, Inc.*, 481 F.3d 1138, 1142 (9th Cir. 2007) (certifying to this Court question of Washington partnership law regarding the duty of loyalty, because the clarification from this Court "will have far-reaching effects on those who contract in Washington, or are subject to Washington law").

A. The Court Should Accept Review To Clarify the Standards of Conduct Under WRUPA.

The general standards of partners' conduct in the Revised Uniform Partnership Act, as adopted in Washington ("WRUPA"), contain provisions which appear to pull in opposite directions. *See* RCW 25.05.165, 25.05.015(2). The duties of loyalty and care, and the obligation to perform all duties and exercise all rights consistent with the obligation of good faith and fair dealing, are found in the same section that grants (limited) permission to a partner to further its own interest. The proper reconciliation of those competing concepts is an issue of substantial public interest, going to the very heart of what it means to be a partner in

Washington. The Decision gave priority to the pursuit of self-interest, misconstruing the word "merely." That is not what the Legislature intended and should not be the rule in Washington.

1. The Decision Conflicts with Settled Precedent by Holding That a Partner Need Not *Affirmatively* Disclose Information to the Other Partners.

In *Crisman*, 85 Wn. App. at 22, the court held that a fiduciary owes an "*affirmative* duty of disclosure" to "fully disclose all facts relating to his interest in and his actions involving the affected property," and that failure to disclose is tantamount to actual concealment. In *Karle v. Seder*, 35 Wn.2d 542, 550 (1950) this Court held the sale of a partnership interest between two partners triggers the purchasing partner's duty of "*full* disclosure of *all* material facts within his knowledge." (Emphasis added).[6]

A partner has a duty to "fully disclose all known information that is significant and material to the affairs or property of the partnership." *Bishop of Victoria Corp. Sole v. Corp. Bus. Park, LLC*, 138 Wn. App. 443, 458 (2007). As *Karle* demonstrates, the "affairs . . . of the partnership" include the transfers of partnership interests, whether by sale or otherwise.

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[6] While the party aggrieved in *Karle* was the selling partner, the principle applies with equal force where, as here, the aggrieved parties are the partners being asked to consent to the transaction, thereby waiving their rights to participate, either directly or indirectly, in the purchase. They are, in effect, sellers. This Court affirmed the continued vitality of *Karle* in *J&J Celcom v. AT&T Wireless Services, Inc.*, 162 Wn.2d 102, 107 (2007).

The affirmative duty to disclose was recognized and codified in WRUPA. RCW 25.05.160(3)(a) provides that a partner must disclose,

> *[w]ithout demand*, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter.

(emphasis added).[7] The Decision conflicts with case law and the statute in holding that the Manager discharged his duty of disclosure merely by telling the other partners: "feel free to call if you have questions" about the Disputed Purchase. Decision at 4, 13-14; Supplemental Appendix C.[8] But WRUPA, as well as cases from Washington and other jurisdictions[9], clearly establish that the duty of disclosure is a duty to *affirmatively* disclose. Absent affirmative disclosure of all material information, the other partners may not be on notice that they should make specific requests for information that may be material to their interests.[10]

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[7] Here, the rights that the Manager asked the partners to exercise on May 15, 2012, were: (1) to consent or withhold their consent to the Disputed Purchase; and (2) to waive or not waive any right of first refusal the transaction might give rise to.

[8] The only information that the Manager "affirmatively" disclosed was that the 20.618% O'Brien interest was available and that the Manager had *already* secured a deal to purchase it for himself. CP 117; Supplemental Appendix C. He did not disclose the most critical information, such as the price and the Partnership's right to purchase the O'Brien Interest under the partnership agreement and the rights of first refusal it was asking them to waive.

[9] *TSA Intern. Ltd. v. Shimizu Corp.*, 990 P.2d 713, 728 (Haw. 1999) ("The duty of disclosure . . . requires *affirmative*, timely disclosure *without prompting*.") (emphasis added); *Silverberg v. Colantuno*, 991 P.2d 280, 285 (Colo. App. 1998) (same).

[10] *See Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1181 (3rd Cir. 1996) (absent a partner's affirmative

(continued . . .)

The Decision equates a mere invitation to "feel free to ask questions" with the affirmative disclosure required of a partner. Any partner is "free" at any time to "ask questions"; the Manager's statement to that effect does nothing to discharge his duty. The Decision creates a troubling precedent and significantly dilutes the duty of disclosure that is at the core of the statutory and common law of agency and partnerships.

2. The Decision Incorrectly Holds That a Partner Discharges His Duty to Disclose So Long As He "Eventually" Discloses Material Information, Even *After* the Transaction In Question.

The Decision holds that the duty of disclosure was satisfied because the Manager "*eventually* disclosed the details of the transaction to RSD." Decision at 14 (emphasis added). The delay here prevented RSD from evaluating and exercising its right of first refusal until after the Manager had completed its purchase. The very purpose of imposing a duty of disclosure is to give the other partners a fair opportunity to evaluate and act on the information *before* being overtaken by events. As such, the duty means *nothing* unless it is a duty of *timely* disclosure. Decisions from other jurisdictions have made this explicit.[11]

(. . . continued)

disclosure of material information, another partner "may have no reason to suspect that it should make inquiry into what may appear to be a routine matter").

[11] *TSA Intern.*, 990 P.2d at 728 ("The duty of disclosure requires . . . affirmative, *timely* disclosure without prompting.") (emphasis added); *Silverberg*, 991 P.2d at 285 (same). Indeed, the federal Eighth Circuit Court of Appeals held that a partner violated its duty of disclosure when it did what the Manager did here, that is, wait until it had exploited

(continued . . .)

This Court should grant review to correct the holding that a partner's "eventual" disclosure satisfies the duty to disclose, and to establish that the duty requires, *at a minimum*, that a partner disclose information *before* he exploits that information for his own benefit.

B. The Decision Explicitly Conflicts With Division 2's Holding and This Court's Precedents, That a *Managing* Partner Owes a Higher Duty Than Other Partners.

The conduct complained of in this case is not merely the conduct of one partner, among many, in its capacity as a partner. It is the conduct of the Manager and Managing Partner, who alone was charged with managing the affairs of the Partnership, and was granted a power of attorney by every other partner to facilitate that management. CP 229, 244-45.[12] A number of Washington cases have held that a managing partner owes a higher duty than that owed by the non-managing partners. These cases establish that a managing partner is a "trustee" of the partnership, and as such must in all matters related to partnership affairs act *solely* in the partnership's interest and place the partnership's interest *ahead* of its own. *See Bovy*, 17 Wn. App. at 571 n.3 ("as managing

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(. . . continued)

information for its own benefit before it disclosed that information to the other partners. *Triple Five of Minnesota, Inc. v. Simon*, 404 F.3d 1088, 1098 (8th Cir. 2005).

[12] The fact that the Manager *also* held a power of attorney for each partner is yet *another* basis for holding him to the highest fiduciary standard. *Keene v. Board of Accountancy*, 77 Wn. App. 849, 858 (1995) (power of attorney brings with it the duty "to avoid any *possible* conflict of interest by acting *solely* in [the grantor's] interest") (emphasis added).

partner, Bovy occupied *a higher fiduciary position* [than the other general partners] and had the burden of dispelling *all doubts* concerning the discharge of his duties") (emphasis added); *Guntle v. Barnett*, 73 Wn. App. 825, 835 & n. 18 (1994) ("The managing partner acts as trustee for the partnership."); *In re Wilson's Estate*, 50 Wn.2d at 846 (rule requiring managing partner to maintain complete records "is grounded upon the theory that the managing partner is acting as a trustee for his firm"); *In re Tembreull's Estate*, 37 Wn.2d 93, 102 (1950); *Simich v. Culjak*, 27 Wn.2d 403, 408 (1947); *Monroe v. Winn*, 16 Wn.2d 497, 508 (1943).[13]

Here, the Court of Appeals expressly refused to apply *Bovy*, and instead held the Manager to the same fiduciary standard to which all other, non-managing partners are held under WRUPA. Decision at 14-15. However, whatever WRUPA has to say about the duties of partners as such, it did not even purport to address—let alone make changes to—the long-established common law and equitable principles of partnership and

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[13] These authorities reflect the rule applied in other jurisdictions as well. *See* J. William Callison and Maureen A. Sullivan, *Partnership Law and Practice*, § 12:4 (2015) ("When a partner alleges that a managing partner breached his or her fiduciary duties, all doubts are resolved against the managing partner and the burden of proof is on the managing partner."); *Triple Five of Minnesota, Inc. v. Simon*, 404 F.3d 1088, 1097 (8th Cir. 2005) ("a managing partner owes the highest possible fiduciary duty to his partners"); *Thomas v. Leighton*, 324 S.W.3d 150, 153 (Tex. App. 2010); *Fernandez v. Garza*, 354 P.2d 260, 264 (Ariz. 1960); *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) .

agency with respect to the particular rules governing third party managers and managing general partners.[14]

The fiduciary duties of managing partners are a function not just of their status as partners, but of the additional voluntary entrustment to them by each of the other partners of all or a portion of the management powers and duties each would otherwise hold and exercise directly as a partner. That entrustment brings with it an additional set of fiduciary obligations under the principles of the law of Agency. "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." Restatement (Third) Agency § 8.01 (2015). This duty "requires that the agent *subordinate the agent's interests to those of the principal and place the principal's interests first* as to matters connected with the agency relationship." *Id.* (emphasis added).

The refusal of the Court of Appeals to follow these precedents and to recognize the principle not only creates a conflict between published opinions in this State; it also leads to an absurd result. If the partners contracted with a *non*-partner to manage the business and affairs of the Partnership and paid it for its services, no one would suggest that the

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[14] The principles of law and equity, including the law of agency, *supplement* WRUPA "[u]nless displaced by particular provisions of this chapter." RCW 25.05.020(1) and RUPA Official Comment (Appendix G at 9). There is no "particular provision" of WRUPA that displaces the law of agency as it relates to the entrustment by one partner to another of some or all of the first partners rights and powers.

manager's fiduciary and related duties were defined by WRUPA, just because it was organized as a partnership. Should those duties be reduced because the Manager *later* acquires an interest in the partnership and also becomes a partner? That is what happened here—the Manager was a third-party Manager *before* he also became a partner in the Partnership. CP 225. This Court should grant review to resolve the explicit conflict created by the published Decision, and clarify that managing partners owe a heightened duty to the partners and the partnership.[15]

C. The Decision Conflicts With Washington Law Regarding the Circumstances In Which a Partner May Pursue His Private Interests Without Violating the Duty of Loyalty.

In *In re Wilson's Estate*, the Court held that a partner does not violate the duty of loyalty merely by engaging in enterprises or acquiring property "in his own behalf" while the partnership is in existence. *In re Wilson's Estate*, 50 Wn.2d at 846-847. However, the duty *is* violated when a partner purchases property for his own benefit "when the firm itself is entitled to the advantage of such purchase." *Id.* Thus, a partner

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[15] The Manager has argued that he was not acting in his capacity as Manager when he obtained and exploited the opportunity to purchase the O'Brien Interest for himself. However, as this Court has recently observed, "[a] head that wears two hats is nonetheless only one head." *Rekhter v. State Dept. of Soc. & Health Servs.*, 180 Wn.2d 102, 114 (2014). Further, the record shows that the Manager *was* acting *as Manager* with respect to the Disputed Purchase. CP 117; Supplemental Appendix C (Manager signs letter to partners disclosing his purchase of the O'Brien Interest as "Managing Partner"); CP 122; Supplemental Appendix F (Option Agreement states that the Manager is relying on information he learned *in his capacity* as "general manager of the Partnership").

may acquire property for himself *only* if three conditions are met: (1) "the transaction is disconnected from the partnership business"; (2) the transaction "is not conducted in competition or rivalry" with the partnership; and (3) the partner "is under no duty to conduct the transaction on behalf of the firm." *Id.* at 847.

The Decision ignores the considerations set forth in *In re Wilson's Estate* and instead holds that the duty of loyalty was not breached because the other partners did not *express* an interest in purchasing the O'Brien Interest for the Partnership. Decision at 13-14. That consideration is irrelevant to the analysis of the duty of loyalty. And the Court of Appeals' reliance on it is especially inappropriate where, as here, the partner pursuing his own self-interest: (1) is also the Manager who is specially charged with the duty of watching out for the interests of the *Partnership*, including the Partnership's interest in acquiring the shares of withdrawing partners; and (2) withheld all material information from the other partners until after he had secured the opportunity for his own benefit, including the existence of the Partnership Option.[16]

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[16] The only place where the conduct of the other partners is relevant is in the application of RCW 25.05.015, which allows the partners to "ratify" a transaction that would otherwise violate the duty of loyalty. The Manager has never argued that the Disputed Purchase was ratified under that provision, presumably because the consent vote plainly did not satisfy RUPA's requirement that ratification come *after* full disclosure of material facts.

D. This Court Should Grant Review to Decide Whether a Partner May Vote to Approve a Transaction When He Has a Direct Pecuniary Interest in It That Is Adverse to the Partnership's Interest.

Without explanation, the Decision concluded that the Disputed Purchase had been approved by the requisite percentage of partnership interests and that the Manager's own 20.618% vote should be counted. Under Section 7.1.1 of the Partnership Agreement, relied on by the Manager, the requisite number had not been reached without counting the Manager's own vote. This is an issue of substantial public interest and of first impression in this State in a partnership setting.

The Court of Appeals confused formal compliance with Section 7.1.1 of the partnership agreement with satisfaction of the Manager's fiduciary duties. In this, the Decision conflicts with what this Court said in *Obert v. Environmental Research*, 112 Wn.2d 323, 337 (1989):

> In point of fact, such arguments attempt to equate a breach of a fiduciary duty to a mere breach of contract. Such is not the law, and a disservice to the law would be done were we to ignore the very real distinctions between the two.

By definition, an individual agent does not get to "vote" on whether its principal will approve the agent's self- interested transaction. The rule is and should be no different when the principal is an entity with group governance. A corporate director may not vote to approve a transaction where he or she has a conflict of interest. *See* RCW 23B.08.730(2). WRUPA's legislative history makes clear that only "disinterested partners" may vote. Appendix G (RUPA Commentary) at 7-8. A

provision which allowed the interested partner to vote where it had a conflict would be "manifestly unreasonable." While the language appears in RCW 25.05.015(2)(c), it has a more general application in fiduciary law dealing with conflicts of interest. Appendix G at 7-8.

A partnership agreement can include an alternative procedure for the purpose of approving a transaction that would otherwise constitute the breach of fiduciary duty by a partner, provided the procedure itself is not "manifestly unreasonable." A procedure that requires a less than unanimous vote and allows the interested partner to vote would be "manifestly unreasonable." The approval must come in any event after full disclosure of all material facts. RCW 25.05.015(2)(c)(ii).[17]

E. The Decision Conflicts With the Settled Rule That Contracts Must Be Construed to Give Effect to Every Provision.

In Washington a contract must be construed to give effect to every clause and in a manner that renders none a nullity. *Kitsap County*, 136 Wn.2d at 575-576. Section 7.3.1 of the partnership agreement provides that, if a partner decides to sell its interest, it *shall*

> afford to the other Partners (the "Option Partners") written notification of such intentions, which notice shall specify the terms

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[17] In this case approval requires a unanimous consent to the Disputed Transaction because the Manager, as purchaser, was (1) acting as a party with an interest adverse to the partnership and (2) because it had appropriated a "partnership opportunity". Either reason alone was sufficient. The Manager's interest was manifestly adverse to the Partnership and all of the partners.

> and conditions of the conveyance proposed, the purchase price therefore . . .

CP 71-72. Section 7.3.2 provides that if no partner elects to exercise its right of first refusal within 30 days, and the partner fails to close the proposed sale to the proposed purchaser on the proposed terms within an additional 60 days, then thereafter:

> the right of first refusal contained in this Section 7.3, including the requirements for notice set forth herein, *shall again apply* to *any attempt* by the Selling Partner to sell his interest in the Partnership.

Id. at 72 (emphasis added).

The Court of Appeals and the trial court failed to give effect to these provisions, which express the parties' intention that section 7.3 applies to "any" attempt by a partner to sell its interest. In particular, the word "again" would be meaningless if the section had not applied to an initial attempt to sell. That is exactly what the Manager told the partners he meant when he offered the partnership interests in 1987. CP 230 By holding that Section 7.1.1 provides an "alternative" route for a selling partner to pursue, the Decision effectively reads the "shall again apply to any attempt" language out of Section 7.3.

VII. CONCLUSION

For the foregoing reasons RSD respectfully requests that the Court accept review to correct the significant errors in the published Decision and clarify Washington law as it relates to the regulation of duties of partners and managing partners.

RESPECTFULLY SUBMITTED this 30th day of November, 2015.

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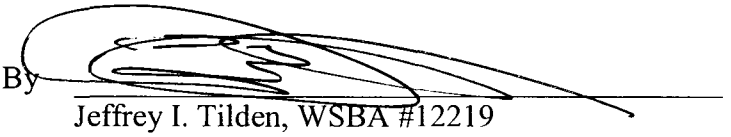
By 

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APPENDIX

Appendix A

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CASE #: 71926-2-I
RSD AAP LLC, Appellant v. Alyeska Ocean LLC& Jeff & Jane Doe Hendrick's, Respondent
Skagit County, Cause No. 13-2-00279-8

Counsel:

Enclosed is a copy of the opinion and order withdrawing September 14, 2015 opinion filed in the above-referenced appeal which states in part:

"We affirm"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure
c: The Honorable Susan Cook

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

RSD AAP, LLC, Appellant, v. ALYESKA OCEAN, INC; JEFF HENDRICKS and JANE DOE HENDRICKS, individually and as a marital community, Respondents.	)	No. 71926-2-I ORDER WITHDRAWING OPINION AND SUBSTITUTING OPINION

The court has determined that the opinion filed on September 14, 2015, should be withdrawn and a substitute published opinion be filed. Now, therefore, it is hereby

ORDERED that the opinion filed on September 14, 2015, be withdrawn and a substitute published opinion be filed.

DATED this 21st day of September, 2015.

Trickey, J

Spearman, C.J

Cox, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RSD AAP, LLC, Appellant, v. ALYESKA OCEAN, INC; JEFF HENDRICKS and JANE DOE HENDRICKS, individually and as a marital community, Respondents.	)	No. 71926-2-I DIVISION ONE PUBLISHED OPINION FILED: September 21, 2015

TRICKEY, J. — RSD AAP, LLC (RSD) is a partner in the Auriga/Aurora General Partnership (AAGP). RSD appeals the trial court's summary dismissal of its lawsuit against another partner, Alyeska Ocean, Inc. (AOI). RSD asserts that the trial court erred by holding that (1) the right of first refusal provision set forth in the partnership agreement was not triggered, (2) the partnership agreement's requirement that written consent from two thirds of the partnership be obtained before encumbering a partnership interest was not breached, and (3) the fiduciary duty of loyalty or good faith and fair dealing was not violated. Finding no error, we affirm.

FACTS

Jeff Hendricks is the sole shareholder of AOI. In 1987, AOI purchased two vessels to convert them for commercial fishing. To raise capital to convert the vessels and prepare them for operation, AOI formed AAGP in 1988. All of the partners who were invited to join AAGP were friends or family of Hendricks.

A general partnership agreement (Agreement) was entered into on February 13, 1988. Article VII of the Agreement involved the transferring of partnership interests. It provided, in relevant part:

> 7.1 Transfer Prohibited.
>
> 7.1.1 No Partner may, without the prior written consent of the Partners holding at least a two-thirds interest in the Partnership (excluding the transferring Partner's interest), directly or indirectly sell, lease, transfer, assign, give, pledge, hypothecate or otherwise encumber or permit or suffer any encumbrance of all or any part of his interest in the Partnership, with or without consideration, except as provided in this Article VII and Section 8.2.
>
> . . . .
>
> 7.3 Right of First Refusal. Notwithstanding the provisions of Section 7.1.1, a Partner may sell his interest in the Partnership upon compliance with the conditions of Section 7.1.2 and the following conditions:
>
> . . . .[1]

As set forth in Section 7.3, if a partner decided to accept an offer to purchase his or her partnership interest, the partner was required to provide written notification to the other partners of his or her intention to sell the interest. That notification was to include the terms and conditions of the proposed offer. After receiving the selling partner's notification, the other partners would have 30 days to elect to purchase for themselves the selling partner's interest upon the same terms and conditions in the selling partner's notification. If the other partners elected not to purchase the interest or if they did not respond within 30 days, the selling partner was permitted to effect the sale of his or her interest upon the same terms and conditions contained in the notification to the other.

In addition, the Agreement contained an integration clause:

> 12.3 Governing Law, Miscellaneous. This Agreement is intended to benefit only the parties hereto, constitutes the entire agreement of the parties relative to the formation, operation, termination and dissolution of

[1] Clerk's Papers (CP) at 70-71.

> the Partnership . . . . There are no promises, terms, conditions or obligations other than those contained herein, and this Agreement supersedes all previous communications, representations or agreements, either verbal or written, between the parties concerning the subject matter hereof. No variations, modifications, or changes herein or hereof shall be binding upon either party hereto . . . .[2]

AOI became the general manager of AAGP under the Agreement and Management Agreement, and has continued to hold that position since the formation of the partnership.

Robert Resoff became an original partner of AAGP through his corporation Robert E. Resoff, Inc. RSD is a wholly-owned subsidiary of, and managed by, Robert E. Resoff, Inc. In 2010, Robert E. Resoff, Inc. transferred its entire 20.618 percent share of its partnership interest to RSD. George Steers is the president of Robert Resoff, Inc.

On April 24, 2012, Hendricks contacted Mark O'Brien, a partner of O'Brien Enterprises, Inc., to ask if he was interested in selling his partnership interest to him. During that conversation, O'Brien informed Hendricks for the first time that he had terminal cancer and only had a few weeks to live. O'Brien was receptive to the notion of selling his interest and suggested that Hendricks give him his "idea" of a purchase price.[3]

On April 30 through May 10, 2012, Hendricks communicated with Clayton Lynch, O'Brien's certified public accountant, about the valuation of O'Brien's interest and determined that a purchase by way of an option would be the best method of accomplishing the transaction. Hendricks forwarded to Lynch an updated valuation of O'Brien's 20.618 percent interest—$3,482,478—that was prepared by Hendicks' accountant. On May 10, Hendricks wrote to Lynch offering to pay $4 million plus

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[2] CP at 77.
[3] CP at 55.

$500,000 for O'Brien's share of the partnership funds held for distribution and in reserve for a pending shipyard expense. Hendricks notified Lynch that his counsel, Doug Fryer, would draft an Option Agreement.

On May 15, 2012, Hendricks sent a letter to the partners alerting them of O'Brien's health condition.[4] He told them that he and O'Brien "agreed that after his death [AOI] would purchase [O'Brien's] corporate interest in the partnership."[5] In the letter, Hendricks attached a "CONSENT AND WAIVER as required by our partnership agreement" to be returned to Hendricks.[6] Hendricks also instructed the partners to "[f]eel free to call if you have questions about the agreement or [O'Brien's] condition."[7]

By May 21, 2012, counsel for O'Brien and Hendricks agreed on a form of Option Agreement to be executed. The Option Agreement stated that it "is entered into as of May 24, 2012."[8] Although the Option Agreement had been executed effective May 24, 2012, according to Hendricks, O'Brien and his wife did not sign it until May 31.[9] The option was not exercisable until O'Brien's death. By May 31, 2012, Hendricks received the consent of two-thirds of the partnership, excluding O'Brien's consent.

On June 4, 2012, Matt Lieske contacted Hendricks about the details of the transaction. Lieske inquired about the value agreed upon for O'Brien's interest. Hendricks replied, providing a detailed explanation of what he believed his valuation of the company was for a sale of a less-than-controlling interest versus the sale of a

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[4] CP at 117.
[5] CP at 117.
[6] CP at 117-19.
[7] CP at 117.
[8] CP at 121.
[9] The Option Agreement does not indicate the dates on which each party signed it.

controlling interest. On June 6, 2012, Hendricks wired O'Brien $200,000 as consideration to finalize the Option Agreement.

By June 8, 2012, Hendricks had not heard from RSD. Hendricks contacted Twig Mills, one of the Robert E. Resoff, Inc. trustees, to inquire about RSD's consent. Mills responded that George Steers was meeting with the other managers on the week of June 14 to discuss the O'Brien transaction.

On June 20, 2012, Steers wrote to Fryer, asking for the details of the O'Brien purchase. Steers also notified Fryer that RSD may want to exercise its right of first refusal. Fryer responded the next day. He informed Steers that all of the partners had given written approval of the acquisition by AOI of the option to purchase O'Brien's partnership interest. Fryer stated his opinion that under the Agreement, because two-thirds of the partnership had consented, the right of first refusal did not apply. Steers responded by letter dated June 25, 2012, asserting that as a partner, Hendricks was required by the Revised Uniform Partnership Act (RUPA), chapter 25.05 RCW, to meet his fiduciary duties and disclose the terms of the transaction.

O'Brien died on July 9, 2012. Under the Option Agreement, this event triggered the 30-day period for Hendricks to exercise the option to purchase O'Brien's interest in the partnership. On July 10, Fryer received Steers' June 25 letter. Fryer responded that same day with details of the transaction by sending a copy of the Option Agreement and advising Steers that O'Brien had died and Hendricks planned to close the transaction within 30 days.

On July 30, 2012, Fryer received the executed closing documents, including a bill of sale for the O'Brien partnership interest. Hendricks wired the balance of the purchased price shortly after August 2, 2012.

Prior to the acquisition of O'Brien's interest, AOI, O'Brien Enterprises, Inc., and RSD each owned a 20.618 percent partnership interest in AAGP.

On August 8, 2012, Steers advised Fryer that Robert E. Resoff, Inc. had elected to purchase the O'Brien interest on the same terms set forth in Hendricks' Option Agreement.

On February 13, 2013, RSD filed a complaint for declaratory and equitable relief against AOI. RSD alleged breach of fiduciary duty, breach of contract, and interference with business expectancy. In its prayer for relief, RSD requested (1) declaratory relief that its alleged right of first refusal under Section 7.3 of the Agreement be recognized; (2) that the court impose a constructive trust to protect RSD's alleged interest in the O'Brien transaction based upon its purported right of first refusal; and (3) specific performance of the Agreement that would require AOI to make the O'Brien transaction subject to the right of first refusal as determined by Section 7.3 of the Agreement.

AOI moved for summary judgment against RSD. AOI maintained that under the plain language of the Agreement, only where a partner cannot obtain consent from two-thirds of the partnership to a transfer of interest does the right of first refusal apply. AOI argued that because the transfer of O'Brien's partnership interest was approved by two-thirds of the partnership, the right of first refusal was never triggered. The trial court granted AOI's motion for summary judgment.

RSD appeals.

ANALYSIS

We review summary judgment orders de novo. Durland v. San Juan County, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). Summary judgment is appropriate only if there is no genuine issue of material fact in the pleadings, affidavits, and depositions on file, and the moving party is entitled to judgment as a matter of law. CR 56(c). Material facts are those upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

RSD first contends that the trial court's interpretation of the Agreement was erroneous because, it argues, under the Agreement, even where a partner obtains consent of two-thirds of the non-selling partners under Section 7.1.1, it still must comply with the right of first refusal provision set forth in Section 7.3. We disagree with RSD's interpretation of the Agreement.

"The interpretation of a contract can be a mixed question of law and fact. But where the contract presents no ambiguity and no extrinsic evidence is required to make sense of the contract terms, contract interpretation is a question of law." Rekhter v. Dep't of Soc. & Health Servs., 180 Wn.2d 102, 134, 323 P.3d 1036 (2014) (internal citations omitted).

The touchstone of contract interpretation is the parties' intent. See Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 100, 285 P.3d 70 (2012); 25 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 5:7, at 152 (2d ed. 2007). We construe contracts "to reflect the intent of the parties." Corbray v. Stevenson, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). We follow the "'objective manifestation theory'" of contract interpretation, focusing on the

"'reasonable meaning of the contract language to determine the parties' intent.'" Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712, 334 P.3d 116 (2014) (quoting Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). "We impute an intention corresponding to the reasonable meaning of the words used." Hearst, 154 Wn.2d at 503.

We also follow the context rule that "extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of *specific words and terms*" used in the contract. William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Trust v. Port of Everett, 159 Wn. App. 389, 399-400, 245 P.3d 779 (2011) (emphasis added). Extrinsic evidence includes both the contract's subject matter and objective, the circumstances surrounding contract formation, both the parties' conduct and subsequent acts, and the reasonableness of the parties' respective interpretations. Hulbert, 159 Wn. App. at 400. However, extrinsic evidence may not be used to "'show an intention independent of the [contract]' or to 'vary, contradict[,] or modify the written word.'" Hearst, 154 Wn.2d at 503 (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 693, 974 P.2d 836 (1999)). Moreover, extrinsic evidence of a party's subjective, unilateral, or undisclosed intent regarding the meaning of a contract's terms is inadmissible. Hulbert, 159 Wn. App. at 400. "Nor is it admissible under the parol evidence rule to add to the terms of a fully integrated written contract." Hulbert, 159 Wn. App. at 400.

We "should ultimately give effect to . . . the intent of the parties at the time of execution." 25 DEWOLF & ALLEN, § 5:7, at 154 (2007). If contractual language is "clear

and unambiguous," we must enforce the written contract. Lehrer v. Dep't of Soc. & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000).

The primarily disputed sections of the Agreement are repeated as follows:

> 7.1.1 No Partner may, without the prior written consent of the Partners holding at least a two-thirds interest in the Partnership (excluding the transferring Partner's interest), directly or indirectly sell, lease, transfer, assign, give, pledge, hypothecate or otherwise encumber or permit or suffer any encumbrance of all or any part of his interest in the Partnership, with or without consideration, except as provided in this Article VII and Section 8.2.
>
> . . . .
>
> 7.3 Right of First Refusal. *Notwithstanding* the provisions of Section 7.1.1, a Partner *may* sell his interest in the Partnership upon compliance with the conditions of Section 7.1.2 and the following conditions:
>
> . . . .[10]

RSD interprets these provisions, in addition to others quoted above, to mean that the right of first refusal in Section 7.3 trumps the two-thirds consent requirement in Section 7.1.1.

The plain language of Sections 7.1.1 and 7.3, when read together, delineates two separate mechanisms of transferring partnership interest. The first is Section 7.1.1's general requirement that in order to transfer a partnership interest, the partner must obtain written consent of the partners holding at least a two-thirds interest in the partnership. The second mechanism is outlined in Section 7.3, the right of first refusal provision. The term "notwithstanding" indicates that this is a separate method of transferring interest. "Notwithstanding" is defined as "without prevention or obstruction from or by"; "NEVERTHELESS, HOWEVER, YET." Webster's Third New International Dictionary 1545 (2002).

[10] CP at 70-71 (emphasis added).

The term "may" in Section 7.3 also supports this interpretation. It establishes that the right of first refusal procedure is optional, not required. The language of the Agreement does not state that it is mandatory that a transferring partner follow the procedure of first refusal. The Agreement could have done so by mirroring the language of Section 7.1.1. Nor does the Agreement state that Section 7.3 is an additional requirement to Section 7.1.1.

RSD relies on extrinsic evidence to buttress its argument that the Agreement requires a selling partner to comply with the right of first refusal regardless of whether the partner obtained consent from the partnership. For example, RSD focuses attention on a 1987 Offering Memorandum, offered by AOI, which contained a provision regarding the right of first refusal. But resorting to extrinsic evidence such as this is unwarranted. [S]urrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of *specific words and terms used*' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" Hearst, 154 Wn.2d at 503 (quoting Hollis, 137 Wn.2d at 695-96). RSD seeks to modify—not define—the clear terms of the contract to support its interpretation.

The Agreement's language is clear and unambiguous. The consent provision in Section 7.3 is a separate process of transferring a partnership interest from the right of first refusal in Section 7.1.1. The trial court did not err in so concluding.

RSD next contends that material questions of fact remain as to whether AOI complied with Section 7.1.1 of the Agreement. According to RSD, because the Option Agreement is dated May 24, it was on that date that the agreement to grant Hendricks an option became binding and, thus, encumbered O'Brien's partnership interest. RSD

argues, as it did to the trial court, that because May 24 predates May 31, the date that the partners consented to the transfer, AOI failed to comply with Section 7.1.1's requirement that the transferring partner obtain *prior* written consent. RSD did not present evidence refuting the fact that O'Brien signed the Option Agreement on May 31. Its argument was that the Option Agreement was binding on May 24 by virtue of the effective date listed on the agreement.

The trial court based its summary judgment decision on its finding that the Option Agreement became binding when O'Brien signed it on May 31, after two-thirds of the partnership consented to the transaction.

Nevertheless, AOI argues on appeal that the Option Agreement, which is different from a purchase and sale agreement, was not binding on O'Brien until he received the $200,000 consideration on June 6. We agree with this assertion.

> An option to purchase property is a contract wherein the owner, in return for a valuable consideration, agrees with another person that the latter shall have the privilege of buying the property within a specified time upon the terms and conditions expressed in the option. If no consideration passes, the transaction resolves itself into a mere offer which may be withdrawn by the optionor at any time before acceptance by the optionee. But when supported by a consideration, as in the case at bar, the execution of the agreement results in a contract binding upon the optionor which may not be withdrawn by him during the time set forth therein.

Whitworth v. Enitai Lumber Co., 36 Wn.2d 767, 770, 220 P.2d 328 (1950). Accordingly, an option contract is not binding until consideration passes. Here, consideration did not change hands until June 6, when Hendricks wired O'Brien $200,000. The trial court did not err. See Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984) (reviewing court may affirm the trial court's judgment on any theory established by pleadings and supported by proof).

RSD further contends that there was no evidence that Hendricks obtained *written* consent from the partners. RSD asserts that the trial court misread Hendricks' declaration. In Hendricks' declaration, he stated, "By [May 31] I had the consent of 2/3 of the partners excluding the transferring partner."[11] However, in its summary judgment motion, AOI also attached a copy of the consent forms mailed to the partners. Additional evidence offered by AOI on summary judgment demonstrated that the consent was in written form. Furthermore, RSD presented no evidence that contradicted AOI's evidence that the consent was in writing. A trier of fact could reasonably infer, based on this evidence, that AOI properly obtained consent in writing from the partners. The trial court correctly concluded that no material question of fact remained as to whether the consent received was in writing and obtained prior to encumbering O'Brien's partnership interest, as required by Section 7.1.1. of the Agreement.

RSD contends, finally, that the trial court erred by summarily dismissing his claim that Hendricks breached his duties of loyalty and good faith and fair dealing to the partners and partnership. We disagree.

Partners are accountable to each other and the partnership as fiduciaries. Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC, 138 Wn. App. 443, 457, 158 P.3d 1183 (2007). One of the duties owed as a fiduciary is the duty of loyalty, which includes refraining from self-dealing, secret profits, and conflicts of interest. Bishop, 138 Wn. App. at 457 (citing RCW 25.05.165(2)(a)-(c)). A partner also has an obligation of good faith and fair dealing to discharge duties to the partnership and other partners under the terms of the partnership agreement. RCW 25.05.165(4).

[11] CP at 56.

RUPA governs partnership affairs to the extent not defined in the partnership agreement. Horne v. Aune, 130 Wn. App. 183, 200-01, 121 P.3d 1227 (2005); RCW 25.05.165. RUPA is considered a "gap filler" in this manner. Horne, 130 Wn. App. at 200-01. "With few exceptions . . . partners may 'write their own ticket.'" Horne, 130 Wn. App. at 200-01 (internal quotation marks omitted) (quoting Seattle-First Nat'l Bk. v. Marshall, 31 Wn. App. 339, 347, 641 P.2d 1194 (1982)). Included within those exceptions is the duty of loyalty under RCW 25.05.165(2). RCW 25.05.015(2)(c) prohibits a partnership agreement from eliminating the duty of loyalty under RCW 25.05.165(2). Partnership agreements also cannot "[u]nreasonably reduce the duty of care under RCW 25.05.165(3)," or "[e]liminate the obligation of good faith and fair dealing under RCW 25.05165(4)." RCW 25.05.015(2)(d), (e).

RSD contends that Hendricks breached the duty of loyalty because, he argues, the opportunity to purchase the O'Brien interest was a "partnership opportunity." RSD points to Section 8.2 of the Agreement, which gave the partnership an opportunity to purchase a partner's interest upon his or her death. Section 8.2 of the Agreement provided:

> Upon the death . . . of any partner, the Partnership shall continue the Partnership business under its then present name. . . . The Partnership may elect to (but need not) liquidate the interest of the . . . deceased . . . Partner and cause the Partnership to purchase the interest of the . . . deceased . . . Partner at a purchase price equal to 100% of the Value of the . . . deceased . . . Partner's interest . . . .[12]

Notably, not one partner expressed an interest in purchasing O'Brien's partnership interest for the benefit of the partnership. Hendricks informed the partners of the

[12] CP at 74.

transaction in his May 15, 2012 letter to them, and gave them the opportunity to inquire further about the details of the transaction. Had any of the partners been interested in purchasing the interest for the partnership as a "partnership opportunity," they could have taken action to do so. RSD communicated its interest in purchasing the O'Brien interest weeks after having been informed of the transaction. And RSD sought to purchase the interest on its own behalf as an individual partner, and not on behalf of the partnership interest.

RSD also argues that Hendricks failed to disclose the material terms of the transaction before seeking timely, informed consent from the partners. The good faith obligation of a partner includes a duty of candor, which demands that the partner abstain from any and all concealment concerning matters pertaining to the partnership business and to refrain from making false statements to a copartner. Bovy v. Graham, Cohen & Wampold, 17 Wn. App. 567, 570-71, 564 P.2d 1175 (1977) (citing Karle v. Seder, 35 Wn.2d 542, 214 P.2d 684 (1950)). Hendricks satisfied the good faith obligation by promptly informing the partners of O'Brien's impending death and the deal upon which they agreed. Indeed, Hendricks eventually disclosed the details of the transaction to RSD.

RSD cites Bovy for the proposition that as managing partner Hendricks is held to the highest standard of fiduciary obligation. In Bovy, Division Two stated in a footnote, "We also note that as managing partner, Bovy occupied a higher fiduciary position and had the burden of dispelling all doubts concerning the discharge of his duties. In the event a managing partner is unable to satisfy this burden, all doubts would ordinarily be resolved against him." 17 Wn. App. at 571 n.3 (citing Conrad v. Judson, 465 S.W.2d 819

(Tex. Civ. App. 1971); Bakalis v. Bressler, 1 Ill. 2d 72, 115 N.E.2d 323 (1953)). No Washington case has adopted this proposition since Bovy. Because it is merely dicta, we do not apply this proposition for the first time here.

RCW 25.05.165(5) states that no duty is violated under either RUPA or a partnership agreement "merely because the partner's conduct furthers the partner's own interest." AOI did not violate the duty of loyalty or any other obligation imposed because it sought an opportunity for itself as a partner in the enterprise.

We reject RSD's claim that AOI breached its fiduciary duties. The trial court did not err.

We affirm.

Trickey, J

WE CONCUR:

Spearman, C.J.

Cox, J.

Appendix B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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October 27, 2015

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CASE #: 71926-2-I
RSD AAP LLC, Appellant v. Alyeska Ocean LLC& Jeff & Jane Doe Hendrick's, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: Reporter of Decisions

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

RSD AAP, LLC, Appellant, v. ALYESKA OCEAN, INC; JEFF HENDRICKS and JANE DOE HENDRICKS, individually and as a marital community, Respondents.	No. 71926-2-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, RSD AAP, LLC, has filed a motion for reconsideration. The respondents, Alyeska Ocean, Inc. and Jeff and Jane Doe Hendricks, have filed an answer. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 27th day of October, 2015.

FOR THE COURT:

Trickey, J

Appendix C

West's Revised Code of Washington Annotated
Title 25. Partnerships (Refs & Annos)
Chapter 25.05. Revised Uniform Partnership Act (Refs & Annos)
Article 1. General Provisions

West's RCWA 25.05.015

25.05.015. Effect of partnership agreement--Nonwaivable provisions

Currentness

(1) Except as otherwise provided in subsection (2) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.

(2) The partnership agreement may not:

(a) Vary the rights and duties under RCW 25.05.025 except to eliminate the duty to provide copies of statements to all of the partners;

(b) Unreasonably restrict the right of access to books and records under RCW 25.05.160(2);

(c) Eliminate the duty of loyalty under RCW 25.05.165(2) or 25.05.235(2)(c), but, if not manifestly unreasonable:

(i) The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty; or

(ii) All of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(d) Unreasonably reduce the duty of care under RCW 25.05.165(3) or 25.05.235(2)(c);

(e) Eliminate the obligation of good faith and fair dealing under RCW 25.05.165(4), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(f) Vary the power to dissociate as a partner under RCW 25.05.230(1), except to require the notice under RCW 25.05.225(1) to be in writing;

(g) Vary the right of a court to expel a partner in the events specified in RCW 25.05.225(5);

(h) Vary the requirement to wind up the partnership business in cases specified in RCW 25.05.300 (4), (5), or (6);

(i) Vary the law applicable to a limited liability partnership under RCW 25.05.030(2); or

(j) Restrict rights of third parties under this chapter.

Credits
[1998 c 103 § 103.]

Notes of Decisions (1)

West's RCWA 25.05.015, WA ST 25.05.015
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

Appendix D

West's Revised Code of Washington Annotated
Title 25. Partnerships (Refs & Annos)
Chapter 25.05. Revised Uniform Partnership Act (Refs & Annos)
Article 1. General Provisions

West's RCWA 25.05.020

25.05.020. Supplemental principles of law

Currentness

(1) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(2) If an obligation to pay interest arises under this chapter and the rate is not specified, the rate is that specified in RCW 19.52.010(1).

Credits
[1998 c 103 § 104.]

Notes of Decisions (2)

West's RCWA 25.05.020, WA ST 25.05.020
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

Appendix E

West's Revised Code of Washington Annotated
Title 25. Partnerships (Refs & Annos)
Chapter 25.05. Revised Uniform Partnership Act (Refs & Annos)
Article 4. Relations of Partners to Each Other and to Partnership

West's RCWA 25.05.160

25.05.160. Partner's rights and duties with respect to information

Currentness

(1) A partnership shall keep its books and records, if any, at its chief executive office.

(2) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

(3) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

(a) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter; and

(b) On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

Credits
[1998 c 103 § 403.]

Notes of Decisions (2)

West's RCWA 25.05.160, WA ST 25.05.160
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

Appendix F

West's Revised Code of Washington Annotated
Title 25. Partnerships (Refs & Annos)
Chapter 25.05. Revised Uniform Partnership Act (Refs & Annos)
Article 4. Relations of Partners to Each Other and to Partnership

West's RCWA 25.05.165

25.05.165. General standards of partner's conduct

Currentness

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

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

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

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

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

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

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

(6) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

Credits

[1998 c 103 § 404.]

Notes of Decisions (55)

West's RCWA 25.05.165, WA ST 25.05.165
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

Appendix G

UNIFORM PARTNERSHIP ACT (1997)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTH YEAR SAN ANTONIO, TEXAS
JULY 12 - JULY 19, 1996

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
San Antonio, Texas, February 4, 1997

2/27/98

UNIFORM PARTNERSHIP ACT – QUICK CHRONOLOGY

1914 – Original Uniform Partnership Act

1992 – Promulgation of Uniform Partnership Act (1992) by Uniform Law Commissioners

1993 – Amendments to Uniform Partnership Act (1992) Becomes
Uniform Partnership Act (1993)

1994 – Amendments to Uniform Partnership Act (1993) Becomes
Uniform Partnership Act (1994)

1996 – Amendments to Uniform Partnership Act (1994)
Adds Limited Liability Partnership. Becomes Uniform Partnership Act (1996)

1997 – Amendment to Uniform Partnership Act (1996), Section 801
Becomes Uniform Partnership Act (1997)

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195

UNIFORM PARTNERSHIP ACT (1997)

PREFATORY NOTE

The National Conference of Commissioners on Uniform State Laws first considered a uniform law of partnership in 1902. Although early drafts had proceeded along the mercantile or "entity" theory of partnerships, later drafts were based on the common-law "aggregate" theory. The resulting Uniform Partnership Act ("UPA"), which embodied certain aspects of each theory, was finally approved by the Conference in 1914. The UPA governs general partnerships, and also governs limited partnerships except where the limited partnership statute is inconsistent. The UPA has been adopted in every State other than Louisiana and has been the subject of remarkably few amendments in those States over the past 80 years.

In January of 1986, an American Bar Association subcommittee issued a detailed report that recommended extensive revisions to the UPA. See UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association, Should the Uniform Partnership Act be Revised?, 43 Bus. Law. 121 (1987) ("ABA Report"). The ABA Report recommended that the entity theory "should be incorporated into any revision of the UPA whenever possible." Id. at 124.

In 1987, the Conference appointed a Drafting Committee to Revise the Uniform Partnership Act and named a Reporter. The Committee held its initial meeting in January of 1988 and a first reading of the Committee's draft was begun at the Conference's 1989 Annual Meeting in Kauai, Hawaii. The first reading was completed at the 1990 Annual Meeting in Milwaukee. The second reading was begun at Naples, Florida, in 1991 and completed at San Francisco in 1992. The Revised Uniform Partnership Act (1992) was adopted unanimously by a vote of the States [sic] on August 6, 1992. The following year, in response to suggestions from various groups, including an American Bar Association subcommittee and several state bar associations, the Drafting Committee recommended numerous revisions to the Act. Those were adopted at the Charleston, South Carolina, Annual Meeting in 1993, and the Act was restyled as the Uniform Partnership Act (1993). Subsequently, a final round of changes was incorporated, and the Conference unanimously adopted the Uniform Partnership Act (1994) at its 1994 Annual Meeting in Chicago. The Revised Act was approved by the American Bar Association House of Delegates in August, 1994. (Emphasis added)

The Uniform Partnership Act (1994) ("Revised Act" or "RUPA") gives supremacy to the partnership agreement in almost all situations. The Revised Act is, therefore, largely a series of "default rules" that govern the relations among partners in situations they have not addressed in a partnership agreement. The primary focus of RUPA is the small, often informal, partnership. Larger partnerships generally have a partnership agreement addressing, and often modifying, many of the provisions of the partnership act.

The Revised Act enhances the entity treatment of partnerships to achieve simplicity for state law purposes, particularly in matters concerning title to partnership property. RUPA does not, however, relentlessly apply the entity approach. The aggregate approach is retained for some purposes, such as partners' joint and several liability. (emphasis added)

The Drafting Committee spent significant effort on the rules governing partnership breakups. RUPA's basic thrust is to provide stability for partnerships that have continuation agreements. Under the UPA, a partnership is dissolved every time a member leaves. The Revised Act provides that there are many departures or "dissociations" that do not result in a dissolution.

Under the Revised Act, the withdrawal of a partner is a "dissociation" that results in a dissolution of the partnership only in certain limited circumstances. Many dissociations result merely in a buyout of the withdrawing partner's interest rather than a winding up of the partnership's business. RUPA defines both the substance and procedure of the buyout right. (Emphasis added)

Article 6 of the Revised Act covers partner dissociations; Article 7 covers buyouts; and Article 8 covers dissolution and the winding up of the partnership business. See generally Donald J. Weidner & John W. Larson, The Revised Uniform Partnership Act: The Reporters' Overview, 49 Bus. Law. 1 (1993).

The Revised Act also includes a more extensive treatment of the fiduciary duties of partners. Although RUPA continues the traditional rule that a partner is a fiduciary, it also makes clear that a partner is not required to be a disinterested trustee. Provision is made for the legitimate pursuit of self-interest, with a counterbalancing irreducible core of fiduciary duties. (Emphasis added)

****

One final change deserves mention. Partnership law no longer governs limited partnerships pursuant to the provisions of RUPA itself. First, limited partnerships are not "partnerships" within the RUPA definition. Second, UPA Section 6(2), which provides that the UPA governs limited partnerships in cases not provided for in the Uniform Limited Partnership Act (1976) (1985) ("RULPA") has been deleted. No substantive change in result is intended, however. Section 1105 of RULPA already provides that the UPA governs in any case not provided for in RULPA, and thus the express linkage in RUPA is unnecessary. Structurally, it is more appropriately left to RULPA to determine the applicability of RUPA to limited partnerships. It is contemplated that the Conference will review the linkage question carefully, although no changes in RULPA may be necessary despite the many changes in RUPA.

[General] Comment

These Comments include the original Comments to the Revised Uniform Partnership Act (RUPA or the Act) and the new Comments to the Limited Liability Partnership Act Amendments to the Uniform Partnership Act (1994).

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[RCW 25.05.005]
[Definitions]

[Comment]

The RUPA continues the definition of "business" from Section 2 of the Uniform Partnership Act (UPA).

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"Partnership" is defined to mean an association of two or more persons to carry on as co-owners a business for profit formed under [RCW 25.05.055]... that is, a general partnership.

****

The definition of "partnership agreement" is adapted from Section 101(9) of RULPA. The RUPA definition is intended to include the agreement among the partners, including amendments, concerning either the affairs of the partnership or the conduct of its business. (Emphasis added)

****

"Partnership interest" or "partner's interest in the partnership" is defined to mean all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights. A partner's "transferable interest" is a more limited concept and means only his share of the profits and losses and right to receive distributions, that is, the partner's economic interests. See [RCW 25.05.205] and Comment.

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"Property" is defined broadly to include all types of property, as well as any interest in property.

****

"Transfer" is defined broadly to include all manner of conveyances, including leases and encumbrances.

[RCW 25.05.010.]
[Knowledge and notice]

Comment

The concepts and definitions of "knowledge," "notice," and "notification" draw heavily on Section 1-201(25) to (27) of the Uniform Commercial Code (UCC). The UCC text has been altered somewhat to improve clarity and style, but in general no substantive changes are intended from the UCC concepts. "A notification" replaces the UCC's redundant phrase, "a notice or notification," throughout the Act.

A person "knows" a fact only if that person has actual knowledge of it. Knowledge is cognitive awareness. That is solely an issue of fact. This is a change from the UPA Section 3(1) definition of "knowledge" which included the concept of "bad faith" knowledge arising from other known facts. (Emphasis added)

"Notice" is a lesser degree of awareness than "knows" and is based on a person's: (i) actual knowledge; (ii) receipt of a notification; or (iii) reason to know based on actual knowledge of other facts and the circumstances at the time. The latter is the traditional concept of inquiry notice.

****

A person "receives" a notification when (i) the notification is delivered to the person's place of business (or other place for receiving communications) or (ii) the recipient otherwise actually learns of its existence.

The sender "notifies" or gives a notification by making an effort to inform the recipient, which is reasonably calculated to do so in ordinary course, even if the recipient does not actually learn of it.

****

Subsection (e) determines when an agent's knowledge or notice is imputed to an organization, such as a corporation. In general, only the knowledge or notice of the agent conducting the particular transaction is imputed to the organization. Organizations are expected to maintain reasonable internal routines to insure that important information reaches the individual agent handling a transaction. If, in the exercise of reasonable diligence on the part of the organization, the agent should have known or had notice of a fact, or received a notification of it, the organization is bound. The Official Comment to UCC Section 1-201(27) explains:

> This makes clear that reason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have been communicated to the individual conducting that transaction. (Emphasis added)

****

Subsection (f) continues the rule in UPA Section 12 that a partner's knowledge or notice of a fact relating to the partnership is imputed to the partnership, except in the case of fraud on the partnership.

****

[RCW 25.05.015]

[Effect of partnership agreement—Nonwaivable provisions]

Comment

1. The general rule under [RCW 25.05.015(1)] is that relations among the partners and between the partners and the partnership are governed by the partnership agreement. See Section 101(5). To the extent that the partners fail to agree upon a contrary rule, RUPA provides the default rule. Only the rights and duties listed in [RCW 25.05.015(2)], and implicitly the corresponding liabilities and remedies under [RCW 25.05.165], are mandatory and cannot be waived or varied by agreement beyond what is authorized. Those are the only exceptions to the general principle that the provisions of RUPA with respect to the rights of the partners inter se are merely default rules, subject to modification by the partners. All modifications must also, of course, satisfy the general standards of contract validity. See [RCW 25.05.020].

****

4. Subsection ([2])([c]) through ([e]) are intended to ensure a fundamental core of fiduciary responsibility. Neither the fiduciary duties of loyalty or care, nor the obligation of good faith and fair dealing, may be eliminated entirely. However, the statutory requirements of each can be modified by agreement, subject to the limitation stated in subsection ([2])([c]) through ([e]).

There has always been a tension regarding the extent to which a partner's fiduciary duty of loyalty can be varied by agreement, as contrasted with the other partners' consent to a particular and known breach of duty. On the one hand, courts have been loathe to enforce agreements broadly "waiving" in advance a partner's fiduciary duty of loyalty, especially where there is unequal bargaining power, information, or sophistication. For this reason, a very broad provision in a partnership agreement in effect negating any duty of loyalty, such as a provision giving a managing partner complete discretion to manage the business with no liability except for acts and omissions that constitute willful misconduct, will not likely be enforced. See, e.g., Labovitz v. Dolan, 189 Ill. App. 3d 403, 136 Ill. Dec. 780, 545 N.E.2d 304 (1989). On the other hand, it is clear that the remaining partners can "consent" to a particular conflicting interest transaction or other breach of duty, after the fact, provided there is full disclosure. (Emphasis added)

RUPA attempts to provide a standard that partners can rely upon in drafting exculpatory agreements. It is not necessary that the agreement be restricted to a particular transaction. That would require bargaining over every transaction or opportunity, which would be excessively burdensome. The agreement may be drafted in terms of types or categories of activities or transactions, but it should be reasonably specific.

A provision in a real estate partnership agreement authorizing a partner who is a real estate agent to retain commissions on partnership property bought and sold by that partner would be an example of a "type or category" of activity that is not manifestly unreasonable and thus should be enforceable under the Act. Likewise, a provision authorizing that partner to buy or sell real property for his own account without prior disclosure to the other partners or without first offering it to the partnership would be enforceable as a valid category of partnership activity.

Ultimately, the courts must decide the outer limits of validity of such agreements, and context may be significant. It is intended that the risk of judicial refusal to enforce manifestly

unreasonable exculpatory clauses will discourage sharp practices while accommodating the legitimate needs of the parties in structuring their relationship. (Emphasis added)

5. Subsection ([2])([c])(i) permits the partners, in their partnership agreement, to identify specific types or categories of partnership activities that do not violate the duty of loyalty. A modification of the statutory standard must not, however, be manifestly unreasonable. This is intended to discourage overreaching by a partner with superior bargaining power since the courts may refuse to enforce an overly broad exculpatory clause. See, e.g., Vlases v. Montgomery Ward & Co., 377 F.2d 846, 850 (3d Cir. 1967) (limitation prohibits unconscionable agreements); PPG Industries, Inc. v. Shell Oil Co., 919 F.2d 17, 19 (5th Cir. 1990) (apply limitation deferentially to agreements of sophisticated parties).

Subsection ([2])([c])(ii) is intended to clarify the right of partners, recognized under general law, to consent to a known past or anticipated violation of duty and to waive their legal remedies for redress of that violation. This is intended to cover situations where the conduct in question is not specifically authorized by the partnership agreement. It can also be used to validate conduct that might otherwise not satisfy the "manifestly unreasonable" standard. Clause (ii) provides that, after full disclosure of all material facts regarding a specific act or transaction that otherwise would violate the duty of loyalty, it may be authorized or ratified by the partners. That authorization or ratification must be unanimous unless a lesser number or percentage is specified for this purpose in the partnership agreement. (Emphasis added)

[When adopting RUPA, the Washington State legislature moved the term "manifestly unreasonable" from Subsubsection (2)(c)(i) to the flush language of Subsection (2)(c) itself so that a less than unanimous consent provision could not be "manifestly unreasonable" either. This change was made at the suggestion of the Partnership Law Committee of Washington State Bar Association's Business Law Section (the "Committee") in its July 1997 Report on the proposed Washington Uniform Partnership Act (the "Committee Report") which explained the suggested change as follows:

> "The Committee recommends moving the phrase "if not manifestly unreasonable" to the preamble of Section 103(b)(3) so that it modifies both clause (i),relating to the types or categories of activities that do not violate the duty of loyalty, and clause (ii), relating to the authorization or ratification of acts or transactions that would otherwise violate the duty of loyalty. The effect of this change is that, in addition to the full disclosure requirement already contained in clause (ii), the authorization or ratification procedure must not be manifestly unreasonable. Generally, approval or ratification of a transaction involving a conflict of interest by disinterested partners is the standard of reasonableness...". Committee Report p. 2. (emphasis added)

The full text of the Committee Report is at p. of the Appendix.]

10. Under subsection (b)(8), the partnership agreement may not vary the right of partners to have the partnership dissolved and its business wound up under Section 801(4), (5), or (6).

****

[RCW 25.05.020]
[Supplemental principles of law]

Comment

The principles of law and equity supplement RUPA unless displaced by a particular provision of the Act. This broad statement combines the separate rules contained in UPA Sections 4(2), 4(3), and 5. These supplementary principles encompass not only the law of agency and estoppel and the law merchant mentioned in the UPA, but all of the other principles listed in UCC Section 1-103: the law relative to capacity to contract, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other common law validating or invalidating causes, such as unconscionability. No substantive change from either the UPA or the UCC is intended.

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[RCW 25.05.050]
[Partnership as entity]

Comment

RUPA embraces the entity theory of the partnership. In light of the UPA's ambivalence on the nature of partnerships, the explicit statement provided by subsection (a) is deemed appropriate as an expression of the increased emphasis on the entity theory as the dominant model. But see [Section 306 (partners' liability joint and several unless the partnership has filed a statement of qualification to become a limited liability partnership).

Giving clear expression to the entity nature of a partnership is intended to allay previous concerns stemming from the aggregate theory, such as the necessity of a deed to convey title from the "old" partnership to the "new" partnership every time there is a change of cast among the partners. Under RUPA, there is no "new" partnership just because of membership changes. That will avoid the result in cases such as Fairway Development Co. v. Title Insurance Co., 621 F. Supp. 120 (N.D. Ohio 1985), which held that the "new" partnership resulting from a partner's death did not have standing to enforce a title insurance policy issued to the "old" partnership.

****

[RCW 25.05.150]
[Partner's rights and duties]

Comment

1. [RCW 25.05.150 Partner's rights and duties] is drawn substantially from UPA Section 18. It establishes many of the default rules that govern the relations among partners. All of these rules are, however, subject to contrary agreement of the partners as provided in Section 103.

****

7. Under subsection (6), each partner has equal rights in the management and conduct of the business. It is based on UPA Section 18(e), which has been interpreted broadly to mean that, absent contrary agreement, each partner has a continuing right to participate in the management of the partnership and to be informed about the partnership business, even if his assent to partnership business decisions is not required.

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8. Subsection (7) provides that partners may use or possess partnership property only for partnership purposes. (Emphasis added)

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11. Subsection (j) continues with one important clarification the UPA Section 18(h) scheme of allocating management authority among the partners. In the absence of an agreement to the contrary, matters arising in the ordinary course of the business may be decided by a majority of the partners. Amendments to the partnership agreement and matters outside the ordinary course of the partnership business require unanimous consent of the partners. Although the text of the UPA is silent regarding extraordinary matters, courts have generally required the consent of all partners for those matters. See, e.g., Paciaroni v. Crane, 408 A.2d 946 (Del. Ch. 1989); Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989); Duell v. Hancock, 83 A.D.2d 762, 443 N.Y.S.2d 490 (1981).

****

[RCW 25.05.160]
[Partner's rights and duties with respect to information.]

Comment

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3. Subsection (3) is a significant revision of UPA Section 20 and provides a more comprehensive, although not exclusive, statement of partners' rights and duties with respect to partnership information other than books and records. Both the partnership and the other partners are obligated to furnish partnership information.

Paragraph (a) is new and imposes an affirmative disclosure obligation on the partnership and partners. There is no express UPA provision imposing an affirmative obligation to disclose any information other than the partnership books. Under some circumstances, however, an affirmative disclosure duty has been inferred from other sections of the Act, as well as from the common law, such as the fiduciary duty of good faith. Under UPA Section 18(e), for example, all partners enjoy an equal right in the management and conduct of the partnership business, absent contrary agreement. That right has been construed to require that every partner be provided with ongoing information concerning the partnership business. See Comment 7 to Section 401. Paragraph (a) provides expressly that partners must be furnished, without demand, partnership information reasonably needed for them to exercise their rights and duties as partners. In addition, a disclosure duty may, under some circumstances, also spring from the Section 404(d) obligation of good faith and fair dealing. See Comment 4 to Section 404. (Emphasis added)

[Excerpt from Comments on RCW 25.10.431, "Right of general partner and former general partner to information", the identical provision under the Uniform Limited Partnership Act:
"Subsection ([2]) – Source: RUPA Section 403(c). **[RCW 25.05.160(3)]**
Subsection ([2])([a]) – If a particular item of material information is apparent in the limited partnership's records, whether a general partner is obliged to disseminate that information to fellow general partners depends on the circumstances.
Example: A limited partnership has two general partners: each of which is regularly engaged in conducting the limited partnership's activities; both of which are aware of and have regular access to all significant limited partnership records; and neither of which has special responsibility for or knowledge about any particular aspect of those activities or the partnership records pertaining to any particular aspect of those activities. Most likely, neither general partner is obliged to draw the other general partner's attention to information apparent in the limited partnership's records.
Example: Although a limited partnership has three general partners, one is the managing partner with day-to-day responsibility for running the limited partnership's activities. The other two meet periodically with the managing general partner, and together with that partner function in a manner analogous to a corporate board of directors. Most likely, the managing general partner has a duty to draw the attention of the other general partners to important information, even if that information would be apparent from a review of the limited partnership's records.
In all events under subsection (b)(1), the question is whether the disclosure by one general partner is "reasonably required for the proper exercise" of the other general partner's

rights and duties."]

Paragraph (a) continues the UPA rule that partners are entitled, on demand, to any other information concerning the partnership's business and affairs. The demand may be refused if either the demand or the information demanded is unreasonable or otherwise improper. That qualification is new to the statutory formulation. The burden is on the partnership or partner from whom the information is requested to show that the demand is unreasonable or improper. The UPA admonition that the information furnished be "true and full" has been deleted as unnecessary, and no substantive change is intended. (Emphasis added)

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[RCW 25.05.165]

[General standards of partner's conduct.]

Comment

1. [RCW 25.05.165] is new. The title, "General Standards of Partner's Conduct," is drawn from RMBCA Section 8.30. Section [165] is both comprehensive and exclusive. In that regard, it is structurally different from the UPA which touches only sparingly on a partner's duty of loyalty and leaves any further development of the fiduciary duties of partners to the common law of agency. Compare UPA Sections 4(3) and 21.

Section [165] begins by stating that the only fiduciary duties a partner owes to the partnership and the other partners are the duties of loyalty and care set forth in subsections ([2]) and ([3]) of the Act. Those duties may not be waived or eliminated in the partnership agreement, but the agreement may identify activities and determine standards for measuring performance of the duties, if not manifestly unreasonable. See Sections 103(b)(3)-(5). Section [165] continues the term "fiduciary" from UPA Section 21, which is entitled "Partner Accountable as a Fiduciary." Arguably, the term "fiduciary" is inappropriate when used to describe the duties of a partner because a partner may legitimately pursue self-interest (see Section 404(e)) and not solely the interest of the partnership and the other partners, as must a true trustee. Nevertheless, partners have long been characterized as fiduciaries. See, e.g., Meinhard v. Salmon, 249 N.Y. 458, 463, 164 N.E. 545, 546 (1928) (Cardozo, J.). Indeed, the law of partnership reflects the broader law of principal and agent, under which every agent is a fiduciary. See Restatement (Second) of Agency § 13 (1957).

2. Section [165(2) provides three specific rules that comprise a partner's duty of loyalty. Those rules are exclusive and encompass the entire duty of loyalty.

Subsection [(2)(a)] is based on UPA Section 21(1) and continues the rule that partnership property usurped by a partner, including the misappropriation of a partnership opportunity, is held in trust for the partnership. The express reference to the appropriation of a partnership opportunity is new, but merely codifies case law on the point. See, e.g., Meinhard v. Salmon, supra; Fouchek v. Janicek, 190 Ore. 251, 225 P.2d 783 (1950). Under a constructive trust theory, the partnership can recover any money or property in the partner's hands that can be traced to the partnership. See, e.g., Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984), aff'd, 737 P.2d 852 (Colo. 1987); Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 144 A.2d 207 (1958); Harestad v. Weitzel, 242 Or. 199, 536 P.2d 522 (1975). As a result, the partnership's claim is greater than that of an ordinary creditor. See Official Comment to UPA Section 21.

UPA Section 21(1) imposes the duty on partners to account for profits and benefits in all transactions connected with "the formation, conduct, or liquidation of the partnership." Reference to the "formation" of the partnership has been eliminated by RUPA because of concern that the duty of loyalty could be inappropriately extended to the pre-formation period when the parties are really negotiating at arm's length. Compare Herring v. Offutt, 295 A.2d 876 (Ct. App. Md. 1972), with Phoenix Mutual Life Ins. Co. v. Shady Grove Plaza Limited Partnership, 734 F. Supp. 1181 (D. Md.

1990), aff'd, 937 F.2d 603 (4th Cir. 1991). Once a partnership is agreed to, each partner becomes a fiduciary in the "conduct" of the business. Pre-formation negotiations are, of course, subject to the general contract obligation to deal honestly and without fraud.

****

Subsection [(2)(b)] provides that a partner must refrain from dealing with the partnership as or on behalf of a party having an interest adverse to the partnership. This rule is derived from Sections 389 and 391 of the Restatement (Second) of Agency. Comment c to Section 389 explains that the rule is not based upon the harm caused to the principal, but upon avoiding a conflict of opposing interests in the mind of an agent whose duty is to act for the benefit of his principal. (Emphasis added)

****

Section [165(2)(c)] provides that a partner must refrain from competing with the partnership in the conduct of its business. This rule is derived from Section 393 of the Restatement (Second) of Agency and is an application of the general duty of an agent to act solely on his principal's behalf.

The duty not to compete applies only to the "conduct" of the partnership business; it does not extend to winding up the business, as do the other loyalty rules. Thus, a partner is free to compete immediately upon an event of dissolution under Section 801, unless the partnership agreement otherwise provides. A partner who dissociates without a winding up of the business resulting is also free to compete, because Section 603(b)(2) provides that the duty not to compete terminates upon dissociation. A dissociated partner is not, however, free to use confidential partnership information after dissociation. See Restatement (Second) of Agency § 393 cmt. e (1957). Trade secret law also may apply. See the Uniform Trade Secrets Act.

Under [Section .015(2)(c)], the partnership agreement may not "eliminate" the duty of loyalty. Section [.015(2)(c)(i)] expressly empowers the partners, however, to identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable. As under UPA Section 21, the other partners may also consent to a specific act or transaction that otherwise violates one of the rules. For the consent to be effective under Section 103(b)(3)(ii), there must be full disclosure of all material facts regarding the act or transaction and the partner's conflict of interest. See Comment 5 to Section 103. (Emphasis added)

4. Subsection (4) is also new. It provides that partners have an obligation of good faith and fair dealing in the discharge of all their duties, including those arising under the Act, such as their fiduciary duties of loyalty and care, and those arising under the partnership agreement. The exercise of any rights by a partner is also subject to the obligation of good faith and fair dealing. The obligation runs to the partnership and to the other partners in all matters related to the conduct and winding up of the partnership business. (Emphasis added)

The obligation of good faith and fair dealing is a contract concept, imposed on the partners because of the consensual nature of a partnership. See Restatement (Second) of Contracts § 205 (1981). It is not characterized, in RUPA, as a fiduciary duty arising out of the partners' special relationship. Nor is it a separate and independent obligation. It is an ancillary obligation that applies whenever a partner discharges a duty or exercises a right under the partnership agreement or the Act.

The meaning of "good faith and fair dealing" is not firmly fixed under present law. "Good faith" clearly suggests a subjective element, while "fair dealing" implies an objective component. It was decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases. Some commentators, moreover, believe that good faith is more properly understood by what it excludes than by what it includes. See Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 262 (1968):

> Good faith, as judges generally use the term in matters contractual, is best understood as an "excluder" – a phrase with no general meaning or meanings of its own. Instead, it functions to rule out many different forms of bad faith. It is hard to get this point across to persons used to thinking that every word must have one or more general meanings of its own – must be either univocal or ambiguous.

The UCC definition of "good faith" is honesty in fact and, in the case of a merchant, the observance of reasonable commercial standards of fair dealing in the trade. See UCC §§ 1-201(19), 2-103(b). Those definitions were rejected as too narrow or not applicable.

In some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative disclosure obligation that supplements the Section [160] duty to render information.

Under Section [.015(2)(e)], the obligation of good faith and fair dealing may not be eliminated by agreement, but the partners by agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable. See Comment 7 to Section [.015]. (Emphasis added)

5. Subsection [(5)] is new and deals expressly with a very basic issue on which the UPA is silent. A partner as such is not a trustee and is not held to the same standards as a trustee. Subsection [(5)] makes clear that a partner's conduct is not deemed to be improper merely because it serves the partner's own individual interest.

That admonition has particular application to the duty of loyalty and the obligation of good faith and fair dealing. It underscores the partner's rights as an owner and principal in the enterprise, which must always be balanced against his duties and obligations as an agent and fiduciary. For example, a partner who, *with consent*, owns a shopping center may, under subsection [(5)], legitimately vote against a proposal by the partnership to open a competing shopping center. (Emphasis added)

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[RCW 25.05.170]

[Actions by partnership and partners]

Comment

****

Under RUPA, an accounting is not a prerequisite to the availability of the other remedies a partner may have against the partnership or the other partners. That change reflects the increased willingness courts have shown to grant relief without the requirement of an accounting, in derogation of the so-called "exclusivity rule." See, e.g., Farney v. Hauser, 109 Kan. 75, 79, 198 Pac. 178, 180 (1921) ("[For] all practical purposes a partnership may be considered as a business entity"); Auld v. Estridge, 86 Misc. 2d 895, 901, 382 N.Y.S.2d 897, 901 (1976) ("No purpose of justice is served by delaying the resolution here on empty procedural grounds").

Under subsection [(2)], a partner may bring a direct suit against the partnership or another partner for almost any cause of action arising out of the conduct of the partnership business. That eliminates the present procedural barriers to suits between partners filed independently of an accounting action. In addition to a formal account, the court may grant any other appropriate legal or equitable remedy. Since general partners are not passive investors like limited partners, RUPA does not authorize derivative actions, as does RULPA Section 1001. (Emphasis added)

****

6. Subsection (f) is new and provides that a transfer of a partner's transferable interest in the partnership in violation of a restriction on transfer contained in a partnership agreement is ineffective as to a person with timely notice of the restriction. Under Section 103(a), the partners may agree among themselves to restrict the right to transfer their partnership interests. Subsection (f) makes explicit that a transfer in violation of such a restriction is ineffective as to a transferee with notice of the restriction. See Section 102(b) for the meaning of "notice." RUPA leaves to general law and the UCC the issue of whether a transfer in violation of a valid restriction is effective as to a transferee without notice of the restriction.

Whether a particular restriction will be enforceable, however, must be considered in light of other law. See 11 U.S.C. § 541(c)(1) (property owned by bankrupt passes to trustee regardless of restrictions on transfer); UCC § 9-318(4) (agreement between account debtor and assignor prohibiting creation of security interest in a general intangible or requiring account debtor's consent is ineffective); Battista v. Carlo, 57 Misc. 2d 495, 293 N.Y.S.2d 227 (1968) (restriction on transfer of partnership interest subject to rules against unreasonable restraints on alienation of property) (dictum); Tupper v. Kroc, 88 Nev. 146, 494 P.2d 1275 (1972) (partnership interest subject to charging order even if partnership agreement prohibits assignments). Cf. Tu-Vu Drive-In Corp. v. Ashkins, 61 Cal. 2d 283, 38 Cal. Rptr. 348, 391 P.2d 828 (1964) (restraints on transfer of corporate stock must be reasonable). Even if a restriction on the transfer of a partner's transferable interest in a partnership were held to be unenforceable, the transfer might be grounds for expelling the partner-transferor from the partnership under Section 601(5)(ii).

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[RCW 25.05.225]

[Events causing partner's dissociation]

Comment

1. RUPA dramatically changes the law governing partnership breakups and dissolution. An entirely new concept, "dissociation," is used in lieu of the UPA term "dissolution" to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business. "Dissolution" is retained but with a different meaning. See Section 802. The entity theory of partnership provides a conceptual basis for continuing the firm itself despite a partner's withdrawal from the firm.

Under RUPA, unlike the UPA, the dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership. Section 801 identifies the situations in which the dissociation of a partner causes a winding up of the business. [RCW 25.05.250] provides that in all other situations there is a buyout of the partner's interest in the partnership, rather than a windup of the partnership business. In those other situations, the partnership entity continues, unaffected by the partner's dissociation. (Emphasis added)

****

Section [225] enumerates all of the events that cause a partner's dissociation.

****

3. Section 601(2) provides expressly that a partner is dissociated upon an event agreed to in the partnership agreement as causing dissociation. There is no such provision in the UPA, but that result has been assumed.

****

No. 92650-6

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 71926-2-1

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

RSD AAP LLC,

Plaintiff/Appellant/Petitioner

vs.

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

Defendants/Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR REVIEW OF RSD AAP LLC

GORDON TILDEN THOMAS
& CORDELL LLP
Jeffrey I. Tilden, WSBA #12219
Michael P. Brown, WSBA #45618
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154-1007
Attorneys for Plaintiff/Appellant
RSD AAP LLC

Appendix A

From: Jeff Hendricks [mailto:jeff@alveska.com]
Sent: Wednesday, June 06, 2012 3:27 PM
To: 'Matt Lieske'
Subject: RE:

Hi Matt,

Back home now. The long haul flying is certainly not as enjoyable. Glad I ended up a fisherman first.

The purchase and sale values in the fishing industry are all over the board. The buyers have different motivations, namely:

1. The CDQ groups are required to invest in the fishing industry. They have substantial excess cash and income and have a strong goal be a major stakeholder in the Bering Sea resources for generations to come.

2. The large corporate shore based processing companies are very vulnerable to access to the resource because of independent vessel owners and will parlay their processing profits to protect that access.

3. The large food companies have a strong attraction for the large factory trawler companies and are willing to pay higher values for access to the resource and its products.

4. Large venture capital investors have been willing to risk paying higher values for factory trawler companies hoping for profit from flipping the deal within 2 to 5 years.

Because of the above, we have seen catcher vessels sold at 2 to 4 times actual value based on income. However, catcher vessel allocations are a fraction of the value of factory trawler allocation because of the efficiency, independence and added value profitability of the factory trawlers.

If we were to sell 100% of the Auriga and Aurora we might benefit still by such values. However, the value of selling a minority share in a catcher vessel partnership can only be based on actual income because there is no control, no liquidity, no consequential benefits and it comes with all the risk of the operations, resource and industry.

Simply put, you would base the value on the income less a factor for risk, lack of control and liquidity and alternate investment income.

The Auriga and Aurora generate about $3 million in cash flow before tax. It would then be a question of how big of loan payments could you make from the cash flow from the partnership. If you were able to get a 100% loan you could pay annual payments of $3million and at 10 years and 6% it would amortize a little over $20 million. That's the basis that I purchase Mark's interest as well as my mom's and dad's.

I know past sales as well as the replacement value of the Auriga and Aurora is probably over 3 times that value but that's the nature of the industry. You can probably put $60 million on your financial statement without question but a minority share without control is only worth the income it produces reduce by risk and liquidity.

Exhibit M, Page 1
Hendricks Declaration

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

And finally Mark O'Brien's heirs have no connections with the fishing industry and he has substantial net worth in eastern Washington farm land so I think the proceeds from selling the Auriga and Aurora partnership interest may be used for inheritance tax.

Please hold this information confidential.

Good fish'n,

Jeff

From: Matt Lieske [mailto:mlieske@gmail.com]
Sent: Monday, June 04, 2012 12:23 PM
To: Jeff Hendricks
Subject: Re:

Hi Jeff,

Sounds like you have been busy piloting your plane. I hope all the long haul flying lately has taken any of the enjoyment out of it for you.

I talked to Joel Friday and told him I was sending the approval in, it should be there today or tomorrow at the latest. I didn't have any hesitation in signing it but I didn't do it when I first opened it and it got pushed off to the side until I saw it again last Friday.

Once you get the transaction completed I would be curious to know what value you agreed upon so as to have a rough idea of what my investment is worth at this point in time. I'm not looking to sell, just interested in what it is valued at.

Matt

Appendix B

Jeff Hendricks

From: Jeff Hendricks <jeff@alyeska.com>
Sent: Friday, April 27, 2012 4:44 PM
To: Bryce Morgan
Subject: AA Purchase

Bryce,

I thought after our phone conversation that may be another reason that using the after death option may collapse any agreement.

That is, Resoff's death triggered a by/sell option in our partnership agreement which called for a value based on selling 100% of the partnership. This caused Resoff's lawyers to use a couple recent sales and dock talk which values in themselves were way out of reasonableness. But based on those sales they came up with $10 million for 20%. You probably remember the exercise. To make matters worse, at the time I think some in the industry were confusing the value of catcher boat quota with that of factory trawler quota which was many more times valuable.

At any rate, I think it may be a deal killer if we get too far outside the basics which wold probably prompt Mark's professional advisers to start second guessing with their form of due diligence.

With the cash flow and IBITDA history I will propose a cash purchase price to Mark that would be for either the partnership interest or corporate shares. We'll see how Mark and his advisers respond to that and we can go from there.

Jeff

OK

AOI 1639

Appendix C

ALYESKA OCEAN, INC.

2415 T Avenue #208
Anacortes, WA 98221
Tel (360) 293-4677
Fax (360) 293-6232

May 15, 2012

To: Partners of the AURIGA/AURORA GENERAL PARTNERSHIP

From: Jeff Hendricks

Re: Mark O'Brien

Dear Partners,

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 is the sole shareholder and officer of O'Brien Maritime, Inc. which holds a 20.6186% interest in the Auriga/Aurora General Partnership. Mark and I have agreed that after his death, my corporation, Alyeska Ocean, Inc. would purchase Mark's corporate interest in the partnership.

Feel free to call if you have questions about the agreement or Mark's condition.

Otherwise, please sign the enclosed CONSENT AND WAIVER as required by our partnership agreement and return to me by the enclosed self-addressed envelope.

Sincerely yours,

Jeff Hendricks, President
Alyeska Ocean, Inc.
Managing Partner, Auriga/Aurora General Partnership

Enclosure

AOI 1470

Exhibit K, Page 1
Hendricks Declaration

CONSENT AND WAIVER OF PARTNERS
OF
AURIGA AURORA GENERAL PARTNERSHIP

The undersigned hereby consent to the acquisition by Alyeska Ocean, Inc. of an option to purchase and the potential exercise of that option to acquire the partnership interest of O'Brien Maritime, Inc. in the AURIGA/AURORA General Partnership. To the extent any such transfer may create any right of first refusal under the terms of the AURIGA/AURORA General Partnership Agreement; such right is hereby released and waived. This consent and waiver may be signed in counterparts and by facsimile.

PARTNERS:

ALYESKA OCEAN, INC.

By: Jeff Hendricks, President

KNUTSON MARITIME ENTERPRISES, INC.

By: Douglas G. Knutson, President

MELVIN ENTERPRISES, INC.

By: Brian L. Melvin, President

KIRKPATRICK ENTERPRISES, INC.

By: Kevin W. Kirkpatrick, President

GILDEN ENTERPRISES, INC.

By: Gene E. Gilden, President

RSD (AAP), LLC

_____

By:_____

Its:_____

SUND ENTERPRISES, INC.

_____

By: Leonard A. Sund, President

GUDMUNDSON ENTERPRISES, INC.

_____

By: Robert D. Gudmundson, President

NELSON MARITIME COMPANY, INC.

_____

By: Richard N. Nelson, President

NATIONS ENTERPRISES, INC.

_____

By: Janice Nations, President

HENDRICKS MARITIME CORPORATION

_____

By: Tod S. Hendricks, President

LIESKE CORPORATION

_____

By: Matthew J. Lieske, President

Appendix D

PARTNERSHIP BALLOT FOR TRANSFER OF MEMBERSHIP

TO MEMBERS OF THE AURIGA/AURORA GENERAL PARTNERSHIP:

This is to advise that O'Brien Maritime, Inc., a general partner in the Auriga/Aurora General Partnership, has requested pursuant to Article VII of the Partnership Agreement the written consent of the partners holding at least two-thirds interest in the partnership to the transfer of a 6.87 percent interest in the partnership to Rawlinson Maritime, Inc.. A copy of the letter from the counsel for O'Brien Maritime, Inc. is attached hereto.

Please return this ballot indicating whether or not you consent to this transfer:

☐ Yes, I consent to the transfer.

☒ No, I do not consent to the transfer.

PARTNER: ROBERT E. RESOFF, INC.

BY: _____
Robert E. Resoff, President

AOI 0767

Exhibit E, Page 1
Hendricks Declaration

Appendix E

ALYESKA OCEAN, INC.

816 FOURTH STREET - P.O. BOX 190 - ANACORTES, WASHINGTON 98221
206 293-4677 TELEX 152597-AOI-AACT TELEFAX 206 293-4241

May 14, 1988

To: Partners of AURIGA/AURORA GENERAL PARTNERSHIP

Fm: Jeff Hendricks, Manager

Dear Partners,

Last week Nancy Duffy confirmed with me that she would like to sell her 5% share in the partnership. Her cash contribution was $130,000.

The net book value of her share as of June 1, 1988 is estimated to be from $140,000 to $150,000 depending on this months income from the AURIGA's joint venture operations.

I suggested that Tod Hendricks and Matt Leiske were considered as potential investors from the beginning and have confirmed that they would like to use their "capital construction fund" to purchase her share at 2.5% each. Tod and Matt are the relief skipper and mate on the vessels and I felt that their involvement would further enhance the operators interest in the investment.

In any event, 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. If any partner has any comments, especially about the potential sale to Tod and Matt, please call me as soon as possible to avoid any misunderstandings or disappointments.

Otherwise, I've instructed our partnership attorney, Mr. Ken Johnson (386-7629) to handle the situation according to our partnership agreement and the remaining partners desires.

Best regards,

AURIGA/AURORA GENERAL PARTNERSHIP

Jeff Hendricks
Manager

cc: Ken Johnson

AOI 1612

Appendix F

AGREEMENT

THIS AGREEMENT is entered into as of May 24, 2012, between Alyeska Ocean, Inc. ("Alyeska") a Washington corporation, the sole shareholder of which is Jeff Hendricks, and O'Brien Maritime, Inc. ("O'Brien") a Washington corporation the sole shareholder of which is Mark O'Brien, . The Parties agree as follows:

Whereas, O'Brien and Alyeska have been general partners in the Auriga/Aurora General Partnership since its formation in 1988 and Jeff Hendricks has been employed by the partnership as its general manager since 1988; and

Whereas O'Brien is now desirous of selling its interest in Auriga/Aurora General Partnership because of a negative medical opinion regarding its sole shareholder Mark O'Brien;

It is, therefore Agreed as follows:

1. Upon execution of this Agreement, Alyeska will pay to O'Brien the sum of Two Hundred Thousand Dollars ($200,000) for an irrevocable option to purchase O'Brien's 20.6186% partnership interest (the Interest) in the Auriga/Aurora General Partnership (the Partnership) which is the owner of the Fishing Vessels Auriga and Aurora. The Partnership is also the owner of certain fishing quota and an interest in PacMon LLC.

2. The option will last for the term of two years.

3. The option will entitle Alyeska to purchase the Interest for the sum of Four Million Dollars ($4,000,000) to be paid to O'Brien in cash at closing, less the Two Hundred Thousand Dollars ($200,000) option money. In addition to the purchase price, Alyeska will pay O'Brien the sum of Five Hundred Thousand Dollars ($500,000) at closing for O'Brien's share of the earnings of the Partnership which have not been distributed between the date the option is executed and closing. To the extent that O'Brien receives a distribution of partnership earnings between the date of the granting of the option and closing, the payment for undistributed earnings shall be reduced, Provided that the distribution of $63,144.46 to O'Brien which is scheduled for May 31, 2012 will not be deducted. Closing will be within thirty (30) days of the exercise of the option.

4. The option may be exercised by Alyeska by notice in writing within thirty (30) days after the death of Mark O'Brien. If Mark O'Brien does not pass within two years, this Agreement shall be rescinded and the option money returned to Alyeska.

5. O'Brien warrants that there are no liens or encumbrances on its Interest and that the Interest will be conveyed free and clear at closing.

6. O'Brien shall furnish at the time of execution of this option agreement the following:
(1) A copy of a unanimous consent without a meeting of shareholders and directors consenting to this option and the sale of substantially all the assets of O'Brien;
(2) A certificate of the Secretary of O'Brien of the Articles of Incorporation, bylaws and incumbency of officers and directors;
(3) A written consent of Mark O'Brien's spouse, Margaret O'Brien to the option;
(4) Wire transfer instructions for payments; and
(5) A personal guarantee by Mark O'Brien of performance of all covenants in this Agreement.

7. O'Brien makes no warranties or representations regarding the Interest (other than the representation in paragraph 5. above), the Partnership, the Partnership's business or its assets; and Alyeska represents that it has relied on no such representation by O'Brien. Alyeska acknowledges that as general manager of the Partnership, its sole shareholder has had full and complete access to all assets of the Partnership (including all its books, records and financial information), he has conducted all inspections and investigations he deems sufficient to become fully informed regarding the subject of this transaction, and that his knowledge in that regard is imputed to Alyeska.

8. Closing shall take place at the offices of Mikkelborg, Broz, Wells and Fryer. Payment of all funds shall be by wire transfer. At closing O'Brien will furnish a bill of sale conveying all right and title to its partnership Interest, free and clear of liens and encumbrances.

9. Governing Law. This Agreement shall be governed by the law of the State of Washington.

10. Time is of the Essence. Time is of the essence in this Agreement.

11. Integration. The foregoing constitutes the entire agreement of the parties and supersedes all prior discussions and agreements; this agreement may not be amended except in writing and signed by both parties.

IN WITNESS, WHEREOF, the Parties have caused this Agreement to be effective and executed the date first written above.

ALYESKA OCEAN, INC.

By: _____
Title: President

O'BRIEN MARITIME, INC.

By: _____
Title: _____

AOI 0247

Exhibit L, Page 3
Hendricks Declaration