

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

CLA PROPERTIES LLC, A
CALIFORNIA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

SHAWN BIDSAL, AN INDIVIDUAL,

Respondent.

CLA PROPERTIES LLC, A
CALIFORNIA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

SHAWN BIDSAL, AN INDIVIDUAL,

Respondent.

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APPELLANT'S APPENDIX

VOLUME 26

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15:03:17 1 Q. Okay.

15:03:18 2 A. And do correction in a trial balance.

15:03:22 3 Q. When you referred to the interest income that you

15:03:25 4 raised some questions about --

15:03:27 5 A. Interest income --

15:03:28 6 Q. -- is it shown on this general ledger?

15:03:32 7 A. Yes.

15:03:32 8 Q. Where is it shown?

15:03:33 9 A. On the second page, account No. 70200. It shows

15:03:41 10 311,265.12, and it says interest from March 6, 2011, to

15:03:55 11 9-22-2011. March 6, 2011, we had not bought the

15:04:04 12 property at that time.

15:04:04 13 Q. Okay. But just answer the question.

15:04:06 14 A. Yeah.

15:04:06 15 Q. Mr. Gerrard asked you questions about the

15:04:13 16 operating agreement and he talked about Exhibit A to

15:04:19 17 the -- it's actually Exhibit 5, which is the tax -- tax

15:04:25 18 part of the document.

15:04:30 19 Are you an accountant?

15:04:32 20 A. No.

15:04:32 21 Q. Did you -- when you signed this operating

15:04:38 22 agreement, did you read every word in this Exhibit A?

15:04:41 23 A. Not every word but, you know, those that

15:04:44 24 interested me.

15:04:45 25 Q. Okay. Did you have -- did you -- are you capable

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15:04:55 1 of understanding all of the tax information on this
15:04:58 2 Exhibit A?
15:04:59 3 A. Some of them, I'm not.
15:05:03 4 Q. Just one last -- one last here before we leave.
15:05:17 5 We talked about in Exhibit 6 -- you know what? I'm
15:05:21 6 going to hold off on that.
15:05:36 7 Has Mr. Bidsal ever provided you with the escrow
15:05:38 8 instructions relating to the deed in lieu agreement?
15:05:41 9 A. No. I don't think so.
15:05:59 10 THE ARBITRATOR: Are you withdrawing that
15:06:01 11 question? Are you withdrawing that questions?
15:06:04 12 MR. LEWIN: Oh. I think he said -- I think he
15:06:05 13 answered "no."
15:06:06 14 THE ARBITRATOR: Did you answer that question?
15:06:08 15 THE WITNESS: Did you ask me a question?
15:06:10 16 MR. LEWIN: I asked him if he ever provided him
15:06:10 17 with the escrow instructions.
15:06:12 18 THE ARBITRATOR: For the deed in lieu?
15:06:12 19 MR. LEWIN: For the deed in lieu.
15:06:13 20 THE ARBITRATOR: And you said --
15:06:13 21 MR. GERRARD: Escrow instructions?
15:06:16 22 MR. LEWIN: Right.
15:06:16 23 MR. GERRARD: Objection. Lack of foundation.
15:06:17 24 THE ARBITRATOR: Yeah, I don't know if there are
15:06:19 25 escrow instructions for the deed in lieu.

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15:06:19 1 MR. LEWIN: Okay. Let me rephrase it.

15:06:21 2 BY MR. LEWIN:

15:06:21 3 Q. Has Mr. Bidsal ever provided you with any escrow

15:06:27 4 instructions relating to the deed in lieu agreement or

15:06:29 5 the escrow?

15:06:29 6 A. No, they haven't. I don't think so.

15:06:44 7 MR. LEWIN: I have nothing. I'll reserve the

15:06:46 8 rest.

15:06:46 9 THE ARBITRATOR: All right. Mr. Gerrard, do you

15:06:49 10 have more questions at this time?

15:06:50 11 MR. GERRARD: Sure. Thank you, Your Honor.

15:06:50 12 FURTHER EXAMINATION

15:06:50 13 BY MR. GERRARD:

15:06:51 14 Q. Mr. Golshani, who managed the property right

15:06:56 15 after the deed in lieu of foreclosure agreement?

15:06:59 16 A. Myself and Mr. Bidsal managed.

15:07:02 17 Q. Isn't it true, sir, that all the way through 2011

15:07:05 18 and into early 2008 that American Nevada Holdings, LLC,

15:07:12 19 who had been the property manager for the former owner,

15:07:15 20 continued to be property manager through the entirety of

15:07:19 21 2011 and into 2012?

15:07:21 22 A. Correct. They did manage the day-to-day, managed

15:07:28 23 property, collected rent, and things like that.

15:07:30 24 Q. Okay. And, sir, you have just provided testimony

15:07:33 25 about Exhibit 95, which is -- you stated is a general

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15:07:38 1 ledger of Green Valley Commerce, LLC?

15:07:43 2 A. Yes.

15:07:43 3 Q. Okay. How do you know that this is a ledger that

15:07:45 4 was created by anyone at Green Valley Commerce, LLC?

15:07:47 5 A. Because all the accounting is done in-house.

15:07:52 6 Q. Sir, that's -- that's not --

15:07:53 7 A. That's what he -- what Mr. Bidsal disclosed to

15:07:55 8 me.

15:07:55 9 Q. Okay. This is for the year of 2011; correct?

15:08:00 10 All the entries on Exhibit 95 were entered in the year

15:08:05 11 2011; correct?

15:08:06 12 A. All the what?

15:08:07 13 Q. All of the entries on this general ledger that

15:08:12 14 you have as Exhibit 95 were entered in the year 2011?

15:08:16 15 MR. LEWIN: Objection. Calls for speculation.

15:08:16 16 A. I'm not sure.

15:08:19 17 MR. LEWIN: Wait. Wait, please. Objection.

15:08:22 18 THE ARBITRATOR: They are all dated; right?

15:08:23 19 MR. GERRARD: Right.

15:08:25 20 THE ARBITRATOR: All the entries are dated 2011.

15:08:28 21 MR. LEWIN: That doesn't mean when they were --

15:08:29 22 that doesn't mean that they -- that's the time that they

15:08:30 23 were placed -- they were entered.

15:08:32 24 THE ARBITRATOR: Well, the ledger is as of

15:08:34 25 December 31, 2011.

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15:08:36 1 MR. LEWIN: But it's printed in 2012, Your Honor. Page 251
15:08:39 2 THE ARBITRATOR: Okay. Printed 2000 -- there's a
15:08:41 3 June 4, 2012, date on top. So, I mean, I'll allow him
15:08:48 4 to ask the questions if Mr. Golshani knows.
15:08:51 5 MR. GERRARD: Right.
15:08:51 6 BY MR. GERRARD:
15:08:52 7 Q. So, Mr. Golshani, if you look at Exhibit 95, you
15:08:55 8 can see that the dates where -- all the entries are in
15:08:58 9 the year 2011; correct?
15:09:00 10 A. Should be, yes.
15:09:01 11 Q. And that's at the time when American Nevada
15:09:04 12 Corporation was acting as the property manager for Green
15:09:09 13 Valley Commerce, LLC; correct?
15:09:10 14 A. Correct, but manager --
15:09:12 15 Q. Sir, it's just yes or no.
15:09:14 16 A. Okay.
15:09:14 17 Q. Do you have any knowledge, yes or no, about who
15:09:21 18 actually prepared this general ledger?
15:09:23 19 A. Yes.
15:09:24 20 Q. Okay. Did you see any of the entries input into
15:09:28 21 this ledger by anyone at Mr. Bidsal's direction or by
15:09:32 22 Mr. Bidsal?
15:09:33 23 A. With my own eyes, no.
15:09:35 24 Q. No. And you never saw who actually created any
15:09:38 25 of the entries on this general ledger, did you?

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15:09:40 1 A. No.

15:09:40 2 Q. All right.

15:09:43 3 A. I haven't seen somebody entering it.

15:09:45 4 Q. Okay. You just received a copy of it from the

15:09:48 5 company's accountants; correct?

15:09:49 6 A. Correct.

15:09:50 7 Q. Okay. Do you know if this general ledger and all

15:09:55 8 the entries that are on it were prepared by American

15:09:57 9 Nevada Corporation, who was the manager of the property

15:10:01 10 in 2011? Do you know? Yes or no.

15:10:04 11 A. I don't know if they produced it, no.

15:10:11 12 Q. Let's go back to Exhibit 108 again. Exhibit 108

15:10:24 13 is this email that you say was sent in January of 2016,

15:10:31 14 making reference to prior communications that you'd had

15:10:37 15 with Mr. Bidsal about how distributions were to be made

15:10:41 16 of money from the sale of properties; correct?

15:10:44 17 A. Whatever it says.

15:10:47 18 Q. Well, sir, I'm asking you a question. Didn't you

15:10:50 19 testify that Exhibit 108 was a communication that

15:10:59 20 followed up on oral conversations that you testified

15:11:03 21 you'd had with Mr. Bidsal about how distributions were

15:11:07 22 supposed to be made? Isn't that your testimony you just

15:11:11 23 gave?

15:11:11 24 A. Yes.

15:11:11 25 Q. Okay. And let's take a look at what the email

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15:11:17 1 actually says, the response from Mr. Bidsal that's on
15:11:20 2 page CLAARB22087. So it says -- the second paragraph,
15:11:29 3 which is the one we care about, says, "In regard to your
15:11:32 4 question on the sale of the property, our distribution
15:11:36 5 is in accordance with the operating agreement. On each
15:11:40 6 sale, we first pay the capital back to the partners, and
15:11:46 7 then we distribute the profit on a 50-50 basis. That is
15:11:50 8 why we cut four checks for the sale of each property,
15:11:53 9 two for the return of capital to each partner, and two
15:11:56 10 for the profits to each partner."

15:11:58 11 Do you see where I'm reading?

15:11:59 12 A. Yes, sir.

15:11:59 13 Q. Okay. And that statement accurately describes
15:12:02 14 exactly what Mr. Bidsal did from the sale of every one
15:12:05 15 of the three properties that were sold by the company;
15:12:07 16 correct?

15:12:07 17 A. Yes.

15:12:08 18 Q. Okay.

15:12:10 19 THE ARBITRATOR: I don't know if there were two
15:12:13 20 checks each on Building C.

15:12:17 21 MR. GERRARD: There were. We just don't have
15:12:19 22 copies of them.

15:12:19 23 MR. SHAPIRO: No, Building C. There weren't four
15:12:22 24 checks, there were only two on C. That's correct.

15:12:26 25 MR. GERRARD: Because there was -- okay.

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15:12:26
15:12:27
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15:12:42
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15:13:08
15:13:11
15:13:15
15:13:19
15:13:22
15:13:24
15:13:28
15:13:31

1 BY MR. GERRARD:

2 Q. So on Building C, there were no -- there was not

3 two checks because there was only a return of capital on

4 Building C; correct?

5 A. No. On Building C --

6 Q. It's yes or no, sir.

7 A. No.

8 Q. Okay. So on Building C -- we talked about this

9 when we looked at the distribution -- the amount that

10 was distributed was approximately \$95,000; correct?

11 A. About, yes.

12 Q. Yeah. And that \$95,000 was split 70-30 because

13 \$95,000 was less than the capital -- I'm sorry, the

14 basis attributed to Building C; correct?

15 A. Because less?

16 Q. Yes.

17 A. No.

18 Q. There was no amount of proceeds from the sale of

19 Building C after the 1031 exchange that exceeded the

20 basis -- the company's basis in Building C; correct?

21 A. I'm not sure.

22 THE ARBITRATOR: I opened this up. I shouldn't

23 have. We went through this all. 95,000 is less than

24 399,000. Remember that whole line of questioning? I

25 opened this up just by making a correction that wasn't

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15:13:34 1 even really relevant, so. All right. Next question. Page 255

15:13:34 2 THE WITNESS: All I am saying --

15:13:37 3 BY MR. GERRARD:

15:13:37 4 Q. Sir, there is no question pending.

15:13:39 5 THE ARBITRATOR: My fault. My fault. Next

15:13:41 6 question comes from Mr. Gerrard.

15:13:44 7 MR. GERRARD: Okay. Thanks.

15:13:45 8 BY MR. GERRARD:

15:13:45 9 Q. Now, sir, let's look at exhibit -- let me find it

15:14:21 10 here. Let's turn to Exhibit Number 19.

15:14:31 11 A. 9 or 19?

15:14:33 12 Q. 19.

15:14:33 13 MR. SHAPIRO: 1-9.

15:14:34 14 BY MR. GERRARD:

15:14:34 15 Q. Do you have that in front of you, sir?

15:14:46 16 A. I'm there, yes.

15:14:47 17 Q. Open up to page No. 1644. Bates No. 1644. So a

15:14:59 18 few moments ago you testified that you made some

15:15:01 19 objection because you saw the 2013 tax return that your

15:15:08 20 distributions -- I'm sorry, that your capital

15:15:11 21 percentages were not 70-30 anymore. Do you remember

15:15:13 22 that testimony?

15:15:14 23 A. Yes.

15:15:14 24 Q. So let's take a look at this page. You see on

15:15:17 25 your Schedule K-1, at page 1644, that it shows that your

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15:15:23 1 ending capital account percentage was 71.95 percent. Do
15:15:34 2 you see that? Page 256

15:15:34 3 A. Yes.

15:15:35 4 Q. So your capital account had gone up; correct?

15:15:38 5 A. Yes.

15:15:39 6 Q. And if we look at the next document, which is

15:15:46 7 Bates No. 1645, Mr. Bidsal's ending capital account

15:15:50 8 balance for year 2013 was at 28.047 percent, and so his

15:15:56 9 had gone down below 30 percent; correct?

15:15:58 10 A. Correct, yes.

15:15:59 11 Q. Okay. When you said that there was -- you were

15:16:02 12 objecting because the distribution -- the percentages of

15:16:05 13 the capital accounts weren't still 70-30, what you were

15:16:11 14 objecting to was something that happened in your favor;

15:16:13 15 correct?

15:16:13 16 A. No.

15:16:14 17 Q. Your capital account went up?

15:16:15 18 A. No.

15:16:16 19 Q. Okay. You don't see that your capital account --

15:16:18 20 A. My capital.

15:16:20 21 Q. -- has gone up from 70 percent to 71.95 percent?

15:16:26 22 MR. LEWIN: Objection. Argumentative.

15:16:26 23 A. No.

15:16:28 24 MR. LEWIN: Wait a second. If I start to talk,

15:16:29 25 please wait a second. The court reporter can't take us

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15:16:33 1 both down and there's just a small chance it might be
15:16:35 2 relevant.
15:16:38 3 He's arguing with the witness now. It's
15:16:38 4 argumentative.
15:16:41 5 THE ARBITRATOR: Overruled.
15:16:42 6 BY MR. GERRARD:
15:16:42 7 Q. You can see what it says there; correct?
15:16:44 8 A. Yes.
15:16:45 9 Q. Okay. And were you also present for the
15:16:49 10 deposition of Jim Main, the accountant?
15:16:51 11 A. Yes.
15:16:51 12 Q. Did you hear him explain in his deposition that
15:16:54 13 this is normal for capital account percentages to be off
15:16:58 14 slightly from where they start?
15:17:00 15 MR. LEWIN: Objection. Hearsay.
15:17:02 16 BY MR. GERRARD:
15:17:02 17 Q. Do you remember that testimony?
15:17:04 18 THE ARBITRATOR: Okay. There was an objection to
15:17:07 19 hearsay.
15:17:07 20 MR. GERRARD: Oh, I'm sorry.
15:17:08 21 THE ARBITRATOR: Hearsay.
15:17:11 22 MR. GERRARD: Oh, I'm asking for a state of mind
15:17:13 23 because this is what he's claiming was the basis for his
15:17:16 24 objecting. I'm asking what he heard from Mr. Main. I
15:17:19 25 can save it if you want. I can --

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15:17:21 1 THE ARBITRATOR: Ask it on rebuttal. That's fine
15:17:23 2 because it doesn't -- Mr. Main's statement in the
15:17:26 3 deposition doesn't affect his state of mind.
15:17:29 4 MR. GERRARD: No, but he was there for it.
15:17:30 5 THE ARBITRATOR: Yeah, but state of mind at the
15:17:33 6 time of deposition is really not --
15:17:35 7 MR. GERRARD: No, that's fair enough. I can ask
15:17:37 8 it later. I agree with Your Honor. All right.
15:17:47 9 BY MR. GERRARD:
15:17:47 10 Q. Sir, would you look at Exhibit 24, please.
15:17:55 11 Remember, you said you made these objections in 2013;
15:17:58 12 correct?
15:17:59 13 A. Some --
15:18:01 14 Q. Is that what you said?
15:18:02 15 A. Yeah, we started at that -- probably at that
15:18:04 16 time, yes.
15:18:05 17 Q. Okay. So now let's look at Exhibit 24, and let's
15:18:08 18 look again at your K-1, which is CLA Bidsal 1819.
15:18:12 19 A. 2014 tax return?
15:18:13 20 Q. Yeah. Exhibit 24. We're looking at page 1819.
15:18:25 21 Let me know when you're there, sir.
15:18:28 22 A. I'm here.
15:18:29 23 Q. Okay. And so look at your K-1 for 2014. Your
15:18:35 24 ending capital account percentage is 72.34 percent;
15:18:42 25 correct?

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15:18:42 1 A. Yes.

15:18:43 2 Q. And Mr. Bidsal's, if you look at his, is

15:18:46 3 27.655 percent; correct?

15:18:48 4 A. Yes.

15:18:48 5 Q. Okay. And let's look at Exhibit 27, the 2015 tax

15:19:05 6 return. And let's look again at your K-1 on page 2312.

15:19:14 7 Let me know when you're there, sir.

15:19:23 8 Are you there?

15:19:23 9 A. Yes.

15:19:24 10 Q. So this K-1 shows that your capital account

15:19:27 11 balance at the end of 2015 was 73.07 percent; correct?

15:19:30 12 A. Yes.

15:19:31 13 Q. And Mr. Bidsal's capital account balance was

15:19:34 14 26.92 percent; correct?

15:19:35 15 A. Correct.

15:19:36 16 Q. Okay. So the over-distributions hadn't been made

15:19:40 17 to Mr. Bidsal, they'd been made to you; correct?

15:19:42 18 A. No.

15:19:43 19 Q. Okay.

15:19:53 20 MR. GERRARD: I have nothing further.

15:19:54 21 MR. LEWIN: Just a couple follow-ups.

15:19:56 22 THE ARBITRATOR: Sure.

15:19:56 23 FURTHER EXAMINATION

15:19:57 24 BY MR. LEWIN:

15:19:57 25 Q. Mr. Gerrard just asked you about the

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15:20:00 1 over-distributions. When a person makes a -- when you
15:20:03 2 get a distribution on a return -- distribution from the
15:20:09 3 company, it reduces your capital account; right?

15:20:11 4 A. That's right. That's why I'm saying you're
15:20:16 5 over-distributing. That's why his capital is lower.

15:20:18 6 Q. So --

15:20:19 7 A. Nobody -- may I continue?

15:20:21 8 Q. Sure.

15:20:22 9 A. Nobody wants to commit to 70 percent and be
15:20:28 10 forced to invest 73, 72, or 74 in a scale of 4 million.
15:20:36 11 It's a lot of money.

15:20:37 12 Q. Okay. We just talk about -- Mr. Gerrard asked
15:20:44 13 you a question looking at your 2013 tax return, and he
15:20:47 14 said you were complaining about that in 2013. You
15:20:50 15 didn't get -- when did you receive that 2013 tax return?

15:20:53 16 A. In 2014.

15:20:55 17 Q. Okay. So were you making -- were you complaining
15:20:59 18 about the 2013 tax return in 2013 or some other year?

15:21:03 19 A. No. Usually I get it on the following year and I
15:21:08 20 look at it.

15:21:09 21 Q. Okay.

15:21:10 22 MR. LEWIN: I have nothing else.

15:21:12 23 MR. GERRARD: Your Honor, I move to admit
15:21:14 24 Exhibits 4, 5.

15:21:21 25 THE ARBITRATOR: Give me a second.

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15:21:24	1	MR. LEWIN: I've agreed to most of these, but	Page 261
15:21:27	2	since we don't have a real formal stipulation, we ought	
15:21:30	3	to go through and admit them.	
15:21:32	4	MR. GERRARD: Yeah, I'm going to do that right	
15:21:34	5	now.	
15:21:35	6	THE ARBITRATOR: Are you done asking questions?	
15:21:45	7	MR. GERRARD: I am.	
15:21:46	8	THE ARBITRATOR: Okay. I had a question just	
15:21:47	9	based on what Mr. Lewin just asked.	
15:21:47	10	EXAMINATION	
15:21:47	11	BY THE ARBITRATOR:	
15:21:50	12	Q. So, Mr. Golshani, your understanding is that if	
15:21:53	13	the K-1, let's say for 2015 in Exhibit 27, shows your	
15:22:00	14	ending capital account at 73 percent instead of 70, your	
15:22:08	15	understanding is that that means that you haven't been	
15:22:19	16	distributed the right amount so as to reduce your	
15:22:22	17	original capital contribution?	
15:22:23	18	A. Yes, sir.	
15:22:24	19	Q. That's your understanding?	
15:22:25	20	A. Yes.	
15:22:26	21	Q. So is that what signalled to you that there was	
15:22:28	22	an issue?	
15:22:29	23	A. Exactly.	
15:22:30	24	Q. All right.	
15:22:33	25	THE ARBITRATOR: Now I'll allow follow-up.	

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15:22:36 1 MR. GERRARD: Sure, I have a follow-up.

15:22:36 2 FURTHER EXAMINATION

15:22:36 3 BY MR. GERRARD:

15:22:39 4 Q. But, Mr. Golshani, at the time that you made that

15:22:39 5 objection, you did not object to the manner in which

15:22:43 6 distributions were being made from the sale of property,

15:22:46 7 did you?

15:22:46 8 A. That's a different issue.

15:22:48 9 Q. Thank you.

15:22:51 10 THE ARBITRATOR: Okay. All right. So now I'm on

15:22:53 11 your --

15:22:58 12 MR. GERRARD: You got your log there, Judge? I

15:23:00 13 just want to make sure.

15:23:00 14 THE ARBITRATOR: Yeah.

15:23:01 15 MR. GERRARD: So I've got -- I'm moving to admit

15:23:04 16 Exhibits 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17 --

15:23:20 17 MR. LEWIN: Hold on a second. Hold on a second.

15:23:20 18 THE ARBITRATOR: Everything on that page except

15:23:21 19 11?

15:23:23 20 MR. GERRARD: Oh, I'm not looking at the page.

15:23:23 21 I'm looking at my notes, Judge.

15:23:24 22 MR. SHAPIRO: But yes. Yeah, I'm with you. Yes.

15:23:29 23 MR. GERRARD: 17, then 18, 19, 21, 22, 23, 24,

15:23:41 24 25, 26, 27, 28, 29, 36, 30, 31, 32 --

15:23:58 25 MR. LEWIN: Hold on a second. You're now back at

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15:23:59 1 30?

15:24:01 2 MR. GERRARD: Yep. Okay. So 30, 31, 32, 33, 34,

15:24:07 3 37, 38, 43, 91 --

15:24:22 4 THE ARBITRATOR: Okay. Hold on. 91 is the other

15:24:24 5 list. Hold on. 91. Okay.

15:24:29 6 MR. GERRARD: And 108. And with that objection,

15:24:37 7 I also move to admit Exhibit 20. Exhibit 20 is just the

15:24:41 8 last page of the 2013 tax return, which is already in

15:24:44 9 Exhibit 19. It was just broken up.

15:24:47 10 THE ARBITRATOR: Okay. All right.

15:24:49 11 MR. LEWIN: I have an objection to No. 10.

15:24:53 12 No. 10 is an incomplete document.

15:24:57 13 MR. GERRARD: That's true. We didn't -- we

15:24:59 14 didn't include the whole --

15:25:01 15 MR. LEWIN: I'm fine -- I'm okay with No. 10 --

15:25:05 16 MR. GERRARD: It's only being offered for the

15:25:06 17 purpose of showing that the deed was recorded on that

15:25:09 18 date.

15:25:10 19 MR. LEWIN: Well, except that -- the fact that

15:25:11 20 there's multiple parcels is important. I would just

15:25:14 21 request that since you've asked him about No. 10 that

15:25:15 22 you provide a document that has the full legal

15:25:19 23 description.

15:25:20 24 MR. GERRARD: Okay. We can do that.

15:25:22 25 MR. LEWIN: Then 10 is fine.

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15:25:23 1 THE ARBITRATOR: Do you have any objections to Page 264
15:25:26 2 the rest?
15:25:27 3 MR. LEWIN: No.
15:25:28 4 THE ARBITRATOR: All right. So -- okay. So the
15:25:47 5 following exhibits are admitted: 4, 5, 6, 7, 8, 9, 10
15:26:00 6 is conditionally admitted with an agreement that
15:26:04 7 claimants will supplement it with the remainder of the
15:26:06 8 document supporting the --
15:26:08 9 MR. GERRARD: It's the legal description, which
15:26:10 10 is cut off.
15:26:10 11 THE ARBITRATOR: Okay. 12 through 38, 43, 93,
15:26:37 12 108.
15:26:39 13 MR. SHAPIRO: Was it 91 or 93? I had marked 91
15:26:43 14 is one that he had moved for admission on.
15:26:51 15 THE ARBITRATOR: Let me go back and look again.
15:26:51 16 MR. GERRARD: It is 91.
15:26:53 17 THE ARBITRATOR: It is 91. Sorry. Okay. So 91
15:27:01 18 and 108. All right.
15:27:14 19 MR. SHAPIRO: And then for the record, just to be
15:27:16 20 clear, I had noted that -- let me find it -- that 107
15:27:26 21 had been --
15:27:29 22 THE ARBITRATOR: It's already been denied.
15:27:31 23 Okay. Want to take a recess before Mr. Bidsal?
15:27:44 24 MR. GERRARD: Sure.
15:27:47 25 THE ARBITRATOR: Let's take about ten minutes.

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15:27:49 1 MR. GERRARD: Okay.

15:27:52 2 ***

3 (RECESS TAKEN FROM 3:27 P.M. TO 3:37 P.M.)

4 ***

5 Whereupon,

6 SHAWN BIDSAL,

7 having first been called as a witness, was duly sworn

8 and testified as follows:

15:37:43 9 THE ARBITRATOR: You go by Shawn, S-H-A-W-N,

15:37:43 10 Bidsal, B-I-D-S-A-L?

15:37:58 11 THE WITNESS: Yes, Your Honor. That's correct.

15:37:59 12 THE ARBITRATOR: Okay. Make sure you keep your

15:38:00 13 voice up so that the court reporter can hear you. All

15:38:00 14 right?

15:38:04 15 THE WITNESS: Okay.

15:38:05 16 THE ARBITRATOR: All right. Mr. Shapiro.

15:38:07 17 MR. SHAPIRO: Thank you.

15:38:07 18 EXAMINATION

15:38:07 19 BY MR. SHAPIRO:

15:38:10 20 **Q. Shawn, what is your current occupation?**

15:38:10 21 A. Real estate investment and management.

15:38:15 22 **Q. How long have you been in real investment and**

15:38:18 23 **management?**

15:38:18 24 A. Almost 25 years.

15:38:22 25 **Q. Have you ever engaged in the management of**

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15:38:27 1 property that you did not own, either -- that you did
15:38:31 2 not own an interest in, either in your individual
15:38:33 3 capacity or as a member of an LLC?
15:38:36 4 A. No.
15:38:39 5 MR. SHAPIRO: Is he loud enough for you? Are you
15:38:39 6 catching that?
15:38:39 7 THE REPORTER: Yes, thank you.
15:38:39 8 MR. SHAPIRO: He's a little soft, so I want to
15:38:39 9 make sure.
15:38:44 10 BY MR. SHAPIRO:
15:38:44 11 Q. In your activities as a real estate investment
15:38:52 12 and management, have you had the opportunity to form
15:38:56 13 limited liability companies?
15:38:58 14 A. Yes, I have.
15:38:59 15 Q. Have you ever formed an LLC in which you were the
15:39:02 16 sole managing member?
15:39:03 17 A. Yes.
15:39:04 18 Q. Have you formed LLCs where you had other members?
15:39:07 19 A. Yes.
15:39:09 20 Q. Have you formed corporations?
15:39:14 21 A. Yes.
15:39:14 22 Q. Who is Ben Golshani?
15:39:19 23 A. He's my first cousin from my mom's side.
15:39:23 24 Q. And have you entered into any business
15:39:26 25 transactions with Ben?

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15:39:28 1 A. Yes, I have.

15:39:29 2 Q. How many business ventures have you and Ben been

15:39:33 3 involved in together?

15:39:33 4 A. We have three LLCs.

15:39:37 5 Q. When was the first time that you engaged in any

15:39:43 6 business venture with Ben?

15:39:46 7 A. 2011 -- mid-2011.

15:39:51 8 Q. Was it the transaction at issue in this case?

15:39:54 9 A. Yes.

15:39:55 10 Q. To your knowledge, as of the time when you first

15:40:02 11 started the transaction in this case, do you know if Ben

15:40:06 12 had any experience in investing in or managing

15:40:09 13 commercial real property?

15:40:11 14 A. He was in the textile business. He owns a

15:40:14 15 company called Noveltex, so.

15:40:16 16 Q. Are you familiar with an entity called CLA

15:40:20 17 Properties?

15:40:20 18 A. Yes, I am.

15:40:21 19 Q. And who or what is CLA Properties?

15:40:24 20 A. He is my partner in Green Valley Commerce.

15:40:28 21 Q. Who owns CLA Properties?

15:40:30 22 A. Ben does.

15:40:32 23 Q. Are you familiar with a business or website

15:40:38 24 called auction.com?

15:40:39 25 A. Very much so.

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15:40:40

1 Q. Can you tell me what auction.com is?

15:40:43

2 A. It's one of the internet website platforms where

15:40:48

3 you can purchase notes and properties.

15:40:50

4 Q. Do you have experience buying from auction.com?

15:40:54

5 A. Yes, I do.

15:40:55

6 Q. When was the first time that you bought anything

15:40:59

7 from auction.com?

15:41:01

8 A. Late 2000 -- 2007 to 2010, in there.

15:41:10

9 Q. Prior to the transaction at issue in this case,

15:41:13

10 how many times had you purchased or made a purchase via

15:41:17

11 the auction.com platform?

15:41:19

12 A. Note and property, few times.

15:41:24

13 Q. More than five?

15:41:26

14 A. Probably not. Less than five.

15:41:35

15 Q. Okay, less than five. Tell me the process of --

15:41:41

16 if I wanted to buy something on auction.com, could I log

15:41:45

17 into today and buy something today?

15:41:46

18 A. Yes, you can.

15:41:48

19 Q. Is there any type of a qualification process?

15:41:52

20 A. Yes, there is.

15:41:53

21 Q. So if -- would I have to be qualified before I

15:41:57

22 could attempt to purchase anything on that platform?

15:42:00

23 A. Yes. You need to decide if you're buying it on

15:42:04

24 your own name as a -- as a -- in a personal capacity, or

15:42:09

25 as an entity -- legal entity. So if you're buying it as

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15:42:12 1 a legal entity, you need to provide the articles and
15:42:17 2 offer the agreements and fill out forms online and
15:42:21 3 register, and then you also have to provide proof of
15:42:25 4 funds prior to the -- the ability to be able to bid. So
15:42:30 5 they usually list the properties in the platform online
15:42:34 6 about 45 to 60 days prior to the sale. The sale is a
15:42:39 7 three-day sale, and you need to provide proof of fund in
15:42:44 8 full amount to be able to qualify to bid.

15:42:48 9 **Q. So you're saying if I don't show auction.com that**
15:42:51 10 **I have the cash available to complete whatever it is I'm**
15:42:56 11 **bidding on, they won't even allow me to bid?**

15:42:59 12 A. Depends on when, at what point in time.

15:43:03 13 **Q. Oh, it's changed?**

15:43:04 14 A. Yes.

15:43:05 15 **Q. Okay. Let's talk about 2011. How was it working**
15:43:07 16 **in 2011?**

15:43:08 17 A. You need to provide full proof of fund up to the
15:43:12 18 amount you are going to bid.

15:43:19 19 MR. SHAPIRO: And he's sounding soft to me, but
15:43:19 20 you're hearing him?

15:43:19 21 (Reporter confirmation.)

15:43:21 22 MR. SHAPIRO: Okay. Good. All right. I won't
15:43:23 23 ask again unless you say something.

15:43:23 24 THE REPORTER: Thank you.

15:43:23 25 ///

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15:43:27 1 BY MR. SHAPIRO:

15:43:27 2 Q. So as of 2011 -- or 2011, had you or any of your

15:43:36 3 entities gone through the qualification process on

15:43:39 4 auction.com?

15:43:40 5 A. Yes. I use a couple of LLCs. One LLC in

15:43:48 6 particular, Real Equities, LLC, and also West Coast

15:43:51 7 Investment to bid on auction.com.

15:43:54 8 Q. And so both of those had been pre-qualified by

15:43:58 9 auction.com?

15:43:59 10 A. Correct. But on each occasion, you need to --

15:44:05 11 they screen you, make sure you are qualified for that

15:44:07 12 property because you need to register, and for that

15:44:10 13 property you still need to declare up to what amount

15:44:14 14 you're bidding.

15:44:15 15 Q. Did you have any conversations with Ben about the

15:44:18 16 qualification process required by auction.com?

15:44:20 17 A. Yes, we talked about it.

15:44:24 18 Q. Was -- do you have any knowledge as to whether

15:44:28 19 Ben was qualified to make any bidding on auction.com?

15:44:31 20 A. At that particular time for that property?

15:44:35 21 Q. In 2011.

15:44:36 22 A. I was qualified.

15:44:37 23 Q. That wasn't the question. The question was: Do

15:44:39 24 you know if Ben was qualified on -- to bid on

15:44:42 25 auction.com in 2011?

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15:44:44 1 A. I don't think so.

15:44:47 2 Q. Now, you've obviously sat through Ben's testimony
15:44:55 3 today. You know what this case is about. At some point
15:44:59 4 in 2011, you purchased a loan off of auction.com;
15:45:02 5 correct?

15:45:02 6 A. Yes.

15:45:03 7 Q. And what entity did you initially use to bid on
15:45:07 8 that loan?

15:45:08 9 A. One of my LLC entities, Real Equities.

15:45:12 10 Q. Real Equities, LLC or Inc.?

15:45:14 11 A. That one is LLC.

15:45:15 12 Q. Okay. Can you just describe for me real briefly
15:45:23 13 kind of how that came about?

15:45:24 14 A. The -- as I said, the property gets -- goes --
15:45:31 15 they call it online. It goes online 45 to 60 days prior
15:45:35 16 to bidding. And when it goes online, it's available on
15:45:39 17 the website. So I check the website periodically, make
15:45:44 18 sure I'll have first chance to look at anything that
15:45:48 19 comes on. And if I like the asset, I contact my local
15:45:52 20 broker in Vegas, Jeff Chang, and I bounce it back to
15:45:56 21 him, "See, I'm looking at these few locations. What do
15:45:56 22 you think?"

15:46:00 23 And if he says that they are good, then I come
15:46:07 24 down. I ask him about the property, if it's a no, so he
15:46:12 25 does some research. But then I come down and look at it

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15:46:15 1 and do some due diligence, see if it's something I want
15:46:21 2 to purchase.

15:46:22 3 Q. Okay. Turning your attention to the loan at
15:46:26 4 issue that you ultimately purchased, did that same
15:46:30 5 process -- was that same process followed? In other
15:46:32 6 words, did you contact Jeff Chang and say, "Hey, there's
15:46:35 7 this loan. What do you think?" Or did you make your
15:46:37 8 own independent decision?

15:46:39 9 A. No, I look -- I -- it's online, so everyone can
15:46:42 10 look at it. So I looked at the -- there were a few of
15:46:44 11 them that I identified. I bounced it back with Jeff and
15:46:49 12 Jeff said, "This is a -- relatively a good thing, good
15:46:53 13 candidate to come and look."

15:46:55 14 So I drove from L.A. and looked at it -- and Ben
15:46:59 15 was with me, actually. We drove together. And looked
15:47:03 16 at that one and at a few more.

15:47:05 17 Q. Okay. What happened next in the process of
15:47:08 18 making the decision to purchase that note?

15:47:10 19 A. I was -- at that time, I was qualified because
15:47:15 20 the auction -- this is a three-day auction. So the PSA
15:47:24 21 was signed -- the auction price submitted on 19 of May.
15:47:25 22 So the bidding process opened on May 17th. So it goes
15:47:29 23 17, 18, 19.

15:47:30 24 So I came down. I downloaded all the loan
15:47:36 25 documents from the website, and I start doing the due

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15:47:43 1 diligence on the paper portion of it, checking all the
15:47:46 2 documents. And then when I came down, I checked the
15:47:50 3 property. We did a drove by. And -- on a note
15:47:57 4 purchase, we are not allowed to contact the borrower,
15:47:59 5 and also tenants, so most of the due diligence is done
15:48:04 6 on our own.

15:48:05 7 So I did that and then qualified. This is a --
15:48:11 8 one of the good ones. We should bid on it.

15:48:13 9 **Q. Okay. Can you turn to Exhibit 1. Do you**
15:48:38 10 **recognize Exhibit 1?**

15:48:39 11 A. Yes, I do.

15:48:40 12 **Q. What is Exhibit 1?**

15:48:41 13 A. That's the PSA that is actually online on an
15:48:50 14 unsigned version, and when we win a bid, the auction.com
15:48:56 15 fills it out with our information -- with who the buyer
15:49:00 16 is, the amount, the -- all information, and they send it
15:49:07 17 electronically for signature. And I signed that, and I
15:49:11 18 sent it back to them. It's more like a DocuSign format.

15:49:16 19 **Q. Well, actually, right at the top of the first**
15:49:20 20 **page, it appears it says "DocuSign envelope."**

15:49:24 21 **Do you do that?**

15:49:25 22 A. Yes.

15:49:25 23 **Q. Now, you noted that this is an unsigned copy.**
15:49:28 24 **Did you have the ability to make any changes to the**
15:49:30 25 **document prior to signing?**

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15:49:31 1 A. No. Auction.com, their draft PSAs are basically Page 274
15:49:40 2 non-negotiable.
15:49:41 3 Q. So if -- this is the document that you, in fact,
15:49:46 4 signed; correct?
15:49:47 5 A. Yes.
15:49:47 6 Q. And you would have signed it via DocuSign?
15:49:49 7 A. Yes.
15:49:50 8 Q. Okay.
15:49:52 9 MR. SHAPIRO: Your Honor, I'm going to move for
15:49:52 10 the admission as I go. I think it's a little easier.
15:49:55 11 So I move for the admission of Exhibit 1.
15:49:58 12 MR. LEWIN: Can we just get a date when he signed
15:49:59 13 it?
15:50:00 14 BY MR. SHAPIRO:
15:50:00 15 Q. Do you know when you signed this document?
15:50:02 16 A. May 19th.
15:50:04 17 MR. LEWIN: Okay. No objection.
15:50:07 18 THE ARBITRATOR: All right. 1 is admitted.
15:50:11 19 THE WITNESS: And then Bidsal 4059.
15:50:13 20 BY MR. SHAPIRO:
15:50:13 21 Q. I'm sorry. Bidsal 4059?
15:50:16 22 A. Yes.
15:50:16 23 Q. Oh, it is signed. Okay. There it is. So that's
15:50:25 24 your signature?
15:50:25 25 A. Yes.

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15:50:26 1 Q. Okay. And the date there is the date that you Page 275
15:50:29 2 signed it?
15:50:29 3 A. Right.
15:50:30 4 Q. Okay. Turning to Bidsal 4035.
15:50:42 5 MR. LEWIN: Can you give me a page number?
15:50:43 6 MR. SHAPIRO: That's what we just looked at,
15:50:46 7 4035.
15:50:48 8 MR. LEWIN: I don't have a Bates-stamped copy.
15:50:50 9 MR. SHAPIRO: I don't see page numbers on here,
15:50:53 10 so no, I can't. Do you have page numbers on yours?
15:50:54 11 MR. LEWIN: Actually, I do.
15:50:56 12 MR. SHAPIRO: Okay. It's after -- there's 26 and
15:50:57 13 then there's two pages that don't have page numbers, so
15:51:00 14 it'd technically be 28, I guess.
15:51:05 15 MR. LEWIN: Okay. The one says -- I see his
15:51:11 16 signature on it.
15:51:12 17 MR. SHAPIRO: Yeah, that's what we were looking
15:51:14 18 at.
15:51:14 19 MR. LEWIN: Okay.
15:51:16 20 BY MR. SHAPIRO:
15:51:16 21 Q. Now, looking at this signature page, which is
15:51:20 22 Bates stamp 4035 -- I understand yours isn't -- there's
15:51:24 23 a name of the buyer. Do you see that?
15:51:27 24 A. Where are we now?
15:51:33 25 Q. 4035.

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15:51:37 1 A. Yes. I'm there.

15:51:50 2 Q. Who's the buyer?

15:51:52 3 A. Real Equities. And I'm their manager.

15:51:55 4 Q. Okay. So you signed this as the manager of Real

15:51:58 5 Equities, LLC; correct?

15:51:59 6 A. Yes.

15:51:59 7 Q. And do you own Real Equities, LLC?

15:52:03 8 A. Yes, I do own it. 100 percent.

15:52:05 9 Q. Now, going back to the first page, there's a --

15:52:16 10 this has a number of different terms. One is the

15:52:18 11 purchase price. What was the purchase price or the

15:52:22 12 agreed-upon purchase price?

15:52:22 13 A. \$3 million 850-.

15:52:26 14 Q. And what were you purchasing for that amount?

15:52:28 15 A. A note with all the loan documents, plus the

15:52:37 16 security deed of trust -- deed of collateral.

15:52:40 17 Q. And if you look at "buyer" on the first page, who

15:52:44 18 does it identify as the buyer?

15:52:45 19 A. That's Shawn Bidsal. That's me.

15:52:47 20 Q. Is it Shawn Bidsal?

15:52:48 21 A. Not as person, but the buyer itself is the Real

15:52:52 22 Equities, LLC.

15:52:53 23 Q. Okay. Turning to the next page, which is page 2

15:53:00 24 of the document Bates-stamped Bidsal 4005, who is the

15:53:06 25 escrow agent?

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15:53:07 1 A. Escrow Agent is Yvette Cantu (phonetic).

15:53:15 2 Q. Well, this identified an escrow agent; right?

15:53:20 3 A. Yes.

15:53:22 4 Q. And who does it identify?

15:53:23 5 A. It's the Commerce Title.

15:53:29 6 Q. Commerce Title company?

15:53:30 7 A. Right.

15:53:31 8 Q. Okay. Now, this was purchased under the name of

15:53:47 9 Real Equities. Did Real Equities end up taking

15:53:49 10 ownership of the note?

15:53:50 11 A. No.

15:53:52 12 Q. Turn your attention to Exhibit 2. Do you

15:54:03 13 recognize Exhibit 2?

15:54:04 14 A. Yes, I do.

15:54:05 15 Q. What is Exhibit 2?

15:54:06 16 A. It's the assignment of the -- the agreement I

15:54:20 17 have to purchase the note from Real Equities through

15:54:23 18 Green Valley Commerce.

15:54:23 19 Q. Was Ben aware of this agreement at or about the

15:54:29 20 time it was signed?

15:54:31 21 MR. LEWIN: Objection. Lack of foundation.

15:54:34 22 Speculation.

15:54:34 23 THE ARBITRATOR: If he knows.

15:54:36 24 A. In terms of the assignment to the --

15:54:36 25 ///

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15:54:44 1 BY MR. SHAPIRO:

15:54:44 2 Q. Do you know if Ben was aware of this agreement on

15:54:47 3 or about the date you signed it?

15:54:50 4 A. Yes.

15:54:50 5 Q. How do you know that?

15:54:51 6 A. Because we had conversations that I'm buying this

15:54:58 7 note for myself, if he -- he was coming with me --

15:55:02 8 tagging along -- that if he wants, he can be a partner.

15:55:07 9 He could be a 50-50 partner.

15:55:09 10 Q. Now, he ended up putting the required deposit up;

15:55:12 11 right? That money came from him?

15:55:13 12 A. After I secured the purchase agreement and I

15:55:17 13 already show the proof of fund and was in a so-called

15:55:28 14 PSA agreement -- signed PSA agreement -- then we had a

15:55:31 15 conversation that we can form an LLC, -- Green Valley

15:55:37 16 Commerce -- and he can be a 50 percent partner, yes.

15:55:39 17 Q. If you turn to Bidsal 3995, which is the third

15:55:47 18 page of the agreement. Do you recognize the signatures?

15:55:54 19 A. Yes. Both of them are mine.

15:55:56 20 MR. SHAPIRO: Okay. Your Honor, I move for the

15:55:58 21 admission of Exhibit 2.

15:56:01 22 MR. LEWIN: No objection.

15:56:01 23 THE ARBITRATOR: Exhibit 2 will be admitted.

15:56:04 24 BY MR. SHAPIRO:

15:56:04 25 Q. Now, you indicated that Jeff Chang was involved

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15:56:08 1 in this transaction and assisted you in some of the due
15:56:13 2 diligence; is that correct?

15:56:13 3 A. Yes.

15:56:14 4 Q. Was he paid any type of a commission on this
15:56:16 5 transaction?

15:56:16 6 A. Yes, he was.

15:56:17 7 Q. Do you know how much that commission was?

15:56:19 8 A. It's about -- it's very low. It's like five --
15:56:26 9 half a percent, so 5,000 of the -- of the sale.

15:56:50 10 Q. Now, at some point, you formed -- or the entity
15:56:58 11 Green Valley Commerce, LLC, was formed; correct.

15:57:01 12 A. Yes.

15:57:01 13 Q. Who formed that entity?

15:57:02 14 A. I did that.

15:57:06 15 Q. And I'll direct your attention to Exhibit 4. Do
15:57:15 16 you recognize Exhibit 4?

15:57:16 17 A. Yes.

15:57:17 18 Q. What is Exhibit 4?

15:57:18 19 A. That's the LLC article of organization which I
15:57:25 20 formed.

15:57:29 21 Q. Okay. And did Ben have anything to do with the
15:57:35 22 formation of the entity?

15:57:36 23 A. No. I did that.

15:57:39 24 Q. Were you ultimately successful in purchasing the
15:58:00 25 note?

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15:58:01 1 A. Yes.

15:58:01 2 Q. Do you recall what date your note purchase

15:58:05 3 occurred?

15:58:05 4 A. I think it was -- the escrow time for notes are

15:58:11 5 ten days or about ten days. I think it was either

15:58:14 6 June 1 or June 10.

15:58:16 7 Q. I'll direct your attention to Exhibit 3. Do you

15:58:20 8 recognize Exhibit 3?

15:58:21 9 A. Yes.

15:58:22 10 Q. What is Exhibit 3?

15:58:23 11 A. That's the closing statement to purchase the

15:58:26 12 note.

15:58:26 13 Q. And is there a date on there?

15:58:28 14 A. There's a settlement date of 6-3-2011.

15:58:35 15 Q. Is that the date that it closed?

15:58:37 16 A. I think so. That range.

15:58:41 17 Q. And there's a signature on this page under "the

15:58:44 18 buyer." Do you see that?

15:58:46 19 A. Yes.

15:58:47 20 Q. Whose signature appears there?

15:58:49 21 A. That's mine.

15:58:51 22 MR. SHAPIRO: Your Honor, I move for the

15:58:53 23 admission of Exhibit 3.

15:58:55 24 MR. LEWIN: No objection.

15:58:56 25 THE ARBITRATOR: All right. It will be admitted.

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15:59:03 1 MR. LEWIN: What happened to 4?

15:59:05 2 THE ARBITRATOR: It's already in.

15:59:07 3 MR. LEWIN: Oh, 4's already in. Okay. I can't

15:59:09 4 find my sheet.

15:59:09 5 BY MR. SHAPIRO:

15:59:10 6 **Q. Looking at Exhibit 3 -- well -- so once you**

15:59:21 7 **closed the loan on June 3 -- or closed escrow on June 3,**

15:59:26 8 **what happened next?**

15:59:26 9 A. Then we had to start a formal negotiation with

15:59:32 10 the borrower. We had the ability now to contact them.

15:59:36 11 And I drafted a -- it's called an opening letter, which

15:59:44 12 I had the form of it. And I fill it up and sometime

15:59:52 13 around mid June, I think, we hired David LeGrand as an

15:59:57 14 attorney. And he looked at it and I think he devised a

16:00:05 15 better letter, and then I sent to the Christopher Childs

16:00:11 16 which was the -- I think it was the attorney for the

16:00:14 17 borrower at that time.

16:00:17 18 **Q. And, I mean, I -- I don't know that the details**

16:00:21 19 **of those negotiations are real relevant here, so let's**

16:00:24 20 **try and keep it to a minimum, but did that -- you know,**

16:00:27 21 **what was the ultimate outcome of your discussions with**

16:00:29 22 **the borrower?**

16:00:29 23 A. The borrower had two guarantees. One was a lease

16:00:38 24 corporate guarantee and they also had a so-called spring

16:00:45 25 parent guarantee that they were very careful not to

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16:00:52 1 create a breach. And so they were cooperating because
16:00:56 2 the amount of the -- the face value of the note was much
16:00:58 3 higher than what we paid, so.

16:01:00 4 Q. So I'm familiar with guarantees on what's
16:01:03 5 commonly referred to as "bad boy carve-outs." Is that
16:01:06 6 what you're referring to?

16:01:08 7 A. To some point, yes.

16:01:09 8 Q. Okay. So can -- can you briefly describe why
16:01:14 9 they were being so careful not to trigger the
16:01:16 10 guarantees? Just help us understand that real briefly.

16:01:18 11 A. From what I understand, the loan was a CMBS loan,
16:01:24 12 which was foreclosed by LNR. At that time, LNR was the
16:01:28 13 largest servicer in the country and I purchased a lot of
16:01:33 14 stuff from them. So CMBS loans are very tough loans
16:01:38 15 because the language of the loan is kind of very strict.
16:01:46 16 They had to make sure that what they collect from rent
16:01:48 17 and security deposit, everything is like segregated and
16:01:54 18 kept okay. And also, under a lease guarantee, their --
16:02:00 19 one of their spring partners was managing the property,
16:02:05 20 American Nevada.

16:02:09 21 Q. So under -- under CMBS loans, is it fair to say
16:02:14 22 that if the borrower fails to comply with the loan
16:02:17 23 agreement, that that can trigger personal liability on
16:02:20 24 behalf of the guarantors?

16:02:21 25 A. Corporate liability in this case, yes.

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16:02:23 1 Q. Okay. Now, turn to Exhibit 8, please.

16:02:27 2 A. 8?

16:02:29 3 Q. Yes. What is Exhibit 8?

16:02:34 4 A. That's a negotiated deed in lieu agreement with

16:02:39 5 the borrower and borrower entities.

16:02:42 6 Q. Okay. And if you can turn to Bidsal 1442, which

16:02:49 7 is page 13. Actually, 1441, which is page 13.

16:03:01 8 A. Yes.

16:03:01 9 Q. Is that your signature?

16:03:02 10 A. Yes.

16:03:04 11 Q. And if you turn to the next page, it appears that

16:03:08 12 there's three more signatures; correct?

16:03:17 13 A. Yes.

16:03:18 14 Q. Now, the borrower or the current owner of the

16:03:21 15 property at that time was Green Valley Commerce Center,

16:03:24 16 LLC; correct?

16:03:24 17 A. Yes.

16:03:25 18 Q. What was American Nevada Holding, LLC? Why did

16:03:28 19 they sign this?

16:03:29 20 A. I -- we received the structure, the spring

16:03:35 21 structure. I just don't remember it now, but, like,

16:03:39 22 they were a parent company and they had members. And

16:03:43 23 somewhere down the line of that membership, the -- at

16:03:48 24 the end of that hierarchy, they would own properties --

16:03:52 25 multiple properties -- like a tier structure.

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16:03:55	1	And Green Valley Commerce Center was one of those
16:04:01	2	LLCs which was owned by American Nevada and Silver
16:04:05	3	Springs, Inc. And so in order to make sure that we get
16:04:11	4	the proper conveyance, we have to get not only the --
16:04:17	5	the right owner to sign, but also the parent companies
16:04:20	6	to sign. And other reasons including other --
16:04:25	7	Q. Look at the first page.
16:04:27	8	A. -- other entities were also the guarantors. One
16:04:30	9	was a leasing guarantor and one was the corporate
16:04:33	10	guarantor. That is B(V) and --
16:04:37	11	Q. Okay. So you're looking --
16:04:39	12	MR. LEWIN: Wait. Can we have the witness finish
16:04:42	13	his answer, because...
16:04:48	14	A. -- and B(VI).
16:04:50	15	BY MR. SHAPIRO:
16:04:50	16	Q. Okay. So what page are you looking at?
16:04:51	17	A. 1429.
16:04:53	18	Q. So Bidsal 1429, which is the first page of the
16:04:56	19	deed in lieu agreement; correct?
16:04:58	20	A. Yes.
16:05:00	21	Q. And you're referencing section 1B(V)?
16:05:03	22	A. And VI.
16:05:04	23	Q. And VI. So Silver Springs, Inc., was a carve-out
16:05:10	24	guarantee or it signed a carve-out guarantee; correct?
16:05:14	25	A. Yes.

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16:05:14 1 Q. And American Nevada Holdings signed a leasing
16:05:17 2 guarantee?
16:05:17 3 A. Yes.
16:05:18 4 Q. Okay. Now, what's the date of this agreement?
16:05:21 5 A. September 22, 2011.
16:05:23 6 Q. And you bought the property when?
16:05:26 7 A. The actual property? September 22.
16:05:30 8 Q. I'm sorry. Thank you for correcting me.
16:05:33 9 You became the owner of the note at what date?
16:05:36 10 A. I think June 3, 2011.
16:05:40 11 Q. Okay. So why was there a gap between June and
16:05:42 12 September?
16:05:42 13 A. Negotiating with the borrower, American Nevada
16:05:50 14 and GVCC, to get a proper -- get the loan negotiated and
16:05:57 15 signed. And also they were managing the property at
16:06:01 16 that time, to be able to get the rents and security
16:06:04 17 deposit back properly.
16:06:05 18 Q. Okay. Drawing your attention, again, looking at
16:06:13 19 the first page of the deed in lieu agreement, I'm
16:06:15 20 looking at Section 1B(I)?
16:06:18 21 A. Section 1B --
16:06:21 22 Q. (I).
16:06:21 23 A. Okay.
16:06:22 24 Q. Is that the note that you purchased on June 3 or
16:06:26 25 around June 3?

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16:06:27 1 A. That's the original note.

16:06:28 2 Q. Okay. And (II), is that the deed of trust that

16:06:33 3 secured the note that you purchased?

16:06:34 4 A. Correct.

16:06:35 5 Q. (III) is an assignment of leases or rents

16:06:39 6 associated with that?

16:06:40 7 A. Yes.

16:06:40 8 Q. Okay. If you could turn to -- well, actually,

16:06:47 9 same page, Section 1C. What was the point of

16:06:51 10 Section 1C?

16:06:51 11 A. Basically, it's a full release of the lien and

16:07:01 12 the guarantee. So once they convey the property, then

16:07:07 13 basically they want to be done. They don't want to have

16:07:12 14 a lawsuit or any other future claims.

16:07:16 15 Q. Now, you heard Ben testify earlier today;

16:07:21 16 correct?

16:07:21 17 A. Yes.

16:07:23 18 Q. And part of Ben's testimony was that he testified

16:07:25 19 that as of June 3 when they bought the note, that he

16:07:28 20 considered that you owned the property. Do you recall

16:07:31 21 that testimony?

16:07:32 22 A. Yes.

16:07:32 23 Q. Do you agree with his assessment?

16:07:34 24 A. No.

16:07:34 25 Q. Why not?

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16:07:35 1 A. Note is a -- purchase is a risky business because
16:07:41 2 it's subject to potential pitfalls before you can
16:07:45 3 actually own a property. The borrower can file
16:07:48 4 bankruptcy, the borrower can sell the property and pay
16:07:52 5 you off, the borrower can come up with the money and
16:07:57 6 make the loan current, and -- I don't even know. Maybe
16:08:04 7 there are more of those potential pitfalls, but -- no.
16:08:06 8 It's not a property.

16:08:09 9 Q. Looking at Section 2.1, which is on the next
16:08:14 10 page, what was the borrower agreeing to do here?

16:08:21 11 A. It's an absolute conveyance of the -- of the
16:08:26 12 property.

16:08:26 13 Q. And is that the triggering event as far as when
16:08:33 14 you become the owner of the actual property?

16:08:35 15 A. Yes.

16:08:50 16 Q. Now, looking at Section 2.2, Roman numeral A,
16:09:09 17 what was the purpose of this provision?

16:09:13 18 A. So basically this is a deed in lieu. It's the
16:09:31 19 so-called predecessor document to the grant deed. So
16:09:36 20 this is an agreement entered -- basically the meeting of
16:09:39 21 the minds -- between the borrower and the lender, that
16:09:43 22 will -- eventually will result in obtaining a grant
16:09:47 23 deed. So basically what it says is that we are doing
16:09:52 24 this document, but later on, the grant deed will be the
16:09:56 25 final document. So until the grant deed is issued, the

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16:10:00 1 lien is -- still remain.

16:10:03 2 Q. Turning your attention to Section 2.10, which is
16:10:06 3 on Bidsal 1432. This talks about a dollar amount of
16:10:22 4 295,258.93. Do you see that?

16:10:25 5 A. Yes.

16:10:25 6 Q. What -- tell me why this provision was included?

16:10:29 7 A. When we bought the note, the note was already in
16:10:36 8 default. And the borrower was acting as a so-called
16:10:44 9 defaulted borrower and was obligated to collect the rent
16:10:51 10 on behalf of the lender. In the loan documents, there's
16:10:54 11 a document called a license that -- actually, it's in
16:10:57 12 the assignment of rent or deed of trust that -- well,
16:11:02 13 let me backtrack.

16:11:03 14 When we bought the note, we put ourselves in the
16:11:06 15 shoes of the existing lender, so now we are the lender.
16:11:09 16 As soon as we buy the note, we are the lender. So we
16:11:12 17 are entitled to all the obligations of the borrower or
16:11:15 18 all the proceeds that they collect from the property.
16:11:15 19 And under the fact that we are in the shoes of the
16:11:34 20 previous lender and based on the assignment of rent, the
16:11:39 21 borrower who used to have a license to collect the rent,
16:11:43 22 pay the bills, and keep the revenue, that license is
16:11:49 23 revoked. They no longer can reap the benefit of the
16:11:54 24 profits.

16:11:55 25 So whatever rent is collected, it needs to pay

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16:12:00 1 the expenses from the date of the default, which I think
16:12:03 2 it was sometime in 2010, and keep all that monies for
16:12:08 3 the benefit of the lender. In this case, we are the
16:12:12 4 lender.

16:12:13 5 **Q. Was this a specifically negotiated provision?**

16:12:16 6 A. It's the -- the concept and the language is
16:12:20 7 actually in the loan documents. But the running total
16:12:25 8 and the amount of how much is going to be, that was --
16:12:28 9 yeah. Because they had to provide us with the
16:12:31 10 financials, how much they are making every month, how
16:12:33 11 much is the cost. So we knew the rent collections, we
16:12:39 12 knew the expenses per month. They would provide that.
16:12:41 13 So in terms of the -- the document, that was already in
16:12:45 14 the loan document. But in terms of the amounts, that
16:12:49 15 was reflected here in 2.10.

16:12:51 16 **Q. Now, at the second part of 2.10, it talks about a**
16:12:56 17 **management agreement.**

16:12:57 18 A. Yes. So what happened is --

16:13:00 19 MR. LEWIN: Can we have a question?

16:13:04 20 BY MR. SHAPIRO:

16:13:04 21 **Q. Did -- did American Nevada Realty, LLC, enter**
16:13:09 22 **into a management agreement to manage the property?**

16:13:12 23 A. They were managing the property, but as a part of
16:13:20 24 the deed in lieu, yes. We did sign a management
16:13:24 25 agreement that became a part of this document -- this

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16:13:27 1 deed in lieu document. And I'm thinking it was one of
16:13:30 2 the exhibits. And they were managing it from before we
16:13:34 3 buy it all the way through 2011 till September, and then
16:13:40 4 they keep managing it through somewhere in the -- I
16:13:44 5 think middle of 2012.

16:13:46 6 **Q. And at the time that they stopped managing the**
16:13:49 7 **property, who took over the management of the property?**

16:13:51 8 A. Then I took over the management.

16:13:58 9 MR. LEWIN: I'm sorry. What was the date that
16:14:00 10 they -- they ended management?

16:14:01 11 THE WITNESS: Sometime there's a general
16:14:03 12 ledger --

16:14:04 13 MR. LEWIN: I just wanted to know the date you
16:14:06 14 said earlier.

16:14:06 15 THE ARBITRATOR: He said middle of 2012.

16:14:09 16 MR. LEWIN: Thank you, Your Honor.

16:14:09 17 THE ARBITRATOR: Certainly.

16:14:09 18 THE WITNESS: Thank you, Your Honor.

16:14:11 19 BY MR. SHAPIRO:

16:14:11 20 **Q. Drawing your attention to 2.11, next page. Why**
16:14:23 21 **was this provision included?**

16:14:23 22 A. Because they had this -- the -- American Nevada,
16:14:28 23 the management company for the borrower, had the -- was
16:14:33 24 collecting and keeping the security deposits -- rent
16:14:37 25 security deposits of the tenants, and based on the --

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16:14:45 1 this deal, they had it turn over to us.

16:14:48 2 Q. Direct your attention to Exhibit 10. Can you
16:14:59 3 tell me what Exhibit 10 is?

16:15:00 4 A. That's the grant bargain, grant deed and deed of
16:15:10 5 sale that basically transfers the property from Green
16:15:17 6 Valley Commerce Center to Green Valley Commerce, LLC.

16:15:20 7 Q. Okay. And what date did that transfer occur?

16:15:25 8 A. On September 22, 2011.

16:15:30 9 Q. All right. Now I want to go back. So this --
16:15:34 10 there's some discussion about the fact that the full
16:15:36 11 legal description was not attached to this document. I
16:15:39 12 want to draw your attention back to Exhibit 8. To Bates
16:15:46 13 No. 1444. So 1444.

16:15:56 14 Tell me when you're there.

16:15:57 15 A. I'm there.

16:15:59 16 Q. Okay. Is this -- was this the legal description
16:16:04 17 on -- of the property you were obtaining title to on
16:16:08 18 September 22, 2011?

16:16:10 19 A. Yes.

16:16:13 20 Q. And this legal description appears to go on pages
16:16:18 21 15 and 16 or Bates stamp Bidsal 1444 to 1445; correct?

16:16:24 22 A. Yes.

16:16:24 23 Q. How many parcels are described in this legal
16:16:29 24 description?

16:16:29 25 A. Two.

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16:16:30 1 Q. Two parcels or three?

16:16:32 2 A. Two.

16:16:33 3 Q. Well, let me direct your attention to 1445.

16:16:35 4 A. Yeah. I'm --

16:16:37 5 Q. Okay. So what is the third parcel that is

16:16:41 6 conveyed? Is that an actual parcel or is that something

16:16:46 7 else?

16:16:46 8 A. It's an easement parcel, service parcel.

16:16:52 9 Q. Okay. So when it comes to actual real property

16:16:55 10 as opposed to easement, how many parcels were there?

16:16:57 11 A. Two parcels plus an easement, so three.

16:17:06 12 Q. Okay. Two parcels plus an easement. And on

16:17:08 13 those two parcels, how many buildings were there?

16:17:10 14 A. All together, eight.

16:17:12 15 Q. If you had wanted to sell just one of these

16:17:18 16 parcels, would you have been able to -- to sell just one

16:17:20 17 of the parcels?

16:17:24 18 MR. LEWIN: Objection to the extent it calls for

16:17:26 19 a legal conclusion.

16:17:27 20 THE ARBITRATOR: If he knows.

16:17:28 21 A. From what I remember, no, because it was kept as

16:17:33 22 one park -- one industrial park.

16:17:39 23 BY MR. SHAPIRO:

16:17:39 24 Q. And if you had wanted to sell one building, would

16:17:43 25 you have been able to sell one building?

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16:17:45

1 A. No.

16:17:45

2 Q. Did you consider the property to be one parcel or

16:17:52

3 two parcels? In other words, one property or two

16:17:55

4 property or eight property or nine property? What did

16:17:58

5 you consider it to be?

16:17:59

6 A. At that time, I was looking at it as one

16:18:02

7 property. One park.

16:18:04

8 Q. Now, turning to Exhibit 9.

16:18:16

9 MR. SHAPIRO: And I guess, just as a housekeeping

16:18:18

10 matter, Rod, do you agree that the legal description

16:18:22

11 attached to the deed in lieu agreement, it would be the

16:18:25

12 same as the one on the deed?

16:18:27

13 MR. LEWIN: That's my understanding.

16:18:30

14 MR. SHAPIRO: Okay. Do we need to supplement

16:18:31

15 that exhibit, or can we just have that understanding?

16:18:33

16 Either way, I don't care. If you want --

16:18:36

17 MR. LEWIN: Whatever His Honor wants.

16:18:37

18 THE ARBITRATOR: It isn't going to matter to me.

16:18:37

19 MR. LEWIN: That's fine. It doesn't matter to

16:18:39

20 me, as long as we understand that it's two -- that there

16:18:41

21 are not three parcels listed and --

16:18:45

22 MR. SHAPIRO: Sure.

16:18:46

23 MR. LEWIN: That one parcel has been stated in

16:18:50

24 various times.

16:18:53

25 MR. SHAPIRO: Yep.

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1 BY MR. SHAPIRO:

2 Q. All right. Turning to Exhibit 9. On

3 Exhibit 9 -- this is already in evidence. It's the

4 settlement statement for the transfer of the title to

5 the property; correct?

6 A. Yes.

7 Q. There's really only two items under the buyer

8 credit column. Do you see that?

9 A. Yes.

10 Q. What are those two items?

11 A. Well, this refers back to the DIL. One is the

12 net rent collected by the borrower/seller, and the other

13 one is a security deposit.

14 Q. Okay. At the time that you closed on title to

15 the property, which was September 22, 2011, did you have

16 a signed operating agreement for Green Valley Commerce?

17 A. No.

18 Q. And when did you ultimately sign the operating

19 agreement for Green Valley Commerce?

20 A. Sometime in December of 2011.

21 Q. I'm going to direct your attention to Exhibit 6.

22 Looking at the second page of Exhibit 6 -- this is an

23 email from David LeGrand to you dated December 10, 2011;

24 correct?

25 A. Yes.

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16:21:47

1 Q. Do you know if you had signed the operating
2 agreement at the time you received this email?
3 A. I think -- I think I did. Sometime in 2011. I
4 don't remember was it -- I think it was maybe before
5 then or about that time frame.
6 Q. Well, go two more pages. This is an email from
7 you to David LeGrand dated December 12, 2011; correct?
8 A. Yes.
9 Q. And what do you say?
10 A. Yeah. So it's signed by 12-12.
11 Q. Okay. So by December 12, 2011, it was signed.
12 So it would have been early 2000 -- or early December of
13 2011; correct?
14 A. Yes.
15 MR. LEWIN: I'm sorry, Jim. I have four pages in
16 this exhibit. Is there only three?
17 MR. SHAPIRO: No, there's four. I haven't talked
18 about all four, but yeah. There's four.
19 MR. LEWIN: Because you said go two pages and the
20 email -- the email you're talking about is three pages.
21 THE ARBITRATOR: Well, yeah. Two pages from
22 where he was before is where he ended up. All right.
23 MR. SHAPIRO: All right.
24 BY MR. SHAPIRO:
25 Q. Direct your attention to Exhibit 5. Do you

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16:21:59 1 recognize Exhibit 5?

16:22:00 2 A. Yes.

16:22:01 3 Q. What is Exhibit 5?

16:22:02 4 A. That's the signed operating agreement for Green

16:22:07 5 Valley Commerce.

16:22:07 6 Q. Are your initials anywhere on that first page?

16:22:10 7 A. Yes.

16:22:11 8 Q. Which ones are your initials?

16:22:13 9 A. The bottom right corner. SB, Shawn Bidsal.

16:22:17 10 Q. Is that the one on the right or is that the

16:22:18 11 initials on the left?

16:22:19 12 A. To the right.

16:22:20 13 Q. Okay. And did you initial each page?

16:22:23 14 A. Yes.

16:22:31 15 Q. Now, do you know who the other initials are?

16:22:36 16 A. It's Ben Golshani.

16:22:38 17 Q. Were you present when he signed and initialed

16:22:40 18 this?

16:22:40 19 A. Yes.

16:22:41 20 Q. So you watched him do it?

16:22:43 21 A. We did it together.

16:22:45 22 Q. Okay. And then if you can turn to Bidsal 21,

16:22:51 23 which is page 21. Is that your signature?

16:22:56 24 A. Page 21 or Exhibit 21?

16:22:59 25 Q. I'm sorry. Page 21 of Exhibit 5. If I said

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16:23:02 1 exhibit, I meant Bates stamp. But anyway, page 21. Page 297

16:23:17 2 Is that your signature?

16:23:18 3 A. Yes.

16:23:18 4 Q. Well, all four are not. Are your signatures on

16:23:22 5 that page?

16:23:23 6 A. Yeah, two signatures.

16:23:23 7 Q. Do you recognize Ben's signatures?

16:23:25 8 A. Yes.

16:23:26 9 Q. Is it fair to say that the process of agreeing on

16:23:33 10 the actual language in this operating agreement was long

16:23:36 11 and arduous?

16:23:39 12 A. Somewhat, yes.

16:23:42 13 Q. When did you first start trying to agree on the

16:23:47 14 language of the operating agreement. Do you recall?

16:23:49 15 A. What part of the agreement?

16:23:51 16 Q. Any part. When did you first decide "we need to

16:23:55 17 draft an operating agreement"?

16:23:56 18 A. It was early on in June, July of 2011.

16:24:02 19 Q. Okay. So between June, July of 2011 and December

16:24:07 20 when you finally signed it, that's a period of how many

16:24:09 21 months?

16:24:10 22 A. Six months. Five, six months.

16:24:13 23 Q. Five, six months. Okay. Was the language in

16:24:19 24 this agreement -- well, strike that.

16:24:22 25 If you look at page 1, under "the business of the

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16:24:27 1 company," what does that say?

16:24:31 2 A. It's basically buying a secured note, converting

16:24:36 3 it to property, and running it. Managing it.

16:24:38 4 Q. Was that the intended business of the company

16:24:41 5 when you signed the operating agreement on -- in

16:24:44 6 December of 2011?

16:24:45 7 A. Yes.

16:24:46 8 Q. Was that an accurate description of what both you

16:24:51 9 and Ben contemplated the business of the company to be?

16:24:55 10 A. At that time, yes.

16:24:55 11 Q. Now, draw your attention to Exhibit B, which is

16:25:11 12 the last page. What was your percentage interest in

16:25:23 13 this company?

16:25:24 14 A. 50 percent.

16:25:25 15 Q. How much cash capital did you contribute?

16:25:29 16 A. 1,215,000.

16:25:31 17 Q. And what was CLA Properties' percentage interest?

16:25:35 18 A. 2,834,250.

16:25:38 19 Q. What was their percentage interest?

16:25:39 20 A. Capital.

16:25:41 21 Q. What was CLA Properties' percentage interest?

16:25:44 22 A. 50 percent.

16:25:44 23 Q. And how much cash capital did CLA Properties

16:25:48 24 contribute?

16:25:49 25 A. 2,834,250.

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16:27:00

1 **Q. Why is it that the percentage interest was equal**
2 **when the cash capital was not equal?**

3 A. A couple of reasons. I'm the one who found the
4 property, tied it up, got the opportunity on it, and
5 then assigned it to the Green Valley Commerce and
6 brought in Ben to be a partner. And also I did all of
7 the work from beginning to now managing the property.

8 **Q. Did you have any type of an agreement with Ben**
9 **about the return of cash capital contributions?**

10 MR. LEWIN: Objection. Whatever the agreement --
11 is he talking about the agreement in the operating
12 agreement, which isn't the agreement we're talking? Is
13 he talking about something else?

14 THE ARBITRATOR: It's a yes-or-no question, first
15 of all. So we'll take -- we'll take it if necessary.

16 BY MR. SHAPIRO:

17 **Q. Okay. So did you have any type of an agreement**
18 **with Ben regarding the return of his initial cash**
19 **capital?**

20 THE ARBITRATOR: Did you have an agreement with
21 him or did you have any conversations with him?

22 MR. SHAPIRO: The question was agreement.

23 BY MR. SHAPIRO:

24 **Q. Did you have an agreement?**

25 THE ARBITRATOR: Okay.

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16:27:00 1 A. Yes.

16:27:01 2 BY MR. SHAPIRO:

16:27:01 3 **Q. And what was that agreement?**

16:27:03 4 MR. LEWIN: Objection. Calls for conclusion.

16:27:05 5 THE ARBITRATOR: Are we talking about what's in

16:27:08 6 the operating agreement, or are we talking about

16:27:08 7 something else?

16:27:10 8 MR. SHAPIRO: I'm talking about generally. Did

16:27:12 9 they have an understanding --

16:27:14 10 MR. GERRARD: So ask that question. Did they

16:27:14 11 have an understanding.

16:27:14 12 MR. SHAPIRO: All right.

16:27:16 13 BY MR. SHAPIRO:

16:27:16 14 **Q. Did you have an understanding -- did you and Ben**

16:27:18 15 **have an understanding regarding Ben's return -- the**

16:27:21 16 **return of Ben's initial cash capital?**

16:27:23 17 MR. LEWIN: Objection. It's subjective to

16:27:26 18 understanding. It's irrelevant to what was said between

16:27:27 19 the parties.

16:27:28 20 THE ARBITRATOR: Not necessarily. I mean, the

16:27:30 21 intention of the parties as it goes to any potential

16:27:33 22 ambiguities makes it relevant. So I'm going to allow

16:27:35 23 the question. I haven't declared ambiguity, but

16:27:39 24 obviously --

16:27:40 25 MR. SHAPIRO: That's the whole fight.

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16:27:42 1 THE ARBITRATOR: Yeah. It's overruled. Page 301
16:27:46 2 objection is overruled. The
16:27:48 3 A. Yes, I had that understanding.
16:27:49 4 BY MR. SHAPIRO:
16:27:49 5 **Q. And what was your understanding with Ben?**
16:27:52 6 A. So basically, if we are going to return the
16:28:00 7 partners' capital, either we do it through a refinance
16:28:03 8 where there's enough -- refinance all of the -- the
16:28:08 9 cashout financing is generated to pay back both
16:28:11 10 partners. That's one scenario.
16:28:13 11 The other scenario is if we sell the whole assets
16:28:17 12 of the company and generate enough money to pay back the
16:28:21 13 cash contributions.
16:28:23 14 **Q. Okay. Does Exhibit B to the operating agreement**
16:28:27 15 **reflect that understanding?**
16:28:29 16 MR. LEWIN: Objection. Calls for his opinion as
16:28:34 17 to what it says.
16:28:37 18 THE ARBITRATOR: Overruled. I mean, it's not an
16:28:39 19 objection, but yeah, that's the gist of the question.
16:28:42 20 A. Yes.
16:28:43 21 BY MR. SHAPIRO:
16:28:43 22 **Q. At the time Exhibit B was drafted, were you and**
16:28:48 23 **Ben contemplating subdividing and selling the**
16:28:51 24 **properties?**
16:28:53 25 A. Subdividing --

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16:28:59 1 MR. LEWIN: I'm sorry. Objection. The drafting
16:29:01 2 took place over a long period of time. Can we pin down
16:29:01 3 a time? It's vague as to time.

16:29:09 4 MR. SHAPIRO: Okay.

16:29:10 5 BY MR. SHAPIRO:

16:29:10 6 Q. There was previously -- during Ben's testimony,
16:29:15 7 there was evidence introduced that the language of
16:29:19 8 Exhibit B was primarily finalized at least by
16:29:23 9 September 22, 2011. Is that your understanding?

16:29:27 10 A. Yes.

16:29:28 11 Q. Okay. So let's just use September 22, 2011.

16:29:36 12 Excuse me.

16:29:41 13 Can you turn to Exhibit 91, please? It's going
16:29:53 14 to be in a different binder.

15 MR. LEWIN: Shawn, the binders are there and
16 they're numbered.

17 THE WITNESS: Which number?

18 MR. LEWIN: 91.

19 BY MR. SHAPIRO:

16:30:33 20 Q. Okay. So Exhibit 91 is an email from David
16:30:36 21 LeGrand to you and Ben; correct?

16:30:38 22 A. Yes.

16:30:39 23 Q. And what's the date of this email?

16:30:42 24 A. September 16, 2011.

16:30:44 25 Q. All right. Can you read the first paragraph of

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16:30:47

1 **this email?**

16:30:47

2 A. "Shawn and Ben, I made some minor edits on the

16:30:52

3 Schedule B and answered some of Ben's questions."

16:30:54

4 Q. Okay. Now I want to turn to the very last page

16:30:57

5 of this exhibit. Can you compare that to Exhibit B of

16:31:07

6 the operating agreement that was ultimately signed by

16:31:09

7 you and Ben? Do you see any differences? Ignore the

16:31:21

8 underlining and the balloons along the right-hand side

16:31:25

9 that talk about "delete." If you ignore those, do you

16:31:28

10 see any differences between this Exhibit B in Exhibit 91

16:31:33

11 and the Exhibit B in Exhibit 5?

16:31:35

12 A. From the word "preferred allocation" down,

16:31:37

13 they're the same. And the Exhibit B on top, the member

16:31:41

14 percentage interest is still the old number, 30-70. And

16:31:46

15 then also the member capital is blank.

16:31:48

16 Q. Okay. So if I -- if you focus on "preferred

16:31:51

17 allocation and distribution schedule," from that point

16:31:55

18 down, it's the same. Is that your testimony?

16:31:58

19 A. Yes.

16:32:00

20 Q. Okay. So certainly by September 16, if not

16:32:05

21 before -- because LeGrand says, "I made some minor

16:32:10

22 edits" -- but certainly by September 16, 2011,

16:32:14

23 everything from "preferred allocation and distribution

16:32:16

24 schedule" below was finalized; correct?

16:32:18

25 A. Yes.

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16:32:20 1 Q. Okay. So as of September 16, 2011, what did
16:32:27 2 Green Valley Commerce own?
16:32:28 3 A. The note. Documents on the Green Valley Commerce
16:32:34 4 property.
16:32:34 5 Q. And was it contemplated as between you and Ben
16:32:41 6 that you would be subdividing and selling the individual
16:32:46 7 buildings as of September 16, 2011?
16:32:48 8 A. No. Selling part, no.
16:32:52 9 Q. Now you're making a distinction. Explain.
16:32:55 10 A. I've done this before multiple times. I can
16:33:00 11 enhance the value of a property by subdivision. And
16:33:04 12 I've done it in commercial setting and I've done it in
16:33:06 13 residential setting.
16:33:07 14 So basically, when we -- when we take a property
16:33:12 15 and we do a subdivision, it would enhance the value. So
16:33:19 16 sometime after this date, I think around October, we did
16:33:27 17 a recordation of subdivision.
16:33:29 18 Q. But as of October, were you planning on selling
16:33:31 19 any of the buildings?
16:33:33 20 A. At that time, no.
16:33:36 21 Q. Okay. Ultimately you did, though; correct?
16:33:39 22 A. Yes. Actually, we couldn't regardless of --
16:33:43 23 Q. Was -- was Ben receptive to the idea of selling
16:33:47 24 properties, or did he resist that concept?
16:33:50 25 A. He didn't want to sell it. He -- his idea was to

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16:33:53 1 keep it for cash flow.

16:33:56 2 Q. How do you know that?

16:33:57 3 A. We had conversations. And he basically liked to

16:34:02 4 invest, and once invested, wants to just collect the

16:34:05 5 rent.

16:34:06 6 Q. So going back to Exhibit B of Exhibit 5. And you

16:34:19 7 can put that binder away. I think we're done with it.

16:34:30 8 There's the -- and I'm going to focus your attention to

16:34:33 9 "preferred allocation and distribution schedule."

16:34:36 10 There's a paragraph below that and then there's first

16:34:39 11 step, second step, third step, fourth step. Do you see

16:34:42 12 that?

16:34:42 13 THE ARBITRATOR: Or final step.

16:34:45 14 MR. SHAPIRO: Or final step. Thank you. Yes.

16:34:45 15 BY MR. SHAPIRO:

16:34:49 16 Q. Tell me your understanding about what that

16:34:52 17 language was supposed to accomplish.

16:34:55 18 A. That's basically a special -- or in this instance

16:35:00 19 they call it a preferred allocation where you're trying

16:35:04 20 to either wind down the company, gradually close it, or

16:35:09 21 you're trying to return the cash capital contributions

16:35:17 22 of members in one shot. So based on that, if you go and

16:35:24 23 do a refinance, you generate enough cash out dollars to

16:35:30 24 pay off the -- both members. You would pay off both

16:35:34 25 members and that would be the return of the --

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16:35:36 1 100 percent return of capital. Or the other one is
16:35:40 2 the -- you basically sell the assets of the company and
16:35:44 3 wind down and liquidate and close.

16:35:47 4 Q. Was it -- in your opinion, was this provision
16:35:51 5 ever triggered in any of the -- at any point in the
16:35:54 6 history of the company?

16:35:55 7 A. No.

16:35:56 8 Q. Why not?

16:35:58 9 A. We never complied with this special allocation.
16:36:05 10 It never triggered.

16:36:08 11 Q. Now, going to the next paragraph, which is a
16:36:11 12 short sentence, it says, "Losses shall be allocated
16:36:15 13 according to capital accounts." Do you see that?

16:36:17 14 A. Yes.

16:36:17 15 Q. And then following that, it -- there's a
16:36:20 16 paragraph or there's two more paragraphs. Can you
16:36:24 17 read -- let's just start with the -- the paragraph
16:36:27 18 following it. It starts with "Cash distributions of
16:36:30 19 profits." Can you read that, please?

16:36:30 20 A. "Cash contributions of profits from
16:36:33 21 operations" --

16:36:34 22 Q. You said "contributions." Is that what it says?

16:36:36 23 A. "Distributions" -- I'm sorry -- "of profits from
16:36:39 24 operations shall be allocated and distributed 50 percent
16:36:42 25 to Shawn Bidsal and 50 percent to CLA Properties, LLC."

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16:36:46 1 Q. Right. And then can you read the final
16:36:48 2 paragraph?
16:36:48 3 A. "It is the express intent of the parties that
16:36:52 4 cash distributions of profits refers to distributions
16:36:58 5 generated from operations resulting in ordinary income
16:37:00 6 in contrast to cash distributions arising from capital
16:37:05 7 transactions or nonrecurring events such as the sale of
16:37:09 8 all or substantially -- a substantial portion of the
16:37:12 9 company's assets or cash out financing."
16:37:15 10 Q. Is it fair to say that your understanding with
16:37:28 11 Ben was that in all respects, you'd be treated as 50-50
16:37:33 12 partners unless the company sold the property -- which,
16:37:41 13 as of September 16, it wasn't even a property; it was a
16:37:45 14 promissory note -- but it sold it's primary asset, or
16:37:48 15 there was a refinance that had enough money to pay off
16:37:52 16 the cash capital contributions?
16:37:54 17 MR. LEWIN: Objection, Your Honor. His
16:37:55 18 unexpressed understanding is not relevant.
16:38:01 19 THE ARBITRATOR: Say that again.
16:38:02 20 MR. LEWIN: His unexpressed understanding is not
16:37:57 21 relevant. What's in his mind is not pertinent to what
16:38:08 22 took place between the members or the partners or the
16:38:11 23 two of them.
16:38:13 24 MR. SHAPIRO: And, Your Honor, again, it is
16:38:14 25 relevant because it is ambiguous, and that's the whole

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16:38:18 1 point that we're here. And so I think it does go to
16:38:20 2 what was the understanding of the parties, what was the
16:38:23 3 intent.

16:38:25 4 MR. LEWIN: Your Honor, the intent is described
16:38:28 5 by --

16:38:29 6 THE ARBITRATOR: Well, you said "unexpressed."

16:38:31 7 MR. LEWIN: That's right.

16:38:32 8 THE ARBITRATOR: "The unexpressed intent." So if
16:38:37 9 there was a thought in someone's mind that was never
16:38:40 10 expressed, I agree with you.

16:38:42 11 MR. LEWIN: That's what we're talking about.

16:38:44 12 MR. SHAPIRO: It was expressed. It was expressed
16:38:47 13 in Exhibit B.

16:38:48 14 THE ARBITRATOR: So I'll sustain an objection as
16:38:50 15 to an unexpressed intent. If you want to rephrase the
16:38:55 16 question.

16:38:56 17 BY MR. SHAPIRO:

16:38:56 18 **Q. Based upon your discussions with Ben, was**
16:39:01 19 **Exhibit B consistent with your agreement with Ben?**

16:39:05 20 MR. LEWIN: Same objections, Your Honor.

16:39:07 21 THE ARBITRATOR: Overruled.

16:39:08 22 A. Yes.

16:39:08 23 BY MR. SHAPIRO:

16:39:08 24 **Q. And based upon your conversations with Ben, was**
16:39:24 25 **your understanding with Ben consistent with what**

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16:39:29 1 Exhibit B means?

16:39:31 2 A. Yes.

16:39:31 3 Q. Okay. So you just testified about what your --

16:40:06 4 yours and Ben's understanding was regarding the return

16:40:08 5 of the cash capital; correct?

16:40:10 6 A. Yes.

16:40:12 7 Q. Is Exhibit B consistent with that understanding?

16:40:18 8 A. Yes.

16:40:19 9 Q. Please turn to page 10 of Exhibit 5. Actually,

16:40:45 10 strike that.

16:40:55 11 Okay. Actually, we're back to page 10. Okay.

16:41:00 12 There's a definition section. Do you see that?

16:41:01 13 A. Yes.

16:41:02 14 Q. There's a definition of COP. Is the COP the same

16:41:10 15 as a capital account?

16:41:12 16 A. What?

16:41:14 17 Q. When --

16:41:22 18 A. No.

16:41:23 19 Q. Did you answer the question, or...

16:41:25 20 A. I didn't even understand the question.

16:41:27 21 Q. Okay. When you -- you and Ben as members of

16:41:32 22 Green Valley Commerce had a capital account for

16:41:36 23 accounting purposes; correct?

16:41:37 24 A. Capital account in the -- with the CPA -- with

16:41:44 25 the outside CPA?

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16:41:45 1 Q. Yes.

16:41:45 2 A. A running capital account, yes. Yes.

16:41:47 3 Q. Sure. Sure. And that's my question, which is:

16:41:49 4 Is COP intended to be the same thing as a capital

16:41:52 5 account or is it different?

16:41:53 6 A. It's different.

16:41:54 7 Q. Okay. And the COP was intended to be what?

16:42:02 8 A. The -- well, at what point in time, first?

16:42:06 9 Q. Well, at the time that this was signed, the

16:42:13 10 Exhibit B identified the cash capital contributions of

16:42:16 11 each member, you being 1.215 million and Ben being

16:42:21 12 \$2,834,250; correct?

16:42:24 13 A. Yes.

16:42:25 14 Q. Okay. Is that supposed to be the COP as of the

16:42:28 15 time that the operating agreement was signed, or was the

16:42:30 16 COP something different?

16:42:31 17 A. As to the time of signing the operating

16:42:43 18 agreement, the COP meant the cost of properties at that

16:42:47 19 time. So yes.

16:42:50 20 Q. So yes what?

16:42:51 21 A. The cost of purchase would be -- with some

16:42:58 22 adjustments because of certain expenses of purchase, the

16:43:05 23 COP would be what the cash capital of the partners was,

16:43:20 24 minus some adjustments for the conversion of the note

16:43:28 25 into a property because there was some cost involved.

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16:43:31 1 Q. Turning to the next page, which is page 11,
16:43:50 2 there's the formula -- well, okay. One more page. That
16:43:53 3 was simply a page to provide additional language that
16:43:56 4 had been cut off on page 10, which we're not going to
16:43:59 5 talk about. So you can skip that.

16:44:01 6 Go to page 11, which is Bidsal 11. Here there's
16:44:07 7 two formulas on this page. Do you see the formulas?

16:44:12 8 A. Yes.

16:44:13 9 Q. Which one is the applicable formula to this
16:44:16 10 dispute?

16:44:16 11 A. I think the second formula.

16:44:26 12 Q. Okay. So again, I guess, in all fairness, that
16:44:29 13 really depends on what the supreme court does, but
16:44:32 14 assuming that the supreme court upholds the arbitration
16:44:36 15 award, then the second formula would be the applicable
16:44:39 16 one?

16:44:39 17 A. Yes.

16:44:39 18 Q. Okay. And who proposed that language, that
16:44:42 19 formula language?

16:44:43 20 A. That was Ben's.

16:44:43 21 MR. LEWIN: Objection, Your Honor. Again, we're
16:44:47 22 getting into drafting.

16:44:52 23 MR. SHAPIRO: Your Honor, I asked who proposed
16:44:54 24 it. It's not -- it's not an issue of drafting. It's
16:44:57 25 just, is this something he came up with, or is it

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16:44:59 1 something Ben come up? It's background and foundation. Page 312

16:45:03 2 THE ARBITRATOR: Right. Okay. I'm going to

16:45:04 3 allow.

16:45:04 4 MR. SHAPIRO: Okay.

16:45:06 5 MR. GERRARD: Did you get an answer?

16:45:08 6 THE WITNESS: I said Ben.

16:45:10 7 MR. GERRARD: Okay. I didn't hear the answer.

16:45:11 8 I'm sorry.

16:45:12 9 BY MR. SHAPIRO:

16:45:12 10 Q. Now, here the formula talks about the COP, and

16:45:20 11 the COP is defined as "the cost of purchase as it

16:45:27 12 specified -- as it's specified" -- that's a spelling

16:45:28 13 error, but -- "as it's specified in the escrow closing

16:45:32 14 statement at the time of purchase of each property owned

16:45:33 15 by the company"; correct?

16:45:35 16 A. Yes.

16:45:35 17 Q. Did GVC purchase a property or a promissory note?

16:45:41 18 A. Bought a promissory note.

16:45:44 19 Q. Okay. And at some point, there was a conversion

16:45:48 20 of the promissory note to a property by virtue of the

16:45:52 21 deed in lieu agreement; correct?

16:45:54 22 A. And the grant bargain.

16:45:57 23 Q. And the grant bargain as well?

16:45:58 24 A. Yes.

16:45:59 25 Q. Okay. So at the time that the conversion

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16:46:04 1 occurred, that settlement statement was Exhibit 3. Is
16:46:11 2 there anything on Exhibit 3 that identifies the cost of
16:46:14 3 purchase?

16:46:16 4 A. Exhibit 3 is the purchase of the note.

16:46:23 5 Q. Oh, I'm sorry. Where's the settlement statement
16:46:26 6 for the -- let's see. Oh, Exhibit 9. Exhibit 9.
16:46:31 7 That's the settlement statement for the escrow by which
16:46:37 8 Green Valley Commerce obtained title to the property;
16:46:39 9 correct?

16:46:39 10 A. Yes.

16:46:40 11 Q. And is there anything on this settlement
16:46:42 12 statement that identifies the cost of purchase?

16:46:45 13 A. No, it does not.

16:46:46 14 Q. Okay. And so almost immediately out of the gate,
16:46:52 15 the facts of what actually happened were not matching
16:46:56 16 what the parties originally anticipated; correct?

16:46:58 17 A. You can say that, yes.

16:47:02 18 Q. Now, I want to pause for a second. I want to
16:47:13 19 talk about this conversion. You mentioned that you --
16:47:18 20 you did a subdivision of the property; correct?

16:47:25 21 A. Yes.

16:47:26 22 Q. Was Ben part of the decision to create -- or to
16:47:30 23 subdivide the property?

16:47:31 24 A. He was informed. I did the work, but he was cc'd
16:47:40 25 on the emails and --

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16:47:41 1 Q. Well, did he agree that that was a good idea?

16:47:42 2 A. Yeah, he did agree.

16:47:45 3 Q. Did he object to any subdivision?

16:47:48 4 A. No.

16:47:49 5 Q. Okay. I want to turn your attention to

16:47:54 6 Exhibit 7. Do you recognize this document?

16:48:01 7 A. Yes.

16:48:02 8 Q. What is it?

16:48:02 9 A. That's the recordation of the CC&R for the -- for

16:48:12 10 the creation of the parcels for Green Valley Commerce,

16:48:15 11 the eight parcels plus the parking lot.

16:48:17 12 Q. Okay.

16:48:19 13 A. And the rights and obligations of the --

16:48:24 14 Q. Did you have anything to do with the preparation

16:48:28 15 of this document?

16:48:28 16 A. Yes.

16:48:28 17 Q. Tell me what your involvement was?

16:48:30 18 A. I worked on the CC&R. It was -- actually came to

16:48:39 19 me as a boilerplate document, a document which I changed

16:48:46 20 the information to reflect the -- Green Valley

16:48:50 21 Commerce's property. And we finally recorded it in

16:48:57 22 March of 2012.

16:48:58 23 Q. Okay. Directing your attention to Bidsal 1392.

16:48:58 24 THE ARBITRATOR: Hold on. Before you do that,

16:49:05 25 let's go off the record for a second.

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16:49:05 1 (Discussion off the record.)

16:49:05 2 MR. GERRARD: What page did you say, Jim?

16:49:43 3 MR. SHAPIRO: 1391, which is page 37 of the

16:49:44 4 document.

16:49:50 5 THE WITNESS: Okay.

16:49:50 6 BY MR. SHAPIRO:

16:49:50 7 Q. Is that your signature?

16:49:52 8 A. Yes.

16:49:55 9 Q. And if you turn to the next page, what is this

16:49:58 10 page?

16:49:58 11 A. It's a notary page.

16:50:01 12 Q. And what date did you have it notarized?

16:50:04 13 A. March 15, 2012.

16:50:06 14 Q. And looking at the first page, when was the

16:50:08 15 document recorded?

16:50:09 16 A. March 16, 2012.

16:50:13 17 Q. Why did you prepare and record CC&Rs against the

16:50:23 18 property?

16:50:23 19 A. That basically gets the property to a point that

16:50:29 20 if you want to sell it each parcel, you can.

16:50:32 21 Q. Had you and Ben had discussions about selling

16:50:36 22 part of the property as of March of 2012?

16:50:39 23 A. Yeah, we were talking about it.

16:50:46 24 Q. Was Ben in agreement, or was he resisting?

16:50:51 25 A. Kind of resisting. Not very interested.

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16:50:59 1 Q. At what point did he finally agree to sell any
16:51:03 2 portion of the original property?
16:51:04 3 A. Later on, we did some marketing -- or actually
16:51:11 4 analysis of the market sometime in -- middle of the year
16:51:17 5 toward August of 2012. And Jeff Chang was the broker.
16:51:23 6 He brought in some good analysis, some numbers showing
16:51:27 7 that we can make lot of money on this. And me and Ben
16:51:33 8 talked about it, and we both agreed to list it at that
16:51:38 9 time.
16:51:39 10 Q. Okay. So that occurred after March of 2012?
16:51:42 11 A. Yes.
16:51:43 12 Q. So by March of 2012, we are four months after the
16:51:52 13 operating agreement was signed and over six months after
16:51:55 14 you obtained title to the property; correct?
16:51:56 15 A. Yes.
16:51:56 16 Q. At that time, it still was not agreed upon that
16:52:01 17 anything would be sold; is that accurate?
16:52:02 18 A. Agreed upon by partners, you're right.
16:52:06 19 Q. Okay.
16:52:06 20 THE ARBITRATOR: Mr. Shapiro, just pick a spot in
16:52:10 21 the next ten minutes or so that makes sense.
16:52:13 22 MR. SHAPIRO: Perfect. Yeah, we're going to hit
16:52:14 23 a nice natural spot here soon, so.
16:52:17 24 BY MR. SHAPIRO:
16:52:17 25 Q. Direct your attention to Bates stamp 1365. Okay.

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16:52:43 1 Direct your attention to Section 4.1. There's a defined Page 317
16:52:48 2 term in here called "declarant control period." Do you
16:52:51 3 see that?
16:52:51 4 A. Yes.
16:52:51 5 Q. Who is the declarant?
16:52:52 6 A. GVC. Green Valley Commerce, LLC.
16:52:55 7 Q. And what is the declarant control period?
16:52:55 8 A. So...
16:53:18 9 MR. LEWIN: Can the witness answer without just
16:53:20 10 reading what the document says? Does he know one way or
16:53:24 11 another?
16:53:24 12 MR. SHAPIRO: Is there any reason why he can't
16:53:26 13 look at the document to refresh his recollection?
16:53:28 14 MR. LEWIN: Because, well, I want to get -- I'd
16:53:29 15 like to -- if he needs to refresh his recollection --
16:53:31 16 THE ARBITRATOR: Let me ask you this: How big an
16:53:34 17 issue is it in what we have -- what I have to decide
16:53:37 18 whether he knows off the top of his head what the
16:53:41 19 declarant control period is?
16:53:42 20 MR. LEWIN: Your Honor, you're right. I'm sorry.
16:53:45 21 BY MR. SHAPIRO:
16:53:45 22 Q. Do you recall what declarant control period is?
16:53:48 23 What is the point of the declarant? Just generally
16:53:50 24 speaking, what does the declarant do?
16:53:52 25 A. I haven't read this section for a long time.

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16:53:55 1 Q. That's okay. We'll move on.

16:53:56 2 A. Basically, declarant means the developer who --

16:54:01 3 or subdivider that -- in this case, is Green Valley

16:54:06 4 Commerce -- and...

16:54:09 5 Q. That's fine. That's fine.

16:54:10 6 A. Up to a point, as long as the majority of the

16:54:16 7 buildings or parcels are still owned, declarant is in

16:54:19 8 charge. And once it dispenses with so many of the

16:54:22 9 buildings, then there would a board appointed, on and

16:54:25 10 on.

16:54:25 11 Q. Was Ben aware that you were preparing and

16:54:28 12 ultimately recording the CC&Rs?

16:54:30 13 A. Yes.

16:54:31 14 Q. Did he ever object to it?

16:54:32 15 A. No.

16:54:33 16 Q. There's an owners' association described and

16:54:39 17 provided for in the CC&Rs; correct?

16:54:41 18 A. Yes.

16:54:42 19 Q. And who manages that owners' association?

16:54:45 20 A. I formed it and manage it.

16:54:57 21 MR. SHAPIRO: Honestly, Your Honor, that's

16:54:57 22 probably a good spot.

16:54:58 23 THE ARBITRATOR: Okay. We'll take our evening

16:55:02 24 recess.

25 (The proceedings concluded at 4:55 p.m.)

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1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)
3 SS:
4 COUNTY OF CLARK)

5 I, MIA C. O'SULLIVAN, Certified Shorthand
6 Reporter, do hereby certify that I took down in
7 shorthand (Stenotype) all of the proceedings had in the
8 before-entitled matter at the time and place indicated;
9 and that thereafter said shorthand notes were
10 transcribed into typewriting at and under my direction
11 and supervision, and the foregoing transcript
12 constitutes a full, true, and accurate record of the
13 proceedings had.

14 IN WITNESS WHEREOF, I have hereunto affixed
15 my hand this 26th day of March, 2021.

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MIA C. O'SULLIVAN, RPR, NV CCR #964

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EXHIBIT 265

In the Matter Of:
Bidsal, Shawn vs CLA Properties, LLC

ARBITRATION DAY 2

March 18, 2021

Job Number: 735326

1 J A M S
2 * * * * *
3
4 SHAWN BIDSAL, an individual,)
5 Claimant/Counter-Respondent,)
6 v.) JAMS Ref No. 1260005736
7 CLA PROPERTIES, LLC, a)
8 California limited liability)
9 company,)
Respondent/Counterclaimant.)

10

11

12

13

14

DAY 2

15

ARBITRATION

16

BEFORE DAVID WALL, ESQ., ARBITRATOR

17

LAS VEGAS, NEVADA

18

THURSDAY, MARCH 18, 2021

19

20

21

Reported By Mia C. O'Sullivan, RPR, NV CCR No. 964
Job No. 735326

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23

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1 JAMS ARBITRATION,
2 taken at 3800 Howard Hughes Parkway, 11th Floor, Las
3 Vegas, Nevada, on Thursday, March 18, 2021, at
4 9:00 a.m., before Mia C. O'Sullivan, Certified Court
5 Reporter, in and for the State of Nevada.

6

7 APPEARANCES:

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22

23 Also Present:

24

Shawn Bidsal
Benjamin Golshani

25

(Via Zoom) Daniel Gerety

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1

I N D E X

2

3

WITNESS: CHRIS WILCOX

4

5

EXAMINATION

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6

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7

By The Arbitrator

378, 581

8

By Mr. Lewin

448, 613

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			Page 323
	1	LAS VEGAS, NEVADA; THURSDAY, MARCH 18, 2021	
	2	9:00 A.M.	
	3	***	
09:00:24	4	THE ARBITRATOR: Okay. So we're interrupting	
09:00:45	5	Mr. Bidsal's testimony to take this witness now;	
09:00:48	6	correct?	
09:00:49	7	MR. GERRARD: Correct.	
	8	THE ARBITRATOR: Okay. Would you raise your	
	9	right hand, please?	
	10	Whereupon,	
	11	CHRIS WILCOX,	
	12	having first been called as a witness, was duly sworn	
	13	and testified as follows:	
09:00:59	14	THE ARBITRATOR: All right. And is it Chris	
09:00:59	15	Wilcox?	
09:01:02	16	THE WITNESS: Chris L. Wilcox.	
09:01:02	17	THE ARBITRATOR: C-H-R-I-S? Common spelling	
09:01:06	18	Wilcox?	
09:01:07	19	THE WITNESS: W-I-L-C-O-X.	
09:01:09	20	THE ARBITRATOR: Okay. All right.	
09:01:15	21	Mr. Gerrard?	
09:01:16	22	MR. GERRARD: Thank you.	
09:01:16	23	EXAMINATION	
09:01:17	24	BY MR. GERRARD:	
09:01:17	25	Q. Mr. Wilcox, good morning.	

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09:01:19 1 A. Good morning.

09:01:20 2 Q. So Mr. Wilcox, can you please tell The Court how

09:01:26 3 you're presently employed?

09:01:27 4 A. I am a partner with the CPA firm Eide Bailly LLP.

09:01:34 5 Q. And are you the partner in charge of the Las

09:01:36 6 Vegas, Nevada, office of that national accounting firm?

09:01:38 7 A. Yes, I am.

09:01:40 8 THE ARBITRATOR: What's the firm?

09:01:42 9 THE WITNESS: Eide Bailly. It's spelled

09:01:45 10 E-I-D-E -- Edward Ivan Dog Edward -- Bailly,

09:01:51 11 B-A-I-L-L-Y.

09:01:51 12 THE ARBITRATOR: Would you have had that?

09:01:51 13 THE REPORTER: I appreciate that. I'd have had

09:01:51 14 to google it.

09:01:51 15 BY MR. GERRARD:

09:02:07 16 Q. Mr. Wilcox, would you please give The Court your

09:02:11 17 educational background?

09:02:12 18 A. I have a bachelor's in accounting from Southern

09:02:16 19 Utah University in Cedar City, Utah.

09:02:21 20 Q. Did you graduate summa cum laude?

09:02:23 21 A. I did.

09:02:23 22 Q. When did you graduate from Southern Utah

09:02:27 23 University?

09:02:27 24 A. 1984.

09:02:28 25 Q. And what happened after you graduated in terms of

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09:02:33
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09:03:55

1 your employment?

2 A. I accepted a position with the CPA firm Laventhol
3 & Horwath. I was with them for three years, and then I
4 moved to Bradshaw, Smith & Company, a local CPA firm.
5 Laventhol & Horwath is a national firm; Bradshaw, Smith
6 & Company is a local CPA firm. And I became a partner
7 in that firm. And after about eight years in that firm,
8 I started my own firm with two other partners. After
9 19 years we split that up, and --

10 Q. What was the name firm?

11 A. Johnson Jacobson Wilcox. And that firm split up
12 after 19 years. And then for just over a year and a
13 half, I practiced with my partner Kirk Jacobson. And
14 then we were acquired by the CPA firm I'm currently
15 with, Eide Bailly.

16 Q. And are you a certified public accountant?

17 A. I am.

18 Q. When did you first become certified?

19 A. 1986 or 1987, somewhere in there.

20 Q. Have you been continuously certified as a CPA
21 from that time?

22 A. Yes.

23 Q. Are you a member of any professional
24 associations?

25 A. I'm member of the AICPA. I'm a member of --

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09:03:58

1 **Q. What is AICPA?**

09:04:01

2 A. Excuse me. AICPA is associate -- American

09:04:04

3 Institute of Certified Public Accountants. I'm also a

09:04:08

4 member of the Nevada state Society of CPAs. I'm also in

09:04:14

5 the tax -- part of the tax group of the AICPA. I'm also

09:04:22

6 part of the national tax office for Eide Bailly.

09:04:29

7 **Q. And what are the general areas in which you have**

09:04:35

8 **practiced as an accountant?**

09:04:36

9 A. I practice solely in the area of income taxation.

09:04:40

10 Most of my clients are either partnerships, LLCs, S

09:04:45

11 corporations, and high net worth individuals.

09:04:47

12 **Q. And have your clients focused in specific types**

09:04:52

13 **of areas? In other words, your core group of clients?**

09:04:55

14 A. Yeah. My biggest group of clients is probably

09:04:58

15 automobile dealerships, construction. Beyond that,

09:05:01

16 manufacturing, wholesale distributing, real estate

09:05:05

17 development.

09:05:05

18 **Q. Have you had a lot of experience with real estate**

09:05:09

19 **developers?**

09:05:10

20 A. I have.

09:05:10

21 **Q. And approximately -- without divulging names --**

09:05:14

22 **how many real estate developers have you provided tax**

09:05:17

23 **services to over the years?**

09:05:18

24 A. Over my career, probably 5 to 10. They're fairly

09:05:29

25 significant developers, large businesses. That would be

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09:05:32 1 the real estate side, development, yeah.

09:05:35 2 Q. Now, as a part of your business, are you
09:05:38 3 routinely required to review partnership agreements,
09:05:44 4 shareholder agreements, operating agreements, those
09:05:48 5 types of documents?

09:05:49 6 A. Yes. On a regular basis.

09:05:54 7 Q. And what is the purpose of your reviewing those
09:05:56 8 types of documents as a certified public accountant?

09:05:59 9 A. Every partnership return that is prepared, it's
09:06:07 10 necessary to look at the partnership agreement --
09:06:09 11 understand the terms of the agreement -- so you can know
09:06:11 12 how the income is to be allocated, distributed, and so
09:06:15 13 forth.

09:06:15 14 Q. Okay. Is the allocation and distribution of
09:06:20 15 income to a company something that is generally governed
09:06:24 16 by the operative documents, or is that governed by the
09:06:27 17 tax code?

09:06:27 18 A. No, it's governed by the operative documents.

09:06:38 19 MR. GERRARD: Judge Wall, I'm not sure. I mean,
09:06:40 20 in the old days, we used to have to certify people as
09:06:43 21 expert.

09:06:44 22 THE ARBITRATOR: Is this somebody you want to
09:06:45 23 take on voir dire?

09:06:46 24 MR. LEWIN: No.

09:06:46 25 THE ARBITRATOR: So you stipulate to his

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09:06:47 1 qualifications?

09:06:48 2 MR. LEWIN: Yeah. Sure. I was thinking about

09:06:50 3 doing that earlier, but.

09:06:50 4 THE ARBITRATOR: It's a balance between letting

09:06:53 5 me know his qualifications beyond -- I don't even know

09:06:56 6 if his CV is part of --

09:06:59 7 MR. GERRARD: It is, but we haven't --

09:07:01 8 THE ARBITRATOR: All right. So to the extent

09:07:03 9 that Nevada law arguably still requires him to be

09:07:07 10 accepted by the court as an expert, at arbitration I

09:07:12 11 certainly would do that, given the fact there's no

09:07:14 12 objection.

09:07:14 13 MR. GERRARD: Okay.

09:07:14 14 BY MR. GERRARD:

09:07:14 15 Q. Sir, have you testified as an expert in the past?

09:07:17 16 A. Yes, I have.

09:07:18 17 Q. On approximately how many occasions?

09:07:20 18 A. Gosh. Maybe ten.

09:07:26 19 Q. Okay.

09:07:26 20 A. I don't know off the top of my head.

09:07:28 21 Q. Do you consider that to be a focus of your

09:07:31 22 practice?

09:07:31 23 A. It is one of the things I do, yes.

09:07:37 24 Q. Okay. But in terms of your overall practice, is

09:07:42 25 that a small portion of what you do?

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09:07:44 1 A. It is a small portion.

09:07:46 2 Q. Okay. So let's go back to what we were talking

09:07:49 3 about. Do you understand the term "pass through

09:07:52 4 taxation entity"?

09:07:54 5 A. Yes.

09:07:54 6 Q. What is a pass through taxation entity?

09:07:57 7 A. The terms "pass through" simply means that the

09:08:01 8 entity itself does not pay taxes. The income from that

09:08:05 9 entity is passed through to either the partners, the

09:08:08 10 members, or the shareholders, and then they pay the tax

09:08:12 11 on that income generated by the entity.

09:08:14 12 Q. And what types of entities generally qualify as

09:08:18 13 pass through taxation entities?

09:08:20 14 A. Partnerships, LLCs, S corporations, some trusts.

09:08:28 15 Q. Okay. So when you say "S corporations," are you

09:08:32 16 talking about a corporation that's made a subchapter S

09:08:35 17 election?

09:08:36 18 A. That is correct.

09:08:36 19 Q. Now, in this case, you were asked to look at an

09:08:43 20 operating agreement for a Nevada limited liability

09:08:47 21 company; correct?

09:08:48 22 A. Correct.

09:08:48 23 Q. Okay. Is a limited liability company a pass

09:08:53 24 through taxation entity?

09:08:55 25 A. Yes.

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09:09:41
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09:09:53
09:09:55
09:09:57

1 Q. What importance does that have in terms of a K-1
2 on a limited liability company's corporate or company
3 tax return?
4 MR. LEWIN: Objection. That's outside the scope
5 of his report and outside the scope of his assignment as
6 far as I understand it.
7 MR. GERRARD: I don't agree with that.
8 Obviously, to do what he does, he has to determine -- to
9 determine if things have been properly prepared, you
10 have to look at the K-1s. And that's what he's going to
11 testify about right now.
12 MR. LEWIN: Your Honor, he gave a report. I
13 asked him if all of his opinions were contained in his
14 report. There's no such opinion.
15 THE ARBITRATOR: You deposed him?
16 MR. LEWIN: I did.
17 THE ARBITRATOR: Okay.
18 MR. LEWIN: And I asked him if all of his
19 opinions were in his report. He said yes. This opinion
20 that he's soliciting is not in the report and not given
21 in the deposition.
22 MR. GERRARD: Well, I don't think we're
23 soliciting an opinion right now. We're soliciting the
24 background or how he arrived at his opinions. And how
25 he arrived at his opinions was to look at the tax

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09:09:59 1 returns of the company, as he clearly testified in his
09:10:02 2 deposition and as is clearly set forth in the report.

09:10:05 3 MR. LEWIN: I have no problem you asking if he
09:10:07 4 looked at the K-1s, but giving an opinion as to how
09:10:10 5 important they are is little bit of a different issue.

09:10:13 6 THE ARBITRATOR: Well, if you review the tax
09:10:15 7 returns, tax returns include the schedule Ks and K-1s.
09:10:19 8 He certainly has to have an understanding of what a K-1
09:10:22 9 and what its purpose is and why it's included as part of
09:10:26 10 the return. So in terms of that, which is sort of where
09:10:29 11 I thought the question was going --

09:10:32 12 MR. GERRARD: That's exactly where we're going.

09:10:32 13 THE ARBITRATOR: I think that it's probably
09:10:34 14 appropriate for him. It's a basis for his opinion.

09:10:36 15 MR. LEWIN: Very well. Thank you.

09:10:38 16 THE ARBITRATOR: You may answer the question if
09:10:38 17 you recall it.

09:10:40 18 THE WITNESS: So a K-1 is part of the tax return
09:10:44 19 for either a partnership, or in this case -- or an S
09:10:49 20 corporation. In this case, the LLC. And the K-1 is
09:10:53 21 what reports to the member that member's share of the
09:10:58 22 net income. It also tells the member what their
09:11:01 23 distributions were. The K-1 also shows what -- well, it
09:11:06 24 shows the capital account as well.

09:11:06 25 ///

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09:11:07

1 BY MR. GERRARD:

09:11:07

2 Q. So from looking at a K-1, could you quickly

09:11:12

3 determine how income and gain are being allocated and

09:11:17

4 distributed?

09:11:20

5 A. From looking at all of the K-1s, you could

09:11:23

6 determine how the income is being allocated and how the

09:11:26

7 gains are being allocated, yes.

09:11:28

8 Q. So in this case, sir -- there's a binder of

09:11:32

9 exhibits in front of you. If you turn to Exhibit 5.

09:11:40

10 MR. GERRARD: Is that the right one? I'm not

09:11:42

11 sure.

09:11:44

12 MR. SHAPIRO: Yeah, 5 is the operating agreement.

09:11:44

13 BY MR. GERRARD:

09:11:49

14 Q. Okay. Do you have that in front of you, sir?

09:11:51

15 A. I do.

09:11:52

16 Q. Do you recognize that document?

09:11:53

17 A. It is the operating agreement for Green Valley

09:11:57

18 Commerce, LLC.

09:11:57

19 Q. Were you asked to review this as a part of your

09:12:00

20 engagement?

09:12:02

21 A. Yes.

09:12:02

22 Q. And did you review the entirety of this

09:12:04

23 agreement?

09:12:04

24 A. I did.

09:12:05

25 Q. And did you find that it was -- had contained

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09:12:08 1 clear language, or did you find that it contained
09:12:11 2 ambiguities?

09:12:13 3 MR. LEWIN: Objection. That's not his province.

09:12:14 4 THE ARBITRATOR: Well, not in a legal sense, but
09:12:18 5 in a general sense, as least the way I understood the
09:12:20 6 question.

09:12:21 7 MR. GERRARD: Yeah. I mean, an accountant has to
09:12:23 8 read it and has to be able to understand it to be able
09:12:25 9 to do their job.

09:12:25 10 THE ARBITRATOR: Ambiguity is a term of art in
09:12:28 11 the law. I'm not taking this question that way; I'm
09:12:31 12 taking it as someone who --

09:12:32 13 MR. GERRARD: I can re-ask it, Your Honor.

09:12:35 14 THE ARBITRATOR: No. That's fine.

09:12:35 15 MR. GERRARD: Okay.

09:12:35 16 BY MR. GERRARD:

09:12:36 17 Q. Go ahead, sir.

09:12:36 18 A. Yes, I did find some ambiguities in the
09:12:41 19 agreement.

09:12:41 20 Q. What specific parts of the agreement were you
09:12:45 21 most interested in for purposes of arriving at your
09:12:48 22 testimony and your opinions in this case?

09:12:50 23 A. Page 10 talks about the formula for the buyout.

09:12:59 24 Q. Did you find the language of the formula to be
09:13:01 25 easily understood?

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09:13:06 1 A. No. It was not easily understood.

09:13:08 2 Q. Okay. What other provisions were you most

09:13:12 3 interested in?

09:13:12 4 A. Exhibit A and Exhibit B.

09:13:16 5 Q. Okay. And Exhibit A is titled Tax Provisions;

09:13:27 6 correct?

09:13:27 7 A. Correct.

09:13:27 8 Q. And so did you review all those tax provisions?

09:13:31 9 A. Yes.

09:13:32 10 Q. Did you find the tax provision portion,

09:13:36 11 Exhibit A, easy to understand?

09:13:37 12 A. Exhibit A was -- is pretty much boilerplate

09:13:43 13 language that -- it's pretty common language.

09:13:46 14 Q. Any difficulties as an accountant understanding

09:13:49 15 what the company intended to do in reading Exhibit A?

09:13:55 16 MR. LEWIN: Excuse me one moment. That calls for

09:14:00 17 speculation, "what the company intended to do."

09:14:05 18 MR. GERRARD: I'll rephrase it.

09:14:05 19 THE ARBITRATOR: All right.

09:14:07 20 BY MR. GERRARD:

09:14:07 21 Q. Any difficulty in you understanding what appeared

09:14:09 22 to be the company's intentions from reading Exhibit A?

09:14:17 23 MR. LEWIN: Objection. I don't think he's here

09:14:19 24 to speculate about intentions. It's not the subject of

09:14:22 25 an accountant.

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09:14:23 1 MR. GERRARD: Well, I disagree.

09:14:25 2 MR. LEWIN: The issue of interpreting the

09:14:28 3 contract is Your Honor's province, not his.

09:14:31 4 MR. GERRARD: Accountants are always required to

09:14:33 5 review an agreement to interpret what they understand

09:14:37 6 the intent is based upon the language of the agreement

09:14:39 7 for purposes of them preparing their tax returns and tax

09:14:43 8 documents.

09:14:45 9 THE ARBITRATOR: We're dealing with sort of a

09:14:49 10 cross between legal terms of art -- ambiguity, intent of

09:14:54 11 the parties -- and an expert. But in terms of the legal

09:14:59 12 part of it, there's a lay definition to "I look at the

09:15:07 13 operating agreement to see what the parties intended,"

09:15:10 14 and that's the way I understood the question. So I'm

09:15:15 15 going to overrule it based on the foundation that's been

09:15:19 16 laid that he has to review documents like these; has

09:15:22 17 experience to try to ascertain what was supposed to

09:15:28 18 happen in terms of capital accounts and tax provisions.

09:15:32 19 So you may answer.

09:15:33 20 BY MR. GERRARD:

09:15:33 21 **Q. Do you remember the question?**

09:15:36 22 A. I think I answered it.

09:15:36 23 **Q. Yeah, I think you actually did.**

09:15:36 24 THE REPORTER: I did not get an answer.

09:15:43 25 MR. GERRARD: Okay. Let me ask it again to make

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09:15:43 1 sure we're clear.

09:15:43 2 BY MR. GERRARD:

09:15:46 3 Q. In reading the language of Exhibit A to the
09:15:49 4 operating agreement, did you have any difficulty in
09:15:52 5 determining what appeared to be the intent of the
09:15:55 6 company as it relates to these tax provisions?

09:15:59 7 A. No.

09:15:59 8 Q. Attached to that there's another document called
09:16:04 9 Exhibit B. Did you review that document?

09:16:07 10 A. I did.

09:16:08 11 Q. Did you have any difficulty understanding what
09:16:11 12 the parties -- or what the company intended to have
09:16:17 13 happen based upon Exhibit B?

09:16:19 14 A. Yes. There was some unclarity in Exhibit B.

09:16:24 15 Q. Okay. Let's go back to Exhibit A. We're looking
09:16:29 16 at page 22 of Exhibit 5. As an accountant reading this
09:16:40 17 operating agreement, did you come to a conclusion about
09:16:44 18 how allocations of gain, loss, deductions, income,
09:16:51 19 depreciation, and distributions were to be made?

09:16:54 20 A. So the allocations are on page 23? Is that what
09:17:00 21 you're referring to?

09:17:02 22 Q. Well, before we get to page 23, let's walk
09:17:05 23 through the first page of Exhibit A, which is
09:17:09 24 Section 4.1. Did you read the capital account
09:17:13 25 provisions in 4.1.1 and 4.1.1.1 and 4.1.1.2?

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09:17:21 1 A. Yes, I did.

09:17:22 2 THE ARBITRATOR: Setting aside why they're
09:17:24 3 numbered that way.

09:17:24 4 MR. GERRARD: I know.

09:17:25 5 THE ARBITRATOR: Go ahead.

09:17:26 6 BY MR. GERRARD:

09:17:26 7 Q. When you look at this first paragraph of 4.1.1,
09:17:34 8 it says "A single capital account is to be maintained
09:17:37 9 for each member," and then it says "in accordance with
09:17:41 10 the capital accounting rules of section 704(b) of the
09:17:45 11 code."

09:17:46 12 What is Section 704(b) of the code?

09:17:49 13 A. Section 704(b) deals with partnership capital
09:17:53 14 accounts and how to maintain those accounts. There are
09:17:59 15 transactions that can take place within a partnership
09:18:02 16 where maybe some special adjustments need to be made.
09:18:05 17 It also deals with allocation of income and items of
09:18:09 18 income.

09:18:25 19 Q. Do you have Binder 2 there in front of you?

09:18:25 20 A. Yes.

09:18:36 21 Q. Can you open up Exhibit 54 in Binder 2?

09:18:39 22 A. Okay.

09:18:42 23 THE ARBITRATOR: 54?

09:18:46 24 MR. GERRARD: 54.

09:18:48 25 THE ARBITRATOR: That's in my Binder 3.

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09:18:51 1 MR. GERRARD: They might not be numbered the
09:18:54 2 same.
09:19:04 3 BY MR. GERRARD:
09:19:04 4 Q. Do you recognize Exhibit 54?
09:19:07 5 A. Looks like it's Internal Revenue Code section --
09:19:10 6 it's the regulations under 704.
09:19:13 7 Q. Okay. And so we have the Code Section 704(a) and
09:19:17 8 704(b), and then there's regulations associated with it;
09:19:20 9 correct?
09:19:20 10 A. Correct.
09:19:20 11 Q. Now, under Internal Revenue Code Section 704(a),
09:19:28 12 how are you to determine how allocations and
09:19:32 13 distributions are supposed to be made in a company?
09:19:34 14 A. You're to go to the operating agreement.
09:19:37 15 Q. Okay. Under Section 704(b) of the Internal
09:19:43 16 Revenue Code, how are you to determine how allocations
09:19:46 17 and distributions are to be made by a company?
09:19:49 18 A. Per the operating agreement, as long as it has
09:19:52 19 substantial economic effect.
09:19:53 20 Q. Okay. Can you explain that to The Court? I know
09:19:56 21 this is a broad area. Just give him a very brief
09:20:00 22 synopsis of how this works.
09:20:01 23 A. All substantial economic effect says is you can't
09:20:04 24 give the cash to one person -- sorry -- to one person,
09:20:08 25 and all the income to somebody else. That doesn't have

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09:20:12 1 substantial economic effect. Basically, the income and
09:20:16 2 the cash, how those get allocated have to make sense.
09:20:19 3 That's an oversimplification, but that's the basis of
09:20:22 4 it.

09:20:22 5 Q. Okay. Using an example, if I put a million
09:20:26 6 dollars of -- if I contributed a million dollars to a
09:20:29 7 company, and then -- and there were three members of
09:20:34 8 that limited liability company, and the other two
09:20:38 9 members got all the distributions and I didn't get any,
09:20:41 10 would that satisfy the regulations in Code
09:20:49 11 Section 704(b)?

09:20:49 12 A. Probably not. You'd have to look at all of the
09:20:53 13 operating agreement to see what the -- to the end of the
09:20:55 14 wrap up, but that would be -- that would certainly be
09:20:58 15 something you'd want to look at.

09:21:00 16 Q. Okay. To be clear, when you read Section 704(a)
09:21:04 17 and 704(b) of the IRS code that's made reference to in
09:21:08 18 this Section 4.1.1 of the agreement -- of the operating
09:21:11 19 agreement, your testimony was that those provisions of
09:21:17 20 the tax code direct you to the operating agreement to
09:21:21 21 determine how distributions and allocations are to be
09:21:24 22 made?

09:21:24 23 A. It says very clearly that partnership's
09:21:27 24 distributive share of any income item, gain, loss shall
09:21:32 25 be determined by the partnership agreement.

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09:21:33 1 Q. Okay. And you're reading from the regulation;
09:21:36 2 correct?
09:21:37 3 A. Yes.
09:21:37 4 Q. Okay. So when we come back to the operating
09:21:40 5 agreement, Exhibit 5, at page 22, let's start with the
09:21:49 6 capital account provisions here in Section 4.1.1. This
09:21:56 7 says that the capital accounts are supposed to be
09:21:59 8 maintained in accordance with the capital accounting
09:22:03 9 rules of Section 704(b). And you just testified 704(b)
09:22:07 10 would require you to look at the operating agreement to
09:22:09 11 determine how allocations and distributions are to be
09:22:11 12 made, but that they would have to have substantial
09:22:15 13 economic effect; right?
09:22:16 14 A. Correct.
09:22:16 15 Q. Did you determine that in this case all of the
09:22:19 16 distributions and allocations had substantial economic
09:22:23 17 effect?
09:22:23 18 A. Yes.
09:22:24 19 Q. So if I'm understanding your testimony correctly
09:22:26 20 then, we've satisfied Section 704(b); correct?
09:22:30 21 A. In my opinion, absolutely yes.
09:22:32 22 Q. So the only concern we would have about 704(b)
09:22:39 23 then would be how to determine what the distributions
09:22:41 24 and allocations are, and that directs you to look at the
09:22:44 25 operating agreement -- the Code section directs you to

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1 look at the operating agreement?

2 A. Correct.

3 MR. LEWIN: Again, Your Honor, I don't want to
4 interrupt the witness's testimony, but these are all
5 opinions that are not in his report. And when I asked
6 him if all of his opinions were in his report, he said
7 yes.

8 THE ARBITRATOR: I haven't reviewed his report.

9 MR. LEWIN: I know. That's what I'm saying. I
10 understand we're trying to get an idea of how he's
11 looking at it, does it satisfy -- but when he says his
12 opinion is X, Y, and Z, now I have something we never
13 really addressed before.

14 THE ARBITRATOR: Do the opinions that he gave in
15 his report or the deposition require on a foundational
16 underpinning that the provisions of Exhibit A don't run
17 afoul of 704(b)?

18 MR. LEWIN: Probably, but I don't know because
19 it's not in his report.

20 MR. GERRARD: Of course they do. His ultimate
21 opinions, as you're going to hear, are whether the
22 distributions were properly made in this company. That
23 was one of his opinions. To do that, you have to run
24 through this analysis, and he's explaining to you how to
25 conduct that analysis.

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09:23:55 1 THE ARBITRATOR: I understood most of this. It's
09:23:57 2 sort of my own remedial tax education. Some of it I
09:24:04 3 already know. I don't know what his opinions are, but I
09:24:09 4 assume his opinions have to do with whether allocations
09:24:12 5 and distributions were made properly and what the
09:24:15 6 appropriate measure of that is. And a part of that, as
09:24:19 7 I understand it, is -- would have to be look, you know,
09:24:24 8 the way it was set up at least in Exhibit A, did it
09:24:28 9 violate the IRS code. So I'm going to allow it.

09:24:32 10 BY MR. GERRARD:

09:24:32 11 Q. So if you look at Section 4.1.1, you can see that
09:24:36 12 it talks about maintaining a member's capital account.
09:24:38 13 And in general terms, what is a capital account?

09:24:41 14 A. A capital account is a record of what the member
09:24:49 15 has invested in the company. And it's a historical
09:24:55 16 record of their investments, their allocation of income,
09:24:57 17 and the distributions. That's very general what --
09:25:02 18 that's what a capital account is.

09:25:04 19 Q. So if we look at Section 4.1.1, the last sentence
09:25:09 20 says "In general, under such rules, a member's capital
09:25:13 21 account shall be," and then you go to 4.1.1.1, and it
09:25:18 22 says "increased by," and then it gives three things that
09:25:21 23 it can be increased by; correct?

09:25:22 24 A. Correct.

09:25:22 25 Q. And if you look at 4.1.1.2, it says these are the

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09:25:27 1 things that a member's capital account can be decreased
09:25:32 2 by; correct?
09:25:33 3 A. Correct.
09:25:33 4 Q. Is there anything about these two sections that
09:25:36 5 is in any way out of the ordinary?
09:25:38 6 A. No.
09:25:39 7 Q. Okay. So this is just explaining that a capital
09:25:43 8 account's going to go up, according to 4.1.1.1, by the
09:25:48 9 amount of money contributed and the value of the
09:25:50 10 property contributed and by allocations to a member of
09:25:55 11 income and gain; correct?
09:25:56 12 A. Correct.
09:25:57 13 Q. And it's going to go down by -- in 4.1.1.2, by
09:26:02 14 the amount of money distributed to that member, and the
09:26:06 15 value of property distributed to the member, and the
09:26:10 16 allocations to the member of expenditures, and the
09:26:14 17 allocations to the member of loss and deduction?
09:26:16 18 A. Correct.
09:26:17 19 Q. Okay. Those are just general accounting terms;
09:26:19 20 correct?
09:26:19 21 A. That's correct.
09:26:20 22 Q. Now let's turn to Section 5.1 on page 23 of the
09:26:30 23 operating agreement. Of course, we're still on
09:26:32 24 Exhibit A. Section 5.1 starts with the word
09:26:39 25 "Allocations." Do you see where I'm looking?

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09:26:40

1 A. Yes.

09:26:41

2 Q. Was this paragraph and the paragraph that follow

09:26:44

3 important to your analysis?

09:26:45

4 A. Well, yeah. It is important to the analysis. It

09:26:50

5 tells us how to allocate the income.

09:26:52

6 Q. Okay.

09:26:53

7 A. Or where to go to find out how to allocate the

09:26:57

8 income.

09:26:57

9 Q. All right. So according to Section 5.1, it says

09:27:02

10 "Each member's distributive share of income, gain, loss,

09:27:06

11 deduction, or credit (or items thereof) of the company

09:27:12

12 as shown on the annual federal income tax return

09:27:15

13 prepared by the company's accountants or as finally

09:27:19

14 determined by the United States Internal Revenue Service

09:27:21

15 or the courts, and as modified by the capital accounting

09:27:24

16 rules of Section 704(b) of the Code and the Income Tax

09:27:28

17 Regulations thereunder, as implemented by Section 8.5

09:27:33

18 hereof, as applicable, shall be determined as follows."

09:27:37

19 So what does that paragraph mean to you as an

09:27:38

20 accountant?

09:27:39

21 A. It just says take the net income of the company,

09:27:43

22 apply the rules from the Internal Revenue Code to

09:27:47

23 determine what the actual net income is. Maybe -- if

09:27:51

24 the return has been audited, then maybe the courts may

09:27:54

25 have weighed in on some adjustments. But arrive at net

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09:27:59 1 income -- now that you've got net income based on the
09:28:03 2 Internal Revenue Code, now go down to 5.1.1.1, and
09:28:07 3 here's how to allocate that net income.

09:28:09 4 Q. So looking at 5.1.1.1, how does this operating
09:28:14 5 agreement say that that net income is supposed to be
09:28:17 6 allocated?

09:28:18 7 A. It says that "items of income, gain, loss,
09:28:23 8 deduction, or credit shall be allocated among the
09:28:26 9 members in proportion to their percentage interests as
09:28:31 10 set forth in Exhibit B."

09:28:32 11 So it basically refers you to Exhibit B of the
09:28:35 12 operating agreement.

09:28:35 13 Q. Okay. And do the words income, gain, loss,
09:28:41 14 depreciation -- I'm sorry -- deduction or credit, does
09:28:43 15 that cover everything that you could have in a company
09:28:48 16 for accounting purposes? In other words, is that all --
09:28:51 17 is that everything?

09:28:53 18 A. Yeah. That's all inclusive.

09:28:57 19 Q. Does that include depreciation?

09:28:59 20 A. Yes.

09:28:59 21 Q. So it says that you have to do this in proportion
09:29:04 22 to the percentage interest in Exhibit B, and then the
09:29:07 23 rest of that sentence where you stopped in Exhibit B
09:29:09 24 says "subject to the preferred allocation schedule
09:29:13 25 contained in Exhibit B."

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09:29:15 1 Do you see that?

09:29:15 2 A. Yes.

09:29:15 3 Q. Okay. So let's look at Exhibit B. Do you see

09:29:26 4 the members' percentage interest there?

09:29:27 5 A. Yes.

09:29:29 6 Q. And what -- according to those members'

09:29:34 7 percentage interest as used in Section 5.1.1.1 of

09:29:41 8 Exhibit A, how is income, gain, loss, deduction, or

09:29:45 9 credit to be allocated?

09:29:47 10 A. To be allocated 50-50. 50 percent to Bidsal;

09:29:51 11 50 percent to CLA Properties.

09:29:53 12 Q. Now, that appears to be the general rule --

09:29:59 13 correct? -- for this company.

09:30:03 14 A. Yes.

09:30:03 15 Q. Now, there is this language that says "subject to

09:30:05 16 the preferred allocation schedule contained in

09:30:10 17 Exhibit B."

09:30:10 18 Do you see that language?

09:30:11 19 A. Yes.

09:30:11 20 Q. So we see this word "preferred allocation." What

09:30:19 21 is a preferred allocation generally in accounting terms?

09:30:22 22 A. Preferred allocation means if certain things have

09:30:27 23 happened, then you don't follow the ordinary rules; you

09:30:31 24 would go to this special rule. It would apply only in

09:30:36 25 specifically denominated instances.

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09:30:39 1 Q. Okay. So it's clearly an exception to the
09:30:42 2 general rule?
09:30:43 3 A. It is exception to the general rule.
09:30:45 4 Q. And according to your testimony, it only applies
09:30:47 5 in special -- in specific circumstances?
09:30:51 6 A. Correct.
09:30:52 7 Can we take like a 30-second break or less?
09:30:55 8 MR. GERRARD: Yes.
09:30:56 9 Judge, is that okay?
09:30:57 10 THE ARBITRATOR: Yeah.
09:31:22 11 (Discussion off the record.)
09:31:22 12 BY MR. GERRARD:
09:31:43 13 Q. So you just testified that the general rule in
09:31:45 14 this company according to Exhibit A is that everything
09:31:48 15 gets allocated 50-50 and distributed 50-50 between the
09:31:51 16 members; correct?
09:31:52 17 A. Yes.
09:31:53 18 Q. But then there was an exception to that for what
09:31:57 19 we've referred to here as a preferred allocation. Do
09:32:00 20 you see on Exhibit B the preferred allocation and
09:32:02 21 distribution schedule?
09:32:04 22 A. Yes, I do.
09:32:04 23 Q. Did you review that?
09:32:05 24 A. I did.
09:32:06 25 Q. And can you explain to me what the special

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1 circumstance is that would trigger the use of the
2 special allocation language in Exhibit B?
3 A. Right underneath the heading that you read,
4 Preferred Allocation and Distribution Schedule, it talks
5 about "Cash distributions from capital transactions
6 shall be distributed per the following method."
7 And the "following method" it's referring to is
8 the step-down allocation below.
9 Q. Okay.
10 A. And then it tells us what those capital
11 transactions are: A refinancing event, the sale of
12 company asset. In the event of those two items under
13 this paragraph, cash is to be distributed in this
14 step-down allocation method.
15 Q. So in that first paragraph that you just talked
16 about, you identified "refinancing event" as being what
17 would be a capital transaction; correct?
18 A. Yes.
19 Q. And then you've identified "sale of company
20 asset," and you used the word "asset" as in singular;
21 correct?
22 A. That's the way it's written, yes.
23 Q. So if there was a sale of company asset, in your
24 mind, what did that mean?
25 A. That would mean that if the company sold -- it

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09:33:38 1 appears to refer to the company having a singular asset.

09:33:41 2 So if the company sold that asset, that would trigger

09:33:44 3 this step-down allocation.

09:33:48 4 Q. Okay. And then -- did you read the entirety of
09:33:53 5 Exhibit B?

09:33:53 6 A. I did.

09:33:54 7 Q. Okay. And what other language in Exhibit B did
09:33:58 8 you find to be important to determining how allocations
09:34:02 9 and distributions were to be made in this company?

09:34:05 10 A. Down towards the bottom of the page, the
09:34:08 11 paragraph that begins with "Cash distribution of profits
09:34:12 12 from operations shall be allocated 50-50."

09:34:16 13 Q. So that's the general rule?

09:34:18 14 A. That's the general rule.

09:34:19 15 Q. Okay. And then is there any other language that
09:34:23 16 was important in your analysis?

09:34:23 17 A. It goes on the next -- the very final paragraph
09:34:27 18 of the operating agreement reads that "It is the express
09:34:31 19 intent of the parties that 'cash distribution of
09:34:33 20 profits' refers to distributions generated from
09:34:38 21 operating results -- excuse me -- operations resulting
09:34:43 22 in ordinary income in contrast to cash distributions
09:34:48 23 arising from capital transactions or nonrecurring events
09:34:51 24 such as a sale of all or a substantial portion of
09:34:56 25 company's assets or cash out financing."

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09:36:01
09:36:02

1 **Q. What did you understand that to mean?**

2 A. Basically, it says if you have a cash

3 distribution of cash that came about because of the

4 operations of the company, that would be 50-50. If you

5 had a capital transaction as defined here, then you

6 would go up and look at the waterfall or the step-down.

7 MR. LEWIN: I'm sorry. Can I have the last part

8 of that answer read, Your Honor?

9 THE ARBITRATOR: If you have a capital

10 transaction, then you use the waterfall or step-down

11 allocation.

12 MR. LEWIN: Thank you.

13 THE WITNESS: Yeah. A capital transaction would

14 trigger the waterfall or the step-down.

15 BY MR. GERRARD:

16 **Q. Now, is this a capital transaction defined by the**

17 **tax code, or is this a capital transaction defined by**

18 **the operating agreement?**

19 A. It seems to be a capital transaction, in my

20 opinion, defined by the operating agreement.

21 **Q. Okay. Now, when you see -- well, let's start**

22 **with that. Would that be consistent with Section 704(b)**

23 **of the tax code in terms of how you determine**

24 **allocations and distributions?**

25 A. The question is, is Exhibit B consistent with

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09:36:05

1 704(b)?

09:36:06

2 Q. No. My question is would it be consistent with

09:36:08

3 the tax codes 704(a) and 704(b) for the operating

09:36:12

4 agreement to define how special allocations are made?

09:36:16

5 A. Yes.

09:36:17

6 Q. Okay.

09:36:18

7 A. Yeah.

09:36:19

8 Q. So you wouldn't expect to find definitions in the

09:36:22

9 tax code to be used to determine how special allocations

09:36:27

10 in a partnership agreement or an operating agreement

09:36:30

11 were to be made?

09:36:31

12 A. The operating agreement would control unless for

09:36:36

13 some reason it was inconsistent with the tax code.

09:36:38

14 Q. Okay. So when you were trying to determine for

09:36:43

15 purposes of your opinion what a capital transaction is,

09:36:46

16 what did you rely upon?

09:36:47

17 A. I relied upon the definition as provided in

09:36:51

18 Exhibit B.

09:36:51

19 Q. Okay. And the definition in Exhibit B of a

09:36:55

20 capital transaction, according to what you read, is

09:36:58

21 what?

09:36:58

22 A. So it describes a capital transaction or a

09:37:04

23 nonrecurring event. And then it gives "events such as a

09:37:10

24 sale of all or a substantial portion of the company's

09:37:15

25 assets or cashout financing."

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09:37:18 1 Those are very clear. That's what constitutes a
09:37:20 2 capital transaction.

09:37:22 3 Q. Now, you have read the expert report of the
09:37:26 4 plaintiffs in this case -- sorry -- of CLA's expert in
09:37:31 5 this case; correct?

09:37:31 6 A. Yes.

09:37:32 7 Q. Does he take the same position as it relates to
09:37:36 8 what a capital transaction is?

09:37:38 9 A. Well, his position of a capital transaction
09:37:44 10 includes items which I don't believe should be included
09:37:47 11 as a capital transaction.

09:37:48 12 Q. Does he try to use a tax definition of a capital
09:37:53 13 transaction to apply that to the operating agreement?

09:37:56 14 A. Yes.

09:37:57 15 Q. Instead of using the language that's actually in
09:38:00 16 the operating agreement?

09:38:00 17 A. Correct.

09:38:01 18 Q. Okay. Now, the language that's in the operating
09:38:05 19 agreement makes reference to "events such as a sale of
09:38:10 20 all or a substantial portion of the company's assets or
09:38:13 21 cash out financing."

09:38:14 22 Do you see that?

09:38:15 23 A. Yes.

09:38:15 24 Q. If a capital transaction was intended by the
09:38:18 25 parties to this operating agreement to be the sale of

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09:38:22 1 any piece of property -- any piece of real property,
09:38:26 2 what would be the purpose of having words "such as a
09:38:30 3 sale of all or a substantial portion of the company's
09:38:33 4 assets or cash out financing"?

09:38:35 5 A. Well, what you just described would be
09:38:38 6 contradictory to what's written.

09:38:40 7 Q. Okay. Now, are you aware, sir -- well, first of
09:38:53 8 all, have you reviewed all the tax returns of this
09:38:57 9 company?

09:38:57 10 A. I do not believe I've seen the 2020 return.
09:39:05 11 Maybe the '19. I don't remember. But up through at
09:39:08 12 least '18, I reviewed them.

09:39:09 13 Q. Okay. And are you aware that there were three
09:39:17 14 individual sales of real property made by this company?

09:39:20 15 A. Yes.

09:39:21 16 Q. Did any of those individual sales trigger this
09:39:26 17 special allocation language in your opinion?

09:39:29 18 A. Not in my opinion, no.

09:39:31 19 Q. Did the company's tax returns ever allocate the
09:39:36 20 gain on any of those individual property sales as if the
09:39:40 21 special allocation language had been triggered?

09:39:43 22 A. No. The gains were always allocated 50-50.

09:39:47 23 Q. Do you know who prepared the company's tax
09:39:50 24 returns?

09:39:50 25 A. Jim Main.

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09:39:52 1 Q. And do you know who Jim Main is?

09:39:55 2 A. I do.

09:39:56 3 Q. How do you know Jim Main?

09:39:57 4 A. I've known Jim Main as a fellow CPA for close to

09:40:02 5 20 years, that neighborhood somewhere.

09:40:04 6 Q. Have you worked on any things that he was working

09:40:08 7 on as well?

09:40:08 8 A. I have not.

09:40:09 9 Q. Okay. Do you know his general reputation?

09:40:13 10 A. He has a good reputation in town. UNLV graduate.

09:40:17 11 Been in practice for 40 years. He might be retiring

09:40:19 12 this year, I think. He's a good man.

09:40:22 13 Q. Did Jim Main treat each of these individual sales

09:40:25 14 as if the special allocation language of Exhibit B had

09:40:29 15 never been triggered?

09:40:30 16 A. That is correct. He did not treat them as if

09:40:33 17 they were capital transactions.

09:40:35 18 Q. Does this operating agreement, according to your

09:40:39 19 reading of it, contemplate selling off individual pieces

09:40:43 20 of real property one at a time?

09:40:46 21 A. It doesn't. Nowhere in here does it talk about

09:40:51 22 that. It always talks about substantially all or

09:40:54 23 company asset nonrecurring event.

09:40:58 24 Q. Now, if there was a sale of an individual piece

09:41:07 25 of real property by this company, and if the special

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09:41:11 1 allocation -- if the special allocation language was not
09:41:17 2 triggered, how would the proceeds from the sale of an
09:41:19 3 individual building be allocated and distributed
09:41:23 4 according to this operating agreement?

09:41:24 5 A. If the special allocation provisions were not
09:41:32 6 triggered, then the sale would be allocated -- the
09:41:36 7 proceeds from the sale would be allocated 50-50 under
09:41:39 8 this agreement because there was no capital transaction
09:41:42 9 pursuant to the agreement definition.

09:41:47 10 Q. Okay. Now, how did the sale proceeds from the
09:41:49 11 sale of the three individual buildings that were sold,
09:41:53 12 how did -- how were those proceeds actually distributed
09:41:58 13 by Mr. Bidsal?

09:41:58 14 A. The distributions from those sale proceeds -- the
09:42:02 15 first part of the distribution was Mr. Bidsal looked at
09:42:06 16 the proceeds and he looked at the cost of -- the
09:42:11 17 original cost of the property that was sold. And he
09:42:17 18 apportioned or basically divided them. And he
09:42:21 19 distributed 70-30 -- 70 percent to CLA, 30 percent to
09:42:27 20 himself -- the portion that was attributable to the
09:42:31 21 original cost of the building or the capital -- the
09:42:33 22 original capital contribution that went to use to
09:42:37 23 purchase or was allocated to the purchase of that
09:42:39 24 building.

09:42:39 25 The balance of the proceeds was distributed

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09:42:41 1 50-50. The balance of the proceeds would be
09:42:44 2 attributable to the gain.

09:42:45 3 **Q. So if the special allocation language of**
09:42:47 4 **Exhibit B was never triggered, did the manner in which**
09:42:52 5 **Mr. Bidsal distributed the revenue benefit himself or**
09:42:56 6 **benefit CLA Properties?**

09:42:57 7 A. No, if he -- it benefitted him -- it benefitted
09:43:03 8 CLA Properties. Had he followed this agreement, it
09:43:09 9 would have all been distributed 50-50. But he didn't.
09:43:11 10 So CLA Properties got 70 percent of that first part
09:43:17 11 versus just 50 percent.

09:43:18 12 **Q. How did Mr. Bidsal determine -- well, let me ask**
09:43:22 13 **it this way: Have you ever seen any purchase agreement**
09:43:27 14 **for this company to have purchased the real property it**
09:43:31 15 **ended up owning?**

09:43:32 16 A. The only purchase agreement for the actual
09:43:36 17 property was the acquisition of the Greenway property in
09:43:40 18 Arizona.

09:43:41 19 **Q. Okay. So what is your understanding of how this**
09:43:46 20 **company ended up to own real property?**

09:43:48 21 A. Well, the company purchased a note that was --
09:43:56 22 well, they purchased a note. And that note was secured
09:44:00 23 by the green -- Green Valley Commerce property. And
09:44:10 24 then they eventually got a deed in lieu of foreclosure
09:44:15 25 on that note and thereby acquired the property. So they

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09:44:19 1 acquired the property through the purchase of a note,
09:44:22 2 got a deed in lieu of foreclosure on that note, and then
09:44:25 3 got fee title to the property.

09:44:27 4 Q. So have you ever seen any actual purchase
09:44:30 5 documents associated with Green Valley Commerce, this
09:44:34 6 company, purchasing the real property that it currently
09:44:37 7 owns, other than the Greenway property?

09:44:39 8 A. No. It did not purchase them individually. It
09:44:45 9 purchased the note. It did not purchase the property.

09:44:47 10 Q. Okay. So in looking at the company's tax
09:44:52 11 records, how was the purchase price of the promissory
09:44:58 12 note allocated amongst the property -- the real property
09:45:02 13 that it ended up ultimately owning?

09:45:04 14 A. So initially, Mr. Main, the CPA -- I assume
09:45:09 15 Mr. Bidsal was involved -- they initially took the
09:45:13 16 purchase price of the note and allocated it among the
09:45:16 17 nine parcels -- eight buildings and the parking --
09:45:22 18 parking lot.

09:45:22 19 Q. Let me stop you right there for a second.

09:45:25 20 At the time that the note was acquired, was the
09:45:29 21 real property subdivided into nine parcels?

09:45:32 22 A. It was not.

09:45:33 23 Q. Okay. What was actually the collateral for the
09:45:37 24 note?

09:45:37 25 A. It was two parcels made up of all of the

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09:45:41 1 buildings. There were eight buildings on one parcel and
09:45:44 2 then a separate parcel which consisted of the parking
09:45:47 3 lot.

09:45:47 4 Q. And then what happened after that? Because you
09:45:53 5 talked about there being separate ownership.

09:45:55 6 A. So after the deed in lieu was -- after the fee
09:46:01 7 title was received as a result of the deed in lieu,
09:46:06 8 14 days later, approximately, the eight buildings were
09:46:12 9 subdivided into eight separate parcels.

09:46:14 10 Q. Okay. And how was -- does that then tie into the
09:46:21 11 testimony you gave earlier about how Jim Main had
09:46:25 12 attributed the purchase price of the note amongst those
09:46:28 13 individual parcels?

09:46:29 14 A. Right. He went in and took the purchase price of
09:46:32 15 the note and allocated that amongst the parking and the
09:46:36 16 eight buildings.

09:46:37 17 Q. Okay. And where did you see that allocation
09:46:40 18 first show up in your review of the tax returns?

09:46:42 19 A. 2011 tax return.

09:46:44 20 Q. Okay. Was there a tax asset detail --

09:46:48 21 A. There's an appreciation schedule.

09:46:49 22 Q. And then was there ultimately any other steps
09:46:53 23 taken by the company to make sure that those allocations
09:46:56 24 were accurate?

09:46:57 25 A. In March of 2013, they hired a firm to come and

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09:47:02 1 do what is called a cost segregation study. And the Page 359
09:47:06 2 cost segregation study basically went in and reallocated
09:47:11 3 the purchase price to --
09:47:13 4 **Q. The purchase price of what?**
09:47:14 5 A. The note.
09:47:14 6 **Q. Okay.**
09:47:16 7 A. Went in and reallocated that over the eight
09:47:18 8 buildings and the parking lot.
09:47:22 9 **Q. Okay. So now let's take that back to what you**
09:47:27 10 **explained Mr. Bidsal did on the sale of each of the**
09:47:30 11 **three buildings. Explain that once again. What did**
09:47:34 12 **Mr. Bidsal do when each of the three buildings were**
09:47:37 13 **sold?**
09:47:39 14 MR. LEWIN: Just a second. Okay.
09:47:44 15 THE ARBITRATOR: Go ahead.
09:47:44 16 A. So when the buildings were sold, Mr. Bidsal
09:47:51 17 identified the amount of a distribution that could be
09:47:54 18 made. He distributed part of that amount based on how
09:48:00 19 much was allocated to the purchase price or allocated to
09:48:05 20 each of the buildings sold.
09:48:07 21 So for example, if there were nine buildings and
09:48:09 22 we paid \$900,000 and we allocated \$100,000 to each of
09:48:14 23 those eight buildings -- I'm sorry. Eight buildings, we
09:48:16 24 allocated \$100,000 to each and \$100,000 to the parking
09:48:20 25 lot. Three of them were sold. So that \$100,000

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09:48:26 1 allocated to the purchase of that building would have
09:48:31 2 been allocated on a 30 percent to Mr. Bidsal and
09:48:36 3 70 percent to CLA. The balance of it was attributable
09:48:42 4 to the gain on the sale, and that was allocated and
09:48:45 5 distributed 50-50.
09:48:45 6 BY MR. GERRARD:
09:48:46 7 Q. So in your hypothetical, any amount over the \$100
09:48:50 8 that was paid to purchase the property --
09:48:51 9 THE ARBITRATOR: 100,000, I think, but -- yeah.
09:48:51 10 BY MR. GERRARD:
09:48:51 11 Q. Did you say 100,000?
09:48:54 12 A. 100,000.
09:48:56 13 Q. Okay. So any amount over the 100,000 that was
09:49:01 14 derived from the sale would have been distributed 50-50?
09:49:03 15 A. Would have been, yes, 50-50.
09:49:05 16 Q. So if you open the binder in front of you to
09:49:08 17 Exhibit 12. Actually, turn to Exhibit 13.
09:49:40 18 Actually, before we go there -- I'm jumping
09:49:43 19 around. I'm sorry. Let's go to the last few pages of
09:49:47 20 Exhibit 18. Let's start there. Do you recognize
09:49:57 21 Exhibit 18?
09:49:57 22 A. Yes. It is the cost segregation study.
09:50:01 23 Q. Okay. If you go towards the very end of that
09:50:05 24 document, on the third to the last page, which on mine
09:50:30 25 has a Bates label of CLA Bidsal 2540.

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09:50:36 1 A. Yes.

09:50:36 2 Q. Do you recognize that page?

09:50:38 3 A. Yes.

09:50:39 4 Q. What is that page?

09:50:40 5 A. This is the allocation of the purchase price to

09:50:47 6 the buildings and to the land.

09:50:48 7 Q. Okay. Is this the one you testified about Jim

09:50:51 8 Main preparing?

09:50:53 9 A. This one was prepared by the cost segregation

09:50:56 10 study people.

09:50:57 11 Q. The cost segregation study wasn't done until --

09:51:01 12 according to this, it wasn't completed --

09:51:03 13 A. Well, this is from the cost segregation study.

09:51:07 14 Q. This is just an exhibit to it.

09:51:11 15 A. Just one minute.

09:51:14 16 Q. Just to be clear, so our cost segregation study's

09:51:17 17 dated March 15, 2013.

09:51:22 18 THE ARBITRATOR: If you go back one page to Bates

09:51:26 19 2539.

09:51:28 20 THE WITNESS: Oh, I'm sorry. This is -- yes,

09:51:32 21 this is the detail prepared by Jim Main on which the

09:51:36 22 2011 tax return was based.

09:51:36 23 BY MR. GERRARD:

09:51:38 24 Q. Okay. And that was my question.

09:51:39 25 A. I'm sorry. That was -- yes.

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09:51:40 1 Q. So now let's go back to Exhibit 13 where we
09:52:02 2 started. Do you recognize Exhibit 13 as being the
09:52:12 3 escrow statement from the sale of Building C?
09:52:15 4 A. Yes.
09:52:17 5 Q. Okay. And then if you look at Exhibit 14, which
09:52:21 6 is the next one there in order, did you review this
09:52:25 7 document as part of your preparation of your opinion?
09:52:27 8 A. I did.
09:52:28 9 Q. And what did you understand this Exhibit 14 to
09:52:31 10 be?
09:52:31 11 A. This was Mr. Bidsal's calculation of the
09:52:37 12 distribution that would be made to him and to CLA.
09:52:40 13 Q. Okay. And how did -- did this distribution
09:52:49 14 breakdown follow the pattern that you described earlier
09:52:52 15 about what you saw Mr. Bidsal had done on the sale of
09:52:56 16 each of the three buildings?
09:52:57 17 A. Yes. This distribution went out on a 70-30
09:53:00 18 ratio.
09:53:01 19 Q. Why was it done on a 70-30 ratio, to your
09:53:05 20 understanding?
09:53:05 21 A. My understanding is that Mr. Bidsal determined
09:53:09 22 that it was the right thing to do since this is the --
09:53:14 23 it was a return. He was just returning capital.
09:53:17 24 Q. Okay. And when you say "he was just returning
09:53:20 25 capital," what do you mean by that?

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09:53:22 1 A. It was a return of capital; therefore, it would
09:53:26 2 be on a 70-30. Page 363

09:53:27 3 Q. So what was the allocable share of -- that had
09:53:34 4 been attributed -- allocable share of the purchase price
09:53:37 5 of the note that had been attributed to Building C? If
09:53:42 6 you want, you can look back again at that last page of
09:53:47 7 Exhibit 18, which is that tax asset detail we saw.

09:53:50 8 A. Let me look at my report. So the original
09:54:09 9 allocation to Building C was 371,773.

09:54:14 10 Q. Okay. And if we look back at Exhibit 14 again --
09:54:17 11 I'm just going to round that for purposes of our
09:54:20 12 conversation to 371,000 so I don't have to give all the
09:54:24 13 change numbers. But if we look back at Exhibit 14, it
09:54:30 14 shows at the very top that there was a certain amount of
09:54:33 15 money generated from the sale; correct?

09:54:35 16 A. Correct. A million -- the sales price looks like
09:54:44 17 it was 1,025,000.

09:54:45 18 Q. Okay. And you can see in his calculations that
09:54:48 19 he gets to a net proceeds number. Do you see that?

09:54:50 20 A. Yes.

09:54:50 21 Q. \$898,629.23?

09:54:55 22 A. Correct.

09:54:56 23 Q. And then he adds in closing costs, and there's a
09:55:00 24 number there of \$790,000. Do you know what that number
09:55:05 25 represents?

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09:55:05 1 A. That would have been the purchase price of the
09:55:07 2 Greenway property in Arizona.

09:55:08 3 Q. Now, why would that be related to this sale of
09:55:13 4 Building C?

09:55:14 5 A. Because Building C was -- the sale -- Building C
09:55:19 6 was sold pursuant to a 1031 exchange.

09:55:23 7 Q. And explain to --

09:55:24 8 THE ARBITRATOR: I know.

09:55:25 9 BY MR. GERRARD:

09:55:25 10 Q. Okay. So when you sell something in a 1031
09:55:28 11 exchange, what happens to the original cost basis that's
09:55:31 12 being carried on the books of the company for the
09:55:34 13 property that's being sold?

09:55:35 14 A. So the original cost basis of the property
09:55:40 15 sold --

09:55:41 16 Q. And that's the \$371,000 number; right?

09:55:45 17 A. That is correct.

09:55:45 18 Q. Okay.

09:55:46 19 A. That cost basis becomes the cost basis of the
09:55:49 20 property acquired.

09:55:51 21 Q. In this case, what was the property that was
09:55:52 22 acquired?

09:55:53 23 A. It was the Greenway property in Arizona.

09:55:56 24 Q. Okay. So when the Greenway property in Arizona
09:55:59 25 was acquired -- one second.

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09:56:35 1 Look at -- you can keep your thumb on Exhibit 14
09:56:38 2 where we were looking at, but turn over to Exhibit 17.
09:56:43 3 A. I'm there.
09:56:44 4 Q. And is this the escrow closing statement you
09:56:47 5 looked at for the purchase of the Greenway property?
09:56:49 6 A. Yes.
09:56:50 7 Q. Okay. So we can see from this document that
09:56:53 8 there was a price paid to the seller of this property of
09:56:59 9 \$790,000; correct?
09:57:00 10 A. Correct.
09:57:01 11 Q. But what was the company Green Valley Commerce's
09:57:05 12 cost basis in this new Greenway property?
09:57:08 13 A. It was the carryover from Building C of 371,000.
09:57:17 14 Q. Now, if they had not done a 1031 exchange, what
09:57:23 15 would have happened to the difference between the
09:57:27 16 \$898,000 of net proceeds and the \$371,000 of the basis
09:57:33 17 in Building C? What would have happened to that money
09:57:36 18 that was the difference?
09:57:37 19 A. That would have been a gain, and that would have
09:57:41 20 been distributed out.
09:57:42 21 Q. So what would Mr. Bidsal have been entitled to of
09:57:45 22 that money under the operating agreement?
09:57:46 23 A. Under the operating agreement, he would have been
09:57:48 24 entitled to 50 percent of that money.
09:57:50 25 Q. Okay. So that -- Mr. Bidsal's share of that

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09:57:54 1 appreciation of that property was rolled over into the
09:57:59 2 purchase of the Greenway property?
09:58:00 3 A. That is correct.
09:58:01 4 Q. And he never received his share of that
09:58:04 5 appreciation; correct?
09:58:04 6 A. He did not.
09:58:05 7 Q. So now let's go back to --
09:58:10 8 THE ARBITRATOR: Can I ask a question?
09:58:10 9 MR. GERRARD: Yes.
09:58:13 10 THE ARBITRATOR: Does it matter that the cost
09:58:15 11 segregation report came a year after the 1031 exchange
09:58:21 12 in the sale of Building C?
09:58:23 13 THE WITNESS: Yeah, they actually readjust the
09:58:26 14 basis of the Greenway property from 371 to 399 --
09:58:33 15 THE ARBITRATOR: I saw both those numbers.
09:58:35 16 THE WITNESS: -- pursuant to that report two
09:58:35 17 years later.
09:58:36 18 THE ARBITRATOR: Okay. Go ahead.
09:58:38 19 BY MR. GERRARD:
09:58:38 20 Q. So when we go back to Exhibit 14, after taking
09:58:47 21 out the money that was used to purchase the Greenway
09:58:50 22 property, according to this, it shows that there was a
09:58:53 23 leftover amount of \$52,069, and then \$43,203 that had
09:59:00 24 been paid on a promissory note from the sale of
09:59:03 25 Building C. So making up 95,000; correct?

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09:59:06 1 A. Correct.

09:59:06 2 Q. And then how was that 95,000 distributed?

09:59:10 3 A. 70-30.

09:59:11 4 Q. Okay. And why was there no portion of that that

09:59:16 5 was distributed by Mr. Bidsal on a 50-50 basis? What

09:59:18 6 was your understanding of why he did it only on a 70-30

09:59:21 7 basis?

09:59:22 8 MR. LEWIN: Objection, Your Honor. Lack of

09:59:25 9 foundation. This would be pure speculation.

09:59:27 10 MR. GERRARD: I don't think so, Your Honor. He

09:59:28 11 said right in his report that he spoke with Mr. Bidsal.

09:59:30 12 THE ARBITRATOR: Do the foundation question

09:59:33 13 first.

09:59:33 14 MR. GERRARD: Sure. I'll be happy to do that.

09:59:34 15 BY MR. GERRARD:

09:59:34 16 Q. Did you speak with Mr. Bidsal to determine how

09:59:37 17 the distributions were calculated on each of the sales

09:59:40 18 of the three buildings?

09:59:41 19 A. We -- yes. We reviewed this report -- these

09:59:46 20 calculations for that distribution with Mr. Bidsal.

09:59:48 21 Q. With Mr. Bidsal; correct?

09:59:49 22 A. Yes.

09:59:50 23 Q. Okay. What was your understanding from your

09:59:54 24 communications with Mr. Bidsal as to the reason why

09:59:57 25 everything from -- all the leftover proceeds from the

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1 sale of Building C were distributed 70-30 instead of
2 50-50?
3 A. He took the position that this was a return of
4 the original capital and that it was the fair and
5 equitable thing to do.
6 Q. Okay. And is that because the amount that was
7 leftover was less than the \$371,000 of basis?
8 A. Right.
9 Q. So if there had been enough leftover money that
10 it exceeded \$371,000, what is your understanding what
11 Mr. Bidsal would have done according to what he told
12 you?
13 A. He would have distributed the 371 on a 70-30, and
14 the excess would have gone out 50-50.
15 Q. Did Mr. Bidsal explain to you why he chose to do
16 this when the special allocation language had never been
17 triggered?
18 A. Just, he felt like that was the right thing to
19 do.
20 Q. Now let's go down to Exhibit 22.
21 A. Okay.
22 Q. Do you recognize Exhibit 22 as the closing
23 statement from the sale of Building E?
24 A. I do.
25 Q. Turn to Exhibit 23. Do you recognize this

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1 document?

2 A. Yes. That is the calculation of the
3 distribution.

4 Q. And, again, this document you also discussed with
5 Mr. Bidsal; correct?

6 A. We did.

7 Q. And what did Mr. Bidsal do in this breakdown?

8 A. As I explained earlier, he determined what the
9 cost basis of the building was. That's the 427,624.
10 That number agrees with the cost segregation schedule.
11 He backed -- he added in the commissions to come up with
12 a total cost -- in his estimation, a total cost basis.
13 That \$479,000 was the amount that was distributed 70-30,
14 70 percent to CLA; 30 percent to himself.

15 Q. Okay.

16 A. And then the balance of cash available -- or the
17 balance of the gain, 370,000 -- or the balance of the
18 proceeds -- I'm sorry -- the 370,000, that was
19 distributed on a 50-50 basis.

20 Q. And did you look at the tax returns for the year
21 2014?

22 A. Yes.

23 Q. And did the tax returns for the year 2014 --
24 Schedule K and K-1s -- did they reflect how the
25 allocation of the gain from the sale of this building

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10:03:25 1 had been allocated --

10:03:26 2 A. Yes.

10:03:27 3 Q. -- and how it had been distributed?

10:03:29 4 A. Yes, it did reflect that.

10:03:31 5 Q. Did it show there was a 70-30 distribution that

10:03:35 6 had been made of the basis portion of the sale of

10:03:40 7 Building E?

10:03:42 8 A. It's not broken down on the tax return, but you

10:03:45 9 can tell there was a disproportionate distribution made

10:03:48 10 because the K-1s reflect 646,000 going to CLA and only

10:03:55 11 454,000 going to Mr. Bidsal. So it does reflect that.

10:04:02 12 Q. And if you look at the K-1s for that year on the

10:04:07 13 2014 tax return -- if you look at, for instance, page

10:04:11 14 CLA Bidsal 1819 -- this is the CLA K-1.

10:04:17 15 A. Yes.

10:04:18 16 Q. Do you see on line 10?

10:04:20 17 A. Yes.

10:04:21 18 Q. What does that reflect?

10:04:23 19 A. So line 10 is the allocation of the tax gain

10:04:28 20 between the members. So that was CLA's -- on 1819, that

10:04:38 21 is CLA's share of the gain.

10:04:39 22 Q. Okay. And if you look at Schedule K in that same

10:04:43 23 tax return.

10:04:44 24 A. Yes.

10:04:44 25 Q. On page 1815.

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10:04:47

1 A. Yes.

10:04:49

2 Q. Does it reflect what the actual gain was from the

10:04:51

3 sale of Building E?

10:04:53

4 A. Yeah. The actual gain was 410,000.

10:04:57

5 Q. So when you compare that to the two

10:05:00

6 Schedule K-1s, what does that tell you about how the

10:05:05

7 \$410,691 was allocated?

10:05:08

8 A. It was allocated equally between the two members.

10:05:12

9 Q. Is that inconsistent with what you understand

10:05:18

10 CLA's position is in this case, that that allocation

10:05:21

11 should have been 70-30 because the special allocation

10:05:25

12 language should have been triggered?

10:05:26

13 A. The allocation of the gain -- well, it's

10:05:37

14 inconsistent with the way that Mr. Gerety, their expert,

10:05:43

15 has done the allocation.

10:05:44

16 Q. Okay. Because the way he's done it, the

10:05:47

17 allocation should have tracked the special allocation

10:05:50

18 language on Exhibit B showing a 70-30 split of all of

10:05:55

19 the gain; correct?

10:05:56

20 A. Correct.

10:05:57

21 Q. And instead, on the tax return, it clearly shows

10:06:02

22 that all the gain was 50-50; correct?

10:06:03

23 A. Correct.

10:06:03

24 Q. And did you find that that was consistent on each

10:06:05

25 tax return when there was a sale of a building?

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10:06:09 1 A. Yes. Yeah, all three of the buildings, any gain Page 372
10:06:13 2 was allocated equally between the members.
10:06:16 3 Q. And that was the same even on the sale of
10:06:20 4 Building C; correct?
10:06:20 5 A. Correct.
10:06:21 6 Q. If you looked at the tax return from the --
10:06:23 7 covered the sale of Building C, even though the
10:06:26 8 distribution of the money was all 70-30 because it was
10:06:29 9 less than the basis in the property, the allocation on
10:06:33 10 the tax return shows that it was allocated 50-50;
10:06:35 11 correct?
10:06:35 12 A. That is correct.
10:06:36 13 Q. All right. Then let's also take a look at
10:06:51 14 Exhibit 25. Let me know when you're there.
10:07:06 15 A. I'm there.
10:07:07 16 Q. And do you recognize this as the settlement
10:07:10 17 statement from the sale of Building B?
10:07:12 18 A. Yes. This is the settlement from the Building B
10:07:16 19 sale.
10:07:17 20 Q. Did you see Exhibit 26?
10:07:18 21 A. Yes.
10:07:19 22 Q. 26?
10:07:21 23 A. 2-6.
10:07:22 24 Q. Yes. What is Exhibit 26?
10:07:24 25 A. Exhibit 26 is the calculation of the amounts that

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10:07:27 1 would be distributed between Mr. Bidsal and CLA.

10:07:31 2 Q. And, again, how was -- how were the -- I'm sorry.

10:07:36 3 How were the distributions done of the sales

10:07:41 4 proceeds from the sale of Building B?

10:07:42 5 A. The same as with prior to. The amount of the

10:07:47 6 basis -- the original cost basis -- was determined.

10:07:50 7 That amount was -- that amount plus some sales costs was

10:07:56 8 allocated on a -- allocated on a -- I'm sorry.

10:08:00 9 In this case, it was the adjusted basis plus the

10:08:04 10 sales cost was allocated 70-30 between Mr. Bidsal and

10:08:09 11 CLA. And the balance of the sales price was allocated

10:08:14 12 on a 50-50 basis.

10:08:15 13 Q. Okay. And, again, in the tax return for 2015, if

10:08:22 14 you look at Schedule K and the Schedule K-1s, can you

10:08:28 15 see that all of the sales proceeds -- all of it -- from

10:08:31 16 the sale of Building B was allocated on a 50-50 basis?

10:08:36 17 A. That is correct.

10:08:37 18 Q. And can you see that it was -- that the

10:08:40 19 distributions tracked the schedule that had been

10:08:44 20 prepared by Mr. Bidsal that you just looked at?

10:08:47 21 A. Yes.

10:08:47 22 Q. Now, is the special allocation language that you

10:09:06 23 saw in this Exhibit B consistent with the type of

10:09:16 24 special allocation language that you've seen in other

10:09:18 25 operating agreements or other partnership agreements?

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10:09:20 1 A. It's --

10:09:27 2 MR. LEWIN: Excuse me. Pardon me. That's an

10:09:30 3 area that he did not testify about, nor is it in his

10:09:36 4 report.

10:09:37 5 MR. GERRARD: He actually did testify. You asked

10:09:38 6 him these specific questions.

10:09:41 7 MR. LEWIN: No. I asked him a different

10:09:43 8 question. I asked him a different question. Not that

10:09:46 9 one. I know the question that I asked him. I asked him

10:09:48 10 whether the waterfall was common in these type of

10:09:51 11 agreements, not the special allocation language which

10:09:54 12 they're talking about.

10:09:54 13 MR. GERRARD: Isn't the waterfall the special

10:09:54 14 allocation language?

10:09:56 15 MR. LEWIN: No. No --

10:09:56 16 THE ARBITRATOR: Isn't the waterfall just another

10:09:59 17 way of talking about the step-down allocation?

10:10:02 18 MR. LEWIN: That is the step-down allocation.

10:10:03 19 But -- maybe I misunderstood the question. I thought

10:10:07 20 he's talking about the -- what they call the "triggering

10:10:11 21 language."

10:10:12 22 THE ARBITRATOR: I thought you were talking about

10:10:13 23 the whole thing. The whole waterfall provision,

10:10:17 24 step-down provision, special allocation, preferred

10:10:20 25 allocation -- to me, those are all the same thing, and

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10:10:22 1 they all discuss what's in Exhibit B below the
10:10:28 2 percentage of members' interest and the statement of the
10:10:32 3 capital contribution.

10:10:33 4 MR. GERRARD: Let me just ask a different
10:10:35 5 question. Make it easier.

10:10:37 6 MR. LEWIN: Maybe I thought he was referring to
10:10:37 7 something else.

10:10:38 8 THE ARBITRATOR: Am I wrong to conflate those
10:10:42 9 four terms?

10:10:43 10 THE WITNESS: Yeah, no. That's -- that's what --

10:10:45 11 THE ARBITRATOR: All right. Go ahead.

10:10:46 12 BY MR. GERRARD:

10:10:46 13 Q. So there's a general concept in many partnership
10:10:49 14 agreements and operating agreements where at some
10:10:55 15 triggering event, there's a return of cash to the
10:10:58 16 original owners that contributed cash?

10:10:58 17 A. That is correct.

10:11:02 18 Q. That's fairly common; correct?

10:11:05 19 A. Every partnership agreement has something like
10:11:06 20 that.

10:11:06 21 Q. Okay. So the concept that you see in this
10:11:12 22 operating agreement is not inconsistent with what you've
10:11:15 23 seen --

10:11:16 24 A. No.

10:11:17 25 Q. -- countless times?

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10:11:18 1 A. It is not inconsistent.

10:11:19 2 Q. Okay. And how many times have you seen a
10:11:21 3 partnership agreement or an operating agreement that has
10:11:25 4 provisions like that in it that trigger a special
10:11:28 5 allocation?

10:11:29 6 MR. LEWIN: Objection. Hearsay.

10:11:29 7 THE ARBITRATOR: How many times in his experience
10:11:31 8 has he seen that type of --

10:11:33 9 MR. LEWIN: Yeah, because that would be -- he'd
10:11:35 10 be talking about what he's seen in a document.

10:11:39 11 MR. GERRARD: He's an expert. He's allowed to
10:11:41 12 rely on hearsay for his opinions.

10:11:41 13 THE ARBITRATOR: That's --

10:11:43 14 MR. LEWIN: Okay.

10:11:43 15 A. Dozens of times.

10:11:45 16 BY MR. GERRARD:

10:11:45 17 Q. Now, according to your review of the operating
10:12:02 18 agreement, do you believe that there was -- that there
10:12:06 19 were any distributions that were made to Mr. Bidsal that
10:12:10 20 were inappropriate under the terms of the operating
10:12:14 21 agreement?

10:12:14 22 A. No.

10:12:16 23 Q. Do you think that Mr. Bidsal actually made
10:12:21 24 distributions -- more distributions to CLA than he would
10:12:24 25 have been required to make under the operating

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10:13:44
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10:13:59
10:14:03

1 agreement?

2 A. I'm sorry. A strict interpretation of the
3 operating agreement -- go back and restate my answer to
4 your prior question. Mr. Bidsal would not have made the
5 70-30 allocations.

6 So the answer to the next question, yes, under
7 the operating agreement, I think CLA received more than
8 they would have done -- should have done.

9 Q. But based upon your experience with these types
10 of agreements and what you've testified was some unclear
11 language in the agreement, do you believe that the way
12 that Mr. Bidsal did this was, in your experience, a fair
13 way to treat this?

14 A. Yes, I do.

15 Q. Did the way that he -- is the manner in which
16 Mr. Bidsal treated this beneficial to him or beneficial
17 to CLA?

18 A. No, it was more beneficial to CLA.

19 Q. All right. Now, we talked about the 1031
20 exchange for a minute earlier. Does CLA's
21 interpretation of how this 1031 exchange should be
22 reflected in the cost of purchase for the formula in the
23 operating agreement, does that deprive Mr. Bidsal of his
24 share of the appreciation realized when Building C was
25 sold?

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10:14:03 1 A. It absolutely deprives him of his share of that Page 378
10:14:08 2 depreciation -- of that appreciation, with an "A," not
10:14:10 3 with a "D."

10:14:13 4 THE ARBITRATOR: If you're going to move into a
10:14:15 5 separate area, can I ask a question?

10:14:17 6 MR. GERRARD: Go ahead.

10:14:17 7 EXAMINATION

10:14:17 8 BY THE ARBITRATOR:

10:14:18 9 Q. I'm going to warn you on the front end, it's not
10:14:20 10 going to be very artful. It's kind of premised on a few
10:14:26 11 things, and if any of my premises are wrong, jump in and
10:14:29 12 correct me.

10:14:30 13 A. Okay.

10:14:31 14 Q. It seems to me that the preferred allocation
10:14:35 15 language in Exhibit B is only necessary because there's
10:14:40 16 a disproportionate capital contribution between the two;
10:14:45 17 right?

10:14:46 18 A. Correct.

10:14:46 19 Q. Okay. So the purpose of the preferred allocation
10:14:51 20 language is to ultimately return those disproportionate
10:14:58 21 capital contributions?

10:15:00 22 A. Correct.

10:15:01 23 Q. Okay. So when you state that the sale of
10:15:14 24 Building C individually or in conjunction with the sales
10:15:19 25 of Buildings B and E don't trigger the special

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10:15:29 1 allocation, when would the special allocation have been
10:15:42 2 triggered if -- for instance, let's assume a
10:15:47 3 hypothetical that each of the eight buildings was sold
10:15:51 4 one per year.

10:15:53 5 A. Okay.

10:15:54 6 Q. At some point, you can't sell all eight and
10:16:02 7 distribute all of the sales proceeds 50-50 because then
10:16:05 8 the assets are gone and the member who has the
10:16:13 9 disproportionately higher capital contribution never is
10:16:17 10 able to recoup that. So at what point in that
10:16:21 11 hypothetical would the special allocation have been
10:16:26 12 triggered so that the member with the higher capital
10:16:29 13 contribution would have been able to recoup it?

10:16:32 14 Did that question make sense?

10:16:33 15 A. Yeah, I understand the question. And that really
10:16:36 16 gets to the heart of why there's -- the operating
10:16:41 17 agreement simply isn't clear. There's ambiguity in it.
10:16:44 18 Because the operating agreement on its face says
10:16:48 19 distribute the assets. If you sell one a year, you
10:16:52 20 never get to -- you never get to substantially all the
10:17:00 21 assets. I mean, when do you get to that? So that's
10:17:02 22 really your question --

10:17:03 23 Q. Right.

10:17:04 24 A. -- is when does it get triggered.

10:17:06 25 Q. You're the accountant for this, and there's a

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10:17:08

1 sale of one a year.

10:17:09

2 A. So under that scenario, at some point in time,

10:17:12

3 you've got to step back and say, Well, this doesn't

10:17:15

4 work. It doesn't work.

10:17:19

5 What Mr. Bidsal did is he had the foresight to

10:17:23

6 look at that and say, What the operating agreement says

10:17:25

7 really doesn't work, so I'm going to -- rather than wait

10:17:31

8 for this operating agreement which doesn't really get

10:17:34

9 everybody their money back, I'm going to figure out how

10:17:39

10 much my original capital, how much of CLA's original

10:17:42

11 capital went into each building, and as the building is

10:17:45

12 sold, I'm going to give it back. I'm going to

10:17:47

13 distribute it back. So that --

10:17:50

14 Q. I understand how he did. I'm kind of focused

10:17:53

15 more on your conclusion that it's not triggered by a

10:18:00

16 single sale --

10:18:00

17 A. Okay. I got you.

10:18:00

18 Q. -- and it's not triggered by two, and it's not

10:18:03

19 triggered by three. When would it be triggered?

10:18:03

20 A. When is it triggered?

10:18:03

21 Q. Yeah.

10:18:10

22 A. And that's one of the ambiguities of the

10:18:13

23 operating agreement, is if you sell one a year for the

10:18:14

24 next eight years, do you say, Well, now we've sold four

10:18:19

25 of them -- of the eight, so that meets the definition or

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10:18:23 1 we think that's substantially all, so now we better
10:18:26 2 start doing it pursuant to the waterfall? There really
10:18:28 3 isn't --

10:18:28 4 Q. You got to do it in a way that makes sure that
10:18:34 5 five through eight are going to sell for --

10:18:38 6 A. Right.

10:18:38 7 Q. -- enough to be able to recoup the greater
10:18:43 8 capital contribution.

10:18:45 9 A. Well -- and then let's take your example a little
10:18:49 10 bit further. There isn't enough paid.

10:18:50 11 Q. Right. The first four sell for a million each,
10:18:53 12 and last four sell for 50,000 each.

10:18:55 13 A. Exactly. At that point in time, 704 would
10:18:59 14 require that -- I'm not sure if this agreement has what
10:19:06 15 they call a deficit restoration clause in it, or if
10:19:11 16 there would have to be a special allocation of all the
10:19:13 17 income. But under 704, we would have to make some
10:19:17 18 adjustments to get -- Mr. Bidsal would have to put money
10:19:21 19 back in to make it right so that CLA got their money.
10:19:25 20 That's what 704 tries to protect against, exactly what
10:19:29 21 you're talking about.

10:19:30 22 Q. So it seems like from a practical standpoint,
10:19:32 23 there would be three ways to do it. Way number one is
10:19:36 24 the way Mr. Bidsal did it. Way number two is somewhere
10:19:40 25 between -- in that scenario, sales five through eight

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10:19:44 1 determine that we're close to the -- substantially all
10:19:47 2 and allocate them in a way that returns the greater
10:19:54 3 capital contribution. And then the third way would be
10:19:59 4 to begin with the first property and allocate all of it
10:20:09 5 70-30 to begin to settle the difference between capital
10:20:17 6 contributions. And you might be done by the middle of
10:20:20 7 property three, and now we're equal and everything after
10:20:24 8 that is 50-50. We hope eventually if we actually sold
10:20:30 9 all eight, all three scenarios would get you to the same
10:20:34 10 place?

10:20:34 11 A. We hope, yes.

10:20:36 12 Q. Okay. So is one of those more a gap issue than
10:20:47 13 another?

10:20:47 14 A. The challenge that you run into is what we're
10:20:52 15 talking about now assumes that Bidsal and CLA are going
10:20:55 16 to be partners through the end of the ownership so there
10:20:59 17 would be a chance to reconcile everything. What happens
10:21:02 18 where what we're talking about here where one partner is
10:21:05 19 bought out? And so now you've got to take that into
10:21:10 20 account as well.

10:21:13 21 Q. Okay.

10:21:14 22 THE ARBITRATOR: All right. Now, to the extent I
10:21:15 23 opened up additional things.

10:21:16 24 MR. GERRARD: I'm sure you did. But that's fine.
10:21:19 25 I'm glad to hear that. It shows what you're hearing.

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10:21:24 1 THE ARBITRATOR: I wanted to do it before you
10:21:26 2 moved on to a completely different area.
10:21:29 3 MR. GERRARD: I appreciate that.
10:21:29 4 FURTHER EXAMINATION
10:21:29 5 BY MR. GERRARD:
10:21:29 6 Q. So in a situation like this where there is a real
10:21:32 7 estate venture like this where you're obtaining real
10:21:35 8 estate and managing it and/or selling it, in your
10:21:39 9 experience in what you've seen in handling these kinds
10:21:43 10 of situations from an accounting side, is there always a
10:21:46 11 risk that the capital doesn't get returned?
10:21:48 12 A. Sure. That's why it's called an investment.
10:21:51 13 Q. So the timing of this is important; correct?
10:21:55 14 A. Yes.
10:21:56 15 Q. And who gets to decide the timing of when these
10:22:01 16 distributions are going to be done and what will be the
10:22:06 17 triggering events that will result in a return of
10:22:09 18 capital?
10:22:09 19 A. Ideally, that would be controlled by the
10:22:15 20 operating agreement.
10:22:15 21 Q. Okay. And isn't that what 704(b) of the tax code
10:22:19 22 requires you to look to?
10:22:20 23 A. Yes.
10:22:21 24 Q. Okay. So in following up with what the judge
10:22:25 25 talked about, obviously in this situation, if all of the

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10:22:30 1 bill -- if all of the property had ultimately been sold
10:22:35 2 one at a time, and they at least were sold for enough
10:22:38 3 money to cover the original cost basis, CLA would have
10:22:41 4 received a return of all of its capital; correct?

10:22:43 5 A. That is correct.

10:22:45 6 THE ARBITRATOR: The way that Mr. Bidsal did it.

10:22:48 7 BY MR. GERRARD:

10:22:48 8 Q. The way that Mr. Bidsal was doing it?

10:22:48 9 A. Right.

10:22:49 10 Q. And in your understanding from talking to
10:22:51 11 Mr. Bidsal, is that the reason why Mr. Bidsal did it the
10:22:55 12 way that he did, because he wanted to treat CLA fairly
10:22:57 13 and he didn't want there to be a situation that would
10:23:00 14 arise such as the one that the judge was describing
10:23:03 15 where there would be a situation where they wouldn't get
10:23:05 16 all their money back?

10:23:06 17 A. That's correct. It also addresses -- it also
10:23:10 18 keeps all parties at risk -- equally at risk.

10:23:14 19 Q. Because in this agreement, what was the ownership
10:23:21 20 percentage of this agreement?

10:23:22 21 A. 50-50.

10:23:23 22 Q. Okay. So although there was more cash that had
10:23:26 23 been put in by CLA than Mr. Bidsal, obviously Mr. Bidsal
10:23:31 24 must have put in something else that made this so that
10:23:34 25 they were equal owners in the company; correct?

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10:23:38 1 A. Correct.

10:23:38 2 Q. And what is your understanding of what Mr. Bidsal

10:23:41 3 put in that gave him the right to be a 50 percent owner?

10:23:44 4 A. Mr. Bidsal found the property to begin with, so

10:23:48 5 he put the opportunity in. Plus, he brought the

10:23:51 6 expertise on how to manage the property and how to

10:23:54 7 subdivide the property -- enhance value through

10:23:58 8 subdivision. So that was the reason that CLA was going

10:24:03 9 to give him 50 percent ownership even though CLA put 70

10:24:07 10 percent of the money in.

10:24:08 11 Q. And who was spending all the time to manage this

10:24:11 12 venture?

10:24:11 13 A. Mr. Bidsal.

10:24:12 14 Q. Okay. So the parties had already decided that

10:24:15 15 they had equal risk in this; correct?

10:24:17 16 A. Correct.

10:24:18 17 Q. And if it didn't turn out the way that they hoped

10:24:22 18 it would turn out, they both stood to lose equally;

10:24:25 19 correct?

10:24:25 20 A. Right.

10:24:26 21 Q. Do you think that the judge's assumption that he

10:24:28 22 made a minute ago, that if Mr. -- if the cash wasn't

10:24:31 23 completely returned to CLA, that that meant that CLA

10:24:35 24 bore a disproportionate risk to Mr. Bidsal? Do you

10:24:38 25 think that that is an accurate assumption?

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10:24:41 1 A. No. Because they would both bear the same --
10:24:45 2 they would both bear risk based on their ownership.

10:24:49 3 Q. And the risk had already been determined by the
10:24:51 4 parties to be 50-50?

10:24:52 5 A. Correct.

10:24:53 6 Q. In this situation, again -- I'll ask the same
10:25:00 7 question I asked before -- do you believe that the
10:25:02 8 approach that Mr. Bidsal took, especially given the
10:25:06 9 ambiguities in Exhibit B, was an appropriate response
10:25:10 10 and a fair response to take care of all of the members
10:25:13 11 of the LLC?

10:25:14 12 A. Yes, I do.

10:25:15 13 Q. Now, what if the opposite approach had been --
10:25:25 14 what if the opposite was the case? What if all of the
10:25:30 15 proceeds from the sale of every building were
10:25:33 16 distributed to CLA until CLA had been paid down to 0,
10:25:39 17 and in the middle of that, CLA decided to purchase
10:25:42 18 Mr. Bidsal's interest in the company at a fixed fair
10:25:46 19 market value number?

10:25:48 20 MR. LEWIN: Excuse me. The question as phrased
10:25:50 21 is not relevant.

10:25:53 22 THE ARBITRATOR: I think we're talking about
10:25:56 23 consequences of potential distribution scenarios.

10:26:01 24 MR. LEWIN: He's talking about all of the -- he
10:26:03 25 just said if all of the distributions were done -- were

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10:26:06 1 given to CLA. That's not even the ballpark of what's
10:26:10 2 going on here.

10:26:10 3 THE ARBITRATOR: No. He's saying if they were
10:26:12 4 all done 70-30; right?

10:26:14 5 MR. LEWIN: No. That's not --

10:26:14 6 MR. GERRARD: Let me rephrase the question. I'll
10:26:19 7 be happy to rephrase.

10:26:20 8 MR. LEWIN: That was the reason I objected.

10:26:22 9 BY MR. GERRARD:

10:26:22 10 Q. What if all of the sales proceeds from the sale
10:26:26 11 of each of the buildings was divided 70-30, as CLA has
10:26:31 12 maintained that it should have been, until each of the
10:26:34 13 members' initial cash had been paid down in full, and
10:26:40 14 then in the middle of that, there was an offer by CLA to
10:26:46 15 purchase the property, such as what we have -- not the
10:26:48 16 property. The membership interest. I'm sorry.
10:26:51 17 Purchase the membership interest of Mr. Bidsal. Would
10:26:54 18 that have created a disadvantage for Mr. Bidsal?

10:26:58 19 A. Mr. Bidsal would not have received his share of
10:27:02 20 the appreciation of the gain on the properties under
10:27:05 21 that scenario until -- he wouldn't start to receive that
10:27:10 22 until we got past Step 3 of the waterfall and we're into
10:27:16 23 Step 4 of the waterfall.

10:27:18 24 Q. Okay. Let's take a look at the operating
10:27:22 25 agreement again, which is Exhibit 5. And let's

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10:27:25 1 specifically look at page 10 -- actually, page 11.

10:27:51 2 So you see on page 11 right above Section 4.3,

10:27:55 3 there's a paragraph that starts "The specific intent of

10:27:58 4 this provision."

10:28:01 5 A. Yes.

10:28:01 6 Q. And then right above that there's a formula;

10:28:04 7 correct?

10:28:05 8 A. Correct.

10:28:05 9 Q. And that's the formula that's at issue in this

10:28:07 10 case; correct?

10:28:08 11 A. Yes.

10:28:09 12 Q. This formula -- fair market value of all the

10:28:13 13 properties less the original cost to purchase them times

10:28:18 14 .05 -- isn't that essentially saying each member gets

10:28:24 15 their half of all the appreciation in the property?

10:28:27 16 MR. LEWIN: Objection, Your Honor. The question

10:28:30 17 misstates the document.

10:28:32 18 THE ARBITRATOR: How?

10:28:34 19 MR. LEWIN: Because it's -- just one second.

10:28:37 20 He said fair market value of all the property.

10:28:44 21 That's not -- that's not the issue -- that's not what

10:28:52 22 fair market value is. Fair market value is the value of

10:28:56 23 the company.

10:29:02 24 MR. GERRARD: Actually, fair market value is not

10:29:03 25 the value of the company; it's the value of the

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10:29:04 1 membership interest by definition.

10:29:09 2 THE ARBITRATOR: If you want to restate.

10:29:10 3 MR. GERRARD: Fine.

10:29:11 4 BY MR. GERRARD:

10:29:11 5 Q. Is it your understanding of the intent of this

10:29:13 6 language in the formula that each member would get their

10:29:18 7 half of the appreciation of all of what the company

10:29:21 8 owned if there was a purchase by one member of the other

10:29:25 9 member's membership interest?

10:29:26 10 A. That is exactly the way the formula reads.

10:29:29 11 Q. So if you utilized this step-down allocation

10:29:33 12 language the way that CLA is asking the court to utilize

10:29:39 13 it, if they had received all the appreciation because

10:29:44 14 they had -- well, they had received a disproportionate

10:29:49 15 share of all the appreciation on the three buildings

10:29:51 16 that were sold because they got 30 percent of all the

10:29:53 17 sales proceeds and Mr. Bidsal only got 30 percent --

10:29:58 18 THE ARBITRATOR: They got 70. You said they got

10:29:58 19 30 -- or he got 30.

10:30:00 20 MR. GERRARD: I thought I said CLA. Did I --

10:30:01 21 THE ARBITRATOR: You said CLA. You just said 30

10:30:04 22 for both.

10:30:05 23 MR. GERRARD: Okay. Let me rephrase.

10:30:06 24 THE ARBITRATOR: Sorry.

10:30:07 25 MR. GERRARD: No, I do appreciate it. It's nice

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10:30:10 1 to know that you're listening.

10:30:25 2 BY MR. GERRARD:

10:30:25 3 Q. So if what had happened is on the sale of each
10:30:28 4 building, all the sales proceeds had been divided 70
10:30:31 5 percent to CLA and 30 percent to Bidsal, and then right
10:30:35 6 after the three buildings had been sold and that had
10:30:38 7 occurred, there was a purchase by CLA under this formula
10:30:42 8 of Mr. Bidsal's membership interest, wouldn't that
10:30:46 9 disproportionately hurt Mr. Bidsal?

10:30:50 10 A. It would hurt him because part of that formula is
10:30:54 11 an add back of the capital contribution of the offering
10:30:59 12 members. And assuming that we had paid all of his back
10:31:04 13 and we interpreted this agreement to mean that it's not
10:31:08 14 the original capital but the remaining unrepaid capital,
10:31:12 15 he'd never -- you wouldn't get any add back. So all he
10:31:15 16 would get at that point would be just his 50 percent of
10:31:17 17 the appreciation.

10:31:18 18 Q. Okay. But also, the purpose of this formula,
10:31:23 19 isn't it to try to make sure that each partner gets
10:31:26 20 their fair share of the appreciation of the property --

10:31:29 21 A. Yes.

10:31:29 22 Q. -- in the company?

10:31:31 23 A. Yes.

10:31:31 24 Q. And let's look at the formula specifically now.
10:31:37 25 First, there's a term that says "FMV." Do you see that?

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1 A. Yes.

2 Q. And let's look back at the previous page to

3 see -- in the Definitions under Section 4.1 to see what

4 that actually means. What does FMV mean?

5 A. "Fair market value."

6 Q. "As specified in Section 4.2"?

7 A. Correct.

8 Q. So let's look at 4.2. 4.2 says "Any member

9 (offering member) may give notice to the remaining

10 members that he or it is ready, willing, and able to

11 purchase the remaining members' interests for a price

12 the offering member thinks is the fair market value."

13 Do you see that?

14 A. Yes.

15 Q. So according to this definition, fair market

16 value means what one member thinks the value of the

17 other member's interest is; correct?

18 A. Correct.

19 Q. Now, let's take a look at the next step in this

20 formula. It says "COP." Do you see that?

21 A. Yes.

22 Q. So let's look at the defined term COP on

23 Section 4.1. "COP means 'cost of purchase' as it

24 specified in the escrow closing statement at the time of

25 purchase of each property owned by the company."

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10:33:02 1 Do you see that?

10:33:02 2 A. Yes, I do.

10:33:03 3 Q. So what property is presently owned by the

10:33:05 4 company?

10:33:05 5 A. Property that's presently owned are -- there are

10:33:08 6 six pieces. Five pieces of property -- actually, seven.

10:33:17 7 There's five buildings -- one in Arizona, four at Green

10:33:22 8 Valley Commerce Center -- and then the parking lot at

10:33:25 9 Green Valley Commerce Center.

10:33:27 10 THE ARBITRATOR: Five at Green Valley?

10:33:27 11 THE WITNESS: There are five --

10:33:27 12 THE ARBITRATOR: At Green Valley, one in Arizona,

10:33:27 13 plus the parking.

10:33:31 14 THE WITNESS: -- at Green Valley, and then the

10:33:33 15 Greenway property in Arizona -- five, six, and then the

10:33:38 16 parking. So that's how we got to seven.

10:33:41 17 BY MR. GERRARD:

10:33:41 18 Q. Okay. So of those properties -- and those are

10:33:45 19 the same properties that were owned by the company at

10:33:48 20 the time of the offers back and forth between Bidsal and

10:33:51 21 CLA to purchase membership interest; correct?

10:33:53 22 A. Correct.

10:33:54 23 Q. Okay. So of those properties, how many of those

10:34:00 24 have you seen an escrow closing statement from, quote,

10:34:04 25 "the time of purchase of each property" that specifies a

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10:34:09

1 cost of purchase?

10:34:10

2 A. The only property that has an escrow closing

10:34:13

3 statement is the Greenway property in Arizona.

10:34:16

4 Q. So if you strictly use the language of this

10:34:23

5 definition, what would be the cost of purchase that

10:34:27

6 would be applied in this formula to CLA's purchase of

10:34:30

7 Mr. Bidsal's interest?

10:34:32

8 A. Only the Greenway property in Arizona.

10:34:34

9 Q. That would be \$790,000?

10:34:37

10 A. Yeah. 790- plus closing costs.

10:34:45

11 Q. Okay. Do you think that that is a reasonable

10:34:50

12 interpretation to take, even though that's what the

10:34:53

13 language says?

10:34:53

14 A. No.

10:34:54

15 Q. And what do you think is reasonable?

10:34:55

16 A. The approach which I took, which was the approach

10:35:01

17 that the accountant took -- Jim Main took when he

10:35:05

18 allocated the price -- the purchase price of the note

10:35:09

19 amongst the properties. I mean, that's the only thing

10:35:12

20 that makes sense here.

10:35:14

21 Q. Okay. Is that also the position that Mr. Bidsal

10:35:19

22 has taken?

10:35:19

23 A. Yes.

10:35:20

24 Q. Has Mr. Bidsal tried to take advantage of CLA by

10:35:24

25 saying, Oh, no, the language actually says it's only

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10:35:28 1 cost of purchase if there is an escrow closing statement
10:35:31 2 from the time of purchase that specifies a cost to
10:35:33 3 purchase?

10:35:33 4 A. No.

10:35:34 5 Q. So if we go back to the formula now -- let's
10:35:43 6 continue on. So we've already identified that there are
10:35:46 7 a couple of ambiguities in the definition of fair market
10:35:51 8 value as just -- is just related to the value of a
10:35:54 9 membership interest; correct?

10:35:56 10 A. Right.

10:35:56 11 Q. Let's take that one step further. You've been
10:36:00 12 involved in a lot of business sales and purchases;
10:36:03 13 correct?

10:36:03 14 A. Correct.

10:36:03 15 Q. Is there a difference between the value of a
10:36:06 16 membership interest generally and the value of the
10:36:08 17 assets of a company?

10:36:10 18 A. Yeah.

10:36:11 19 Q. If you're just selling a membership interest and
10:36:14 20 you value that in the marketplace, what normally
10:36:17 21 happens?

10:36:19 22 MR. LEWIN: Hold on a second.

10:36:25 23 Okay. That's fine.

10:36:29 24 MR. GERRARD: Go ahead, sir.

10:36:30 25 THE ARBITRATOR: Just for whatever it's worth,

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10:36:32 1 and then I'll let you go. I don't believe I have a
10:36:35 2 whole lot of discretion on the fair market value part of
10:36:38 3 the formula.

10:36:39 4 MR. GERRARD: That's not the point I'm making
10:36:40 5 here. The point is the agreement is ambiguous and it is
10:36:43 6 difficult to follow, and so you have to adopt a
10:36:46 7 reasonable interpretation.

10:36:48 8 THE ARBITRATOR: Understood.

10:36:49 9 A. So the question is how do you value a membership
10:36:53 10 interest in a typical transaction. You would start by
10:36:58 11 looking at the assets of the company, but that's
10:37:03 12 certainly not where it begins.

10:37:04 13 You look at -- you could look at the net income
10:37:07 14 of the company and apply some kind of a multiple to it,
10:37:11 15 and then in that case you would ignore the assets
10:37:14 16 because the assets are what are used to generate the net
10:37:17 17 income. You would look at some of the assets held in
10:37:20 18 the company that maybe are going to be distributed out
10:37:23 19 prior to the sale or at the time of the sale, and you
10:37:25 20 wouldn't -- so you wouldn't include those if you were
10:37:27 21 doing an asset-based purchase.

10:37:29 22 BY MR. GERRARD:

10:37:29 23 Q. And if you were going to -- and then is there
10:37:31 24 typically a discount applied to a membership interest?

10:37:34 25 A. And that was where I was going next. And if

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10:37:38 1 there's -- because -- because a membership interest has
10:37:41 2 a limited market, there's a thing called a marketability
10:37:44 3 discount that would probably be applied as well.

10:37:47 4 Q. Okay. So let's now go back to the formula. So
10:37:54 5 we've identified that there's an ambiguity with fair
10:37:55 6 market value because it just deals with the membership
10:37:57 7 interest value, and that there's -- and doesn't say how
10:38:01 8 you take into account that marketability discount.

10:38:04 9 There's also a problem with COP that we just
10:38:07 10 addressed. So let's take a look at the next part of the
10:38:11 11 formula.

10:38:11 12 So then it says "Fair market value minus cost of
10:38:15 13 purchase times .05," which you said the reasonable
10:38:18 14 interpretation of that is whatever the appreciation in
10:38:22 15 the property is of the company, each member should get
10:38:25 16 half of that; right?

10:38:26 17 A. Correct.

10:38:27 18 Q. Then it says "plus capital contribution of the
10:38:30 19 offering member" -- so in this case, that's Mr. Bidsal;
10:38:33 20 correct?

10:38:33 21 A. Correct.

10:38:34 22 Q. "At the time of purchasing the property minus
10:38:40 23 prorated liabilities."

10:38:41 24 Do you see that?

10:38:41 25 A. I do.

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1 Q. So the property of this company, number one, was
2 never purchased -- correct? -- other than the Greenway
3 property.
4 A. Correct.
5 Q. It was just acquired in exchange. So if we take
6 the acquisition time of the property -- forget about the
7 word "purchase" for a minute; let's just use
8 "acquisition." When was all this property that we're
9 talking about actually acquired by the company?
10 A. September of 2011.
11 Q. Okay. And what do you base that upon?
12 A. The deed in lieu.
13 Q. Okay. And that's Exhibit 8 that's in your binder
14 right there. So you're saying that the deed in lieu
15 agreement -- and I'm assuming the deed that came as a
16 result of it -- is what gave title to the property to
17 the company?
18 A. That is my understanding.
19 Q. Okay. So if we use that acquisition date of
20 September 22, 2011, what was Mr. Bidsal's capital
21 contribution on that date?
22 A. 1,215,000.
23 Q. And if we use the time that the original property
24 was purchased, which was the note; correct?
25 A. Correct.

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1 Q. What was Mr. Bidsal's capital contribution on
2 that date?
3 A. 1,215,000.
4 Q. Okay. So under the strict language of this
5 formula, what would have to be added to fair market
6 value minus COP times .05?
7 A. Well, under the strict language of the formula,
8 you'd add 1,215,000.
9 Q. Okay. Is that the position that you think is
10 reasonable notwithstanding the language of this formula?
11 A. No. No. And I did not use that position.
12 Q. And why do you think that that's not reasonable?
13 A. Well, I mean, the reasonable -- to me, it's
14 reasonable that what they're really trying to say here
15 is, Capital contribution less capital that has been
16 returned.
17 Q. Okay. So what's left over of the original cash
18 they put in?
19 A. Yeah. That's not what it says, but I think
20 that's a reasonable man's interpretation.
21 Q. But that interpretation doesn't benefit
22 Mr. Bidsal, does it?
23 A. No.
24 Q. And did Mr. Bidsal take that same interpretation?
25 A. No.

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10:41:08

1 Q. No, I mean did he take the interpretation that
2 you have taken?

10:41:12

10:41:12

3 A. Yeah.

10:41:13

10:41:16

10:41:19

10:41:24

10:41:27

4 Q. Okay. So Mr. Bidsal was not trying to take
5 advantage of CLA by saying, Hey, you have to give me
6 back my full 1,215,000 no matter whether I got some of
7 that already returned from the sale of Buildings C, B,
8 and E?

10:41:28

10:41:33

9 A. I was never -- I never heard him take that
10 position.

10:41:38

10:41:48

10:41:52

10:41:56

10:42:00

11 Q. Okay. Given what you've just testified is the
12 reasonable interpretation of this formula, do you think
13 that it would be reasonable to use the cost of purchase
14 from the actual purchase price of the Greenway property
15 as part of this formula?

10:42:02

16 A. No.

10:42:03

17 Q. Why not?

10:42:04

10:42:11

10:42:14

18 A. Well, obviously, that excludes the costs involved
19 in acquiring the other five properties held by the
20 company.

10:42:15

10:42:19

21 Q. Okay. And does it also exclude the actual cost
22 of Building C?

10:42:21

23 A. Yeah.

10:42:22

10:42:24

24 Q. And that cost is still on the books of the
25 company?

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10:42:25

1 A. If you use the cost of purchase of the Greenway

10:42:30

2 property, then the cost of Building C would be --

10:42:33

3 wouldn't be relevant anymore, because you're using the

10:42:36

4 cost of the actual purchase price of the property.

10:42:40

5 Q. Do you think that that's reasonable, or do you

10:42:42

6 think that the reasonable way is to use the original

10:42:45

7 price of Building C since it's been rolled into the

10:42:49

8 Greenway property?

10:42:50

9 A. It would not be reasonable to use the purchase

10:42:52

10 price of Greenway; it is reasonable to use the carryover

10:42:58

11 basis for the Greenway property.

10:42:59

12 THE ARBITRATOR: You said price of the --

10:43:03

13 carrying over the price of Building C, but you really

10:43:07

14 mean cost --

10:43:08

15 MR. GERRARD: Cost. It's the cost basis, yeah.

10:43:09

16 If I said price, I misspoke.

10:43:14

17 BY MR. GERRARD:

10:43:14

18 Q. Okay. Let's go back to Exhibit 8. This is the

10:43:44

19 deed in lieu agreement. Let me know when you've got

10:43:48

20 that open.

10:43:49

21 A. I'm ready.

10:43:50

22 Q. Now, as a part of this deed in lieu agreement,

10:43:53

23 you understood that there were collected rents that the

10:43:58

24 former owner had that were being transferred to the new

10:44:03

25 owner; correct?

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10:44:04 1 A. Correct.

10:44:04 2 Q. Let's take a look at Section 2.10 on page 1432.

10:44:10 3 So this paragraph states "Upon the execution of

10:44:16 4 this agreement, borrower" -- now, who's the borrower in

10:44:20 5 this case?

10:44:20 6 A. The borrower would be the original purchasers of

10:44:23 7 the Greenway -- I'm sorry -- Green Valley Commerce

10:44:27 8 Center.

10:44:28 9 Q. Okay. So we can also refer to them as owner of

10:44:31 10 the property; correct?

10:44:31 11 A. Correct.

10:44:32 12 Q. Says that they "shall transfer to lender" -- and

10:44:36 13 who's lender in this case?

10:44:38 14 A. So the lender is -- it would be Green Valley

10:44:45 15 Commerce.

10:44:45 16 Q. Okay. Mr. Bidsal and CLA's company?

10:44:47 17 A. Yes.

10:44:48 18 Q. Okay. "Shall transfer to the lender the amount

10:44:51 19 of \$295,258.93, which amount represents the net rents

10:44:58 20 from the property that have not been -- previously been

10:45:03 21 paid to lender or lender's predecessors in interest for

10:45:06 22 the period beginning October 1, 2010, and ending

10:45:10 23 September 21, 2011."

10:45:12 24 Do you see that?

10:45:12 25 A. I do.

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10:45:13 1 Q. And then at the very end of that page, there's a
10:45:19 2 sentence that says "Borrower will cause American Nevada
10:45:22 3 Realty, LLC, to transfer the net rents from the property
10:45:27 4 from and after September 21, 2011, to lender in
10:45:31 5 accordance with and pursuant to the provisions of the
10:45:34 6 management agreement."

10:45:35 7 Do you see that?

10:45:35 8 A. Yes.

10:45:36 9 Q. Okay. So right after that in Section 2.11, that
10:45:42 10 talks about also being the former owner transferring to
10:45:46 11 the new owner \$74,549.01 in security deposits; correct?

10:45:53 12 A. Correct.

10:45:54 13 Q. Okay. Did you see that CLA is -- in their expert
10:45:59 14 report is trying to treat these rents as interest?

10:46:04 15 A. Yes.

10:46:04 16 Q. Is it correct to characterize these rents as
10:46:09 17 interest from an accounting perspective?

10:46:12 18 A. Well, the document speaks -- says that these are
10:46:14 19 rents that were paid over to the owner of the
10:46:17 20 building -- to the lender, who is CL -- who is Green
10:46:25 21 Valley Commerce. I don't -- I don't agree with that.

10:46:26 22 Q. All right. These rents, they're being paid over
10:46:30 23 to the new owner of the property as a result of the new
10:46:34 24 owner taking title; correct?

10:46:35 25 A. Correct.

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1 Q. These rents weren't paid to Green Valley as a
2 lender back at the time that it acquired the note, was
3 it?
4 A. No. They were paid at the time that the deed --
5 the fee simple deed was acquired; this deed in lieu was
6 executed.
7 Q. Okay. So if this was money that belonged to the
8 lender, then our company -- right? -- Green Valley
9 Commerce would have obtained its right to those rents
10 and would have received them back when they acquired the
11 note in June of 2011; correct?
12 MR. LEWIN: Objection. That for calls
13 speculation.
14 THE ARBITRATOR: Overruled.
15 You may answer.
16 A. Correct. Which they did not. They did not
17 receive until they actually took title of the property.
18 BY MR. GERRARD:
19 Q. Okay. Under the operating agreement, how should
20 these rents have been distributed?
21 A. Rent is rent. It would have been part of the
22 operating income 50-50.
23 Q. Even if you treated this as interest instead of
24 rent, how would it be distributed under the operating
25 agreement?

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10:47:45 1 A. Interest is still ordinary income, which the
10:47:48 2 operating agreement specifies will be distributed 50-50.

10:47:51 3 Q. Okay. Based upon general accounting principles,
10:48:05 4 if there's an agreement to sell a membership interest,
10:48:07 5 does the selling member generally lose its rights to
10:48:11 6 allocations and distributions prior to that sale being
10:48:14 7 completed?

10:48:14 8 A. No. Quite the opposite. If there's an agreement
10:48:16 9 to sell the membership interest, it's common that the
10:48:21 10 cash would be distributed prior to the closing of the
10:48:25 11 sale.

10:48:25 12 Q. How was depreciation allocated under this
10:48:29 13 operating agreement?

10:48:30 14 A. It's part of operating income, so it's allocated
10:48:33 15 50-50 to each of the members.

10:48:36 16 Q. So can you explain to me under what circumstances
10:48:43 17 the capital account percentages that started at 70
10:48:50 18 percent for CLA and 30 percent to Bidsal would change
10:48:53 19 over time based upon depreciation?

10:48:56 20 A. Sure. So probably an example is the easiest way
10:49:02 21 to look at it. If the capital accounts were using easy
10:49:05 22 numbers -- 700,000; 300,000; 70-30 -- and the operating
10:49:14 23 income from the -- from the rent -- from the rental
10:49:19 24 activity, let's say it was \$200,000, but included in
10:49:24 25 that \$200,000 is \$100,000 of depreciation. So in that

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10:49:28 1 case, it would actually be \$300,000 of distributable
10:49:35 2 cash. Okay? That would be the income plus the
10:49:38 3 depreciation because the depreciation is a noncash item.

10:49:42 4 **Q. So if that was distributed, how would that affect**
10:49:47 5 **the percentages of the capital accounts?**

10:49:51 6 A. So that would cause the capital -- that would
10:49:54 7 cause Bidsal's capital account percentage to go down,
10:49:57 8 and it would cause CLA's to go up. And the reason for
10:50:01 9 that is this: The income is 200,000. So going back to
10:50:07 10 our capital account maintenance rules, if we were at
10:50:10 11 \$300,000 of income -- of capital for Bidsal, plus the
10:50:17 12 \$100,000 of his share of the net income, now we're at
10:50:21 13 4-, minus his share --

10:50:23 14 **Q. You said "his share of the net income." You're**
10:50:25 15 **talking about the depreciation?**

10:50:26 16 A. No. I'm talking about net income. Remember, net
10:50:28 17 income is 200,000.

10:50:30 18 **Q. Okay.**

10:50:30 19 A. But included in that net income is a deduction of
10:50:34 20 \$100,000 specific to depreciation. A depreciation
10:50:39 21 deduction. So you got net income, but you've also got
10:50:44 22 depreciation, which is a noncash item. So you would
10:50:47 23 have \$300,000 of distributable cash from operations.

10:50:53 24 So Mr. Bidsal gets \$100,000 of income allocated
10:50:58 25 to him. He also gets \$150,000 of cash allocated to him.

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10:51:07 1 So now his capital account is 250,000. 300- plus 100-
10:51:14 2 minus 150-, so it's now 250-.

10:51:18 3 On the other side, Mr. CLA would get the same
10:51:24 4 100,000 of income, so now they're at 800-. They would
10:51:28 5 get the same \$150,000 distribution. So now they are at
10:51:35 6 650-. So our total capital is now not \$1 million, but
10:51:42 7 it's 900,000. 250-, 650-. If you divide 250- by
10:51:52 8 900,000, you don't get 30 percent. You'll get -- I
10:51:58 9 don't have my phone here. I'd do the numbers for you.

10:52:01 10 **Q. That's all right.**

10:52:02 11 A. But you get a number bigger. That's why if you
10:52:05 12 look at just the tax return, his capital account is
10:52:08 13 going to be more than -- I'm sorry -- less than
10:52:12 14 30 percent. It's because of the way -- just the way the
10:52:16 15 accounting works when you have depreciation involved.

10:52:19 16 **Q. Thank you.**

10:52:23 17 THE WITNESS: Did that make sense, Your Honor?

10:52:25 18 THE ARBITRATOR: Fairly, yes. In my mind, I'm
10:52:29 19 doing the math, and it -- I don't know. It's basically
10:52:33 20 5 divided by 19, which is a little less than -- yeah. I
10:52:44 21 think that works.

10:52:46 22 THE WITNESS: It's just simple that the capital
10:52:49 23 account is increased by net income and it's decreased by
10:52:53 24 distributions. Distributions, if they exceed net
10:52:57 25 income, in this case will cause his capital account --

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10:53:04 1 will cause everybody's capital account to get out of
10:53:07 2 that 70-30 ratio.
10:53:09 3 THE ARBITRATOR: It's not an indication of
10:53:13 4 disproportionate distributions or allocations under the
10:53:18 5 operating agreement.
10:53:18 6 THE WITNESS: No. Not at -- no. And to follow
10:53:22 7 that all through, if and when we sell all of the
10:53:27 8 buildings eventually and we distribute back the capital
10:53:31 9 account as Mr. Bidsal has done, they will come back into
10:53:35 10 a 70-30 ratio eventually.
10:53:37 11 BY MR. GERRARD:
10:53:37 12 Q. Now -- so the fact that the capital account
10:53:44 13 balances -- well, let's actually just look at them.
10:53:46 14 THE ARBITRATOR: As reflected on K-1?
10:53:49 15 MR. GERRARD: Yeah.
10:53:50 16 BY MR. GERRARD:
10:53:50 17 Q. Let's start by taking a quick look at Exhibit
10:54:10 18 No. 11 -- 12. Let's look at the K-1s in Exhibit 12.
10:54:18 19 It's the 2011 tax return. So that's on pages 2340 and
10:54:24 20 2341. Do you have those in front of you?
10:54:32 21 A. Yes, I do.
10:54:32 22 Q. Okay. So on this tax return, CLA's ending
10:54:40 23 capital account balance is 70.241966 percent; correct?
10:54:44 24 A. Correct.
10:54:44 25 Q. And Mr. Bidsal's ending capital account balance

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10:54:48 1 is 29.758034. Do you see that?

10:54:52 2 A. Yes, I do.

10:54:52 3 Q. And you're saying that's caused by depreciation?

10:54:55 4 A. Yeah. This is a good example. You can see that

10:55:00 5 if you take a look at line 2 and line 5 of the K-1 and

10:55:06 6 if you add those up, that comes to 240,000. Now, if you

10:55:13 7 go down to Section L, that's how much income was

10:55:18 8 allocated to each partner. That number is the same on

10:55:21 9 both K-1s, those two numbers. 84,155 is the same number

10:55:26 10 allocated 50-50. That comes to 240,246.

10:55:33 11 But then the very next number is 265,000, which

10:55:39 12 is a distribution. There was no capital transaction

10:55:44 13 here. Nothing was sold this year, so this is a great

10:55:49 14 example. There's no argument on whether there's a

10:55:52 15 capital transaction because according to this K-1, we

10:55:57 16 had income and we had interest and our distribution was

10:56:01 17 265,000. That results in Mr. Bidsal's capital account

10:56:06 18 going up by two tenths of a percent and CLA's going down

10:56:10 19 by that same two tenths of a percent.

10:56:13 20 Q. Isn't it just the opposite of that? His going

10:56:16 21 down and CLA's going up?

10:56:17 22 A. No -- I'm sorry. I had them turned around. Yes,

10:56:23 23 it is just the opposite.

10:56:24 24 Q. Yeah. Okay.

10:56:25 25 A. I was looking at them backwards, sorry.

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1 **Q. Okay. Under this operating agreement, how is**
2 **depreciation supposed to be allocated?**
3 A. Depreciation is an element of ordinary income,
4 and so it is allocated -- the depreciation expense is
5 allocated equally between Mr. Bidsal and between CLA.
6 **Q. Now, you saw that Mr. Gerety in his report tried**
7 **to say that depreciation was a capital event and had to**
8 **be split 70-30. Do you recall that?**
9 A. I do.
10 **Q. And do you agree with that?**
11 A. I do not.
12 **Q. Why not?**
13 A. Number one, I've never seen it in my years of
14 practicing where in this situation depreciation would be
15 treated as a capital event. And it's not a capital
16 event for a couple of reasons. The first would be that
17 it's not within the definition of a capital event under
18 the LLC agreement. And then the second reason is
19 eventually that depreciation will get recaptured, and
20 when it does, it will get allocated -- pursuant to the
21 way these tax returns are being prepared -- equally back
22 to the parties the same way it was taken.
23 **Q. Okay. And so let's take a look now at**
24 **Exhibit 15. This is the 2012 tax return. Let's look at**
25 **the K-1s again on page 2550 and 2551.**

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10:57:58 1 A. Okay.

10:57:58 2 Q. And so here you can see that Mr. --

10:58:04 3 THE ARBITRATOR: You said 2550?

10:58:04 4 MR. GERRARD: 2549, sorry.

10:58:06 5 BY MR. GERRARD:

10:58:06 6 Q. So 2549. You can see CLA's ending capital

10:58:12 7 account balance is 71.198; correct?

10:58:16 8 A. Correct.

10:58:16 9 Q. And Mr. Bidsal's on the next page is 28.801;

10:58:20 10 correct?

10:58:20 11 A. Correct.

10:58:21 12 Q. And does that mean that there was inappropriate

10:58:26 13 distributions being made to Mr. Bidsal?

10:58:27 14 A. No. It's the same situation as the prior year.

10:58:32 15 The distributions from operations simply exceeded the --

10:58:38 16 exceeded the ordinary income.

10:58:40 17 Q. Okay.

10:58:41 18 A. I'm guess -- you know, I didn't look, but I'm

10:58:45 19 assuming -- well, I could tell you right now.

10:58:47 20 Yeah, there was 146,000 of depreciation in this

10:58:50 21 year.

10:58:51 22 Q. Okay. You want to show The Court where that's

10:58:52 23 located?

10:58:52 24 A. Sorry. That's on page 51. Third number --

10:59:00 25 fourth -- fifth -- the fifth number from the bottom of