

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 27

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10:59:02 1 the page, depreciation.

10:59:09 2 Q. Okay.

10:59:10 3 A. So I'm just saying that number isn't exactly the
10:59:13 4 difference between net income and distributions, but
10:59:17 5 that is the reason why there's more cash than there is
10:59:20 6 net income. You don't write a check to get to deduct
10:59:24 7 depreciation.

10:59:25 8 Q. Now, let's -- one more quick question. On your
10:59:39 9 review of the tax returns and the accounting records for
10:59:42 10 the company, did you see any evidence that the security
10:59:45 11 deposits that had been originally received had ever been
10:59:49 12 distributed?

10:59:49 13 A. No.

10:59:57 14 Q. All right, sir. So you've explained how you
11:00:01 15 arrived at many of your opinions. Let's talk about --

11:00:07 16 THE ARBITRATOR: Is this a good time to take a
11:00:07 17 break?

11:00:07 18 MR. GERRARD: Yes. Absolutely. Perfect time.

11:00:09 19 THE ARBITRATOR: All right. Let's take a
11:00:10 20 10-minute break.

11:17:58 21 ***

11:17:58 22 (RECESS TAKEN FROM 11:00 A.M. TO 11:17 A.M.)

11:17:58 23 ***

11:17:58 24 THE ARBITRATOR: Mr. Wilcox, you realize that
11:17:59 25 you're still under oath?

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11:18:01 1 THE WITNESS: Yes.

11:18:03 2 BY MR. GERRARD:

11:18:03 3 Q. All right. Mr. Wilcox, you were asked in this

11:18:05 4 case to determine what -- from your review of the

11:18:11 5 operating agreement and the company's accounting

11:18:15 6 records, what the cost of purchase would be using the

11:18:20 7 formula in the operating agreement that we just looked

11:18:24 8 at a few minutes ago in Exhibit 5 at -- I believe it was

11:18:31 9 page 11. Do you recall that formula?

11:18:32 10 A. Yes.

11:18:32 11 Q. Okay. Did you come to an opinion about what the

11:18:40 12 cost of purchase --

11:18:42 13 THE ARBITRATOR: You're just talking about the

11:18:42 14 COP --

11:18:42 15 MR. GERRARD: Just now. Right now.

11:18:46 16 BY MR. GERRARD:

11:18:46 17 Q. Did you determine what the cost of purchase as

11:18:50 18 defined in the operating agreement should be?

11:18:52 19 A. Yes, I did.

11:18:54 20 Q. What number do you believe the cost of purchase

11:18:57 21 should be?

11:18:57 22 A. The cost of purchase should be \$3,136,431.

11:19:11 23 Q. Could you explain how you arrived at that number?

11:19:14 24 A. So I took the original allocation by Mr. Main --

11:19:22 25 the original allocation of the purchase of the note,

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11:19:26 1 applied that to the properties as subdivided, and then

11:19:34 2 adjusted that number to agree with the cost segregation

11:19:38 3 study to arrive at the cost of purchase as allocated to

11:19:46 4 each of the separate properties and the parking lot.

11:19:50 5 Then I took away from that cost of purchase Building B

11:19:56 6 and Building E. And we can -- I've got a schedule that

11:20:05 7 might make sense to help walk through that.

11:20:08 8 MR. GERRARD: Can you put that up, Jim?

11:20:08 9 THE WITNESS: Why don't you go straight to

11:20:08 10 Schedule 3, Jim.

11:20:12 11 MR. LEWIN: Are we going to mark this as an

11:20:25 12 exhibit?

11:20:26 13 MR. GERRARD: The schedule?

11:20:28 14 MR. LEWIN: Yeah.

11:20:29 15 MR. GERRARD: We can.

11:20:29 16 THE ARBITRATOR: All right.

11:20:31 17 MR. GERRARD: I don't know what the next in order

11:20:33 18 is, but -- did we have a break in our numbers or did we

11:20:36 19 just pick up with his?

11:20:38 20 MR. SHAPIRO: We went straight to his.

11:20:41 21 THE ARBITRATOR: There's blanks on this form, but

11:20:44 22 I don't think the numbers --

11:20:44 23 MR. SHAPIRO: We probably should go to 201. At

11:20:55 24 the next break, I can get copies of these printed out

11:20:59 25 and punched and inserted.

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11:21:02 1 MR. LEWIN: What schedule? It's on his report? Page 414
11:21:07 2 THE WITNESS: Schedule 3.
11:22:00 3 MR. GERRARD: Do you want to just go to the end,
11:22:01 4 Judge?
11:22:02 5 THE ARBITRATOR: Did yours end at 81?
11:22:04 6 MR. SHAPIRO: We have identified kind of generic
11:22:10 7 all documents in 80 and 81. We could insert it.
11:22:13 8 THE ARBITRATOR: I just want to make sure. He
11:22:16 9 started at 82 so --
11:22:18 10 MR. LEWIN: The next one would be 201, Your
11:22:20 11 Honor.
11:22:20 12 THE ARBITRATOR: 201. All right. So we'll call
11:22:21 13 it 201.
11:22:22 14 MR. GERRARD: Okay. So this is Schedule 3 to
11:22:25 15 your report?
11:22:26 16 THE WITNESS: Correct.
11:22:36 17 MR. SHAPIRO: So I've got it blown up, but I
11:22:38 18 don't know if this is the portion that you wanted to
11:22:40 19 view.
11:22:42 20 THE WITNESS: This is fine.
11:22:42 21 MR. GERRARD: Okay. Go ahead.
11:23:03 22 THE WITNESS: So what this schedule is -- the top
11:23:05 23 three lines of this schedule are from the cost
11:23:10 24 segregation study. So this is how the purchase price of
11:23:15 25 3,967,182 --

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11:23:18	1	THE ARBITRATOR: Let me stop you there.	Page 415
11:23:23	2	Let's go off the record.	
11:23:23	3	(Discussion off the record.)	
11:24:55	4	THE ARBITRATOR: Back on the record.	
11:24:59	5	You were explaining numbers.	
11:25:01	6	THE WITNESS: Okay. Good to go?	
11:25:05	7	MR. GERRARD: Go ahead.	
11:25:06	8	THE WITNESS: So the top section is the cost of	
11:25:11	9	the properties pursuant to the cost segregation study	
11:25:17	10	done in March 2013. The next section is the -- you can	
11:25:28	11	see the same numbers fall down, but there's some blanks.	
11:25:31	12	There's a blank on Building B and a blank on Building E.	
11:25:34	13	The reason there's a blank on Building B and E is	
11:25:36	14	because those were sold. They're gone. The reason that	
11:25:40	15	the 399,000 under Greenway that was -- used to be	
11:25:46	16	Building C, is that's a carryover of the allocated	
11:25:50	17	basis.	
11:25:52	18	And then the other number that changes in the	
11:26:00	19	middle section is the very last column, the parking lot.	
11:26:03	20	The price -- the purchase price that was allocated to	
11:26:06	21	the parking lot was the 369,956. That has been reduced	
11:26:19	22	by the purchase -- the parking lot allocable to the	
11:26:23	23	three buildings that are gone.	
11:26:25	24	BY MR. GERRARD:	
11:26:25	25	Q. Can you explain why?	

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11:26:27 1 A. Well, because those three buildings were sold,
11:26:32 2 that they're -- what we did is we took and allocated a
11:26:36 3 piece of the parking lot to each of the buildings based
11:26:39 4 on the square footage of each building.

11:26:41 5 THE ARBITRATOR: So it's not 5/8; it's based on
11:26:43 6 square footage?

11:26:44 7 THE WITNESS: Exactly. It's not 5/8; it's based
11:26:47 8 on square footage. And the percentage ends up being
11:26:54 9 68.6 percent. So the inverse of that is 32 -- or
11:26:57 10 31.4 percent of the square footage in the terms of
11:27:03 11 building has been sold. So we reduced -- we took that
11:27:08 12 portion of the parking lot out as well.

11:27:15 13 So the bottom line represents what is still owned
11:27:21 14 by Green Valley Commerce as of September 2, 2017, and
11:27:28 15 you can see those numbers just all fall down from the
11:27:31 16 top line with the exception of the parking lot. And we
11:27:35 17 end up with the 3,136,436, the first number on the
11:27:40 18 left -- or the bottom number on the left column. Pretty
11:27:46 19 simple allocation.

11:27:48 20 BY MR. GERRARD:

11:27:48 21 Q. Now, when we look back at the formula in
11:28:02 22 Exhibit 5, there's also the one element of that formula
11:28:04 23 has to do with the capital contributions of the offering
11:28:07 24 member at the time of the purchase of the property. Do
11:28:10 25 you remember we talked about that earlier?

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11:28:11 1 A. Yes.

11:28:11 2 Q. And you said that if we use that exact language

11:28:15 3 the way that it exactly appears there, that number would

11:28:18 4 be \$1,215,000; correct?

11:28:21 5 A. Correct.

11:28:23 6 Q. Did you come to an opinion of what you thought

11:28:25 7 that number should be, the capital -- the "plus capital

11:28:30 8 contribution of the offering member" part of the

11:28:32 9 formula --

11:28:32 10 A. Yes, I did.

11:28:32 11 Q. -- to determine what that should be under your

11:28:36 12 analysis that you described earlier of what you think is

11:28:38 13 reasonable?

11:28:38 14 What number did you come to for that?

11:28:45 15 A. The net capital contribution of Shawn Bidsal

11:28:49 16 would be \$957,226.

11:28:55 17 Q. Can you explain to The Judge how you came to that

11:29:01 18 number?

11:29:01 19 A. It would probably be easier -- could we have one

11:29:10 20 more exhibit, Schedule 4?

11:29:13 21 MR. GERRARD: Sure.

11:29:13 22 Could we just take a quick break, Judge? I think

11:29:14 23 what we'll do is copy these schedules and put them all

11:29:18 24 in as one exhibit.

11:29:18 25 MR. SHAPIRO: I actually have them all right

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11:29:19 1 here.

11:29:20 2 MR. LEWIN: Put them all as 201 then?

11:29:22 3 THE ARBITRATOR: That's fine.

11:29:42 4 MR. GERRARD: Can we substitute this for 201,

11:29:44 5 Judge? Have it be all schedules?

11:29:53 6 THE ARBITRATOR: Yes.

11:29:54 7 BY MR. GERRARD:

11:29:54 8 Q. So what we looked at last time, Mr. Wilcox, was

11:29:56 9 Schedule 2; correct?

11:29:57 10 A. No. I think we looked at No. 3.

11:30:01 11 Q. No. 3, okay. So which schedule would you like us

11:30:04 12 to look at now?

11:30:05 13 A. No. 4.

11:30:06 14 Q. Okay.

11:30:09 15 A. So Schedule No. 4 is just simply a summation of

11:30:14 16 the original capital contribution and the distributions

11:30:20 17 that Mr. Bidsal allocated to a return of capital. So in

11:30:27 18 2011, you see that Mr. Bidsal contributed 1,215,000.

11:30:34 19 That's in the first column. And then the next number is

11:30:37 20 2,834,250. That's what CLA Properties contributed.

11:30:44 21 In 2012, there was no return of capital or

11:30:48 22 additional contributions. In 2013, there was a \$28,000

11:30:57 23 distribution from the sale of Building C. I think it

11:31:03 24 was \$95,000 approximately that was allocated 70-30. And

11:31:12 25 then in 2014, there was an additional distribution which

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11:31:19 1 was allocated to return of capital by Mr. Bidsal that Page 419
11:31:24 2 was allocated 70-30 again. This was based on the basis
11:31:27 3 of the company plus closing costs, which was allocated
11:31:36 4 as a return of capital.
11:31:38 5 And then we had the same transaction in 2015 when
11:31:44 6 Building B was sold. Again, there was a 30-70
11:31:53 7 distribution. And after that 2015 distribution, the
11:31:58 8 capital -- the remaining capital in the company by both
11:32:03 9 parties is -- doesn't change through 2019. And that
11:32:07 10 number is the \$957,226.
11:32:15 11 **Q. Thank you. Now, you were also asked to determine**
11:32:24 12 **what the purchase price of Mr. Bidsal's membership**
11:32:28 13 **interest in this company would be using that**
11:32:33 14 **formula based -- formula in the operating agreement;**
11:32:36 15 **correct?**
11:32:36 16 A. Correct.
11:32:37 17 **Q. Basing it upon a fair market value number of**
11:32:43 18 **\$5 million; correct?**
11:32:43 19 A. Correct.
11:32:44 20 **Q. And did you arrive at a conclusion or an opinion**
11:32:47 21 **about that?**
11:32:48 22 A. I did. I -- my opinion is that the purchase
11:32:53 23 price that should be paid to Mr. Bidsal is \$1,889,010.
11:33:01 24 **Q. And is that as of a specific date?**
11:33:04 25 A. Yes. That is as of September 22nd -- as of

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11:33:13 1 September 2, 2017.

11:33:15 2 Q. And would that number change if the payment had
11:33:23 3 not been made on September 2, 2017?

11:33:25 4 A. Well, if the payment wasn't made and he -- if the
11:33:31 5 sale had closed and no payment was made, he would be
11:33:35 6 entitled to interest on that payment.

11:33:36 7 Q. Okay. So if we assume that the sale actually
11:33:41 8 closed on September 2, 2017, but the payment was never
11:33:46 9 made, it seems inconsistent; right?

11:33:49 10 A. Correct.

11:33:49 11 Q. If the payment was never made and -- but we still
11:33:52 12 assume that there was a closing as of that date, did you
11:33:54 13 determine what the interest would be on the purchase
11:33:58 14 price from that point forward?

11:34:00 15 A. Yes, I did. The interest based on Nevada Revised
11:34:09 16 Statute 99.040, as published therein, the interest would
11:34:16 17 be \$413,496.

11:34:16 18 Q. Do you have a schedule that shows that
11:34:19 19 computation?

11:34:19 20 A. I do. That's Schedule 6.

11:34:21 21 Q. So let's take a look at Schedule 6 in
11:34:25 22 Exhibit 201. Can you show us what's on this schedule?

11:34:33 23 A. Sure. So I took the -- what the purchase price
11:34:41 24 is -- and the second line is an interest rate of 6.25,
11:34:51 25 6.5, 7 percent. That interest rate is adjusted -- I

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11:34:54 1 believe it's every six months. And so every time the
11:34:59 2 interest rate adjusted, I just -- I calculated the
11:35:02 3 interest. And it's a simple interest for the period
11:35:07 4 that that interest rate was in effect to arrive at total
11:35:13 5 interest due of 413,000 as shown in the far right
11:35:17 6 corner, second number down.

11:35:18 7 Q. Okay. So the interest rate you used was from NRS
11:35:21 8 99.040; is that correct?

11:35:23 9 A. Correct.

11:35:23 10 Q. Which is the legal rate of interest?

11:35:25 11 A. Correct.

11:35:26 12 Q. And let's go back to your Schedule 5 in
11:35:31 13 Exhibit 201 for a minute.

11:35:33 14 A. Okay.

11:35:34 15 Q. Your Schedule 5, is this the calculation you just
11:35:42 16 testified about a minute ago that shows how you arrived
11:35:45 17 at the fair market value -- excuse me -- at the purchase
11:35:49 18 price for Mr. Bidsal's membership interest?

11:35:51 19 A. Correct.

11:35:53 20 Q. So why don't you walk us through that?

11:35:54 21 A. So I used the fair market value of \$5 million. I
11:35:57 22 used the cost of purchase for the properties that were
11:36:03 23 still in existence as of the day of the assumed sale.

11:36:09 24 Q. That's the number you just testified about
11:36:11 25 earlier?

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11:36:11 1 A. That is correct. That's the number from
11:36:13 2 Schedule 3.
11:36:14 3 **Q. Okay.**
11:36:14 4 A. And that arrives -- the next line item is the
11:36:20 5 number of fair market value less cost of purchase, which
11:36:24 6 really, another term for that is appreciation.
11:36:28 7 50 percent of that appreciation for the operating
11:36:33 8 agreement is allocable to Mr. Bidsal. To that number, I
11:36:37 9 added his unreturned original and contributed capital --
11:36:43 10 capital that had been returned.
11:36:45 11 **Q. Okay. And that's the number that you just**
11:36:46 12 **testified about a few minutes ago that was also on**
11:36:49 13 **your --**
11:36:49 14 A. Schedule 4.
11:36:50 15 **Q. Schedule 4, okay.**
11:36:53 16 A. And so his share of the increase in value of
11:36:58 17 931,784.71 plus his originally contributed capital not
11:37:07 18 yet returned was 957,225.64 to arrive at \$1,889,010 --
11:37:18 19 \$11 -- \$10.35.
11:37:21 20 **Q. So if we look now at Schedule 6 where you've**
11:37:25 21 **calculated the interest, if we assume that the purchase**
11:37:26 22 **was supposed to have closed and did close on**
11:37:31 23 **September 2, 2017, but no payment made, and you add the**
11:37:35 24 **interest that you calculated of \$413,496 through what**
11:37:42 25 **date?**

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11:37:42 1 A. I calculated that through December 1st, the date
11:37:46 2 of my report.

11:37:47 3 Q. Okay. So --

11:37:48 4 THE ARBITRATOR: '20? 2020?

11:37:51 5 THE WITNESS: Yes. 2020.

11:37:51 6 BY MR. GERRARD:

11:37:53 7 Q. So since then we have another approximately four
11:37:57 8 months?

11:37:57 9 A. Yeah. Four and a half months.

11:37:59 10 Q. Okay. Of interest. All right. But based upon
11:38:04 11 that number through December, you also calculated a per
11:38:06 12 diem; correct?

11:38:06 13 A. It was three and a half months. Correct.

11:38:09 14 Q. What was the per diem that you calculated that
11:38:11 15 would be the daily per diem from that point to now?

11:38:14 16 A. Well, through December 31st, that per diem would
11:38:19 17 be \$270.96. I did not --

11:38:24 18 Q. Per day?

11:38:25 19 A. Per day, yeah. That would be through the end of
11:38:26 20 December. I did not check to see if the interest rates
11:38:30 21 changed January 1st. If the interest rates are still
11:38:33 22 the same, then that number would still be the same.

11:38:37 23 Q. So if you include the interest that you assume
11:38:42 24 would be paid -- would have calculated or accrued on the
11:38:46 25 unpaid money from September 2nd through the end of

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11:38:50

1 December -- September 2, 2017, through December 1,

11:38:54

2 2020 -- what was the purchase price you came up with in

11:38:58

3 total?

11:38:59

4 A. Purchase price, including interest, would be

11:39:01

5 \$2,302,506.15.

11:39:07

6 MR. LEWIN: Where is that located?

11:39:09

7 THE WITNESS: Schedule 6. Far right-hand column.

11:39:12

8 Last number.

11:39:13

9 MR. LEWIN: Thank you.

11:39:14

10 BY MR. GERRARD:

11:39:14

11 Q. Now, this interest figure that you have

11:39:23

12 calculated of \$413,496 through December 1, 2020, you

11:39:31

13 made an assumption to calculate that number; correct?

11:39:33

14 A. I did. I assumed that the sale was made

11:39:36

15 effective as of that date.

11:39:37

16 Q. Okay. If the sale wasn't effective because no

11:39:41

17 purchase money was ever paid and Mr. Bidsal continued to

11:39:44

18 be a member up until the time he actually gets paid,

11:39:48

19 would he be entitled to this interest amount?

11:39:51

20 A. No. He would still own the property, so he would

11:39:53

21 not be entitled to the interest.

11:39:55

22 Q. Okay. And so he would still, under that theory,

11:39:59

23 be entitled to his distributions from the general

11:40:01

24 operations of the company?

11:40:02

25 A. Exactly. Yes.

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11:40:03 1 Q. Okay.

11:40:05 2 THE ARBITRATOR: Can I interject something?

11:40:07 3 MR. GERRARD: Please.

11:40:08 4 THE ARBITRATOR: You also presumed 0 for prorated

11:40:12 5 liabilities?

11:40:14 6 THE WITNESS: I'm sorry? Presumed what?

11:40:15 7 THE ARBITRATOR: 0 for prorated liabilities in

11:40:18 8 the formula.

11:40:19 9 THE WITNESS: I did. I assumed no outside

11:40:21 10 liabilities.

11:40:22 11 MR. GERRARD: And I was going to ask that

11:40:23 12 question next, so.

11:40:24 13 THE ARBITRATOR: Sorry.

11:40:26 14 MR. GERRARD: You're good. You're headed right

11:40:29 15 where I'm headed.

11:40:29 16 THE ARBITRATOR: I don't know if that's good.

11:40:29 17 MR. GERRARD: It's good for me.

11:40:32 18 BY MR. GERRARD:

11:40:32 19 Q. So if we go back to the formula, the last step of

11:40:33 20 that formula is to "minus prorated liabilities";

11:40:37 21 correct?

11:40:37 22 A. Correct.

11:40:38 23 Q. And you -- from your review of the records of the

11:40:45 24 company, did you determine that there were some

11:40:48 25 liabilities that needed to be subtracted?

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11:40:50 1 A. No, I did not.

11:40:51 2 Q. And did Mr. Gerety in his report determine that

11:40:55 3 there were liabilities that needed to be prorated?

11:40:57 4 A. Yes. He wanted to subtract the tenant deposits.

11:41:01 5 Q. Okay. So he wanted to take whatever the

11:41:06 6 liability was for the deposits that would be owed to

11:41:10 7 tenants and treat those as a liability?

11:41:13 8 A. As a -- yes.

11:41:15 9 Q. Okay. But does the company have all the money

11:41:19 10 for those deposits?

11:41:20 11 A. Well -- and that's the reason I didn't subtract

11:41:22 12 it, is that money -- the deposit money would be in the

11:41:26 13 bank account of the company. And so it's -- if you're

11:41:30 14 going to subtract that liability, then you would need to

11:41:33 15 add back the bank account or just that amount.

11:41:37 16 Q. So because they net out, you didn't include any

11:41:40 17 prorated liabilities?

11:41:40 18 A. Exactly.

11:41:41 19 Q. And in looking at the -- and I asked you this

11:41:44 20 question earlier -- but you looked over all the books

11:41:47 21 and records of the company. Have you seen that the

11:41:50 22 company has at all times maintained those security

11:41:53 23 deposit monies in their accounts?

11:41:55 24 A. Yeah. It appears to me that there's always

11:41:58 25 sufficient money in the company bank account to cover

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11:42:00 1 those security deposits.

11:42:02 2 Q. So the security deposits have never been
11:42:05 3 distributed?

11:42:05 4 A. Not that I could see.

11:42:14 5 MR. GERRARD: Now, Your Honor, I'm just going to
11:42:17 6 inform you that one of the opinions we asked him to
11:42:20 7 write about is the value of management services based
11:42:24 8 upon Mr. Bidsal's sweat equity that we're not going to
11:42:28 9 cover now because we're bifurcating that for another
11:42:30 10 time.

11:42:31 11 MR. LEWIN: You don't want to cover that now?

11:42:33 12 MR. GERRARD: No. If it becomes necessary, we
11:42:36 13 can bring --

11:42:36 14 MR. LEWIN: It's a very short item.

11:42:40 15 MR. GERRARD: No. We're not planning to cover
11:42:42 16 that because it's irrelevant unless the court makes a
11:42:46 17 decision.

11:42:46 18 THE ARBITRATOR: All right. We're bifurcated, so
11:42:51 19 if that's all right -- I mean, it's their witness; it's
11:42:53 20 their expert. If they're okay with the potential of
11:42:56 21 having to have Mr. Wilcox come back either live or by
11:43:02 22 Zoom if that becomes necessary, then they take that on.

11:43:09 23 BY MR. GERRARD:

11:43:09 24 Q. Now, we also asked you to run a calculation that
11:43:17 25 made an assumption that the sale should have closed

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11:43:24 1 September 2, 2017, and what would have been the
11:43:28 2 appropriate distributions that would have belonged to
11:43:32 3 Mr. Bidsal and his membership interest if we treat it as
11:43:38 4 if his membership interest terminated on September 2,
11:43:42 5 2017. Do you recall that?

11:43:42 6 A. I do.

11:43:43 7 Q. And what opinion did you arrive at with respect
11:43:45 8 to that? So in other words, we asked you to determine
11:43:49 9 what amount of the distributions from that year of 2017
11:43:54 10 Mr. Bidsal would have still been entitled to even if we
11:43:58 11 treat it as if his membership interest had been sold on
11:44:01 12 that date; correct?

11:44:02 13 A. Correct.

11:44:02 14 Q. Okay. And what opinion did you arrive at with
11:44:05 15 respect to that?

11:44:05 16 A. I arrived that he had -- he was entitled to --
11:44:14 17 well, let's go to Schedule 10. That might make it a
11:44:19 18 little easier to go through this.

11:44:22 19 Q. All right.

11:44:23 20 A. There were basically two distributions made in
11:44:28 21 2017. There were two distributions made in 2017. The
11:44:42 22 first distribution took place on February 9th, and that
11:44:46 23 distribution was a total of 112,000. Money was paid out
11:44:49 24 of Green Valley Commerce Center and paid out of Greenway
11:44:55 25 Village. So it shows two distributions. They were both

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11:44:57 1 made on the same day; they just came out of two
11:44:59 2 different bank accounts. The total amount of that
11:45:02 3 distribution was 112,000. And I looked at that
11:45:07 4 distribution and I asked myself, Okay, where did
11:45:11 5 \$112,000 come from? Well, that was done on the ninth
11:45:16 6 day of the second month of the year. Pretty reasonable
11:45:19 7 to assume that that money was accumulated in the prior
11:45:22 8 year.

11:45:24 9 And so I took -- I don't know how else you could
11:45:29 10 argue differently, but I'm saying that money was clearly
11:45:34 11 earned and distributed to Mr. Bidsal from 2016 earnings,
11:45:40 12 maybe a little January of 2017 earnings. Clearly, that
11:45:45 13 happened while he was still an owner of the company,
11:45:48 14 assuming that the sale took place -- takes place on the
11:45:50 15 2nd of September '17.

11:45:53 16 Okay? So in my opinion, there's -- he's
11:46:00 17 completely entitled to 50 percent of that distribution.
11:46:02 18 There was no capital transaction, so there would be no
11:46:06 19 70-30 allocation. It was all distribution of ordinary
11:46:11 20 income generated -- cash generated from ordinary income
11:46:15 21 or ordinary operations. Okay?

11:46:16 22 The second distribution in November poses a
11:46:23 23 little bit of a different situation because that
11:46:26 24 distribution would have taken place after the assumed
11:46:30 25 sale date, so some of that cash probably was earned

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11:46:35 1 after Mr. Bidsal no longer had his interest.

11:46:40 2 **Q. Under that assumption?**

11:46:41 3 A. Under that assumption.

11:46:43 4 **Q. Right.**

11:46:43 5 A. And so all I did is I said, All right, I'm

11:46:47 6 assuming we distributed everything that we could

11:46:51 7 distribute on February 9th. How many days was it from

11:46:54 8 February 9th to November 20th? That happened to be

11:46:57 9 284 days. Of those 284 days, how many days did

11:47:02 10 Mr. Bidsal -- under the assumption that he sold his

11:47:06 11 property, how many days did he own it? That's the

11:47:11 12 205 days.

11:47:14 13 So he owned his interest, under this assumption,

11:47:18 14 for 72.2 percent of the time. And I simply applied that

11:47:24 15 72 percent to the distribution that was made to him, and

11:47:29 16 came to the conclusion that he was really only entitled

11:47:31 17 to about a \$104,665 of that distribution.

11:47:36 18 **Q. If it's assumed that the transaction was properly**

11:47:39 19 **completed?**

11:47:39 20 A. Based on the assumption that the transaction

11:47:42 21 closed on that date.

11:47:43 22 **Q. Okay. We also asked you to make a determination**

11:47:51 23 **of what the gross receipts were that were earned by this**

11:47:56 24 **company from September 3, 2017, through August 13th of**

11:48:00 25 **2020; correct?**

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11:48:00 1 A. Correct.

11:48:02 2 MR. LEWIN: Doesn't that only go to the

11:48:04 3 management fees?

11:48:05 4 MR. GERRARD: It does, but it's just a number.

11:48:07 5 It's just a gross receipts number. We're not tying it

11:48:09 6 to any services or anything like that. We could do it

11:48:11 7 later if you want.

11:48:12 8 THE ARBITRATOR: If it's not relevant to anything

11:48:14 9 other than that, don't --

11:48:17 10 MR. GERRARD: All right.

11:48:17 11 BY MR. GERRARD:

11:48:18 12 Q. Let's move on to your last opinion that we asked

11:48:20 13 you to originally draw. This has to do with

11:48:24 14 distributions; correct?

11:48:25 15 A. Correct.

11:48:25 16 Q. We asked you to determine what the total

11:48:29 17 distributions were that were made to each of the members

11:48:31 18 and to offer an opinion about whether the distributions

11:48:35 19 that were made were appropriate under the operating

11:48:38 20 agreement. Did you reach opinions on that?

11:48:39 21 A. I did. My opinion is that the operate -- the

11:48:48 22 distributions as made on -- by the accountant by

11:48:53 23 Mr. Bidsal over the last -- since 2011, that those

11:48:58 24 distributions are in conformity. Well, as we talked

11:49:02 25 about, they're really not in conformity with the

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11:49:05 1 operating agreement if you apply the -- if you apply all
11:49:11 2 of the exact language of the agreement. But
11:49:13 3 nonetheless, the distributions made were reasonable
11:49:18 4 based on Mr. Bidsal's interpretation of the agreement.

11:49:21 5 **Q. And were those distributions that were made**
11:49:25 6 **consistent with what was shown in all the tax returns**
11:49:28 7 **and all of the distribution schedules?**

11:49:30 8 A. Yes.

11:49:30 9 **Q. And is it your understanding and did you assume**
11:49:34 10 **the fact that all of those distribution schedules and**
11:49:38 11 **all of the tax returns were provided to CLA?**

11:49:41 12 A. Yes. By law, they're required to be.

11:49:45 13 **Q. Okay. So is it your -- did you assume for**
11:49:51 14 **purposes of this opinion -- well, strike that.**

11:49:55 15 **Go ahead and finish your analysis.**

11:49:58 16 A. So the analysis I'm looking at is Schedule 12.

11:50:15 17 MR. LEWIN: These are all attached to your
11:50:17 18 report; right? The same schedules?

11:50:18 19 THE WITNESS: Yes. Yes.

11:50:20 20 So year by year, I went through and just
11:50:26 21 calculated the distributions and allocated them between
11:50:30 22 return of capital and just distribution of profits. And
11:50:39 23 the bottom line is that over the course of -- through
11:50:44 24 the end of 2019, Mr. Bidsal received distributions
11:50:50 25 totaling \$2,321,142.20, and CLA Properties received

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11:51:01 1 distributions of \$2,664,841.07. In my opinion, those
11:51:11 2 distributions -- while not in the strict conformance of
11:51:16 3 the operating agreement -- are certainly reasonable and
11:51:21 4 equitable.

11:51:22 5 BY MR. GERRARD:

11:51:22 6 Q. And if you apply the strict language of the
11:51:25 7 operating agreement, whose benefit would that inure to?

11:51:29 8 A. It would inure to CLA.

11:51:32 9 Q. Well, the way that Mr. Bidsal did it inured to
11:51:36 10 benefit CLA; correct?

11:51:37 11 A. I'm sorry. If you applied the strict
11:51:39 12 interpretation, it would be to Mr. Bidsal's benefit; the
11:51:44 13 way it was done, it was made to CLA's benefit.

11:51:46 14 Q. Okay. And when you discussed this -- the way the
11:51:52 15 distributions were done -- with Mr. Bidsal, did
11:51:57 16 Mr. Bidsal inform you that he had discussed how the
11:52:00 17 distributions would be made from the sale of all these
11:52:03 18 properties, given the ambiguities in Exhibit B -- that
11:52:08 19 he had discussed that with Mr. Golshani?

11:52:08 20 A. Yeah. It was my understanding that the schedules
11:52:10 21 we reviewed earlier where they had calculated
11:52:14 22 distributions, that those were provided. And then as
11:52:20 23 far as distributions of operating profits, I don't
11:52:24 24 recall specifically distributing -- discussing that, but
11:52:26 25 it was done consistently through the entire period.

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11:52:29 1 Q. Okay. And if you looked at the tax returns that
11:52:33 2 were provided with the Schedule K-1s and the Schedule K
11:52:37 3 of each tax return, you would have been able to
11:52:39 4 determine how all the distributions were made from those
11:52:41 5 documents as well; correct?

11:52:42 6 A. Yes.

11:52:43 7 Q. All right. Now, you were also asked to respond
11:52:55 8 to some opinions that have been rendered by Dan Gerety;
11:53:03 9 correct?

11:53:03 10 A. Correct.

11:53:04 11 Q. And do you know who Mr. Gerety is?

11:53:06 12 A. I do.

11:53:07 13 Q. Okay. Is he an accountant that also conducts
11:53:14 14 business in Clark County?

11:53:16 15 A. He is.

11:53:18 16 THE ARBITRATOR: G-A-R-R-I-T-Y?

11:53:20 17 MR. GERRARD: G-E-R-E-T-Y.

11:53:35 18 BY MR. GERRARD:

11:53:35 19 Q. Now, the Gerety report expresses essentially two
11:53:43 20 opinions. The first one that \$777,086 of distributions
11:53:48 21 were paid to Mr. Bidsal in excess of what was due him
11:53:52 22 under the Green Valley operating agreement; correct?

11:53:55 23 A. Correct.

11:53:55 24 Q. And that the price that CLA should pay to Bidsal
11:54:00 25 is \$1,598,169; correct?

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11:54:04 1 A. Correct.

11:54:07 2 Q. Did you offer opinions about those two

11:54:11 3 conclusions drawn by Mr. Gerety?

11:54:13 4 A. I did. I do.

11:54:14 5 Q. So let's first talk about your opinion with

11:54:17 6 respect to Mr. Gerety's first opinion that \$777,086 of

11:54:26 7 distributions were paid to Mr. Bidsal in excess of what

11:54:30 8 was due to him. Do you agree with that opinion?

11:54:31 9 A. I do not.

11:54:32 10 Q. Can you explain why?

11:54:34 11 A. Well, the first problem with the opinion is that

11:54:39 12 it -- or with his number is that included in that is

11:54:43 13 distributions from '18 and '19, which are really --

11:54:52 14 we're either entitled to those or we're not entitled to

11:54:55 15 them. Either the sale closed and he's not entitled to

11:54:57 16 them or the sale didn't close and he is entitled to

11:55:00 17 them. So that's one challenge we have to get around.

11:55:03 18 The other is that the rent that was received when

11:55:06 19 the building was foreclosed on or the deed in lieu of

11:55:09 20 foreclosure was executed, he wants to allocate that

11:55:16 21 70-30, which I disagree with. That is ordinary income.

11:55:19 22 It should be 50-50.

11:55:20 23 And then the third issue is that Mr. Gerety is

11:55:24 24 taking a position that -- we talked about ordinary

11:55:31 25 income and how ordinary income for the tax return will

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11:55:35 1 be different than the cash generated from ordinary
11:55:38 2 operations. We talked about that earlier. He's taken
11:55:41 3 the position that that delta -- the difference between
11:55:46 4 ordinary income and the distribution -- that that should
11:55:49 5 be allocated 70-30, which I disagree with.

11:55:54 6 **Q. Why do you disagree with that?**

11:55:56 7 A. Well, it's a component of ordinary income.

11:55:58 8 **Q. And that's -- essentially, we're talking about**
11:56:00 9 **depreciation; right?**

11:56:01 10 A. We're talking about depreciation, right. It's
11:56:01 11 that conversation we had about depreciation.

11:56:05 12 **Q. Does the operating agreement in Exhibit A very**
11:56:08 13 **clearly state how depreciation is allocated?**

11:56:11 14 A. It says that it should be allocated based on the
11:56:15 15 operating agreement in Exhibit A. And then you go to B,
11:56:18 16 and B says that it's allocated 50-50 as part of ordinary
11:56:21 17 income.

11:56:21 18 **Q. Now, Mr. Gerety takes a position that somehow**
11:56:25 19 **depreciation is a capital transaction. How do you**
11:56:29 20 **respond to that?**

11:56:29 21 A. I just think it's incorrect. Frankly, I'm not
11:56:35 22 sure how he's getting to that conclusion because
11:56:40 23 depreciation is a component of ordinary income.

11:56:42 24 **Q. And that's generally accepted accounting**
11:56:45 25 **principles; right?**

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11:56:45 1 A. That is under the tax law, and under generally
11:56:50 2 accepted accounting principles.

11:56:52 3 Q. What other problems did you find with this number
11:56:56 4 that Mr. Gerety had come up with of distributions that
11:56:59 5 were paid to Mr. Bidsal in excess of what was due to
11:57:01 6 him? You mentioned those first two problems.

11:57:06 7 A. I think I hit them all the first -- I think there
11:57:09 8 were just three.

11:57:09 9 Q. Okay. Did you also -- did you agree with
11:57:17 10 Mr. Gerety's conclusion about what constitutes a capital
11:57:21 11 transaction? Isn't that also a part of this analysis?

11:57:24 12 A. Yeah. And I did not agree with that one.

11:57:26 13 Q. How does Mr. Gerety treat this -- determining
11:57:31 14 what is a capital transaction triggering the special
11:57:34 15 allocation language as opposed to what you described
11:57:37 16 earlier?

11:57:38 17 A. So he has taken the position that the sale of the
11:57:43 18 buildings is a capital transaction, and that that would
11:57:48 19 trigger the waterfall which would trigger the 70-30
11:57:53 20 allocation.

11:57:53 21 Q. And in coming to that conclusion, is he using a
11:57:56 22 definition of capital transaction from the operating
11:57:59 23 agreement, or is he using a definition of capital
11:58:02 24 transaction from the tax code?

11:58:03 25 A. Well, it's not from the operating agreement, so

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11:58:08 1 I'm assuming he must be thinking of the tax code. It's
11:58:11 2 definitely not the operating agreement.

11:58:12 3 **Q. If you were just to look at this from a strict**
11:58:15 4 **tax perspective and we had no operating agreement that**
11:58:19 5 **described what a capital transaction was supposed to be,**
11:58:23 6 **under the tax code, what would be a capital transaction?**

11:58:25 7 A. So Section 1221 describes a capital transaction
11:58:33 8 as the sale of any property that's not inventory or
11:58:37 9 royalties or depreciable. So it describes a capital
11:58:42 10 transaction negative anything that's not inventory,
11:58:49 11 royalty or a depreciable property. So right there,
11:58:55 12 we're saying depreciation. There's -- you look up 1221
11:58:59 13 and it's very clear. So depreciation is not part of
11:59:01 14 that capital transaction.

11:59:03 15 **Q. Okay.**

11:59:04 16 A. So I'm not sure where he's going with his
11:59:10 17 assumption.

11:59:10 18 **Q. Now, let's talk for a minute about the Exhibit B**
11:59:16 19 **language in the operating agreement that talks about**
11:59:22 20 **nonreoccurring events. Do you remember that?**

11:59:24 21 A. Yes.

11:59:24 22 **Q. In the last paragraph of Exhibit B, it talks**
11:59:28 23 **about capital transactions or nonreoccurring events such**
11:59:33 24 **as a sale of all or a substantial portion of the**
11:59:36 25 **company's assets or cash out financing.**

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11:59:39 1 Do you remember that language?

11:59:40 2 A. Yes.

11:59:40 3 Q. From a company operation and tax perspective,

11:59:44 4 what is a nonreoccurring event?

11:59:47 5 MR. LEWIN: I'm sorry. I'm not sure that I

11:59:52 6 understand the question. It's vague and ambiguous.

11:59:53 7 What a company and tax -- seems like it's two questions

12:00:00 8 in one.

12:00:02 9 MR. GERRARD: Your Honor, I think the question is

12:00:03 10 perfectly understandable.

12:00:04 11 THE ARBITRATOR: If the perspectives are

12:00:05 12 different -- why don't you rephrase?

12:00:05 13 MR. GERRARD: Okay. I understand what he's

12:00:05 14 saying. That's fine.

12:00:09 15 BY MR. GERRARD:

12:00:13 16 Q. From a company operational perspective, does the

12:00:17 17 way that a company operates have something to do with

12:00:20 18 whether something is a reoccurring event or a

12:00:23 19 nonreoccurring event, if you're talking about a sale of

12:00:26 20 something?

12:00:26 21 A. Yes.

12:00:26 22 Q. Okay. So let's assume that we're talking about a

12:00:32 23 car dealership.

12:00:34 24 A. Okay.

12:00:34 25 Q. If a car dealership sells a car, would that be

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12:00:37 1 reoccurring event or a nonreoccurring event?

12:00:39 2 A. That would be a reoccurring event. You can't --

12:00:42 3 yeah, that would be a reoccurring event.

12:00:43 4 Q. And explain that.

12:00:45 5 A. Well, that's what that dealership is in the

12:00:49 6 business of doing, is selling cars. So that's its

12:00:55 7 business, selling cars. And it's going to do it day in

12:00:58 8 and day out, day in and day out.

12:01:00 9 Q. Now, under Mr. Gerety's approach, he said that if

12:01:05 10 you sell a car, since you can never sell that same car

12:01:08 11 again, that that's a nonreoccurring event; correct?

12:01:10 12 A. That is basically the approach he's taking.

12:01:12 13 Q. Do you agree with that approach?

12:01:13 14 A. Well, no.

12:01:16 15 Q. Same thing with this company. This company

12:01:20 16 ultimately owned nine parcels of property; correct?

12:01:24 17 A. Correct.

12:01:24 18 Q. If the company sells one parcel of that property,

12:01:29 19 is that a reoccurring event or a nonreoccurring event?

12:01:34 20 A. That would have to be a nonreoccurring event.

12:01:37 21 That's not the business that the company's in.

12:01:39 22 Q. What if the company then sells two pieces of

12:01:43 23 property? Would that still be a nonreoccurring event,

12:01:47 24 or would that be a reoccurring event?

12:01:49 25 A. The only way that it could be a reoccurring event

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12:01:53 1 is if you did all of those at one time. If you're

12:01:55 2 spreading them out over a period of years, it would be a

12:01:58 3 nonreoccurring event. I'm sorry. It would be

12:02:03 4 nonreoccurring event. I'm sorry. It would be -- if you

12:02:07 5 sold multiple properties like -- are we talking about

12:02:13 6 like what we did here?

12:02:15 7 Q. Yes.

12:02:15 8 A. Okay. So that would be a reoccurring event in

12:02:19 9 that case.

12:02:19 10 Q. Okay. Because you're selling more than one

12:02:22 11 property?

12:02:23 12 A. Right.

12:02:23 13 Q. It's not -- so is it based upon what's being sold

12:02:27 14 or what the business of the company is?

12:02:29 15 A. It's based on what the business of the company

12:02:30 16 is.

12:02:31 17 Q. Okay. So if in the business of the company, if

12:02:34 18 it sells more than one piece of property, it can no

12:02:37 19 longer be a nonreoccurring event; right?

12:02:39 20 A. Yeah.

12:02:39 21 Q. Okay. So let's go back to what we were talking

12:02:53 22 about before about the distributions. You testified

12:02:56 23 that you disagree with Mr. Gerety's trying to

12:03:02 24 characterize the -- trying to characterize the sales of

12:03:12 25 each of the buildings as a capital transaction to

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12:03:14 1 trigger the special allocation language; correct?

12:03:16 2 A. I disagree with that.

12:03:18 3 Q. And did we cover -- I'm sorry -- did we cover the

12:03:21 4 rents issue?

12:03:22 5 A. Yes, we did. The rent pursuant to the deed in

12:03:32 6 lieu?

12:03:32 7 Q. Correct. Okay. We did cover that.

12:03:35 8 All right. So then the second opinion that

12:03:39 9 Mr. Gerety had come to is that CLA should pay Bidsal

12:03:44 10 \$1,598,169. How does your number differ from

12:03:52 11 Mr. Gerety's number?

12:03:53 12 A. So there's basically two -- well, there are two

12:03:58 13 differences between my calculation and Mr. Gerety's

12:04:01 14 calculation. The primary difference -- our difference

12:04:06 15 is 549 -- I'm sorry. That's not true.

12:04:12 16 The difference is \$290,000.

12:04:19 17 MR. GERRARD: Jim, can you put up that chart?

12:04:22 18 Just that portion of his rebuttal report that is just

12:04:25 19 the charts on page 11? It would be easier for the judge

12:04:28 20 to follow.

12:04:28 21 MR. LEWIN: Are we going to mark this? Is this

12:04:31 22 the same chart?

12:04:31 23 MR. GERRARD: No.

12:04:31 24 THE ARBITRATOR: It's demonstrative?

12:04:39 25 MR. GERRARD: Yeah.

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12:04:39 1 MR. LEWIN: If he's going to use some piece of
12:04:41 2 evidence, I'd like to have it in my hand so I can
12:04:44 3 question the witness about it.

12:04:46 4 MR. GERRARD: It's just a demonstrative exhibit.
12:04:48 5 If you want us to make a photocopy, we can do that
12:04:50 6 during the break.

12:04:53 7 THE ARBITRATOR: Let's do it now. I might need
12:04:55 8 to write on it.

12:06:29 9 ***

12:06:29 10 (RECESS TAKEN FROM 12:04 P.M. TO 12:07 P.M.)

12:07:42 11 ***

12:07:42 12 THE ARBITRATOR: Back on the record.

12:07:55 13 MR. GERRARD: Go ahead, Mr. Wilcox.

12:07:59 14 THE WITNESS: Put the top schedule up. That
12:08:01 15 would be easiest.

12:08:23 16 So all this schedule does is contrast my
12:08:25 17 calculation of the purchase price and Gerety's
12:08:28 18 calculation. We both start at \$5 million. The cost of
12:08:33 19 purchase is -- there's a pretty good size difference
12:08:36 20 there, about 549,000, which I'll go through here in just
12:08:42 21 a minute. And then we have -- our capital contributions
12:08:48 22 number is very close. His number's \$18,000 different
12:08:53 23 than mine. So the primary difference in our
12:08:58 24 calculations is up at the cost of purchase.

12:09:01 25 So let's put the next -- just scroll down to the

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12:09:05 1 next section.

12:09:08 2 The difference in the cost of purchase -- there's

12:09:11 3 basically two differences. In my cost of purchase, I'm

12:09:18 4 using the rollover basis from Building C rather than

12:09:25 5 using the purchase price of Greenway property.

12:09:30 6 BY MR. GERRARD:

12:09:30 7 **Q. Explain why that is the case.**

12:09:32 8 A. Well, so the whole purpose behind a 1031, which

12:09:37 9 this was subject -- Building C was sold as part of the

12:09:41 10 1031 exchange to acquire Greenway. The whole purpose

12:09:44 11 behind that is to defer that gain. Rather than pay tax

12:09:48 12 now, let's take the money out of this one, go buy a new

12:09:51 13 piece of property, defer the gain to the future.

12:09:56 14 Mr. Gerety is taking and saying that he thinks

12:10:00 15 it's appropriate to use the purchase price of the

12:10:04 16 Greenway property as part of the cost of purchase

12:10:10 17 formula, and it just inexplicably takes away

12:10:19 18 Mr. Bidsal's opportunity to participate in that gain.

12:10:25 19 I'm not sure that there's -- I don't understand

12:10:29 20 his logic on that one, because all he's doing is he's

12:10:33 21 saying -- I guess he's reading the operating agreement,

12:10:36 22 which says you got to refer to the escrow statement

12:10:41 23 purchase price. And so he's taking that literal

12:10:44 24 reading. Well, if you take that literal reading, then I

12:10:46 25 need to change my calculation to only include the

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12:10:51 1 Greenway properties since that's the only escrow
12:10:54 2 statement we really have. I don't -- I'm not proposing
12:10:58 3 that because that's illogical as well.

12:11:01 4 **Q. Basically what you're saying is Mr. Gerety is**
12:11:04 5 **picking and choosing when he wants to apply the exact**
12:11:09 6 **language of the cost of purchase definition and when not**
12:11:14 7 **to?**

12:11:14 8 A. Yeah. It appears that way. I mean, it makes
12:11:17 9 absolutely no sense. If you're going to do it the way
12:11:22 10 that Gerety did, then Mr. Bidsal would never ever have
12:11:28 11 consented to a 1031 exchange because it has denied him
12:11:32 12 his share of that gain.

12:11:35 13 **Q. Of the appreciation?**

12:11:36 14 A. Of the appreciation. Why would you do that?
12:11:39 15 Unless, I guess, he didn't understand his own operating
12:11:45 16 agreement.

12:11:45 17 **Q. What other differences are there?**

12:11:47 18 A. The other difference is the parking lot. In
12:11:52 19 Mr. Gerety's report, he takes the full value of the
12:11:56 20 parking lot and adds it to the cost of purchase. I just
12:12:01 21 think that's erroneous. And the reason it's an error is
12:12:07 22 because we've sold off three of those buildings. So
12:12:11 23 when you sell the building, the value of the parking lot
12:12:13 24 attributable or allocable to those buildings, it's no --
12:12:17 25 it just makes no sense. When does Green Valley Commerce

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12:12:24 1 ever get to deduct the value allocable to those three
12:12:30 2 buildings that were sold -- the parking lot attributable
12:12:33 3 to those three buildings that were sold? You never get
12:12:35 4 it, so.

12:12:36 5 Q. So let's make sure we understand that. So there
12:12:39 6 is a set of CC&Rs for this property; correct?

12:12:42 7 A. That's correct.

12:12:42 8 Q. And did you look at the CC&Rs?

12:12:46 9 A. I did.

12:12:47 10 Q. And I'm not asking you to remember word for word
12:12:50 11 what the CC&Rs say, but did you see that the CC&Rs
12:12:53 12 attribute or give rights -- property rights, easement
12:12:58 13 interest rights? Property rights to each owner of each
12:13:02 14 of the buildings? They each have property rights in the
12:13:06 15 parking lot?

12:13:07 16 A. Yeah, I don't know the specific words. But it
12:13:10 17 was something equivalent to noncancelable easement or
12:13:14 18 rights to -- something like that, yes.

12:13:16 19 Q. So as each building is sold off, the owner of
12:13:20 20 that new building owns rights in the parking lot that
12:13:24 21 used to be exclusively controlled by Green Valley
12:13:28 22 Commerce, the company; correct?

12:13:29 23 A. Yes.

12:13:30 24 Q. So are there any other large differences between
12:13:37 25 your number and Mr. Gerety's number?

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12:13:42 1 A. No. Those are the only two differences.

12:13:44 2 Q. Then we also had that prorated labilities number;

12:13:48 3 correct?

12:13:48 4 A. And the prorated labilities, yeah.

12:13:50 5 Q. So that's approximately \$34,500; right?

12:13:54 6 A. Correct.

12:13:56 7 Q. And he deducts that even though that money is

12:14:00 8 still in the bank account; correct?

12:14:02 9 A. Yes. And that's the reason I did not deduct it.

12:14:05 10 Q. Okay.

12:14:23 11 MR. GERRARD: Your Honor, is this a good time to

12:14:25 12 stop for lunch? I've got -- I just want to review to

12:14:32 13 make sure that there's nothing else I need to ask him,

12:14:33 14 because I think I'm done.

12:14:34 15 THE ARBITRATOR: That's fine.

12:14:34 16 You all right with that?

12:14:36 17 MR. LEWIN: That's fine.

12:15:07 18 ***

12:15:07 19 (RECESS TAKEN FROM 12:15 P.M. TO 12:59 P.M.)

12:15:07 20 ***

12:59:14 21 (Daniel Gerety now present via Zoom.)

12:59:14 22 THE ARBITRATOR: Back on the record.

12:59:16 23 You've completed your direct exam?

12:59:21 24 MR. GERRARD: I have, your Honor. I pass the

12:59:23 25 witness. I move for --

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12:59:23	1	THE ARBITRATOR: 201 will be admitted without	Page 448
12:59:26	2	objection.	
12:59:27	3	MR. LEWIN: That's correct.	
12:59:27	4	THE ARBITRATOR: Okay. Now, for purposes of	
12:59:28	5	cross, you want to publish the deposition of Mr. Wilcox;	
12:59:28	6	right?	
12:59:30	7	MR. GERRARD: No objection.	
12:59:32	8	MR. LEWIN: Right. Taken on February 17, 2021.	
12:59:35	9	THE ARBITRATOR: Okay. You can go ahead and open	
12:59:36	10	that then. What was the date?	
12:59:50	11	MR. LEWIN: February 17, 2021.	
12:59:52	12	THE ARBITRATOR: All right.	
13:00:04	13	EXAMINATION	
13:00:04	14	BY MR. LEWIN:	
13:00:05	15	Q. Mr. Wilcox, we just handed you your original	
13:00:07	16	deposition. Do you recall we took your deposition on	
13:00:10	17	February 17, 2021?	
13:00:11	18	A. Yes.	
13:00:12	19	Q. And you were sworn to tell the truth?	
13:00:13	20	A. Yes.	
13:00:13	21	Q. And you did tell the truth that day?	
13:00:16	22	A. I did.	
13:00:16	23	Q. And have you -- you were provided with an	
13:00:19	24	opportunity to review the deposition?	
13:00:20	25	A. I was.	

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13:00:20 1 Q. Did you make any changes?

13:00:24 2 A. I did not.

13:00:25 3 Q. Now, you've testified about --

13:00:32 4 THE ARBITRATOR: Today?

13:00:32 5 MR. LEWIN: Today.

13:00:33 6 BY MR. LEWIN:

13:00:33 7 Q. You testified about your communications with

13:00:36 8 Mr. Bidsal and about how he created the schedules,

13:00:43 9 allocated the purchase price on the properties. But the

13:00:52 10 fact is in your deposition you said you didn't rely on

13:00:55 11 anything Mr. Bidsal told you. Isn't that true?

13:00:58 12 A. I did -- I did state that I didn't rely on -- I

13:01:03 13 didn't rely solely on what he told me, yes. I believe I

13:01:07 14 said I corroborated that with the additional documents,

13:01:10 15 is the way I remember it.

13:01:11 16 Q. Actually, let me read from your deposition.

13:01:15 17 MR. GERRARD: Where you at, Rod?

13:01:16 18 MR. LEWIN: Page 12, line 21 through 23.

13:01:25 19 Actually, I'm going to read from line 12 through 23.

13:01:39 20 BY MR. LEWIN:

13:01:39 21 Q. "Question: In connection with your opinions in

13:01:43 22 this case, did you rely on any documents other than what

13:01:45 23 is stated in your expert report or your rebuttal report?

13:01:48 24 "Answer: No.

13:01:50 25 "Question: Did you rely on communications with

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13:01:53 1 any of Mr. Bidsal's attorneys?

13:01:54 2 "Answer: No. We had communications to discuss,

13:01:57 3 but I relied on the documents.

13:01:59 4 "Question: Did you rely on communications with

13:02:01 5 Mr. Bidsal?

13:02:02 6 "Answer: No," end quote.

13:02:04 7 Now --

13:02:13 8 MR. GERRARD: Is there a question?

13:02:14 9 THE ARBITRATOR: It's coming.

13:02:16 10 MR. LEWIN: It's coming.

13:02:17 11 BY MR. LEWIN:

13:02:17 12 Q. You did, however, rely on a portion of what

13:02:23 13 Mr. Bidsal's affidavit said; right?

13:02:25 14 A. Yes. I quoted in my report what we talked about.

13:02:29 15 Q. And the part that you quoted with Mr. Bidsal was

13:02:32 16 the part that related to the reason for his disparate

13:02:36 17 percentage?

13:02:37 18 A. Correct.

13:02:38 19 Q. And what Mr. Bidsal said in his affidavit that

13:02:48 20 you relied on was that he received a greater percentage

13:02:55 21 interest because he was going to be using his knowledge

13:02:57 22 and expertise in the area of finding deals on property,

13:03:03 23 purchasing property and converting those into fee simple

13:03:08 24 properties if needed, subdividing the properties, and

13:03:11 25 managing the properties; correct?

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13:03:12 1 A. Correct.

13:03:14 2 Q. So "deals" is plural; right?

13:03:17 3 A. Yeah.

13:03:19 4 Q. And the agreement that Mr. Bidsal had with

13:03:22 5 Mr. Golshani about getting a greater interest was

13:03:29 6 because there was -- it was in anticipation that they

13:03:32 7 were going to buy more than one property; right?

13:03:34 8 A. I don't know that. I only know that it said

13:03:37 9 "deals." But I don't know what the mindset was at the

13:03:40 10 time.

13:03:40 11 Q. But "deals" to you means more than one?

13:03:43 12 A. Yeah. "Deals" would indicate more than one.

13:03:46 13 Q. Okay. But in connection with your opinions that

13:03:56 14 you've given in your report and in this case, you did

13:04:00 15 not assume that Green Valley was going to purchase more

13:04:04 16 than one property; right?

13:04:05 17 A. I did not assume that Green Valley was going to

13:04:08 18 purchase more than one property?

13:04:10 19 Q. Yes.

13:04:11 20 A. I'm not sure -- I'm not sure that that's a

13:04:27 21 correct statement. I didn't know what they were going

13:04:30 22 to do at the time.

13:04:31 23 Q. Okay. So let me read from your deposition at

13:04:35 24 page 15, line 2 through 6.

13:04:43 25 So just to be -- quote, "So just to be clear, in

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13:04:46 1 connection with your opinions in this case, you did not
13:04:49 2 assume that Green Valley was going to purchase more than
13:04:52 3 one property; is that correct?

13:04:53 4 "Answer: That is correct," end quote.

13:04:56 5 A. That is what I said.

13:04:57 6 Q. And that was true at the time you gave your
13:05:01 7 deposition; right?

13:05:01 8 A. Yeah.

13:05:02 9 Q. Well, and the point I'm getting at here is that
13:05:05 10 as we get into this, one of the -- one of your opinions
13:05:10 11 in this case is based on the fact that -- let me strike
13:05:10 12 that.

13:05:17 13 It is your testimony that Exhibit B under the
13:05:20 14 terms of the operating agreement was only triggered in a
13:05:27 15 liquidation. Isn't that true?

13:05:28 16 A. I did make that comment. I think I clarified it
13:05:31 17 a little later on, but I did make that comment in my
13:05:33 18 deposition.

13:05:34 19 Q. So that -- and that's why the issue -- that's why
13:05:38 20 when you gave your testimony, you said that you were
13:05:41 21 only assuming that they had -- they were only going to
13:05:43 22 buy one property; right?

13:05:45 23 A. I guess I assumed the facts as they stood at the
13:05:51 24 time.

13:05:51 25 Q. Well, how about standing on the facts that you

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13:05:55
13:06:00
13:06:02
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1 testified to? You said that you did not assume that

2 Green Valley was going to purchase more than one

3 property. I think you're talking about -- are you

4 talking about at the time the operating agreement was

5 signed?

6 A. I don't recall exactly.

7 Q. Okay. I'm trying to juxtapose the fact that you

8 recognized that Mr. Bidsal's contribution was that he

9 was going to find deals for Green Valley. But yet

10 you're saying just a couple pages later that you assume

11 that they were never going to buy more than one

12 property. Can you explain that?

13 A. Yes. So what I said right before that is I said

14 you -- I said that that really wasn't relevant. I

15 didn't really consider what they were -- whether they

16 were going to find more property or not.

17 Q. And so --

18 A. I didn't find that relevant, whether they were

19 going to get more property or not.

20 Q. So in giving your opinions regarding Exhibit B in

21 terms of what constitutes a capital transaction, there

22 was no consideration of yours whatsoever that they may

23 be buying more properties. Is that true?

24 A. Like I said in my deposition, I guess I didn't

25 really consider that to be relevant at that -- as part

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13:07:16 1 of what I was asked to do.

13:07:17 2 Q. That's not my question. My question is you've

13:07:20 3 now -- you've given your interpretation of Exhibit B to

13:07:23 4 the operating agreement.

13:07:23 5 A. Okay.

13:07:24 6 Q. And if I understand your testimony, what you said

13:07:29 7 is you interpret Exhibit B as only being triggered on

13:07:36 8 either -- you said earlier a "liquidation," but either

13:07:41 9 that or a sale of substantially all of its properties;

13:07:44 10 is that correct?

13:07:44 11 A. Correct.

13:07:45 12 Q. Which never took place.

13:07:46 13 A. I'm sorry?

13:07:47 14 Q. Which never took place.

13:07:48 15 A. Okay.

13:07:49 16 Q. And you remember we talked about the fact that

13:07:52 17 Exhibit B -- that it referred to in the beginning

13:07:57 18 paragraph, sale of asset -- "sale of company asset."

13:08:00 19 Do you remember that?

13:08:01 20 A. Uh-huh.

13:08:02 21 THE ARBITRATOR: Is that a yes?

22 THE WITNESS: Yes. I'm sorry.

23 THE ARBITRATOR: For her benefit.

24 THE WITNESS: Yup, I know. Yes.

25 ///

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1 BY MR. LEWIN:

13:08:06 2 Q. And you remember, I asked you if you thought that
13:08:08 3 that was a typo, that it should have said "sale of a
13:08:12 4 company asset."

13:08:13 5 And do you remember what you said about that?

13:08:16 6 A. I probably said I cannot -- the document speaks
13:08:20 7 for itself. I don't recall exactly what I said.

13:08:26 8 Q. Now, you took accounting in college?

13:08:29 9 A. I did.

13:08:30 10 Q. And did you take English courses?

13:08:34 11 A. I did.

13:08:36 12 Q. And you don't know the difference between a
13:08:38 13 conjunctive and a disjunctive. Is that true?

13:08:41 14 A. Not off the top of my head. Probably if you told
13:08:46 15 me what it was, I would say, Oh, yeah, I know that.

13:08:48 16 But I'm not an English professor so no, I
13:08:51 17 couldn't tell you what it is.

13:08:51 18 Q. Let me just read your testimony. Maybe this will
13:08:55 19 refresh your recollection. Page 18, line 21 through 23.

13:09:09 20 Quote, "Question: For example, do you know the
13:09:11 21 difference between a conjunctive and a disjunctive?

13:09:15 22 "Answer: No. English is not my strong suit,"
13:09:20 23 end quote.

13:09:21 24 And do you remember that we talked about the --
13:09:25 25 in Exhibit B, the use of the word "or."

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13:09:34 1 Please turn to Exhibit 5 and turn to Exhibit B in
13:10:10 2 it where it says "It is the express intent of the
13:10:18 3 parties that, quote, 'cash distributions of profits,'
13:10:22 4 end quote, refers to distributions generated from
13:10:25 5 operations resulting in ordinary income in contrast to
13:10:28 6 cash distributions arising from capital transactions or
13:10:31 7 nonrecurring events such as a sale of all or a
13:10:35 8 substantial portion of the company's assets or cash out
13:10:39 9 financing."
13:10:43 10 Do you understand that the word "or" is a
13:10:45 11 disjunctive?
13:10:47 12 A. If you tell me that, I would take your word on
13:10:51 13 it. I have no reason to believe you'd lead me astray.
13:10:54 14 Q. In other words, it's either -- it's one thing or
13:10:56 15 something else; right?
13:10:57 16 A. That's not the way I would read that.
13:11:01 17 Q. Do you understand what a disjunctive is? In
13:11:04 18 other words, it's a contrast.
13:11:08 19 MR. GERRARD: I'm going to object to the
13:11:09 20 question. Obviously, this is outside the scope of his
13:11:10 21 opinions. He's already testified he's not --
13:11:13 22 THE ARBITRATOR: I'll allow it. But I mean, we
13:11:16 23 kind of covered it.
13:11:16 24 MR. LEWIN: Okay.
13:11:16 25 ///

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13:11:21 1 BY MR. LEWIN:

13:11:21 2 Q. Also, the words "such as." Do you think that --

13:11:26 3 is it your interpretation that the words "such as" is

13:11:29 4 not by way of giving an example?

13:11:31 5 A. I think what I said is that that was an example.

13:11:37 6 We discussed that further. I said "such as" is the

13:11:44 7 finding or modifying explaining what the capital

13:11:47 8 transaction or nonreoccurring event is.

13:11:49 9 Q. Well, it's an example of some possible capital

13:11:52 10 transactions as opposed to the whole universe of them?

13:11:56 11 A. Yeah. I don't think I testified that it was the

13:11:58 12 universe of possible capital transactions.

13:12:01 13 Q. So "such as" -- in this context, you interpret

13:12:05 14 the words "such as" as a way of an example of "these are

13:12:07 15 some of the possible nonrecurring events"?

13:12:12 16 A. Sure.

13:12:12 17 Q. Right? Is that correct?

13:12:13 18 A. Yes.

13:12:14 19 Q. Thank you. Now, in terms of Dan Gerety, you've

13:12:17 20 known him for a long time; right?

13:12:19 21 A. I have.

13:12:20 22 Q. And you would trust Mr. Gerety to do your own tax

13:12:26 23 returns; right?

13:12:26 24 A. I think Dan Gerety is a good CPA, yes.

13:12:29 25 Q. So you would trust him to do your own tax

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13:12:32 1 returns; right?

13:12:32 2 A. If I needed him to, I would.

13:12:34 3 Q. Now, in terms of deciding -- interpreting the

13:12:39 4 operating agreement, you as a CPA -- when someone mails

13:12:46 5 you an operating agreement and says, "We'd like you to

13:12:50 6 do our accounting work" -- you take it upon yourself to

13:12:52 7 contact the principal parties to talk to them about

13:12:55 8 terms that you may not understand; right?

13:12:57 9 A. Yes.

13:12:57 10 Q. If possible, you would try to contact the person

13:13:00 11 who drafted the agreement if there's some confusion, if

13:13:04 12 you thought it was not clear; right?

13:13:06 13 A. Yes.

13:13:06 14 Q. If some other CPA had been doing work, you'd try

13:13:10 15 to call that person; right?

13:13:11 16 A. Sure.

13:13:12 17 Q. Now, have you ever spoken to David LeGrand about

13:13:15 18 this operating agreement?

13:13:16 19 A. No, I have not.

13:13:18 20 Q. Have you ever read any of David LeGrand's

13:13:21 21 testimony?

13:13:22 22 A. No.

13:13:22 23 Q. Have you ever spoken to Jim Main about this

13:13:26 24 operating agreement?

13:13:26 25 A. Specifically, no.

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13:13:27 1 Q. Have you ever spoken to him about this case?

13:13:29 2 A. No.

13:13:30 3 Q. Have you ever reviewed any portion of his

13:13:32 4 deposition?

13:13:32 5 A. No.

13:13:33 6 Q. Has anyone told you what Mr. Main said in his

13:13:37 7 deposition?

13:13:38 8 A. Not that I recall.

13:13:39 9 Q. Have you read any portions of Mr. Bidsal's

13:13:43 10 deposition testimony?

13:13:43 11 A. No.

13:13:45 12 Q. Have you read any portions of Mr. Bidsal's

13:13:49 13 testimony in the prior arbitration?

13:13:50 14 A. No.

13:13:51 15 Q. Have you ever spoken to an accountant named

13:13:57 16 Danielle Pena?

13:13:58 17 A. No.

13:13:59 18 Q. Were you told by anyone that you shouldn't talk

13:14:01 19 to these people?

13:14:02 20 A. No.

13:14:02 21 Q. Were you -- did you ever try to contact

13:14:05 22 Mr. Golshani to see if he would subject himself to an

13:14:09 23 interview?

13:14:09 24 A. No.

13:14:10 25 Q. Did anything stop you from talking to any of

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13:14:14 1 these people that I just mentioned?

13:14:16 2 A. No.

13:14:17 3 THE ARBITRATOR: Well, now, come on.

13:14:20 4 MR. LEWIN: Talking about Mr. Golshani?

13:14:22 5 THE ARBITRATOR: Yes.

13:14:23 6 MR. LEWIN: He could have asked for an interview.

13:14:25 7 And you know how cooperative I am.

13:14:28 8 THE ARBITRATOR: In the normal course, yes,

13:14:31 9 speaking to your client without your knowledge, without

13:14:33 10 your consent would be out of bounds.

13:14:38 11 MR. LEWIN: Exactly. I think my question was did

13:14:41 12 he ever ask if he could interview Mr. Golshani.

13:14:43 13 THE ARBITRATOR: You said, Nothing prevented you

13:14:45 14 from speaking to any of those individuals.

13:14:47 15 MR. LEWIN: Okay. You're right.

13:14:47 16 BY MR. LEWIN:

13:14:48 17 Q. Except for Mr. Golshani, which you'd have to get

13:14:51 18 permission to interview, nothing prevented you from

13:14:55 19 speaking to the list of -- all the people on the list

13:14:58 20 that I mentioned; right?

13:14:59 21 A. No.

13:15:00 22 Q. And by the way, you've apparently had some

13:15:05 23 substantial communications with Mr. Bidsal. Do you have

13:15:07 24 any notes of those communications?

13:15:09 25 A. No.

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13:15:10 1 Q. Can you tell us how long you spoke to Mr. Bidsal
13:15:15 2 for?
13:15:15 3 A. I'm sorry. How long?
13:15:16 4 Q. In terms of time.
13:15:17 5 A. I probably had conversations when Mr. Gerrard and
13:15:27 6 Shapiro were on the line with also Mr. Bidsal, two or
13:15:32 7 three hours.
13:15:32 8 Q. But no notes about anything that was said in
13:15:35 9 those conversations?
13:15:35 10 A. No, I did not take notes.
13:15:37 11 Q. My brother's a CPA. He takes notes about
13:15:45 12 everything. That's not part of your common practice?
13:15:46 13 A. I take notes, but not in this kind of a case.
13:15:48 14 Q. Why not in this kind of a case?
13:15:49 15 A. It's just easier not to have notes.
13:15:51 16 Q. What do you mean? Because it might contradict
13:15:53 17 what you say under oath?
13:15:56 18 MR. GERRARD: Objection. Argumentative.
13:15:57 19 THE ARBITRATOR: I'm going to sustain that.
13:15:58 20 BY MR. LEWIN:
13:15:58 21 Q. You wouldn't want those notes to become part of
13:16:02 22 the record in the case, is that the reason you don't
13:16:04 23 take notes?
13:16:04 24 A. I don't take notes because I don't need to take
13:16:08 25 notes.

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1 Q. Okay. Now, have you -- you've indicated that
2 part of your job as a CPA is that you review operating
3 agreements. That's a fair statement; right?
4 A. Yes.
5 Q. You have to figure out how do things tax-wise;
6 right?
7 A. Yes.
8 Q. Have you ever taken over some accounting work
9 from another accountant, when you've looked at it and
10 you've said, Oh, this is not done right.
11 A. Yes.
12 Q. For example, one of your claims is that the money
13 that was received in the deed in lieu, that it was
14 recorded in the general ledger \$311,000 of interest;
15 right?
16 A. Yes.
17 Q. That was also reflected in the tax return of
18 Green Valley; right?
19 A. That is correct.
20 Q. And who prepared those tax returns?
21 A. Jim Main.
22 Q. So sometimes you have found that the records --
23 the accounting records or tax returns that one person
24 prepares are not correct. Everyone makes mistakes;
25 right?

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13:17:11 1 A. Sure.

13:17:11 2 Q. You think that Mr. Main made a mistake when he

13:17:16 3 set forth the \$311,000 of interest from the money that

13:17:20 4 was received on -- from the deed in lieu transaction?

13:17:25 5 A. I did not agree with it being interest.

13:17:29 6 Q. And you thought that was a mistake?

13:17:30 7 A. Yes.

13:17:30 8 Q. Now, have you ever been hired to interpret an

13:17:35 9 operating agreement other than this case?

13:17:38 10 A. Every time I prepare an income tax return, I need

13:17:41 11 to interpret that operating agreement, as you mentioned

13:17:44 12 a few minutes ago.

13:17:45 13 Q. I just mean but specifically as an expert, have

13:17:47 14 you ever been hired to interpret an operating agreement?

13:17:49 15 A. Not that I recall specifically. There have been

13:17:57 16 operating agreements. I don't recall that I was hired

13:18:00 17 to -- specifically to interpret the agreement, no.

13:18:05 18 Q. By the way --

13:18:06 19 A. Answer is no.

13:18:08 20 Q. Did you read any part of Mr. Golshani's testimony

13:18:11 21 in this case or in his prior arbitration?

13:18:14 22 A. I did not.

13:18:14 23 Q. Has anyone told you what he testified about?

13:18:17 24 A. I don't recall being told, no.

13:18:25 25 Q. Now, the operating agreement has an effective

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13:18:38 1 date of June 15, 2011, but we know that it wasn't signed
13:18:46 2 until -- I think the evidence is going to show
13:18:50 3 December 12 -- 11 or 12, 2011. Assume that that's true.

13:18:53 4 A. I agree.

13:18:54 5 Q. Were your opinions influenced by the date that
13:19:00 6 the agreement was effective as opposed to signed?

13:19:04 7 A. No. I don't -- I think if it would have been
13:19:16 8 signed the same day as it was effective, I would have
13:19:18 9 had the same opinions.

13:19:19 10 Q. Is there some tax consequence as to the effective
13:19:21 11 date of the operating agreement?

13:19:23 12 A. Not that I'm aware of.

13:19:24 13 Q. Is there some economic effect as to the effective
13:19:28 14 date of the operating agreement between the members?

13:19:30 15 A. No.

13:19:30 16 Q. As of June 15, 2011, what did Green Valley own?

13:19:41 17 A. I believe the -- if memory serves me correctly,
13:19:47 18 they purchased the note around June 9th or 6th. So at
13:19:53 19 that point, they would have owned the note.

13:19:54 20 Q. What else did they purchase when they bought the
13:19:57 21 note?

13:19:57 22 A. Based on the closing statement, I believe they
13:20:06 23 bought the note. There was some fees and costs, but I
13:20:11 24 don't believe there was anything other than the note on
13:20:12 25 that.

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13:20:13 1 Q. So when you made your decision -- when you
13:20:15 2 testified about the rents in the -- that were
13:20:19 3 transferred in the -- as part of the deed in lieu
13:20:23 4 agreement, did you consider -- strike that. Let me
13:20:34 5 start over with that.

13:20:34 6 When you testified about the rents being rents,
13:20:39 7 not interest or anything else, in connection with the
13:20:42 8 \$295,000 that was transferred as part of the deed in
13:20:46 9 lieu agreement, did you know that there was an
13:20:51 10 assignment of leases and rents dated July 17, 2007.

13:20:56 11 THE ARBITRATOR: 2007?

13:20:58 12 MR. LEWIN: 2007.

13:21:02 13 A. As part of the trust deed and the original note
13:21:05 14 transaction.

13:21:05 15 BY MR. LEWIN:

13:21:05 16 Q. So the note came with a package of documents that
13:21:08 17 gave an interest to the lender in the borrower's
13:21:15 18 property; right?

13:21:16 19 A. Correct.

13:21:16 20 Q. Turn to Exhibit 8, please. Do you see, the deed
13:21:53 21 in lieu agreement sets forth what part -- what was part
13:21:58 22 of the loan package; right?

13:22:00 23 A. Correct.

13:22:00 24 Q. Okay. Now, you've never read the deed of trust
13:22:05 25 note; right?

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13:22:05 1 A. At the time of my deposition, that was true. I
13:22:08 2 did request those documents subsequent to my deposition
13:22:11 3 and reviewed them.

13:22:12 4 Q. Okay. But at the time you gave your deposition,
13:22:14 5 you knew you had to be prepared to give all of your
13:22:17 6 opinions in this case; right?

13:22:17 7 A. As I said, I had not read it at the time of my
13:22:20 8 deposition.

13:22:20 9 Q. But I'm also saying at the time you gave your
13:22:23 10 deposition, you knew that you had to be prepared to give
13:22:25 11 all of your opinions in this case? That's a yes or no.

13:22:27 12 A. Yes.

13:22:28 13 Q. And you knew in order to give opinions about the
13:22:32 14 deed in lieu agreement -- which I think you read; right?

13:22:34 15 A. I did read the deed in lieu agreement.

13:22:37 16 Q. You knew that there was other documents that were
13:22:40 17 part of the note package; right?

13:22:41 18 A. I did know those documents were there. I did not
13:22:46 19 think it was relevant. Still don't, in my opinion.

13:22:49 20 Q. Well, first of all, when you gave your
13:22:54 21 deposition, you couldn't -- you could not have an
13:22:56 22 opinion on how they're relevant because you hadn't read
13:23:00 23 them; right?

13:23:00 24 A. That's correct.

13:23:01 25 Q. Now, at the time of your deposition, you knew

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13:23:04 1 that there was a deed of trust -- assignments of rents, Page 467
13:23:07 2 security agreement, and fixture filing dated July 17,
13:23:11 3 2007; right? That's called a deed of trust?
13:23:13 4 A. Right.
13:23:14 5 Q. You knew that; right?
13:23:15 6 A. I knew because it was in this document.
13:23:17 7 Q. But you hadn't read that either?
13:23:19 8 A. I had not.
13:23:20 9 Q. And you also knew that there was an assignment of
13:23:23 10 leases and rents dated July 17, 2007, but at the time of
13:23:26 11 your deposition, you hadn't read that either?
13:23:29 12 A. Correct.
13:23:29 13 Q. But you do know -- you do have an idea of what an
13:23:35 14 assignment of leases and rents is, don't you?
13:23:36 15 A. I do.
13:23:37 16 Q. Have you since read the assignment of leases and
13:23:41 17 rents?
13:23:42 18 A. I have read through it, yes.
13:23:45 19 Q. You do know that the assignment of leases and
13:23:47 20 rents gives the lender an interest in the leases and
13:23:51 21 rents; right?
13:23:52 22 A. That's correct.
13:23:52 23 Q. You do know that the deed of trust gives the
13:23:55 24 lender an interest in the real property; right?
13:23:58 25 A. Yes.

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1 Q. And so does the security agreement; right? Did
2 you read the security agreement?
3 A. I did.
4 Q. And the fixture filing; right?
5 A. The -- which one?
6 Q. The fixture filing. The deed of trust has a
7 security agreement and fixture filing as part of it.
8 A. Yeah.
9 Q. So at the time that Green Valley acquired the
10 note, it acquired a package of all kinds of other
11 interests in real property; right?
12 A. Correct.
13 Q. And when -- this deed in lieu agreement, you've
14 never seen an escrow for this deed in lieu agreement
15 pertaining to the transfer of conveyance of title;
16 right?
17 A. I have not.
18 Q. As a matter of fact, isn't it your opinion that
19 what took place is that the deed of trust was converted
20 to a fee interest by virtue of this deed in lieu
21 agreement?
22 A. That is my understanding.
23 Q. That is why there's no -- therefore, it wasn't a
24 purchase; it was a conversion from the existing purchase
25 to title; right?

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13:24:54 1 A. That's correct.

13:24:55 2 Q. Okay. So that's why there's no escrow for the --

13:25:00 3 per se for the title aspect; is that correct?

13:25:05 4 A. Yeah.

13:25:05 5 Q. Isn't that what Mr. Bidsal told you?

13:25:08 6 A. I don't think Mr. Bidsal told me that.

13:25:10 7 Q. Did you ever ask him why there wasn't an escrow

13:25:13 8 for the deed in lieu agreement?

13:25:14 9 A. I didn't think it was necessary to ask him why

13:25:17 10 there wasn't an escrow.

13:25:19 11 Q. So -- as a matter of fact, isn't it your

13:25:21 12 opinion -- since you're giving opinions about some of

13:25:25 13 this stuff -- that this deed in lieu agreement actually

13:25:29 14 constitutes a conveyance pursuant to the deed of trust?

13:25:33 15 A. That's my understanding.

13:25:34 16 Q. So the purchase -- the escrow document that

13:25:42 17 really applies to the conversion of the deed of trust

13:25:48 18 into fee title is actually the escrow statement for the

13:25:53 19 purchase of the note; right?

13:25:54 20 A. The escrow statement for the purchase of the note

13:25:58 21 is the statement showing how they acquired the note

13:26:01 22 which ultimately became the property.

13:26:04 23 Q. That escrow statement would be the statement that

13:26:07 24 is called for by the formula because it is in fact --

13:26:13 25 they did receive interest in title at the time they

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13:26:16 1 purchased the note by virtue of these documents. Isn't
13:26:20 2 that true?

13:26:20 3 MR. GERRARD: Objection. That calls for a legal
13:26:22 4 conclusion, and it's an incorrect statement of law.
13:26:24 5 There is no interest in title that is transferred as a
13:26:27 6 result of a deed of trust. That's clear black-letter
13:26:31 7 Nevada law.

13:26:31 8 MR. LEWIN: Actually, there's an interest in
13:26:32 9 property.

13:26:34 10 MR. GERRARD: An interest in property, that's not
13:26:35 11 what you said. You said an interest in title. There's
13:26:36 12 a difference between title, which is an estate, and a
13:26:39 13 security interest, which is an interest in property.
13:26:41 14 They're very different concepts.

13:26:43 15 THE ARBITRATOR: So it's not within this
13:26:49 16 witness's expertise, I don't believe. But if you want
13:26:52 17 him to attempt to answer it --

13:26:55 18 MR. LEWIN: I'll re-ask the question.

13:26:56 19 BY MR. LEWIN:

13:26:57 20 Q. So the opinion that you formed based on review of
13:27:00 21 these documents now that you've had a chance to read
13:27:03 22 them is that the deed of trust was actually converted to
13:27:07 23 fee title; right?

13:27:08 24 MR. GERRARD: Objection. Misstates the document.

13:27:10 25 MR. LEWIN: I'm asking about his opinion.

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13:27:12 1 MR. GERRARD: You just asked if after reading the
13:27:14 2 documents if the documents convert the lien into title.
13:27:20 3 That is exactly --
13:27:20 4 MR. LEWIN: This is coaching. We don't want
13:27:23 5 Mr. Gerrard to testify.
13:27:24 6 MR. GERRARD: I appreciate that. But you can't
13:27:26 7 misstate what the document says if your question is you
13:27:29 8 read the document and that's what it says.
13:27:31 9 MR. LEWIN: I'm asking what his opinion was
13:27:32 10 after --
13:27:32 11 THE ARBITRATOR: All right. Let's rephrase the
13:27:34 12 question.
13:27:35 13 MR. GERRARD: I didn't hear that as the question.
13:27:37 14 I'm sorry, Rob.
13:27:37 15 BY MR. LEWIN:
13:27:37 16 Q. When you use the word -- you used the word
13:27:39 17 "conversion" earlier; right? Do you remember that?
13:27:41 18 A. Okay.
13:27:41 19 Q. And when you talked about conversion, you were
13:27:44 20 talking about conversion converting the interest that
13:27:50 21 Green Valley had by virtue of the deed of trust and the
13:27:54 22 assignment of rents into fee title; right?
13:27:56 23 A. Correct.
13:27:57 24 Q. Okay. And so that gives rise to -- I'll move on.
13:28:05 25 Now, in terms of -- well, now, in terms of --

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1 were all the terms you needed to consider for your
2 opinion defined in the operating agreement?
3 A. No.
4 Q. Was there a definition of what constituted
5 property?
6 A. What constituted property, I don't believe so.
7 Maybe there was. I don't recall.
8 Q. But you do agree that the promissory note is
9 promissory -- the note in the security package is
10 property?
11 A. Yes.
12 Q. Okay. Now, in the accounting profession, there
13 is a generally accepted definition of what constitutes a
14 capital transaction; right?
15 A. In the Internal Revenue Code, there is a
16 definition of a capital transaction.
17 Q. And what is the definition under the Internal
18 Revenue Code of a capital transaction?
19 A. A capital transaction is defined as the sale or
20 exchange of property that is not inventory, rents,
21 royalties, and depreciable property. There might be a
22 couple of other things, but those are the three primary.
23 Q. Is it correct that the sale -- that the sale of
24 property held for investment, that would be a capital
25 asset?

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13:30:08 1 A. Under the Internal Revenue Code, that would be a
13:30:12 2 capital asset, yes.

13:30:13 3 **Q. And is there a definition of what constituted a**
13:30:20 4 **capital transaction in the operating agreement?**

13:30:23 5 A. Well, you've got the definition which we've
13:30:29 6 already talked about on Exhibit B.

13:30:31 7 **Q. Exhibit -- the definition that we just talked**
13:30:35 8 **about, which was a...**

13:30:42 9 A. So the definition is capital transaction, and
13:30:45 10 then it gives some examples or such as sale of all or
13:30:50 11 substantially all -- or a substantial portion of the
13:30:54 12 company's assets or cash out financing.

13:30:56 13 **Q. But a capital transaction in connection with**
13:31:03 14 **Green Valley could be the sale of one property; right?**

13:31:07 15 MR. GERRARD: Objection to the form of the
13:31:09 16 question. It's vague and ambiguous. So whether he's
13:31:11 17 asking for purposes of the tax code or whether he's
13:31:14 18 asking for purposes of the operating agreement.

13:31:16 19 MR. LEWIN: Again, that's -- I don't think that's
13:31:18 20 an appropriate way to object. I think that's
13:31:21 21 testifying.

13:31:21 22 THE ARBITRATOR: What do you mean, it's not
13:31:23 23 appropriate? You've asked him about a definition of
13:31:27 24 capital transaction as it relates to the IRS code and
13:31:30 25 you've asked him about how it's defined in the operating

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13:31:34 1 agreement. So when you ask your question -- because
13:31:35 2 they're different, apparently, in this witness's
13:31:38 3 testimony -- you've got to specify which one you're
13:31:41 4 talking about.
13:31:41 5 BY MR. LEWIN:
13:31:41 6 **Q. Is there anything -- what part of this operating**
13:31:46 7 **agreement do you believe defines capital transaction as**
13:31:51 8 **other than what is defined in the IRS tax code?**
13:31:54 9 A. There's tax code --
13:31:57 10 **Q. Just point me to the words.**
13:32:00 11 MR. GERRARD: I think I have to object. The
13:32:02 12 witness is allowed to answer the question. You didn't
13:32:05 13 ask a yes or no question.
13:32:06 14 MR. LEWIN: I'll withdraw the question.
13:32:08 15 THE ARBITRATOR: All right.
13:32:09 16 BY MR. LEWIN:
13:32:09 17 **Q. Point out the words in this Schedule B or**
13:32:13 18 **anywhere else in this operating agreement that define**
13:32:15 19 **capital transaction?**
13:32:18 20 A. The final paragraph of Exhibit B, as well as the
13:32:25 21 first paragraph of Exhibit B uses the term "capital
13:32:29 22 transactions." In the first paragraph, it says "capital
13:32:33 23 transactions shall be distributed," and then it goes
13:32:39 24 "upon refinancing event" or "sale of company asset, cash
13:32:46 25 is distributed according to a step-down." So I'm

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1 assuming that's referring to capital transactions.

2 Then you go down to Exhibit B, final paragraph,

3 and it says -- talks about "distributions of profits in

4 contrast to distributions from capital transactions or

5 nonrecurring events." And then it goes on to modify

6 or explain what those two items are, "such as a sale of

7 all or a substantial portion of the company assets or

8 cash out financing."

9 **Q. It gives you examples of what those transactions**

10 **could be; right?**

11 A. It does modify them, yeah. It tells you what

12 we're talking about.

13 **Q. So this is the entire list of noncapital**

14 **transactions. Is that your testimony?**

15 A. I already established that I didn't -- I'm not

16 opining that this is the entirety.

17 **Q. Okay. So it's examples; right?**

18 A. Yeah.

19 **Q. Okay. So the bottom line is that if -- in terms**

20 **of under the operating agreement, would it be pertinent**

21 **to determine how the transactions were booked on the tax**

22 **returns?**

23 A. Well --

24 **Q. Yes or no? That's a yes or no. I'm talking**

25 **about the sale transaction.**

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13:33:55 1 A. Would it be pertinent?

13:33:57 2 Q. Yes.

13:33:57 3 A. The operating agreement controls, yes.

13:33:59 4 Q. Would it be pertinent to look at the tax returns

13:34:02 5 if you're trying to figure out if a sale was a capital

13:34:05 6 transaction to see how they were booked on the tax

13:34:07 7 returns?

13:34:07 8 A. No.

13:34:10 9 Q. How were the sales of the three properties booked

13:34:15 10 on the Green Valley tax returns? How were they

13:34:19 11 characterized?

13:34:20 12 A. They were categorized as capital transactions

13:34:24 13 because --

13:34:25 14 Q. That's the answer.

13:34:27 15 THE ARBITRATOR: You can let him finish his

13:34:27 16 answer.

13:34:30 17 MR. GERRARD: You can't cut him off in the middle

13:34:30 18 of his answer.

13:34:30 19 MR. LEWIN: I just asked him --

13:34:30 20 MR. GERRARD: You didn't ask him a yes or no

13:34:30 21 question.

13:34:32 22 MR. LEWIN: I did. I asked him how they were

23 characterized --

24 MR. GERRARD: No, you didn't -- I'm not going to

25 argue with you.

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1 Judge?

2 THE ARBITRATOR: How were they characterized is
3 not --

4 MR. LEWIN: Okay.

5 BY MR. LEWIN:

6 Q. You want to finish your answer?

7 A. My point was the operating agreement dictates how
8 it's going to be reported on the tax return. It's not
9 the tax return that tells -- that was my only point.

10 Q. Okay. So the operating agreement required that
11 the sale of the three properties be reported to the
12 Internal Revenue Service as capital transactions, yes or
13 no?

14 A. No.

15 Q. But they were reported as capital transactions on
16 the tax returns; right?

17 A. They were reported as capital transactions.

18 Q. We talked about nonrecurring events. And you
19 gave the example of a car dealership, where a car was
20 sold every day virtually; right?

21 A. Yes.

22 Q. Green Valley is not in the business of selling
23 properties every day; right?

24 A. That is correct.

25 Q. They've sold -- in the last ten years, they've

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13:35:48

1 sold three properties?

13:35:49

2 A. Three.

13:35:50

3 Q. Three properties. Would you -- but you would say

13:35:53

4 that the sale of those properties are recurring events

13:35:58

5 for purposes of reporting them on the tax forms?

13:36:02

6 A. No. I would say they're nonrecurring.

13:36:06

7 Q. Okay. As a matter of fact, you sell a property,

13:36:09

8 it's gone forever; right?

13:36:10

9 A. It's gone forever.

13:36:11

10 Q. It's a nonrecurring event, the sale; right?

13:36:14

11 A. Just like the car that the car dealership sold is

13:36:16

12 a nonrecurring event. It's gone forever.

13:36:18

13 Q. But there's a difference. The car dealership is

13:36:20

14 in the business of selling properties; Green Valley is

13:36:23

15 not; right? Excuse me.

13:36:25

16 The car dealership is in the business of selling

13:36:27

17 cars on a daily basis. Week after week, they want to

13:36:30

18 sell as many cars as possible. Green Valley is not in

13:36:33

19 the business of selling properties. Isn't that true?

13:36:35

20 A. That is true.

13:36:40

21 Q. You understood that Mr. Bidsal was always in

13:37:25

22 charge of the accounting for Green Valley?

13:37:27

23 A. That is my understanding.

13:37:28

24 Q. And did you ever ask -- going back to that -- the

13:37:33

25 interest -- the reporting of interest that we talked

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13:37:36 1 about?

13:37:36 2 A. Yes.

13:37:36 3 Q. Just to put it in perspective, Green Valley got

13:37:40 4 \$295,000 plus some security deposits at the time they

13:37:45 5 did the deed in lieu agreement; right?

13:37:47 6 A. Correct.

13:37:48 7 Q. That money was reported as interest on the tax

13:37:54 8 return?

13:37:54 9 A. Yes, it was.

13:37:55 10 Q. It was reported as interest in the books and

13:37:57 11 records of Green Valley?

13:37:58 12 A. Yes.

13:37:59 13 Q. Did you ever ask Mr. Bidsal why he reported that

13:38:03 14 income as interest income on the 2011 tax return?

13:38:07 15 A. No.

13:38:09 16 Q. You think Mr. Bidsal is a very smart man, don't

13:38:18 17 you?

13:38:19 18 A. Other than this, I don't know. But I assume he's

13:38:22 19 an intelligent man. He knows how to make good deals.

13:38:25 20 Q. Well, in your two or three hours of conversations

13:38:28 21 with him, you formed the opinion that's he's very

13:38:30 22 sophisticated about property management?

13:38:33 23 A. I would agree with that, yes.

13:38:35 24 Q. So who do you think would be better equipped to

13:38:42 25 determine what that money was in -- that was received as

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13:38:47 1 part of the deed in lieu transaction, Mr. Bidsal, who
13:38:51 2 reported it on the general ledgers and provided
13:38:57 3 documents to Jim Main, and --

13:39:02 4 THE ARBITRATOR: I need to stop you, because part
13:39:03 5 of the factual part of your question is contrary to some
13:39:06 6 of the testimony we had already, so. The testimony
13:39:11 7 wasn't that he -- the testimony so far is not that he
13:39:16 8 inserted that on the general ledger, that that was still
13:39:19 9 American what?

13:39:21 10 MR. GERRARD: American Nevada.

13:39:22 11 THE ARBITRATOR: American Nevada.

13:39:24 12 MR. LEWIN: My view is as the managing member,
13:39:27 13 he's responsible for what's on that general ledger.

13:39:30 14 THE ARBITRATOR: I'm just saying your question
13:39:32 15 presupposed a fact that I'm not sure was --

13:39:34 16 MR. LEWIN: Yeah. I'll rephrase it.

13:39:37 17 BY MR. LEWIN:

13:39:37 18 Q. Did you ask Mr. Bidsal if he reviewed the tax
13:39:42 19 returns before they were submitted to the United States
13:39:45 20 government?

13:39:45 21 A. I don't -- no, I did not ask that specific
13:39:49 22 question.

13:39:49 23 Q. But given your relationship with Mr. Bidsal in
13:39:52 24 the two or three hours that you spent -- time spent with
13:39:55 25 him, is it your understanding and belief that he

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13:39:59 1 reviewed the tax returns before they were submitted?

13:40:02 2 A. It is, yes.

13:40:03 3 Q. So in terms of your opinion that interest was not

13:40:08 4 proper, can you -- who do you think would be better --

13:40:15 5 in a better position to judge that, Mr. Bidsal and

13:40:18 6 Mr. Main on one hand, or you?

13:40:19 7 A. I think I'm in a good position because I've had

13:40:22 8 the opportunity to review all the documents and to make

13:40:25 9 a conclusion specific to that issue that they probably

13:40:29 10 did not focus on.

13:40:30 11 Q. Okay. So let me -- I have sort of a different

13:40:34 12 thing in mind, however. At the time Green Valley

13:40:39 13 purchased the note and got all the security package, the

13:40:43 14 note was in default; right?

13:40:44 15 A. Correct.

13:40:45 16 Q. And the note was -- did you ever make an attempt

13:40:52 17 to find out how much in default it was?

13:40:55 18 A. No.

13:40:55 19 Q. Did you ask Mr. Bidsal how much was the past due?

13:40:58 20 A. No.

13:40:58 21 Q. Do you have any idea how much the past due was?

13:41:01 22 A. I do not know.

13:41:02 23 Q. There's nowhere in all the books and records that

13:41:06 24 you have been provided access to that would indicate how

13:41:08 25 much was in arrears on the note on the date that they

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13:41:10

1 purchased it?

13:41:11

2 A. I never asked the question as it wasn't really

13:41:15

3 relevant to anything I was asked to do.

13:41:17

4 Q. You were asked to figure out what might be

13:41:21

5 distributed 50-50 and what might be a return of capital

13:41:25

6 that's to be distributed 70-30?

13:41:26

7 A. Correct.

13:41:27

8 Q. Right?

13:41:28

9 A. Yes.

13:41:28

10 Q. Now, if Green Valley bought a note -- I'm just

13:41:32

11 going to use the hypothetical because we don't really

13:41:35

12 have the information. But if Green Valley bought a note

13:41:38

13 for \$4 million on July 3, 2011, and \$1 million was in

13:41:43

14 arrears, so there's past due interest and principal due

13:41:49

15 of \$1 million, the basis -- the part that's in arrears

13:41:55

16 as of the date of the purchase of the note constitutes

13:41:58

17 part of the basis of that note; right?

13:41:59

18 A. If the cost of that note was \$4 million,

13:42:02

19 that's -- yes.

13:42:02

20 Q. But I'm talking about the part that -- what Green

13:42:05

21 Valley bought was a portion of the note that's already

13:42:08

22 in arrears. In other words, past due amount. There's

13:42:11

23 already an amount that was due. Not amount due in the

13:42:14

24 future.

13:42:14

25 A. Okay. In your example, yes.

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13:42:16 1 Q. So that becomes part of the -- in terms of
13:42:21 2 accounting for Green Valley, past due amounts that it
13:42:25 3 buys constitutes part of the principal; right?

13:42:32 4 MR. GERRARD: Object -- go ahead.

13:42:32 5 A. So...

13:42:32 6 BY MR. LEWIN:

13:42:34 7 Q. The part of the principal of the asset is what
13:42:36 8 I'm talking about.

13:42:38 9 MR. GERRARD: Now I'm going to object because
13:42:39 10 that's vague and ambiguous. I have no idea what the
13:42:42 11 "principal of the asset" means.

13:42:43 12 THE ARBITRATOR: Maybe the accountant does.

13:42:43 13 THE WITNESS: I'm sorry?

13:42:48 14 THE ARBITRATOR: Maybe you do. You can answer
13:42:50 15 the question if you can.

13:42:52 16 THE WITNESS: Okay. So the reason I hesitate is
13:42:55 17 we spent -- we -- Green Valley spent \$4 million buying a
13:43:01 18 note. If the note's in default by, you know -- by -- by
13:43:10 19 default -- if the note's in default, then there has to
13:43:11 20 be an amount that is due. There's probably unpaid
13:43:14 21 principal under the terms of the note; there's interest
13:43:17 22 under the terms of the note. What they bought was a
13:43:21 23 \$4 million note. If somebody gave them -- if somebody
13:43:24 24 came in and gave them \$5 million for the note, then
13:43:29 25 their basis -- their principal balance on that note

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13:43:32 1 would be \$4 million. Whether it's made up of principal
13:43:36 2 or interest, the amount they paid is \$4 million.
13:43:39 3 BY MR. LEWIN:
13:43:39 4 Q. So that's their basis, \$4 million?
13:43:42 5 A. Yeah.
13:43:44 6 Q. Okay. So when they get paid -- if they got paid
13:43:47 7 a part of the note -- let's say they got paid \$295,000.
13:43:52 8 Would that be a return of capital?
13:43:55 9 A. No. That's rent that they were able to -- that
13:43:59 10 they were entitled to.
13:43:59 11 Q. Assume for the purpose that we're talking about
13:44:04 12 here that it's back due interest. Okay? Or part of
13:44:09 13 the -- or back due principal. Let me start over.
13:44:13 14 THE ARBITRATOR: And the problem is you used the
13:44:14 15 exact amount of the part that was listed in the deed in
13:44:17 16 lieu agreement as rents when you did your example.
13:44:21 17 BY MR. LEWIN:
13:44:21 18 Q. By the way, the fact that it's designated as
13:44:24 19 rents doesn't necessarily mean that it was actually
13:44:26 20 rents that was being transferred; right?
13:44:28 21 A. If the deed in lieu agreement says that's what it
13:44:30 22 is --
13:44:30 23 Q. But who was in charge of that deed in lieu
13:44:33 24 agreement, Mr. Bidsal or Mr. Golshani?
13:44:34 25 A. Who was in charge of the deed in lieu agreement?

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13:44:38 1 Mr. Bidsal.

13:44:38 2 Q. That's right. And so -- and Mr. Bidsal had a

13:44:41 3 greater interest in characterizing funds received from

13:44:48 4 the -- funds received under the note as rents because he

13:44:51 5 got a 50-50 split on that as opposed to return of

13:44:55 6 capital; right?

13:44:55 7 A. Under your scenario, sure. That's -- that is

13:45:00 8 correct. If it was classified as return of capital,

13:45:02 9 then it would be a 30-70.

13:45:04 10 Q. So assuming -- if we were to assume that the

13:45:11 11 rents that were being transferred were part of

13:45:16 12 principal -- in other words, part of the basis that --

13:45:18 13 that return to Green Valley because they're forgiving

13:45:22 14 the rest of the note, that would be a return of capital;

13:45:26 15 right?

13:45:26 16 A. Under the facts as you lay them out. But that's

13:45:31 17 not the facts of the case.

13:45:32 18 Q. You knew -- you know that there was an assignment

13:45:34 19 of leases and rents. Now, you've read it?

13:45:39 20 A. Is that a question?

13:45:40 21 Q. Yeah. Is that correct?

13:45:41 22 A. Yes.

13:45:42 23 Q. And you know that under the terms of the

13:45:47 24 documents you've now read that the borrower was holding

13:45:49 25 money that -- the rents that were due to the lender

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13:45:54 1 under the note?

13:45:55 2 A. Correct.

13:45:55 3 Q. And whether you characterize those monies as

13:46:03 4 rents or you characterize them as interest, they were

13:46:12 5 monies that were due the lender under the promissory

13:46:17 6 note and deed of trust; right?

13:46:19 7 MR. GERRARD: Objection. Misstates the

13:46:20 8 documents.

13:46:21 9 THE ARBITRATOR: Overruled. I'll allow him to

13:46:24 10 answer if he knows.

13:46:25 11 A. So the 295- was part of what was paid to Green

13:46:29 12 Valley Commerce under the deed in lieu. It was paid as

13:46:33 13 rent. Maybe I misunderstood the question.

13:46:37 14 BY MR. LEWIN:

13:46:37 15 Q. The payment of rent and the conveyance of title

13:46:44 16 under this document -- under this deed in lieu took

13:46:47 17 place concurrently; right?

13:46:48 18 A. Okay.

13:46:48 19 Q. Was Green Valley entitled to collect any rent

13:46:52 20 from the borrower other than pursuant to the assignment

13:46:57 21 of rents and leases before the deed in lieu?

13:47:00 22 A. No.

13:47:01 23 Q. So the only thing that Green Valley was entitled

13:47:06 24 to was getting paid interest and principal; right?

13:47:09 25 A. Until they executed the deed in lieu, that's

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1 correct.

2 Q. Under the assignment of rents and leases, the
3 borrower was required to not -- to hold -- not -- to pay
4 whatever those rents were to the lender; right?

5 MR. GERRARD: Objection. Best evidence rule.
6 Let's see the document. He's telling us what the
7 document says, but we don't know that that's what the
8 document says.

9 THE ARBITRATOR: He's asking the witness who has
10 apparently reviewed that document, so I'll allow it.

11 A. Yes.

12 BY MR. LEWIN:

13 Q. So except for the fact that the \$295,000 is
14 characterized as rent, you would have considered that to
15 be a payment of interest in principal on the past due --
16 on the arrearages owed to the lender. Isn't that true?

17 A. No, that's not true. That's not what the
18 document says.

19 Q. Okay. Isn't it true that your experience in
20 advising your clients regarding investing in limited
21 liability companies or partnerships where they're
22 putting up a disproportionate amount of capital, that
23 it's common that the capital is returned first before
24 profits are distributed?

25 A. That is true that there's typically some

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13:48:39

1 provision to get the capital returned.

13:48:41

2 Q. Well, my question -- are you going to answer my

13:48:45

3 question? It's really a yes or no.

13:48:46

4 A. Well, the premise of the question boxes in that

13:48:51

5 that's not the way most agreements are written. There's

13:48:55

6 easily some -- there's some return of the operating

13:48:58

7 money and there's also provisions to return the capital.

13:49:01

8 Q. I'd like to read from your deposition at page 45,

13:49:05

9 line 11 through line 22.

13:49:12

10 Quote, "Isn't it true that in your experience in

13:49:15

11 advising your clients regarding investing in LLCs or

13:49:20

12 partnerships where they are putting up disproportionate

13:49:23

13 amounts of capital that it is common that the capital is

13:49:26

14 returned to the first before profits are distributed;

13:49:31

15 right?

13:49:31

16 "Answer: Yes.

13:49:33

17 "Question: And that is -- in effect, that is

13:49:36

18 what is taking place in these first step through final

13:49:39

19 step allocations on Exhibit B; right?

13:49:42

20 "Answer: Correct. The third step is to return

13:49:45

21 capital."

13:49:51

22 MR. GERRARD: Your Honor, I'm going to just raise

13:49:52

23 one objection as a continuing objection. I've listened

13:49:56

24 now four times to him use the deposition testimony. And

13:50:02

25 under the rules, he's not properly using the -- he's not

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13:50:06 1 allowed just to read in testimony from the deposition.

13:50:10 2 It has to be tied to a question, and it never is. He

13:50:13 3 just asked a question, there was an answer, then he

13:50:15 4 reads from the transcript, and then he moves on.

13:50:18 5 There's supposed to be a question based upon whatever he

13:50:21 6 reads in. That's the way the deposition testimony is

13:50:23 7 supposed to be used. So I'm just going to leave it to

13:50:26 8 Your Honor. I'm just making one continuing objection.

13:50:29 9 I don't think it's being properly used.

13:50:31 10 THE ARBITRATOR: The last example he asked the

13:50:34 11 question, got an answer. From what I gleaned, I took it

13:50:41 12 as an inference that he was refreshing his recollection

13:50:45 13 about what he said as a prior inconsistent statement in

13:50:50 14 the deposition on the exact same question. I'll allow

13:50:55 15 it.

13:50:56 16 MR. GERRARD: You understand my objection; right?

13:50:58 17 THE ARBITRATOR: I do.

13:51:00 18 MR. GERRARD: Because that's never happened.

13:51:01 19 He's never asking the predicate questions, and he's

13:51:03 20 never following up with the questions, so -- and that's

13:51:04 21 just a continuing objection.

13:51:05 22 MR. LEWIN: Actually, that's not true.

13:51:07 23 THE ARBITRATOR: There's been times where he

13:51:09 24 said, Didn't you testify differently in your deposition?

13:51:11 25 MR. GERRARD: But he asked that before he reads

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13:51:13 1 the testimony, and then there's no follow-up question. Page 490

13:51:16 2 MR. LEWIN: No. Wait a second. The way I do

13:51:18 3 this is I ask the question that -- usually I try to ask

13:51:21 4 the same question. If I don't get the -- if I get an

13:51:25 5 inconsistent answer, then I read the deposition. That's

13:51:28 6 what I'm trying to do here.

13:51:30 7 THE ARBITRATOR: I haven't found it to be

13:51:33 8 unacceptable to this point.

13:51:35 9 BY MR. LEWIN:

13:51:35 10 Q. So under Exhibit B, there's a specific paragraph

13:51:43 11 that talks about cash distributions of profits from

13:51:48 12 operations. Do you see it? It says "Cash distributions

13:51:54 13 of profits from operations shall be allocated and

13:52:00 14 distributed 50 percent to Shawn Bidsal and 50 percent to

13:52:04 15 CLA Properties, LLC."

13:52:06 16 And the operations here for Green Valley were for

13:52:10 17 rental properties; right?

13:52:11 18 A. Okay. Yes.

13:52:12 19 Q. And maybe getting some interest on the rent and

13:52:15 20 the rent revenue; right?

13:52:16 21 A. Right.

13:52:16 22 Q. Those are the only operations; correct?

13:52:19 23 A. Correct.

13:52:19 24 Q. Now, if -- these words have some meaning -- in

13:52:32 25 other words, they are to describe when Mr. Bidsal gets

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13:52:36 1 50 percent as opposed to 30 percent; right?

13:52:39 2 A. Correct.

13:52:39 3 Q. And if capital transactions did not include any

13:52:45 4 sales of anything else, why would you need -- in other

13:52:50 5 words, Mr. Bidsal -- let me strike that and start over.

13:52:52 6 In other words, if Mr. Bidsal had a 50 percent

13:52:56 7 interest in all profits, you wouldn't need this

13:52:58 8 paragraph, would you?

13:52:59 9 A. You wouldn't need that paragraph?

13:53:01 10 Q. That's right. It's a yes or no.

13:53:02 11 A. I don't know that it says anywhere --

13:53:22 12 Q. It's a yes or a no, sir.

13:53:23 13 A. Answer would be we still need that paragraph,

13:53:27 14 yes.

13:53:27 15 Q. Why would you need it if -- why would you need

13:53:31 16 it?

13:53:31 17 A. Because really nowhere else -- number one, the

13:53:35 18 preferred allocation paragraph, that language doesn't

13:53:39 19 come into play until something happens -- something

13:53:43 20 special happens that gets us into the special

13:53:46 21 allocations. So take away the first, second, third, and

13:53:53 22 final step, you have nothing that says how cash

13:53:56 23 distributions from profits are going to be allocated.

13:53:58 24 That sentence tells us how they're going to be

13:54:02 25 allocated. That's why you need it.

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13:54:03

1 Q. But this sentence is limited to cash

13:54:06

2 distributions of profits from operations; right?

13:54:08

3 A. Yeah. Yes.

13:54:09

4 Q. So it doesn't say cash distributions from gain on
5 the sale of properties, does it? Yes or no.

13:54:13

13:54:16

6 A. It does not.

13:54:17

7 Q. And if the idea was that Mr. Bidsal was going to
8 get 50 percent of the profits on all transactions unless
9 there was a liquidation, you wouldn't have to have
10 this -- the limitation that it's only from operations;
11 right? Again, yes or no.

13:54:35

13:54:37

12 A. I -- can you ask the question one more time?

13:54:37

13 MR. LEWIN: Can we have it re-read?

13:54:37

14 THE WITNESS: Please.

13:54:37

15 (Page 492, Lines 7 through 11 were read.)

13:55:12

16 THE WITNESS: So are you talking about the
17 limitation cash distribution of profits? That
18 paragraph? That sentence?

13:55:16

13:55:16

19 BY MR. LEWIN:

13:55:17

20 Q. Cash distributions of profits from operations.

13:55:20

21 A. You're talking about the cash distribution of
22 profits from operations sentence?

13:55:22

13:55:24

23 Q. Yes.

13:55:25

24 A. Well, again --

13:55:26

25 Q. Please answer my question. The question was if

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13:55:29 1 Mr. Bidsal was supposed to get 50 percent of all profits
13:55:33 2 regarding sales of property, anything else, unless
13:55:35 3 there's a liquidation, you wouldn't need this whole
13:55:37 4 sentence limiting his 50 percent to operations. Isn't
13:55:41 5 that true?

13:55:41 6 A. I can agree -- yes, I can agree with that.

13:55:43 7 Q. And if a company is selling a capital asset that
13:55:51 8 is not in the normal course of business, that would not
13:55:55 9 be considered to be income from operations. Isn't that
13:55:59 10 true?

13:55:59 11 A. That is true.

13:56:05 12 Q. And the business of Green Valley was to purchase,
13:56:09 13 maintain, rent, and derive income from rentals; right?

13:56:12 14 A. Correct.

13:56:13 15 Q. Now, does the operating agreement differentiate
13:56:24 16 between short-term capital gains and long-term capital
13:56:28 17 gains?

13:56:28 18 A. No.

13:56:29 19 Q. Can we turn to Exhibit A under the operating
13:56:40 20 agreement? I know that sometimes people complain about
13:57:06 21 legal documents. Would you expect an ordinary person to
13:57:10 22 be able to fully understand the meaning of these tax
13:57:14 23 provisions in Exhibit A?

13:57:16 24 A. No, I would not.

13:57:19 25 Q. Okay. That's why you guys are kept in business;

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13:57:24

1 right?

13:57:24

2 A. Yes. That is true.

13:57:26

3 Q. So actually I want to turn to the paragraph that

13:57:32

4 starts with 5.1. That's on page 23. That's the

13:57:38

5 allocation of profits and losses tax and accounting

13:57:42

6 matters.

13:57:47

7 Now, we've talked about allocations and

13:57:49

8 distributions. And allocations and distributions are

13:57:54

9 two different things; right?

13:57:55

10 A. Yes.

13:57:56

11 Q. For example, in this case, the tax provisions

13:58:03

12 call for allocations sometimes to be 50-50 even though

13:58:08

13 the distributions are supposed to go 70-30; right?

13:58:10

14 A. So can I clarify, allocations of income and

13:58:14

15 distributions of cash? I want to make sure that we're

13:58:17

16 talking about the same thing.

13:58:18

17 Q. Exactly. Thank you. As I said, I'm one of those

13:58:22

18 people who don't necessarily understand --

13:58:24

19 A. No, I just wanted to make sure I understood what

13:58:24

20 you were asking.

13:58:26

21 Q. Okay. So allocations of income and distributions

13:58:27

22 of cash are two different issues?

13:58:29

23 A. Agreed.

13:58:31

24 Q. So you could have -- as it is here -- the income

13:58:33

25 is supposed to be -- the income and losses is supposed

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13:58:36

1 to be divided how?

13:58:39

2 A. They're divided --

13:58:39

3 MR. GERRARD: Just a second. Objection. Vague

13:58:43

4 and ambiguous as to the word "divided." Are you talking

13:58:45

5 about allocations or are you talking about

13:58:46

6 distributions?

13:58:47

7 BY MR. LEWIN:

13:58:47

8 Q. Allocated. I'm sorry. Allocated.

13:58:50

9 A. Okay. So income and losses are to be allocated

13:58:53

10 pursuant to B, which says 50-50.

13:58:55

11 Q. Okay. But distributions are supposed to be as

13:59:01

12 shown on the annual federal income tax return prepared

13:59:05

13 by the company's accountants or as finally determined by

13:59:09

14 the United States Internal Revenue Service; right?

13:59:11

15 A. I'm not sure I agree with the way you've

13:59:21

16 interpreted that. So what I read when I say that is

13:59:28

17 that each member's distributive share of income, gain,

13:59:31

18 loss, deduction, or credit of the company as reported on

13:59:36

19 the company's tax return -- so what's reported on the

13:59:42

20 company's tax return prepared by the accountants is

13:59:46

21 determined by the United States Internal Revenue

13:59:48

22 Service.

13:59:48

23 Q. The word I'm focused on is the word -- well, it's

13:59:54

24 actually more. Maybe it's like six words. "Each

13:59:55

25 member's distributive share of income," et cetera. That

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14:00:01 1 refers to each member's distributions are supposed to
14:00:05 2 match up with the tax return; right?
14:00:06 3 A. Okay. So that's referring to each member's --
14:00:10 4 I'm going to use the word "allocation" here. Each
14:00:14 5 member's allocable share of income, gain, or loss. That
14:00:18 6 number, while it says "distributive," is not referring
14:00:22 7 to distributions of cash.
14:00:23 8 Q. Okay. Just to make it clear, the promissory note
14:00:35 9 is a capital asset; right?
14:00:37 10 A. Yes.
14:00:38 11 Q. Now, going back to Exhibit B. In that paragraph,
14:01:01 12 we talked about Mr. Bidsal getting 50 percent of the
14:01:04 13 cash distributions of operations. And then if we go
14:01:11 14 down below that, it says -- and I'm only going to read
14:01:16 15 part of this sentence -- "It is the express intent of
14:01:18 16 the parties that cash distributions of profits refers to
14:01:21 17 distributions generated from operations resulting in
14:01:25 18 ordinary income as opposed to cash distributions."
14:01:29 19 Now, what it's referring to is the term "cash
14:01:32 20 distributions" up in the paragraph right above that
14:01:34 21 Mr. Bidsal gets 50 percent of; right?
14:01:37 22 A. I agree.
14:01:38 23 Q. Okay. Now, the -- and then it's talking about
14:01:43 24 distributions from operations resulting in ordinary
14:01:46 25 income?

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14:01:46 1 A. Correct.

14:01:48 2 Q. And is "ordinary income" a tax term?

14:01:52 3 A. It is.

14:01:52 4 Q. Does ordinary income on a tax return always equal

14:02:01 5 cash flow from operations?

14:02:03 6 A. No.

14:02:03 7 Q. The use of the term "ordinary income" would mean

14:02:14 8 that -- on this paragraph, would mean you'd have to look

14:02:17 9 at what was the ordinary income on the tax return to

14:02:20 10 determine what Mr. Bidsal's getting 50 percent of;

14:02:23 11 right?

14:02:23 12 A. The --

14:02:24 13 Q. Yes or no?

14:02:27 14 A. Yes. You'd have to look at all the items of

14:02:30 15 ordinary income.

14:02:31 16 Q. And ordinary income -- the determination of

14:02:39 17 ordinary income includes a deduction for things like

14:02:44 18 amortization or depreciation; right?

14:02:46 19 A. Correct.

14:02:47 20 Q. Because typically there's not any cash associated

14:02:51 21 with those two items, so that means ordinary income

14:02:54 22 would be less than cash flow; right?

14:02:56 23 A. Correct.

14:02:56 24 Q. Now, is there anything in the operating agreement

14:03:05 25 that says the amounts that -- of the cash flow that are

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14:03:13 1 not included in ordinary income -- you following me so
14:03:15 2 far?
14:03:15 3 A. Uh-huh.
14:03:16 4 Q. That was a yes?
14:03:17 5 A. Yes.
14:03:18 6 Q. Okay. That the amounts that are deducted from
14:03:23 7 ordinary income -- strike that.
14:03:25 8 The amounts that are deducted from the cash flow
14:03:28 9 to make ordinary income, is there anything in the
14:03:32 10 operating agreement that says that those get distributed
14:03:36 11 50-50?
14:03:36 12 A. As you have described it, no.
14:03:42 13 Q. Did you ask Mr. Bidsal if he had any
14:03:47 14 conversations with anybody about what the meaning was of
14:03:50 15 ordinary income?
14:03:51 16 A. No.
14:03:51 17 Q. Did you make any efforts to find out if there was
14:03:54 18 any documents that gave a definition of ordinary income
14:03:58 19 between the parties?
14:03:59 20 A. No.
14:04:43 21 Q. I'd like to now talk to you about valuation. You
14:04:54 22 indicated earlier, and you -- that you -- and you read
14:04:57 23 the documents where Mr Bidsal had offered to purchase
14:05:02 24 CLA's interest -- membership interest in Green Valley.
14:05:06 25 You read that offer; right?

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14:05:08 1 A. Yes, I did.

14:05:09 2 Q. And you read the response where CLA elected not

14:05:13 3 to sell, but to buy; right?

14:05:15 4 A. Yes, I did.

14:05:16 5 Q. And you talked earlier about membership interest

14:05:18 6 and how there'd be a discount and sometimes the income

14:05:22 7 is spread out beforehand. Those are all negotiated

14:05:25 8 agreements; right?

14:05:26 9 A. Yes.

14:05:26 10 Q. And when you're in a buy/sell where someone says,

14:05:31 11 "I'll buy you out for \$10," you either buy or sell for

14:05:36 12 that price; right?

14:05:37 13 MR. GERRARD: Objection. Incomplete

14:05:37 14 hypothetical.

14:05:40 15 THE ARBITRATOR: I'll allow it.

14:05:41 16 A. Yeah.

14:05:41 17 BY MR. LEWIN:

14:05:41 18 Q. So in this case, Mr. Bidsal -- there's a formula,

14:05:46 19 and Mr. Bidsal said, "I'm going to buy you out based on

14:05:48 20 the formula for \$5 million"; right?

14:05:50 21 MR. GERRARD: Objection. Misstates the

14:05:51 22 documents.

14:05:51 23 MR. LEWIN: Okay. It's the essence of the

14:05:51 24 document.

14:05:51 25 ///

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14:05:54
14:05:54
14:05:57
14:06:01
14:06:02
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14:06:34

1 BY MR. LEWIN:
2 Q. Mr. Bidsal made an offer to purchase CLA's
3 membership interest based on a fair market value --
4 valuation of \$5 million?
5 A. I agree with that.
6 Q. When you're talking about an estimated company
7 valuation, you're talking about the valuation of the
8 entire company; is that correct?
9 A. Correct.
10 Q. And the company's valuation includes the
11 valuation of all the company's assets as of that date;
12 right?
13 MR. GERRARD: I'm going to object to the
14 question. It misstates --
15 THE ARBITRATOR: You're talking about a general
16 company valuation, not the application of the formula in
17 our operating agreement?
18 MR. LEWIN: Well, I'm going to get to that in a
19 second.
20 THE ARBITRATOR: Okay. So as long as we
21 understand there's a distinction, sure.
22 Do you want to answer that?
23 MR. LEWIN: Let me rephrase -- restate the
24 question.
25 ///

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14:06:37 1 BY MR. LEWIN:

14:06:37 2 Q. A company's valuation is a value of all the

14:06:43 3 company's assets as of a date certain; right?

14:06:46 4 MR. GERRARD: Again, I'm going to object as vague

14:06:48 5 and ambiguous. I'm not sure if he's asking about under

14:06:49 6 the operating agreement or if he's asking about in

14:06:52 7 general.

14:06:53 8 THE ARBITRATOR: Your asking generally?

14:06:56 9 MR. LEWIN: It's general. It's talking about

14:06:56 10 valuation.

14:06:57 11 THE ARBITRATOR: All right. Generally.

14:06:59 12 You may answer.

14:06:59 13 A. Okay. So in general, the company valuation will

14:07:06 14 be based on -- in this case, the assets of the company.

14:07:09 15 But I also stated that things such as cash would be --

14:07:14 16 BY MR. LEWIN:

14:07:14 17 Q. Sir, that's not the question I asked you. I

14:07:19 18 asked you a specific question. As a matter of fact, I'm

14:07:21 19 reading it right from my script here, with what you

14:07:25 20 said. So I'm going to ask it again.

14:07:28 21 A company's valuation is a value of all the

14:07:30 22 company's assets as of a date certain; right?

14:07:34 23 MR. GERRARD: Again, this is a general -- in

14:07:37 24 general? Not under the operating agreement?

14:07:38 25 THE ARBITRATOR: Right. In general.

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14:07:41 1 A. Correct.

14:07:43 2 BY MR. LEWIN:

14:07:43 3 Q. And when Mr. Bidsal offered to buy CLA's interest

14:07:46 4 in Green Valley based on an estimated company value of 5

14:07:50 5 million -- hold on. Strike that.

14:07:54 6 I'm -- in this case, I'm referring to one of your

14:07:58 7 statements that you made in your report. Your report's

14:08:02 8 not in evidence, but I just want -- we had your report

14:08:05 9 when we took your deposition. Because the question

14:08:07 10 doesn't make any sense unless I tell you that.

14:08:11 11 When you use -- in your report, when you use the

14:08:14 12 term -- that Bidsal offered to buy CLA's interest in

14:08:16 13 Green Valley based on an estimated company valuation of

14:08:19 14 5 million, what did you mean by the term "estimated

14:08:22 15 company valuation"?

14:08:23 16 A. To save me the trouble of looking it up, can you

14:08:29 17 tell me the page on that report?

14:08:30 18 Q. I don't have the page in the report listed.

14:08:34 19 A. It's all right. I'll find it.

14:08:36 20 Q. I can give you the page of your testimony if

14:08:39 21 you'd rather look at that.

14:08:40 22 A. I want to look at the report.

14:08:53 23 THE ARBITRATOR: Do we need the question

14:08:54 24 immediately before that to direct him to a part of his

14:08:57 25 report?

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14:08:58 1 MR. LEWIN: I don't think so.

14:08:58 2 BY MR. LEWIN:

14:08:58 3 Q. It's -- I think it's in your historical

14:09:01 4 narrative.

14:09:10 5 A. Ask me the question again -- or tell me the page

14:09:13 6 in the deposition.

14:09:14 7 Q. Let me see if I can find it here.

14:09:22 8 It's here on page 3, and it's in your second full

14:09:29 9 paragraph. You say "On July 7, 2017" --

14:09:32 10 THE ARBITRATOR: It's not the deposition?

14:09:34 11 MR. LEWIN: I'm reading -- no.

14:09:34 12 BY MR. LEWIN:

14:09:35 13 Q. I'm reading on your report now.

14:09:35 14 A. Thank you.

14:09:37 15 Q. You say "On July 7, 2017, Bidsal offered to

14:09:43 16 purchase CLA's interest in GVC based on an estimated

14:09:47 17 company valuation of \$5 million."

14:09:52 18 And you reference that to the offer to purchase

14:09:57 19 membership interest. So let me repeat the question

14:10:01 20 again.

14:10:01 21 Do you have it? You see what we're talking about

14:10:04 22 now?

14:10:04 23 A. Yup.

14:10:04 24 Q. Okay. So when you use the -- when you said that

14:10:07 25 Bidsal offered to buy CLA's interest in Green Valley

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14:10:10

1 based on an estimated company valuation of \$5 million,

14:10:13

2 what did you mean by the term "estimated company

14:10:17

3 valuation"?

14:10:17

4 A. Well, what I was referring to is that's the price

14:10:21

5 that had been approved or had been stipulated to by the

14:10:24

6 prior arbitrator that -- that it was -- the purchase

14:10:27

7 price was \$5 million.

14:10:29

8 Q. Now, the question --

14:10:30

9 A. And that's -- that Bidsal was offering to buy out

14:10:36

10 CLA's membership interest for \$5 million.

14:10:40

11 Q. This is -- we're talking about a time period

14:10:42

12 before there was an arbitration. We're talking about

14:10:45

13 when Mr. Bidsal -- in your report, you're talking about

14:10:49

14 when Mr. Bidsal made an offer --

14:10:49

15 A. No, that's the reason I just put that last part,

14:10:51

16 that Mr. Bidsal offered to buy CLA's interest at \$5

14:10:53

17 million.

14:10:53

18 Q. So the question is, what did you mean by the term

14:10:57

19 "estimated company valuation"?

14:10:58

20 A. That that was what Mr. Bidsal had deemed the

14:11:04

21 company to be worth.

14:11:05

22 Q. As a matter of fact, that was -- you believe that

14:11:14

23 what Mr. Bidsal had estimated the company -- the LLC and

14:11:18

24 the assets within the LLC -- to be that value; right?

14:11:21

25 A. He estimated that CLA's membership interest was

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14:11:26 1 worth \$5 million.

14:11:27 2 THE ARBITRATOR: Can I just interject here?

14:11:29 3 MR. LEWIN: Yes.

14:11:29 4 THE ARBITRATOR: Kind of give me a road map as to

14:11:33 5 how that part -- this whole line of questioning is

14:11:37 6 relevant to what I have to determine.

14:11:40 7 MR. LEWIN: I will. So one of the big items in

14:11:43 8 this issue has to do with the value of Greenway. Okay?

14:11:51 9 MR. GERRARD: The value of it?

14:11:53 10 MR. LEWIN: Right. The cost of purchase for

14:11:54 11 Greenway.

14:11:55 12 MR. GERRARD: Okay. That's different.

14:11:56 13 THE ARBITRATOR: And how it factors into the

14:11:58 14 formula?

14:11:58 15 MR. LEWIN: And how it factors into the formula.

14:12:00 16 THE ARBITRATOR: Okay.

14:12:02 17 MR. LEWIN: So what happens here -- and if I go

14:12:03 18 through this testimony, you're going to find out that

14:12:05 19 Mr. Wilcox agrees with me -- is that when Mr. Bidsal

14:12:09 20 made his offer of \$5 million, that was an offer for the

14:12:12 21 value --

14:12:13 22 MR. GERRARD: Can we stop saying an offer of

14:12:15 23 \$5 million? He never offered \$5 million. He used the

14:12:15 24 fair market value number of \$5 million.

14:12:20 25 MR. LEWIN: No, it's an offer based on a

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14:12:24 1 valuation of \$5 million.

14:12:26 2 THE ARBITRATOR: His offer of July 7, 2017,

14:12:32 3 plugged \$5 million as the fair market value component of

14:12:36 4 the formula?

14:12:37 5 MR. LEWIN: That's right. It's an offer to buy

14:12:40 6 using the \$5 million as an estimate of value.

14:12:43 7 THE ARBITRATOR: So when he did that --

14:12:44 8 MR. LEWIN: When he did that, the evidence is

14:12:45 9 going to be clear that that offer necessarily included

14:12:48 10 all of the assets of the company as of that date. The

14:12:52 11 value of Greenway as of that date was -- they bought it

14:12:58 12 for -- what? -- they bought it for 8- --

14:13:00 13 THE ARBITRATOR: 790.

14:13:02 14 MR. LEWIN: 790-. Let's say 800,000 just for

14:13:04 15 talking. The gain was built in -- the gain is built

14:13:07 16 into his offer. In other words, if he's valuing the

14:13:11 17 assets -- if his offer includes all of the assets,

14:13:15 18 includes the fair market value of all the properties,

14:13:17 19 that would necessarily include the fair market value of

14:13:20 20 Greenway. Because when he makes the offer -- when he

14:13:22 21 makes the offer, he's trying to get his 50 percent share

14:13:27 22 of the appreciation.

14:13:28 23 So the -- so he uses the value of Greenway --

14:13:32 24 that's part of the \$5 million. Not the cost, for

14:13:36 25 reasons that we'll go into shortly. But that is the

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14:13:40 1 issue.

14:13:41 2 So let me put it a little bit differently. When

14:13:49 3 they sold Building C, let's say that there's half a

14:13:53 4 million dollars of gain, just for argument purposes.

14:13:56 5 They use a tax deferred tax break not to have to pay

14:14:01 6 taxes on that gain.

14:14:03 7 THE ARBITRATOR: Part of the 1031 exchange?

14:14:06 8 MR. LEWIN: As part of the 1031 exchange. That

14:14:08 9 does not affect the value of Greenway. The value of

14:14:10 10 Greenway is the value of Greenway. So when he's valuing

14:14:13 11 the company's assets that he needs take into account --

14:14:16 12 I want to get that gain; I want the fair market value;

14:14:19 13 I'm going to estimate the fair market value of all the

14:14:21 14 assets. That's why it's called fair market value. So I

14:14:24 15 then end up -- I end up with -- the seller, in theory,

14:14:29 16 will get paid for his half of the gain of the assets.

14:14:33 17 That's why this is pertinent.

14:14:36 18 MR. GERRARD: Now let me respond. I'll tell you

14:14:37 19 why it's completely irrelevant. It's irrelevant because

14:14:40 20 the fair market value number has been fixed at

14:14:44 21 \$5 million. And what Mr. Lewin is really arguing is

14:14:47 22 that -- about the assets of the company. This wasn't a

14:14:51 23 sale of the assets of the company. Mr. Bidsal didn't

14:14:57 24 say, "I'm offering -- I'm saying that the value of all

14:15:02 25 the company assets is \$5 million and that's why I'm

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14:15:05

1 making an offer of \$5 million to buy these company

14:15:05

2 assets."

14:15:09

3 It's a value of the membership interest that was

14:15:12

4 being sold. He's valuing what he thinks the membership

14:15:16

5 interest is, and it doesn't matter what Mr. Wilcox

14:15:19

6 thinks was in Mr. Bidsal's mind about how he arrived at

14:15:22

7 that value. All that was being bought is a membership

14:15:26

8 interest, not assets of the company. So Mr. Lewin's

14:15:29

9 argument is completely irrelevant because we're not

14:15:31

10 talking about a sale of assets.

14:15:33

11 THE ARBITRATOR: Is there going to be evidence

14:15:36

12 that establishes some sort of not-very-tenuous link

14:15:42

13 between Mr. Bidsal's determination of fair market value

14:15:46

14 for purposes of the formula in 2017 as \$5 million and a

14:15:54

15 part of that being the appreciation of the Greenway

14:16:01

16 property?

14:16:02

17 MR. LEWIN: Your Honor -- yes. But I think it's

14:16:07

18 incumbent in the offer itself. When you're buying a

14:16:11

19 50 percent membership interest, you're buying -- and

14:16:13

20 when I get to his testimony, you'll see how he describes

14:16:16

21 it.

14:16:16

22 THE ARBITRATOR: "His" being Mr. Bidsal?

14:16:19

23 MR. LEWIN: Mr. Wilcox. And probably

14:16:21

24 Mr. Bidsal's also. We have his testimony. But in terms

14:16:25

25 of what he's doing, he's buying -- he's buying

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14:16:28 1 Mr. Bidsal's half interest in the company. Mr. Bidsal Page 509
14:16:31 2 made an offer valuing the value of the company. The
14:16:35 3 value of the company is comprised --
14:16:37 4 MR. GERRARD: Where's any evidence of that? He
14:16:39 5 never made a value of the company.
14:16:39 6 MR. LEWIN: That is --
14:16:41 7 MR. GERRARD: It's a value of the membership.
14:16:43 8 THE ARBITRATOR: One at a time, please. Let him
14:16:45 9 finish.
14:16:45 10 MR. GERRARD: I'm sorry.
14:16:45 11 MR. LEWIN: Hold on a second.
14:16:50 12 MR. GERRARD: Look at the definition.
14:16:52 13 MR. LEWIN: He's offering -- look, he could offer
14:16:54 14 to buy it for 10 million; he could offer to buy it for 1
14:16:56 15 million. What he's buying -- he has the opportunity to
14:16:59 16 make a valuation of what that membership is worth, and
14:17:02 17 the membership is worth the value of the assets.
14:17:05 18 So when you -- if I -- for example, if they owned
14:17:11 19 a bank, and the bank had \$1 million in the bank, and
14:17:19 20 Mr. Bidsal offered \$2 million for it, he's making a bad
14:17:24 21 deal. If he offered \$800,000 to buy \$1 million worth of
14:17:29 22 cash, he'd be making a great deal if that was accepted.
14:17:34 23 In this case, the value -- the valuation of the
14:17:36 24 company -- I'm just looking at the definitions here --
14:17:39 25 is -- I think it's pretty clear. He's making an offer

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14:17:43 1 based on the valuation -- his estimated valuation of the
14:17:46 2 company -- of the value of the company, in essence.

14:17:49 3 THE ARBITRATOR: Okay. But I have certain terms
14:17:53 4 within the formula to interpret, and the expert forensic
14:17:58 5 accountants are assisting in that. One of them that
14:18:03 6 they need to help me determine is not fair market value,
14:18:06 7 because that's 5 million.

14:18:09 8 MR. LEWIN: Right. Exactly.

14:18:10 9 THE ARBITRATOR: So then there's cost of
14:18:12 10 purchase. And Mr. Wilcox has testified that for
14:18:16 11 purposes of that number, it's more reasonable to use the
14:18:23 12 basis in the cost segregation report for Building C for
14:18:29 13 the Greenway property because of how it was transferred
14:18:32 14 in the 1031 exchange, and it allows both sides,
14:18:36 15 including Mr. Bidsal, to reap the benefit of that
14:18:39 16 exchange and appreciation. Okay. I got that. There
14:18:43 17 isn't really anywhere else in the formula that the value
14:18:49 18 of Greenway is relevant.

14:18:54 19 MR. LEWIN: But it is because in terms of -- what
14:18:57 20 Mr. Wilcox is going to testify is that the valuation
14:19:01 21 Mr. -- value -- had estimated the value of the company
14:19:03 22 including its assets. Okay? And that means at the time
14:19:07 23 he made his estimated 5 million -- his \$5 million
14:19:11 24 estimate, that he included -- and he should have
14:19:15 25 included if he didn't -- but he should have -- he

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14:19:17 1 included the appreciated value of Greenway. That's how
14:19:20 2 we get --

14:19:20 3 THE ARBITRATOR: I just don't think it matters to
14:19:22 4 the formula.

14:19:23 5 MR. LEWIN: But it does because COP with respect
14:19:26 6 to Greenway, they want -- what they want to use is the
14:19:28 7 cost of it, and it's not the cost of it; it's the value
14:19:31 8 at the time. It's the value -- the purchase price.
14:19:33 9 It's the purchase price at the time.

14:19:35 10 MR. GERRARD: So that doesn't have anything to do
14:19:36 11 with the fair market value --

14:19:37 12 MR. LEWIN: Hold on a second. I think it will
14:19:40 13 become clearer.

14:19:40 14 THE ARBITRATOR: I'll give you a little latitude.
14:19:44 15 I'm just telling you I don't see it. I don't see the
14:19:46 16 connection. But if you want to continue a little bit
14:19:48 17 and change my mind, I suppose you could try. At some
14:19:52 18 point, though, we've got to differentiate between fair
14:19:55 19 market value of the company and fair market value of the
14:19:58 20 interest to be purchased.

14:20:00 21 MR. LEWIN: Okay. Right.

14:20:02 22 MR. GERRARD: He's also just asking for pure
14:20:05 23 speculation. He's laid no foundation that Mr. Wilcox
14:20:07 24 would ever know what Mr. Bidsal looked at to come up
14:20:11 25 with this fair market value number.

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14:20:14 1 MR. LEWIN: It doesn't make any difference what
14:20:16 2 Mr. Bidsal looked at. He made the offer, and the offer
14:20:19 3 is a valuation of the company's assets.
14:20:20 4 THE ARBITRATOR: I'll let you go a little
14:20:20 5 further. And --
14:20:24 6 MR. GERRARD: Can I make one response to that?
14:20:26 7 THE ARBITRATOR: Sure.
14:20:26 8 MR. GERRARD: I just want to make sure we're
14:20:27 9 clear. The question that he asked a minute ago was, Do
14:20:30 10 you agree that Mr. Bidsal's offer of \$5 million was
14:20:33 11 based upon all the assets of the company?
14:20:35 12 That's speculation. There's no foundation that
14:20:38 13 this witness ever talked to Mr. Bidsal to derive how he
14:20:44 14 arrived at that \$5 million number. And that's the whole
14:20:47 15 premise of his question. So it's --
14:20:48 16 THE ARBITRATOR: We're moving on to the next
14:20:50 17 question.
14:20:52 18 MR. GERRARD: Thank you.
14:20:53 19 THE ARBITRATOR: I'm not dealing with this as a
14:20:55 20 continuing objection. Jump in contemporaneously.
14:20:58 21 MR. GERRARD: I will. I'll listen to the next
14:20:59 22 question.
14:20:59 23 THE ARBITRATOR: All right.
14:20:59 24 Mr. Wilcox, here's how it's going to go. If
14:21:03 25 somebody objects, for the benefit of the court reporter

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14:21:05 1 and for me, stand down until I say, "Yes, you can
14:21:09 2 answer" or "No, you can't." All right?
14:21:11 3 THE WITNESS: Got it.
14:21:12 4 THE ARBITRATOR: Mr. Lewin.
14:21:34 5 BY MR. LEWIN:
14:21:34 6 Q. Take a look at Section 4.2 of the operating
14:21:37 7 agreement.
14:21:44 8 THE ARBITRATOR: Page 10 or 11?
14:21:47 9 MR. LEWIN: Page 10.
14:21:48 10 BY MR. LEWIN:
14:21:48 11 Q. It says "Any member (offering member) may give
14:21:50 12 notice to the remaining member that he or it is ready
14:21:53 13 and willing to purchase remaining members' interests for
14:21:57 14 a price the offering member thinks is the fair market
14:22:00 15 value."
14:22:06 16 When you're talking about -- how did you
14:22:08 17 interpret "fair market value" there? Did you interpret
14:22:11 18 that as meaning the value of the company's assets?
14:22:13 19 A. I interpreted fair market value as being
14:22:17 20 5 million. That's what I was told to use for that
14:22:20 21 number.
14:22:20 22 Q. My question is in this operating agreement --
14:22:22 23 forgetting about what the offer was, looking at this
14:22:25 24 independently -- isn't it true you believe that this
14:22:28 25 refers to a valuation of all of the -- of the membership

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14:22:32 1 interest, which would include a valuation of the
14:22:34 2 company's assets?
14:22:35 3 A. Yes.
14:22:37 4 MR. GERRARD: Objection.
14:22:38 5 THE ARBITRATOR: I'll allow it.
14:22:40 6 MR. GERRARD: I didn't finish my objection. I
14:22:42 7 was going to say misstates the document, what the
14:22:43 8 language actually says.
14:22:45 9 MR. LEWIN: It doesn't misstate the document.
14:22:47 10 THE ARBITRATOR: All right. Next question.
14:22:48 11 BY MR. LEWIN:
14:22:48 12 Q. Did you see anything in the operating agreement
14:22:50 13 that would exclude the valuation of any asset in
14:22:53 14 connection with the initial offer to buy pursuant to the
14:22:56 15 buy/sell agreement?
14:22:56 16 A. No.
14:22:57 17 Q. And when you saw Mr. Bidsal's offer, you
14:23:05 18 construed it as including a valuation of the company
14:23:13 19 including the assets; right?
14:23:14 20 MR. GERRARD: Objection. Lack of foundation.
14:23:16 21 Calls for speculation.
14:23:17 22 THE ARBITRATOR: I don't think it's relevant what
14:23:19 23 Mr. Wilcox thought.
14:23:22 24 MR. LEWIN: Here's my point: He's basically
14:23:24 25 saying that Mr. Bidsal would be denied the gain if the

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14:23:31 1 cost of -- if the Greenway cost is used -- I mean the
14:23:34 2 cost of C is used as opposed to the cost of Greenway.
14:23:38 3 And I'm saying, No, that value -- when he makes a
14:23:41 4 valuation of company assets, he's including the gain or
14:23:44 5 he should be including the gain, because that's how he's
14:23:48 6 valuing the membership interest. So that would include
14:23:51 7 possible gain. So I mean, let me -- let's assume that.
14:23:53 8 I'll go on. I'm just telling you how I see it.

14:23:57 9 THE ARBITRATOR: Okay.

14:23:58 10 BY MR. LEWIN:

14:23:58 11 Q. So you testified that you thought that Mr. Bidsal
14:24:13 12 would be deprived of the gain on the sale of Building C
14:24:19 13 if the cost of purchase -- the COP for Greenway was
14:24:24 14 used. Do you remember that testimony?

14:24:26 15 A. That is my testimony.

14:24:28 16 Q. Now, if the valuation of -- the \$5 million
14:24:34 17 valuation that Mr. Bidsal gave for the company, wouldn't
14:24:42 18 that include the increased value from the building --
14:24:46 19 the gain in Building C that's attributed to Greenway?

14:24:52 20 MR. GERRARD: Objection.

14:24:53 21 MR. LEWIN: I'm going to rephrase it.

14:24:53 22 MR. GERRARD: Misstates --

14:24:53 23 THE ARBITRATOR: He's going to rephrase.

14:24:56 24 BY MR. LEWIN:

14:24:56 25 Q. If Mr. Bidsal's valuing the company's assets to

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14:25:00 1 make a -- strike that.

14:25:02 2 If Mr. Bidsal is putting a valuation on the

14:25:05 3 company, were you informed that he did not include the

14:25:11 4 cost of purchase of Greenway in that valuation?

14:25:16 5 MR. GERRARD: Objection. Lack of foundation.

14:25:17 6 Misstates what is in the offer and misstates what is in

14:25:21 7 the operating agreement.

14:25:22 8 MR. LEWIN: I don't know why this is so

14:25:24 9 complicated.

14:25:24 10 THE ARBITRATOR: How does it misstate what's in

14:25:24 11 the document?

14:25:26 12 MR. GERRARD: Well, the operating agreement very

14:25:28 13 clearly says that fair market value -- which is what the

14:25:29 14 offer is based upon, FMV -- if you read the definition

14:25:35 15 in Section 4.1, it says "FMV means fair market value

14:25:37 16 obtained as specified in 4.2."

14:25:40 17 If you read 4.2, it says "Any member (offering

14:25:44 18 member) may give notice to remaining member that he or

14:25:47 19 it is willing and able to purchase the remaining

14:25:50 20 members' interests for a price the offering member

14:25:53 21 thinks is the fair market value."

14:25:55 22 THE ARBITRATOR: Of the interest?

14:25:57 23 MR. GERRARD: Yeah. It's the value of the

14:25:58 24 interest; it's not a value of all the assets of the

14:26:00 25 company, which is what Mr. Lewin has repeatedly for the

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14:26:02 1 last 15 minutes tried to get Mr. Wilcox to say that it
14:26:07 2 is. He's trying to get him to say that this fair market
14:26:11 3 value number for the use of the formula that was offered
14:26:14 4 somehow is a value of all the company's assets. And
14:26:18 5 that's not what the operating agreement says, and it's
14:26:20 6 not what Mr. Bidsal's offer says.

14:26:22 7 MR. LEWIN: This is -- that's entirely from left
14:26:25 8 field, because the fair market value is not the fair
14:26:27 9 market value of the CLA membership interest. It's the
14:26:32 10 valuation of the company, and that's how you derive the
14:26:35 11 value of the membership interest.

14:26:37 12 THE ARBITRATOR: Okay. Here's the thing. We're
14:26:42 13 going to start with a basic foundational question, which
14:26:47 14 is -- I'm going to ask. All right?

14:26:49 15 Mr. Wilcox, did you have any conversations with
14:26:51 16 Mr. Bidsal about how he reached the \$5 million FMV
14:26:58 17 number that's in his July 2017 correspondence?

14:27:01 18 THE WITNESS: No, I did not.

14:27:03 19 THE ARBITRATOR: All right.

14:27:04 20 Because your question asked him if he received
14:27:07 21 that -- if he actually -- did Mr. Bidsal tell you that
14:27:11 22 he didn't include the increased value of Greenway in his
14:27:17 23 5 million. And that, for a foundational purpose,
14:27:20 24 presupposes that he had a conversation with Mr. Bidsal
14:27:23 25 about that. He didn't.

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14:27:26 1 MR. LEWIN: Let me clear this up. I know where Page 518
14:27:28 2 you're going, and I'll deal with it a little bit
14:27:31 3 differently.
14:27:31 4 THE ARBITRATOR: Okay.
14:27:32 5 BY MR. LEWIN:
14:27:32 6 Q. Do you have any information that leads you to
14:27:34 7 believe that Mr. Bidsal did not -- strike that.
14:27:39 8 You know there's this definition of COP in this
14:27:41 9 formula; right?
14:27:41 10 A. Yes.
14:27:42 11 Q. Do you have any information -- strike that.
14:27:46 12 Did Mr. Bidsal ever tell you that he did not
14:27:49 13 include the COP for Greenway, which is 790,000 plus some
14:27:55 14 closing costs, when he made his \$5 million valuation?
14:27:59 15 MR. GERRARD: First of all --
14:28:00 16 THE ARBITRATOR: That just goes back to my
14:28:02 17 question, which is he didn't have any conversations with
14:28:03 18 Mr. Bidsal about the \$5 million valuation.
14:28:07 19 MR. LEWIN: I'm now trying to find out does he
14:28:09 20 have any information that he didn't include it.
14:28:11 21 MR. GERRARD: He's already said he didn't talk to
14:28:13 22 him about it, so how can --
14:28:14 23 MR. LEWIN: I want to find out if he has any
14:28:16 24 information that the \$5 million did not include the
14:28:19 25 actual value of Greenway. Because COP is a defined

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14:28:24 1 term.

14:28:24 2 THE ARBITRATOR: All right. Rephrase the

14:28:27 3 question if you would.

14:28:28 4 And Mr. Wilcox, wait for me to assess it.

14:28:32 5 BY MR. LEWIN:

14:28:32 6 Q. Do you have any information from any source that

14:28:36 7 indicates that Mr. Bidsal when he made his \$5 million

14:28:41 8 valuation of the company's value -- it's what it says

14:28:46 9 here.

14:28:49 10 MR. GERRARD: That's not what it says.

14:28:50 11 BY MR. LEWIN:

14:28:50 12 Q. That he did not include the actual cost of

14:28:52 13 purchase of Greenway? And I'm talking about the actual

14:28:55 14 purchase price.

14:28:56 15 MR. GERRARD: Objection. Misstates what's in the

14:28:58 16 offer and misstates what FMV means under the operating

14:29:03 17 agreement. And also, lack of foundation.

14:29:05 18 THE ARBITRATOR: I'm going to start with the

14:29:06 19 foundation.

14:29:08 20 Do you have any information at all about what

14:29:11 21 Mr. Bidsal considered when he made the \$5 million fair

14:29:18 22 market value assessment in his July letter?

14:29:21 23 THE WITNESS: No, I do not.

14:29:23 24 THE ARBITRATOR: All right. So then do you have

14:29:24 25 any information from any source about why he put that

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14:29:27 1 number in there?

14:29:28 2 THE WITNESS: No.

14:29:29 3 THE ARBITRATOR: All right.

14:29:32 4 So to ask him, Did you have any information that

14:29:35 5 he didn't include Greenway without asking the

14:29:38 6 foundational question is, at the very least, misleading.

14:29:43 7 MR. LEWIN: Okay.

14:29:44 8 THE ARBITRATOR: All right.

14:29:46 9 BY MR. LEWIN:

14:29:46 10 **Q. But it is clear under the operating agreement**

14:29:48 11 **that if Mr. Bidsal sold his interest to Greenway -- to**

14:29:54 12 **CLA, that he would be selling all of his interest in all**

14:29:58 13 **of the assets for whatever their value was at the time;**

14:30:00 14 **right?**

14:30:01 15 MR. GERRARD: Objection. Misstates the document.

14:30:03 16 He doesn't have an interest in any assets. He only owns

14:30:06 17 a membership interest.

14:30:07 18 MR. LEWIN: As a membership interest, they have

14:30:09 19 an indirect interest in the assets.

14:30:09 20 MR. GERRARD: Absolutely not --

14:30:13 21 MR. SHAPIRO: It's contrary to Nevada law --

14:30:15 22 MR. GERRARD: It's contrary to Nevada Chapter 86.

14:30:15 23 You cannot -- members expressly under the law have zero

14:30:20 24 interest in the assets of the company. They only have

14:30:22 25 an ownership interest in the company.

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14:30:25 1 THE ARBITRATOR: You mean they have no ownership
14:30:29 2 interest in the property?
14:30:30 3 MR. GERRARD: In any of the assets of the
14:30:31 4 company. They only own their interest in the company.
14:30:34 5 THE ARBITRATOR: I'm going to sustain the
14:30:34 6 objection for the way it was phrased.
14:30:34 7 MR. LEWIN: Okay.
14:30:59 8 MR. SHAPIRO: We've been going for an hour and a
14:31:01 9 half. Would this be a good time for a quick break?
14:31:01 10 MR. LEWIN: Let me just finish up with this
14:31:01 11 section if you don't mind.
14:31:02 12 MR. SHAPIRO: Okay.
14:31:02 13 THE ARBITRATOR: Perfect.
14:31:05 14 BY MR. LEWIN:
14:31:05 15 **Q. It was your understanding when you did your**
14:31:09 16 **report and you formed your opinions that the \$5 million**
14:31:15 17 **offer was for the assets of the company; isn't that**
14:31:19 18 **correct?**
14:31:19 19 MR. GERRARD: Again, same objection. We're just
14:31:21 20 asking the same question in a different way.
14:31:23 21 THE ARBITRATOR: His report doesn't, for my
14:31:27 22 purposes, have any effect on the FMV number in the
14:31:32 23 formula.
14:31:34 24 MR. GERRARD: Or what it includes.
14:31:36 25 THE ARBITRATOR: Correct.

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14:31:37 1 BY MR. LEWIN:

14:31:37 2 Q. Did you have an opinion as to what the \$5 million

14:31:45 3 FMV meant?

14:31:48 4 THE ARBITRATOR: That's a yes or no question.

14:31:52 5 THE WITNESS: Okay.

14:31:54 6 Yes, I do.

14:31:54 7 BY MR. LEWIN:

14:31:54 8 Q. And what was your opinion?

14:31:57 9 A. My opinion is that the \$5 million was

14:32:02 10 Mr. Bidsal's estimate of the fair market value of the

14:32:06 11 company. To do as you have suggested, he would have had

14:32:10 12 to say, Well, the company is worth 4,500,000, but let's

14:32:15 13 say I haven't gotten my benefit of the gain on Green

14:32:18 14 Valley, so I'm going to jump it up to 5 million.

14:32:21 15 I don't think that's what he did. I think he

14:32:23 16 felt like the value of the assets was \$5 million.

14:32:26 17 That's what he -- I'm sorry. The value of the

14:32:28 18 membership interest was 5 million; that's what he

14:32:31 19 offered, never expecting the cost of purchase to be

14:32:39 20 inflated by 500,000 on the Greenway property. That's my

14:32:43 21 opinion.

14:32:43 22 Q. But you don't -- is it -- in effect, it's your

14:32:50 23 opinion, in setting the fair market value of a

14:32:52 24 membership interest, a reasonable person would not

14:32:54 25 consider the value of -- the fair market value of the

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14:32:57 1 assets? That's a yes or no.

14:33:01 2 A. A reasonable person would have considered the

14:33:04 3 fair market value of underlying assets.

14:33:07 4 Q. And one of those assets is cash in the bank;

14:33:09 5 right?

14:33:09 6 A. One of those assets would be cash in the bank.

14:33:12 7 Q. And you --

14:33:13 8 A. He would have considered that. He would have

14:33:16 9 considered if it was going to get distributed as well.

14:33:18 10 Q. That was a yes or no.

14:33:20 11 A. I'm sorry.

14:33:20 12 Q. A reasonable person would have considered in

14:33:24 13 setting the fair market value of a membership interest

14:33:25 14 the amount of cash in the bank; right?

14:33:26 15 A. They would have done that.

14:33:32 16 MR. LEWIN: You know what, he wants to take a

14:33:33 17 break. We can take a break.

14:33:34 18 THE ARBITRATOR: Okay. All right. We'll take

14:33:38 19 about ten minutes.

14:33:40 20 ***

14:33:40 21 (RECESS TAKEN FROM 2:33 P.M. TO 2:50 P.M.)

14:37:38 22 ***

14:37:38 23 THE ARBITRATOR: All right. Mr. Wilcox, you

14:50:40 24 realize you're still under oath?

14:50:41 25 THE WITNESS: Yes.

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14:50:41 1 THE ARBITRATOR: All right.

14:50:42 2 Mr. Lewin, you may continue.

14:50:43 3 BY MR. LEWIN:

14:50:43 4 Q. Mr. Wilcox, did you acquire any information that

14:50:46 5 either CLA or Mr. Bidsal had any need or desire for

14:50:50 6 space in one of the buildings at Green Valley?

14:50:52 7 A. That?

14:50:54 8 Q. That they were going to use -- that either

14:50:57 9 Mr. Bidsal or CLA was going to use -- utilize space --

14:51:02 10 one of the rental spaces for their own use?

14:51:03 11 THE ARBITRATOR: At what point in time?

14:51:05 12 MR. LEWIN: After the purchase was finished.

14:51:08 13 THE ARBITRATOR: Okay.

14:51:08 14 MR. GERRARD: After the purchase was finished?

14:51:12 15 THE ARBITRATOR: After September of 2017.

14:51:12 16 MR. LEWIN: After September, right.

14:51:16 17 THE WITNESS: So the question is did I have any

14:51:18 18 information that they were going to use space in the

14:51:20 19 property?

14:51:20 20 MR. LEWIN: Yes.

14:51:20 21 THE WITNESS: No.

14:51:21 22 BY MR. LEWIN:

14:51:21 23 Q. Is it fair to say then that both Mr. Bidsal and

14:51:27 24 CLA was offering to buy an interest in a company that

14:51:34 25 had a stream of payments?

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14:51:34 1 A. A stream of payments? Rental payments, yes. Page 525

14:51:37 2 Q. An income stream?

14:51:38 3 A. Yes.

14:51:38 4 Q. And if you allocate distributions to -- if you

14:52:02 5 were to allocate part of the proceeds, the income

14:52:07 6 stream, after September 2nd, would -- then you would be

14:52:11 7 depriving CLA of a portion of that income stream; right?

14:52:16 8 MR. GERRARD: Objection. Assumes facts not in

14:52:17 9 evidence.

14:52:17 10 THE ARBITRATOR: I'm not sure I understood the

14:52:18 11 question.

14:52:19 12 MR. LEWIN: He's allocated distributions both --

14:52:24 13 from cash on hand as of the date of the offer and then

14:52:28 14 cash that was earned afterwards -- after the date of the

14:52:30 15 offer.

14:52:30 16 BY MR. LEWIN:

14:52:30 17 Q. So my -- the question I'm asking is that if you

14:52:34 18 allocate distributions -- cash that was earned after

14:52:40 19 September 2nd, you would be depriving CLA of that income

14:52:43 20 stream; right?

14:52:45 21 MR. GERRARD: Objection. Assumes a fact not in

14:52:46 22 evidence.

14:52:46 23 THE ARBITRATOR: If the sale went through on

14:52:46 24 September 7, 2017.

14:52:46 25 MR. LEWIN: That's right. Yes.

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14:52:49 1 MR. GERRARD: And they had been paid.

14:52:50 2 THE ARBITRATOR: Right.

14:52:51 3 You may answer.

14:52:53 4 A. Bidsal would not have a right to an income stream

14:53:01 5 after he ceased to be an owner.

14:53:04 6 THE ARBITRATOR: Hold on right there.

14:53:04 7 MR. LEWIN: Okay.

14:53:04 8 (Pause in proceedings.)

14:53:19 9 BY MR. LEWIN:

14:53:19 10 Q. Regardless of how the \$5 million valuation came

14:53:40 11 about, it is fixed at a point in time; right?

14:53:44 12 A. That was the value the day it was made, I assume.

14:53:47 13 Q. That would be July 7th, I think. Is it July 7th?

14:53:51 14 The date of his offer?

14:53:52 15 A. Right.

14:53:53 16 Q. Okay. Looking at the formula -- we're on

14:54:23 17 page 11. This is the formula that sets forth the manner

14:54:44 18 in which they calculate the purchase price; right?

14:54:46 19 A. Correct.

14:54:47 20 Q. Is there any part of this formula that involves

14:54:51 21 adding back cash on hand?

14:54:53 22 A. No.

14:54:54 23 Q. But it is a formula that describes how to

14:54:59 24 calculate the purchase price; right?

14:55:01 25 A. Yes.

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14:55:02 1 Q. And the formula only includes the valuation of
14:55:05 2 the fair market value by the offering member or the
14:55:08 3 remaining member, as the case may be -- let me rephrase
14:55:12 4 it.

14:55:12 5 And the formula only includes the valuation of
14:55:15 6 fair market value by the offering member; isn't that
14:55:18 7 right?

14:55:18 8 MR. GERRARD: I'm going to object unless you're
14:55:19 9 talking about as defined in the agreement.

14:55:22 10 THE ARBITRATOR: You're talking about as defined
14:55:22 11 in the agreement?

14:55:25 12 MR. LEWIN: Yeah, I'm talking about the formula.

14:55:26 13 THE ARBITRATOR: Okay.

14:55:26 14 A. Yes.

14:55:27 15 BY MR. LEWIN:

14:55:27 16 Q. Do you have any basis to assume based on the
14:55:37 17 documents that you've seen that Mr. Bidsal did not take
14:55:40 18 into account the cash on hand in making the \$5 million
14:55:45 19 valuation?

14:55:45 20 THE ARBITRATOR: That's the same objection I
14:55:47 21 sustained before --

14:55:47 22 MR. GERRARD: Yeah.

14:55:48 23 THE ARBITRATOR: -- so I'll sustain it.

14:55:49 24 BY MR. LEWIN:

14:55:49 25 Q. According to the formula, in determining COP,

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14:56:05 1 you're supposed to evaluate what the cost was pursuant
14:56:08 2 to the settlement statement; right?
14:56:10 3 A. Right.
14:56:10 4 Q. And it's like an escrow closing statement?
14:56:14 5 A. Correct.
14:56:14 6 Q. The sale of Building C -- the 1031 exchange is
14:56:25 7 just a tax deferral. It has nothing to do with the sale
14:56:29 8 per se; is that correct?
14:56:31 9 A. Correct.
14:56:31 10 Q. So the sale of C is a sale on its own two feet;
14:56:35 11 right?
14:56:35 12 A. Yes.
14:56:37 13 Q. And there's a tax deferral to use so you don't
14:56:42 14 have to pay the tax on the gain when you buy another
14:56:46 15 property and you invest the proceeds of that sale into
14:56:50 16 that property?
14:56:51 17 A. Correct.
14:56:52 18 Q. And any part of the proceeds that you don't
14:56:55 19 invest, it's commonly termed in your business as "boot";
14:57:01 20 right?
14:57:01 21 A. Correct.
14:57:02 22 Q. Boot means part of the -- and in this case, CLA
14:57:10 23 invested more than the cost basis of the property;
14:57:13 24 right?
14:57:13 25 A. Correct.

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14:57:14 1 Q. So it deferred the taxes on a portion of the
14:57:20 2 gain; right?
14:57:21 3 A. Correct.
14:57:21 4 Q. And that document that we saw earlier with the
14:57:25 5 \$95,000, that was boot that was then distributed; right?
14:57:27 6 A. Correct.
14:57:28 7 Q. That boot was the unused gain on the -- from the
14:57:39 8 sale of Property C; right?
14:57:42 9 A. Correct.
14:57:42 10 Q. They could have invested -- I guess if they found
14:57:49 11 a more valuable property, they could have invested it
14:57:52 12 all in the property. But you can make a decision not to
14:57:55 13 invest -- to reinvest the money yourself?
14:57:58 14 In other words, in a 1031 exchange, you don't
14:58:01 15 have to invest all your money; you can invest part of it
14:58:03 16 and pay taxes on the rest; right?
14:58:04 17 A. Yes.
14:58:05 18 Q. And still that part that we're talking about is
14:58:08 19 boot?
14:58:08 20 A. Right.
14:58:08 21 Q. The part you have to pay taxes on?
14:58:11 22 A. Okay.
14:58:11 23 Q. Is that right?
14:58:12 24 A. Yes.
14:58:12 25 Q. So the \$95,000 -- you said that Mr. Bidsal did

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14:58:22 1 not -- that nothing triggered Exhibit B. But in fact, Page 530
14:58:30 2 Mr. Bidsal distributed the boot on Building C of \$95,000
14:58:36 3 according to the step-down waterfall; right?
14:58:40 4 A. That is what he did.
14:58:42 5 Q. And have you seen -- and that was the first sale;
14:58:50 6 right?
14:58:51 7 A. Correct.
14:58:51 8 Q. The sale closest in time to signing the operating
14:58:55 9 agreement?
14:58:55 10 A. Correct.
14:58:56 11 Q. And the only information that you have to rely on
14:59:05 12 that Mr. Bidsal did not think that Exhibit B was
14:59:08 13 triggered was something he said to you; right?
14:59:10 14 A. No. I mean, something he said to me may have --
14:59:19 15 I'm trying to think. I don't think I relied on
14:59:22 16 Mr. Bidsal to decide that Exhibit B, the waterfall, was
14:59:27 17 triggered -- it was or wasn't triggered.
14:59:30 18 Q. But Mr. Bidsal distributed it according to the
14:59:35 19 waterfall?
14:59:35 20 A. No --
14:59:35 21 Q. Excuse me. It's a yes or a no. He distributed
14:59:39 22 it 70-30?
14:59:40 23 THE ARBITRATOR: What?
14:59:42 24 MR. LEWIN: The boot on Building C. That's the
14:59:44 25 \$95,000.

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14:59:44 1 THE ARBITRATOR: Right.

14:59:44 2 BY MR. LEWIN:

14:59:45 3 Q. Mr. Bidsal distributed the boot in accordance

14:59:49 4 with the waterfall; right?

14:59:51 5 A. So he --

14:59:52 6 Q. Yes or no?

14:59:52 7 A. Yes. The answer is yes, it was 70-30. I don't

14:59:56 8 know what was in his mind and whether he said, Oh, I'm

14:59:58 9 going to do it according to the waterfall.

15:00:01 10 I don't know that.

15:00:01 11 Q. Did you ask him why he distributed it 70-30?

15:00:04 12 A. No.

15:00:05 13 Q. You're only -- I'll leave it at that.

15:00:13 14 Would you take a look at the escrow closing

15:00:32 15 statement, the purchase of the note, Exhibit 3.

15:00:44 16 I'm sorry. Before we go there, I just forgot to

15:00:48 17 follow up on the question.

15:00:48 18 So the purchase of exhibit -- the sale of C

15:00:53 19 stands on itself, and the purchase of Greenway stands on

15:00:56 20 itself. It's a separate purchase; right?

15:00:59 21 MR. GERRARD: Objection. Vague and ambiguous. I

15:01:01 22 don't know what it means, "stands on itself."

15:01:01 23 MR. LEWIN: Well, he said that earlier.

15:01:02 24 BY MR. LEWIN:

15:01:02 25 Q. The sale of Greenway was a sale independent of

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15:01:08 1 whether or not there's a 1031 tax deferral; right?

15:01:12 2 A. The sale of Building C?

15:01:14 3 Q. The sale.

15:01:15 4 A. The sale of Building C is a separate transaction

15:01:19 5 from the purchase of Greenway. The two are combined

15:01:22 6 because they're part of the same 1031 exchange.

15:01:24 7 Q. That only has to do with tax deferral business;

15:01:27 8 right?

15:01:27 9 A. That has to do with tax deferral.

15:01:30 10 Q. As a matter of fact, when Greenway is sold, the

15:01:36 11 deferred gain has to be paid at that time; right?

15:01:39 12 A. That is correct.

15:01:40 13 Q. So it's recaptured?

15:01:43 14 A. It's not recaptured. It is triggered. That

15:01:47 15 deferred gain, that realized gain, is recognized on the

15:01:51 16 sale of Greenway.

15:01:53 17 Q. So let's assume -- how much was the gain that was

15:01:56 18 deferred in --

15:01:57 19 A. 550,000.

15:01:59 20 Q. Say it's 550,000. Let's say CLA ends up buying

15:02:04 21 the membership interest.

15:02:05 22 A. Correct.

15:02:06 23 Q. Mr. Bidsal's membership interest. And decides to

15:02:10 24 sell Greenway. Who's going to have to be responsible

15:02:17 25 for paying the deferred gain?

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15:02:20 1 MR. GERRARD: Paying the deferred gain or Page 533
15:02:21 2 the taxes on --
15:02:22 3 MR. LEWIN: Paying the taxes. Paying the taxes
15:02:23 4 on the deferred gain.
15:02:24 5 A. The answer to your question is CLA. But that's
15:02:28 6 only part of the answer, so. If you want the full --
15:02:33 7 BY MR. LEWIN:
15:02:33 8 **Q. What's the other part?**
15:02:34 9 A. When CLA buys them out, there will be a purchase
15:02:38 10 price that will get -- because CLA is now taking money
15:02:42 11 and buying out Mr. Bidsal. That is a new asset for CLA
15:02:47 12 which will result in a stepped up basis. Whoever does
15:02:52 13 CLA's tax returns is going to have to go in and allocate
15:02:56 14 what they paid to Mr. Bidsal to the buildings, which is
15:03:01 15 going to increase the basis in the buildings.
15:03:05 16 THE ARBITRATOR: Including Greenway?
15:03:08 17 THE WITNESS: Including Greenway, yeah. It's
15:03:09 18 going to -- Greenway is going to get a big chunk --
15:03:13 19 yeah. I mean, it's just common -- it's called a 743 --
15:03:19 20 734(b) adjustment. You've heard of 754 adjustments?
15:03:24 21 Doesn't matter. That's what it is.
15:03:27 22 BY MR. LEWIN:
15:03:27 23 **Q. Is that adjustment going to be sufficient to pay**
15:03:30 24 **the -- to defer the entire amount of deferred gain that**
15:03:32 25 **the taxes have to be paid on?**

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15:03:34 1 A. No. It will be enough to -- under my
15:03:40 2 calculation, Mr. Bidsal will receive enough that he
15:03:46 3 receives his share of that gain. So when CLA allocates
15:03:49 4 the purchase price to all of those six -- well, actually
15:03:54 5 seven assets -- a big chunk of that will be allocated to
15:04:01 6 Greenway. It will not offset the built-in gain that CLA
15:04:06 7 has. So basically it will wipe out Mr. Bidsal's gain,
15:04:10 8 but CLA will only pay tax on their share of the gain
15:04:14 9 because of that basis adjustment.

15:04:19 10 Q. Okay. Going to No. 3. According to the final
15:04:23 11 settlement statement, the cost of the note was
15:04:27 12 \$4,048,969; right?

15:04:32 13 A. Yeah.

15:04:32 14 Q. That includes the actual cost of the note plus
15:04:35 15 other costs; right?

15:04:36 16 A. Correct.

15:04:37 17 Q. Did you ever find out why that number was not
15:04:43 18 used as the cost -- as the cost for Greenway? Sorry.

15:04:51 19 Did you ever find out why that cost of 4,048,000
15:04:56 20 was not actually used for the cost segregation study?

15:04:59 21 A. I never looked into why they were off about
15:05:04 22 \$50,000.

15:05:05 23 Q. It's actually about \$82,000.

15:05:06 24 A. Is it 82-? I never looked into it.

15:05:10 25 Q. Well, the original cost segregation study was

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15:05:18 1 **\$3,967,182.**

15:05:28 2 A. Yeah. About 82,000.

15:05:30 3 **Q. And you never investigated to find out what the**

15:05:36 4 **difference was and what happened to that missing 82,000;**

15:05:41 5 **is that correct?**

15:05:41 6 MR. GERRARD: Objection. Asked and answered.

15:05:42 7 A. I did not.

15:05:45 8 MR. GERRARD: Go ahead. He's already answered.

15:05:45 9 THE ARBITRATOR: He answered; I did not.

15:05:46 10 I overrule the objection.

15:05:49 11 BY MR. LEWIN:

15:05:49 12 **Q. Do you know whether that \$82,000 was distributed?**

15:05:53 13 A. I saw no evidence of it being distributed.

15:05:57 14 **Q. If there was a distribution of anything above**

15:06:02 15 **\$3,967,182, that would be a return of capital; right?**

15:06:11 16 MR. GERRARD: Again, objection. Based upon what?

15:06:15 17 For tax purposes or for the operating agreement

15:06:17 18 allocation purposes?

15:06:19 19 MR. LEWIN: Based under any purpose. It was to

15:06:20 20 be a return of capital. They put up 4,048,000 and ended

15:06:24 21 up --

15:06:25 22 MR. GERRARD: That's not the question you asked.

15:06:26 23 You asked if it was a return of capital. And there's a

15:06:28 24 difference between how capital -- what a capital

15:06:31 25 transaction is for purposes of the operating agreement

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15:06:35 1 than what it is for purposes of what you pay taxes on.

15:06:37 2 MR. LEWIN: Now I object to the way the objection

15:06:40 3 is being framed. He's basically -- he's making a

15:06:43 4 speaking objection. My question was very simple.

15:06:43 5 BY MR. LEWIN:

15:06:44 6 **Q. Would the difference of the \$82,000 --**

15:06:48 7 MR. GERRARD: Hold on, Mr. Lewin. I haven't

15:06:49 8 heard any --

15:06:50 9 THE ARBITRATOR: I know. I'm waiting for the

15:06:50 10 question.

15:06:50 11 MR. GERRARD: Oh, okay.

15:06:50 12 BY MR. LEWIN:

15:06:52 13 **Q. My question was if the \$82,000 was distributed,**

15:06:55 14 **would that be a return of capital?**

15:06:56 15 MR. GERRARD: So there hasn't been a ruling on

15:06:59 16 the objection.

15:06:59 17 THE ARBITRATOR: That's a yes or no question.

15:07:01 18 Here's the thing: I have -- and always -- protect a

15:07:07 19 party's right on cross-examination to ask closed-ended

15:07:12 20 questions. Yes, no. So to a yes/no question, your

15:07:18 21 options are kind of the following: Yes, no, I don't

15:07:22 22 know, I don't recall, or I can't answer that yes or no,

15:07:29 23 or I don't understand the question.

15:07:30 24 Those are pretty much the options. So to that

15:07:34 25 question, closed-ended as it is, even though it doesn't

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15:07:39 1 differentiate the way Mr. Gerrard requested, I'm going
15:07:43 2 to allow the question to stand if you can answer it.
15:07:47 3 A. And I don't know without understanding -- I'm
15:07:51 4 sorry. I don't know.
15:07:54 5 BY MR. LEWIN:
15:07:54 6 **Q. What would you have to understand to know?**
15:07:56 7 A. Thank you. So I'd need to understand what was
15:08:02 8 behind the distribution. If it was as simple as you
15:08:06 9 said, we put whatever the number is -- 4 point --
15:08:12 10 \$4 million into the company, and we didn't need all the
15:08:14 11 money, and we just distributed it back, then that would
15:08:17 12 be a return of capital. But I don't know that that is
15:08:19 13 or isn't what happened.
15:08:20 14 **Q. Forgive me if I asked you this before. Did you**
15:08:31 15 **ever ask anyone what happened to the \$82,000?**
15:08:33 16 A. As I stated before, I did not.
15:08:36 17 **Q. But when the transaction was recorded, the basis**
15:08:41 18 **or cost of the note dropped from 4,048,969 to 3,967,182;**
15:08:50 19 **right?**
15:08:51 20 A. That is correct.
15:08:52 21 **Q. And one of your assignments was to determine COP**
15:08:59 22 **of Green Valley's property. You never bothered to**
15:09:02 23 **determine whether or not the 4,048,969 should have been**
15:09:10 24 **used as the COP; right?**
15:09:12 25 A. Is that a yes or no?

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15:09:15 1 Q. Yes.

15:09:16 2 A. Well, that was my assignment.

15:10:06 3 Q. Take a look at Exhibit 95. There should be a

15:10:11 4 binder there.

15:10:30 5 A. Here it is.

15:10:35 6 Q. Have you ever seen this ledger before?

15:10:55 7 A. Yes.

15:10:55 8 Q. Where did you see it?

15:10:57 9 A. It's part of the documents that were produced.

15:11:00 10 Q. Given to you by Mr. Bidsal?

15:11:04 11 A. We got all of our documents through the law

15:11:07 12 office.

15:11:08 13 Q. Did you ever talk to Mr. Bidsal about this?

15:11:13 14 A. Generally, yeah.

15:11:15 15 Q. What did he tell you this was?

15:11:16 16 A. That this was a general ledger that I believe

15:11:20 17 that was prepared by Capital One. Yeah, general ledger

15:11:31 18 prepared by Capital One. Not Capital One. Somebody --

15:11:34 19 the original lender.

15:11:35 20 Q. Take a look at account number 30 -- 30,000.

15:11:42 21 THE ARBITRATOR: What was it?

15:11:44 22 MR. LEWIN: Account number 30,000. It's on the

15:11:49 23 first page.

15:11:49 24 THE WITNESS: Okay.

15:11:49 25 ///

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15:11:50 1 BY MR. LEWIN:

15:11:50 2 Q. What does it say the opening equity balance is?

15:11:54 3 A. It shows the open equity balance of 0.

15:11:57 4 Q. How about the deposit?

15:12:02 5 A. It shows...

15:12:13 6 Q. It shows an opening balance of \$4,049,256; is

15:12:19 7 that correct?

15:12:19 8 A. Oh, I'm sorry. I was looking at the total 3-0

15:12:22 9 down below. Pardon me. The opening equity balance is

15:12:29 10 0, but there is a deposit of \$4,049,250.

15:12:33 11 Q. That matches the initial contributions from

15:12:38 12 the -- from Mr. Bidsal and CLA; right?

15:12:39 13 A. That is correct.

15:12:40 14 Q. Did you notice that there was two reductions of

15:12:47 15 principal after that?

15:12:50 16 MR. GERRARD: Two reductions of principal? I'm

15:12:52 17 sorry. Where are you looking, Rod?

15:12:55 18 THE ARBITRATOR: Are you looking at the

15:12:57 19 distributions under --

15:12:58 20 MR. LEWIN: I'm looking at the distributions.

15:13:00 21 THE ARBITRATOR: 30 -- 30700?

15:13:02 22 MR. LEWIN: Yes.

15:13:04 23 MR. GERRARD: I'm sorry. Could you read the

15:13:04 24 question back, Mia? What did he say? Return of what?

15:13:04 25 (Page 539, Lines 14 through 15 were read.)

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15:13:04 1 MR. GERRARD: "Reductions of principal"?
15:13:04 2 THE REPORTER: Yeah.
15:13:15 3 MR. GERRARD: I'm going to object to the
15:13:16 4 question. It misstates the document.
15:13:18 5 THE ARBITRATOR: Overruled. I'll allow it.
15:13:23 6 THE WITNESS: So it appears there were two
15:13:25 7 distributions. Is that what you're referring to?
15:13:29 8 BY MR. LEWIN:
15:13:29 9 Q. Yes. There's two -- do you know where the funds
15:13:30 10 came from for those distributions?
15:13:32 11 A. No, I do not. I was -- I do not know.
15:13:47 12 Q. Did you -- is it fair to say that the reason why
15:13:51 13 you used the amounts in the cost segregation study was
15:13:55 14 because that was the amount that had been historically
15:13:58 15 used by Green Valley in all of its accounting and -- in
15:14:04 16 its accounting and tax returns?
15:14:05 17 A. Yes.
15:14:05 18 Q. And if you went back to adjust the cost basis of
15:14:19 19 the properties, you wouldn't want to have to readjust
15:14:25 20 all the tax returns; right?
15:14:26 21 A. Well, those tax returns are beyond the statute,
15:14:29 22 so that wouldn't be possible.
15:14:30 23 Q. But the tax returns -- the adjustments to the tax
15:14:33 24 returns really had nothing to do with the determination
15:14:35 25 of COP; right?

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15:14:36 1 A. I utilized what was reported in the tax returns
15:14:40 2 because that's what the company has been reporting for
15:14:44 3 the last -- since 2011. So it seemed like a
15:14:47 4 reasonable -- reasonable that that would be the number
15:14:51 5 to use.

15:14:51 6 Q. So looking at the formula, it seems -- is it fair
15:15:01 7 to say that there's two ways to interpret it? One is
15:15:05 8 use original cost -- COP for the cost of -- maybe
15:15:09 9 there's more than two ways. But one way would be to use
15:15:12 10 the original cost attributed -- paid for the note which
15:15:16 11 was converted into the property, and use Mr. Bidsal's
15:15:22 12 initial capital. That would be one way; right?

15:15:25 13 A. Okay.

15:15:25 14 Q. That would not -- logically, that would not take
15:15:29 15 into account property that had been sold?

15:15:32 16 A. Correct.

15:15:32 17 Q. But that's one interpretation of it. The other
15:15:34 18 interpretation would be to provide for the sales of the
15:15:45 19 properties that are no longer there -- right? -- and
15:15:46 20 reduce the COP by those properties, and then -- and to
15:15:54 21 reduce the remaining capital by the capital
15:15:57 22 distributions. That's the other way; right?

15:15:58 23 A. Right.

15:15:59 24 Q. And that's what -- that last version is the
15:16:02 25 version that you took because you felt that was the most

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15:16:04 1 appropriate?

15:16:05 2 A. That's correct.

15:16:05 3 Q. Because it didn't make any sense to be valuing

15:16:09 4 something that's no longer there?

15:16:10 5 A. I'm sorry. Say that one more time.

15:16:11 6 Q. It doesn't make any sense to be -- to try to --

15:16:14 7 in assuming that the valuation of assets has -- is

15:16:17 8 valuing assets that are no longer there?

15:16:19 9 A. Yes.

15:16:19 10 Q. So your reasoning -- your reasoning in doing that

15:16:28 11 was that because three of the properties had been sold

15:16:30 12 so you wouldn't think that would be in COP; right?

15:16:33 13 A. Three properties -- two of the properties should

15:16:37 14 not be part of the COP.

15:16:38 15 Q. Two of the properties. The one -- and there's

15:16:41 16 another -- we have Greenway, which is a horse of a

15:16:44 17 different color.

15:16:45 18 And you discussed that agreement with Mr. Bidsal,

15:16:49 19 and he agreed with your analysis; right?

15:16:51 20 A. He does.

15:16:52 21 Q. As a matter of fact, they didn't like it, but

15:16:55 22 they agreed; right?

15:16:55 23 A. There might have been a better way to go for his

15:17:01 24 benefit, but this is what I felt was the more

15:17:05 25 appropriate way.

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1 Q. Now, talking about the -- going back to the
2 depreciation issue. I was a little confused when you
3 were explaining it to Judge Wall.
4 Let's say we have -- the way the depreciation was
5 handled here, it was distributed as though it was
6 operating income; right?
7 A. The way I handled depreciation.
8 Q. It was -- the way you handled it is that -- you
9 handled the depreciation as though it were ordinary
10 income from operations; right?
11 A. It is a deduction as part of ordinary income from
12 operations.
13 Q. That was a yes or no question. I have a very
14 specific point here.
15 The way you handled depreciation was -- it was
16 though it was ordinary income from operations; right?
17 A. I handled -- depreciation is a -- the way the
18 question is being asked --
19 THE ARBITRATOR: If you can't answer it yes or
20 no, say you can't answer --
21 A. I can't answer it yes or no.
22 BY MR. LEWIN:
23 Q. You've seen that -- one of the problems that
24 Mr. Gerety pointed out is that there was distributions
25 equal to the amount of depreciation that was distributed

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15:18:31 1 50-50; right?

15:18:32 2 A. Correct.

15:18:33 3 Q. Okay. And we've already talked about earlier

15:18:38 4 today that depreciation is not part of -- is not

15:18:45 5 ordinary income. It is -- ordinary income is gross

15:18:48 6 income less depreciation and maybe some other stuff;

15:18:52 7 right?

15:18:52 8 A. So we talked about --

15:18:53 9 Q. That's a yes or no.

15:18:54 10 A. So depreciation is a deduction to arrive at

15:19:00 11 ordinary income. So the answer, I believe, to the

15:19:03 12 question is yes.

15:19:05 13 Q. So I have two issues then. The first issue, I

15:19:09 14 was just trying to figure out what you were explaining

15:19:11 15 to Judge Wall. Assume that all the income is

15:19:14 16 distributed every year, and assume that of that

15:19:19 17 income -- of that income that is distributed, there is

15:19:23 18 cash flow that's part of the -- that's part of the

15:19:28 19 gross -- the income before -- if the cash -- let me

15:19:32 20 rephrase.

15:19:34 21 We talked earlier about there's a difference

15:19:36 22 between cash flow and ordinary income?

15:19:38 23 A. Yes.

15:19:38 24 Q. Okay. Mr. Bidsal distributed cash flow, and part

15:19:43 25 of that cash flow was an amount equal to depreciation;

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15:19:48 1 right?

15:19:48 2 A. Correct.

15:19:48 3 Q. Assuming that everything -- assuming that the

15:19:54 4 income was all distributed 50-50, so the income comes

15:19:59 5 in -- comes into the capital account, is depreciation --

15:20:04 6 does depreciation reduce the capital account?

15:20:06 7 A. Yes.

15:20:06 8 Q. So they would come in 50-50, the depreciation

15:20:09 9 would be 50-50; right?

15:20:10 10 A. Yes.

15:20:11 11 Q. And then there's an equal amount of

15:20:14 12 distributions. Wouldn't the capital account always stay

15:20:18 13 in -- in -- consistent?

15:20:19 14 A. No.

15:20:19 15 Q. Why not?

15:20:20 16 A. As I explained before -- if we could go back

15:20:27 17 through the same example we had before -- if you had a

15:20:31 18 \$900,000 -- I'm sorry.

15:20:34 19 Use \$1 million of capital. Start out 30 --

15:20:39 20 300,000 here and 700,000 over here. Right? Net income

15:20:47 21 would be -- let's call it 200,000. Well, let's call it

15:20:52 22 300,000. 150,000 gets allocated equally between both of

15:20:56 23 them. Part of that net income is a depreciation

15:21:00 24 deduction. If that depreciation deduction was \$100,000,

15:21:07 25 cash flow from ordinary operations would be 300,000.

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15:21:15 1 I'm sorry. It would be 400,000. \$300,000 of income,
15:21:25 2 add back the \$100,000 of depreciation, which is a
15:21:28 3 noncash item. That would mean that there was \$400,000
15:21:32 4 of cash that could be distributed. That would be
15:21:37 5 distributed 50-50.

15:21:39 6 If Mr. Bidsal had a \$300,000 capital account, it
15:21:43 7 would increase by 150- for the income; it would decrease
15:21:46 8 by 200,000 for the cash that was distributed. So now
15:21:53 9 his capital account is 250,000.

15:21:56 10 **Q. So if the accounts were 50-50, everything would**
15:22:01 11 **stay 50-50; right?**

15:22:03 12 A. If the accounts were 50-50 and all of the income
15:22:07 13 and everything was distributed, then yeah.

15:22:09 14 **Q. All distributions, all income, everything's**
15:22:11 15 **50-50, the accounts always should match up; right?**

15:22:14 16 A. Right.

15:22:15 17 **Q. The issue here is that it's 70-30, and that as**
15:22:20 18 **you -- as we've discussed, depreciation is not -- cash**
15:22:24 19 **flow is different than ordinary income from operations;**
15:22:27 20 **right?**

15:22:27 21 A. Correct.

15:22:28 22 **Q. So when Mr. Bidsal distributes the depreciation**
15:22:33 23 **50-50 instead of 70-30, that is what is causing the**
15:22:36 24 **difference in the capital accounts; right?**

15:22:38 25 A. You're -- I can't answer the question the way

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15:22:42 1 you've asked it.

15:22:43 2 Q. Isn't the causation of the variations in the
15:22:48 3 capital account -- his account going up, his account
15:22:51 4 going down -- because Mr. Bidsal is distributing
15:22:56 5 something that should have been distributed 70-30 50-50?

15:23:00 6 A. That is not my opinion. I do not agree with that
15:23:02 7 statement.

15:23:02 8 Q. But you do agree that depreciation is not part of
15:23:06 9 ordinary income from operations; right?

15:23:07 10 A. I don't agree with that statement.

15:23:09 11 Q. You just -- we just went over this. So I want to
15:23:13 12 know. A minute ago, you said it was, and now you're
15:23:16 13 saying it's not. Let's go through it again.

15:23:18 14 THE ARBITRATOR: No. He said it was a deduction
15:23:25 15 from ordinary operations expenses.

15:23:25 16 MR. LEWIN: Well, I think he said it a little bit
15:23:27 17 different, so let me just clear it up so we all know.

15:23:29 18 THE ARBITRATOR: This last question was it's a
15:23:31 19 part of ordinary income.

15:23:33 20 BY MR. LEWIN:

15:23:33 21 Q. Depreciation, according to the formula -- excuse
15:23:39 22 me -- according to the Schedule B, Mr. Bidsal's entitled
15:23:42 23 to cash distributions from profits from operations that
15:23:45 24 result in ordinary income; right?

15:23:47 25 A. Yes.

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15:23:48 1 Q. And ordinary income is not -- is different than
15:23:53 2 cash flow. It doesn't include amounts of -- part of the
15:23:57 3 cash flow that -- there's a deduction for depreciation;
15:24:00 4 right?

15:24:01 5 A. To arrive at ordinary income, you deduct
15:24:04 6 depreciation.

15:24:04 7 Q. Okay. So if I had -- all right.

15:24:09 8 So where in the operating agreement does
15:24:13 9 Mr. Bidsal -- is Mr. Bidsal entitled to receive
15:24:17 10 distributions on a 50-50 basis from depreciation?

15:24:21 11 A. It does not specifically say that in the
15:24:23 12 operating agreement.

15:24:24 13 Q. Not only does it not specifically say it, it
15:24:28 14 doesn't say it all; right?

15:24:29 15 A. It does not say that he's entitled --

15:24:31 16 Q. Yes or no? Doesn't say it at all?

15:24:32 17 A. Correct. Yes.

15:24:32 18 Q. The only time he's entitled to a 50-50
15:24:35 19 distribution is like the rental income, ordinary income
15:24:40 20 as per tax purposes from the operations; right?

15:24:43 21 A. I don't agree with that statement, no.

15:24:47 22 Q. You said that the purchase of -- the sale of
15:25:07 23 Building C and the purchase of Greenway were two
15:25:09 24 separations -- two different transactions; right?

15:25:10 25 A. Correct.

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15:25:13 1 Q. And according to the closing statement, the cost
15:25:16 2 of Greenway was \$846,560?
15:25:21 3 A. Correct.
15:25:22 4 Q. What the purchase price is is not affected by the
15:25:33 5 fact that it's a 1030 exchange; right?
15:25:36 6 A. That is correct.
15:25:40 7 Q. Looking at Schedule B again, the term -- never
15:26:13 8 mind. I withdraw the question.
15:26:15 9 Well, do you believe there's any ambiguity in the
15:26:37 10 step-down allocations? I mean the part that goes from 1
15:26:40 11 to the final step?
15:26:41 12 A. I think those three -- those four steps are
15:26:44 13 clear.
15:26:44 14 Q. And it's -- in your opinion, is it true the sale
15:27:33 15 of a capital asset triggers the waterfall? Right?
15:27:37 16 MR. GERRARD: Objection. Vague and ambiguous.
15:27:40 17 He keeps using a word that has a defined term in the
15:27:45 18 operating agreement that's different from -- for tax
15:27:47 19 purposes. So, again, unless he says for which purpose
15:27:51 20 he's asking the question, we're never going to know
15:27:53 21 how --
15:27:53 22 THE ARBITRATOR: You're talking about under the
15:27:55 23 operating agreement?
15:27:55 24 BY MR. LEWIN:
15:27:55 25 Q. Under the operating agreement, don't you agree

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15:27:58 1 that the sale of a capital asset triggers the waterfall?

15:28:01 2 A. Yes.

15:28:02 3 Q. And there's nothing in this document that

15:28:05 4 indicates, as you testified earlier, that the -- that

15:28:10 5 anything -- that only a liquidation would trigger the

15:28:14 6 waterfall; right?

15:28:15 7 A. No. In my deposition, I made the statement that

15:28:19 8 the waterfall could be triggered only by a liquidation.

15:28:23 9 Subsequent to that, I corrected myself, that other

15:28:25 10 transactions could trigger the waterfall. I said that

15:28:29 11 in my deposition.

15:28:30 12 Q. And you agree that what actually took place with

15:28:41 13 Green Valley's business was different than what was

15:28:43 14 stated in the operating agreement; right?

15:28:45 15 A. I would agree that what took place in Green

15:28:50 16 Valley Commerce --

15:28:50 17 Q. That's a yes or no. Just --

15:28:51 18 THE ARBITRATOR: I didn't really understand the

15:28:53 19 question. What took place with Green Valley Commerce

15:28:56 20 was different than what's in the operating agreement?

15:28:58 21 BY MR. LEWIN:

15:28:58 22 Q. The Schedule B was never -- strike that.

15:29:10 23 With the exception of the sale of Building C,

15:29:16 24 the -- Exhibit B was never followed by Mr. Bidsal; isn't

15:29:20 25 that correct?

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15:29:20 1 A. No. That's not correct.

15:29:23 2 Q. Was it followed with respect to the sale of

15:29:27 3 Building B?

15:29:28 4 A. Building E?

15:29:30 5 Q. B.

15:29:30 6 A. B.

15:29:32 7 Q. That's a yes or a no.

15:29:34 8 A. No.

15:29:35 9 Q. Was it followed with respect to Building E?

15:29:37 10 A. No.

15:29:38 11 Q. But in Building C, he did distribute it 70-30;

15:29:44 12 right?

15:29:44 13 A. Yes, he did.

15:29:45 14 Q. Looking at the definition of COP that's on

15:30:17 15 page 10.

15:30:29 16 MR. SHAPIRO: Exhibit 5.

15:30:30 17 THE WITNESS: Thank you.

15:30:34 18 MR. GERRARD: Where are you looking? I'm sorry.

15:30:34 19 MR. LEWIN: Page 10 of Exhibit 5.

15:30:35 20 BY MR. LEWIN:

15:30:35 21 Q. It says "COP means costs of purchase as it is

15:30:37 22 specified in the escrow closing statement at the time of

15:30:40 23 purchase of each property owned by the company."

15:30:44 24 Now, do you agree that that contemplates more

15:30:48 25 than one property being owned by the company?

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15:30:51 1 A. Yes. It seems to say that.

15:30:53 2 Q. So when we looked at Schedule B -- and remember I
15:31:02 3 asked you before -- on the paragraph that starts the
15:31:07 4 "Preferred allocation and distribution schedule," it
15:31:11 5 says "Cash distributions from capital transactions" --
15:31:13 6 note the plural -- "capital transactions shall be
15:31:16 7 distributed per the following method between the members
15:31:19 8 of the LLC."

15:31:19 9 And here's the part I'm coming to: "Upon any
15:31:22 10 refinancing event, and upon the sale of company asset,
15:31:25 11 cash is distributed" -- pursuant to -- "according to a
15:31:28 12 step-down allocation."

15:31:30 13 Remember I asked you before whether you thought
15:31:32 14 that it was missing a word there. Instead of saying
15:31:40 15 "sale of company asset," you would agree it's not -- at
15:31:43 16 best, it's very poor grammar; right?

15:31:45 17 A. Yeah.

15:31:46 18 Q. But wouldn't you agree that it makes more sense
15:31:48 19 if it were to say "sale of a company asset"?

15:31:51 20 A. I can't read anybody's mind. I don't know. I'm
15:31:55 21 not going to agree with that statement.

15:31:57 22 Q. Was your interpretation of the words "sale of
15:32:01 23 company asset" important to you in making your opinions
15:32:04 24 about whether or not sales of individual properties
15:32:09 25 triggered the waterfall? Was that important to you?

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15:32:12 1 A. Yes.

15:32:12 2 Q. Would it have made -- but you never asked

15:32:17 3 Mr. Bidsal if it's missing a letter, did you?

15:32:20 4 THE ARBITRATOR: A word?

15:32:22 5 BY MR. LEWIN:

15:32:22 6 Q. A word. A word. You never asked him if it was

15:32:24 7 missing a word, did you?

15:32:25 8 A. We had conversations regarding it. He was part

15:32:30 9 of those conversations. I don't recall specifically

15:32:32 10 saying, "Are we missing a word here," so.

15:32:34 11 Q. Did you ask him if it was missing a word here?

15:32:36 12 A. I did not -- I do not recall specifically asking

15:32:39 13 him that question.

15:32:39 14 Q. Do you know David LeGrand?

15:32:40 15 A. I do not.

15:32:41 16 Q. But you know he was the lawyer who represented

15:32:44 17 Green Valley not only in the deed in lieu, but in

15:32:47 18 drafting these documents; right?

15:32:49 19 A. Correct.

15:32:49 20 Q. Would it have made sense for you to call him up

15:32:52 21 and say, "Listen, is this a typo?" Or "What did you

15:32:55 22 mean by this?" Or "Is it missing a word?"

15:32:58 23 In reflection, do you think you should have done

15:33:00 24 that?

15:33:00 25 A. No.

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15:33:00 1 Q. So you would prefer to not -- not to really know
15:33:07 2 what it meant; right?
15:33:09 3 MR. GERRARD: Objection. Argumentive.
15:33:11 4 THE ARBITRATOR: Sustained.
15:33:11 5 A. Not at all. I --
15:33:13 6 THE ARBITRATOR: I've sustained the objection.
15:33:15 7 MR. SHAPIRO: That means no question pending.
15:33:23 8 BY MR. LEWIN:
15:33:23 9 Q. How do you reconcile the fact that the first
15:33:33 10 sentence -- I'll drop it. I'll withdraw.
15:33:38 11 When the document says "a substantial portion of
15:33:47 12 the company's assets," were you informed what Mr. Bidsal
15:33:53 13 testified what he thought a sale of a substantial amount
15:33:57 14 of company assets were?
15:33:58 15 A. No.
15:34:04 16 THE ARBITRATOR: You're talking about in his
15:34:05 17 deposition?
15:34:06 18 BY MR. LEWIN:
15:34:06 19 Q. In his deposition.
15:34:07 20 A. Okay. No.
15:34:10 21 Q. What do you think -- so how do you interpret --
15:34:20 22 would it have been important for you to find out what he
15:34:22 23 thought that provision meant in forming your opinions?
15:34:26 24 A. My opinion is the documents -- the allocation
15:34:29 25 schedule spoke for itself. He didn't feel like it was

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15:34:32 1 substantial or he wouldn't have done the allocations the
15:34:36 2 way he did.

15:34:37 3 Q. Move to strike. That's not really what I asked.
15:34:38 4 That doesn't answer my question. I'm asking questions
15:34:43 5 that really need to be answered directly, and I don't
15:34:44 6 want to be --

15:34:44 7 THE ARBITRATOR: All right. Let's just ask it.
15:34:45 8 BY MR. LEWIN:

15:34:45 9 Q. The question was did you think what Mr. Bidsal
15:34:50 10 thought a substantial amount of the company's assets was
15:34:53 11 would be important in forming your opinions?

15:34:56 12 A. No.

15:34:57 13 Q. Did you think what you thought would be a
15:35:01 14 substantial portion was important?

15:35:03 15 A. Yes.

15:35:04 16 Q. Why is your -- why is what you thought different
15:35:06 17 than what he thought when he's the person who signed the
15:35:09 18 agreement?

15:35:09 19 A. Because I was asked to provide an expert opinion
15:35:12 20 based on the documents that I had to work with.

15:35:15 21 Q. You think it's -- you think it's -- he's
15:35:20 22 50 percent or more; right?

15:35:21 23 A. I think I testified that 50 percent or more would
15:35:25 24 be in the realm, yes.

15:35:26 25 Q. That was a yes or no question.

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15:35:28 1 A. Yes.

15:35:29 2 Q. In a company that owns eight buildings and a

15:35:49 3 parking lot, is a sale of one property a substantial

15:35:58 4 sale, 1/8 of its entire ownership?

15:36:02 5 A. Are you referring specific to Green Valley?

15:36:07 6 Q. Yeah, Green Valley.

15:36:07 7 A. I would say no.

15:36:08 8 Q. How about two?

15:36:09 9 A. Probably not.

15:36:12 10 Q. When you say "probably not," that means --

15:36:14 11 A. No.

15:36:14 12 Q. -- it's on the fence? It's a wobbler?

15:36:16 13 A. No.

15:36:16 14 Q. Okay. Let's assume that -- strike that.

15:36:27 15 Did you ever ask why that phrase is in this

15:36:30 16 document?

15:36:31 17 THE ARBITRATOR: Ask who?

15:36:31 18 MR. LEWIN: Ask anybody.

15:36:34 19 MR. GERRARD: Ask what is in the document?

15:36:35 20 MR. LEWIN: The phrase "a substantial" -- "such

15:36:38 21 as a sale" -- the example of "such as a sale of all or a

15:36:41 22 substantial portion of the company's assets."

15:36:44 23 MR. GERRARD: I don't see any words in here that

15:36:44 24 say "as an example."

15:36:47 25 MR. LEWIN: He's already testified that it was.

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15:36:49 1 THE ARBITRATOR: All right. We know which Page 557
15:36:51 2 provision he's talking about.
15:36:51 3 A. No, I did not.
15:36:53 4 BY MR. LEWIN:
15:36:53 5 Q. Okay. Let me give you a hypothetical. First of
15:36:58 6 all, Mr. Bidsal clearly is entitled to 50 percent of the
15:37:02 7 rents; right?
15:37:02 8 A. Correct.
15:37:03 9 Q. Let's say that there's accounts receivable of
15:37:08 10 \$500,000 from tenants for whatever reasons -- the
15:37:12 11 pandemic -- whatever the reasons are, there's accounts
15:37:15 12 receivable of \$500,000, and there's an offer to buy the
15:37:21 13 entire property -- there's an offer to buy Green Valley
15:37:27 14 for \$5 million. Do you have those numbers in mind?
15:37:31 15 A. Okay.
15:37:32 16 Q. Now, the offer contemplates and takes into
15:37:39 17 consideration that there's \$500,000 of debt that's owed
15:37:43 18 to it. That's another factor; correct?
15:37:45 19 A. Okay. Yes.
15:37:46 20 Q. Under those circumstances, the way this paragraph
15:37:50 21 is phrased --
15:37:52 22 MR. GERRARD: What paragraph?
15:37:53 23 BY MR. LEWIN:
15:37:53 24 Q. The part that we're talking about, "a sale of all
15:37:55 25 or a substantial portion of the company's assets,"

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15:37:59 1 Mr. Bidsal would receive only his share of the proceeds
15:38:07 2 of the sale pursuant to the waterfall. He wouldn't get
15:38:10 3 anything for the debt that's being acquired. Do you see
15:38:16 4 what I'm talking about?

15:38:17 5 MR. GERRARD: I'm sorry. I don't understand what
15:38:18 6 you're talking about because I didn't hear anything
15:38:20 7 about a debt.

15:38:21 8 THE ARBITRATOR: That's the accounts receivable.

15:38:24 9 MR. GERRARD: But that's not a debt.

15:38:26 10 MR. LEWIN: It's a debt that's owed to the
15:38:27 11 company.

15:38:28 12 THE ARBITRATOR: It is to who's supposed to pay
15:38:30 13 it.

15:38:30 14 MR. GERRARD: Owed to the company by a third
15:38:31 15 party?

15:38:32 16 MR. LEWIN: By a third party. By tenants. It's
15:38:33 17 rent that's owed.

15:38:34 18 THE ARBITRATOR: All right. If you can answer
15:38:35 19 the question.

15:38:36 20 BY MR. LEWIN:

15:38:36 21 Q. So under those circumstances, that would be a
15:38:39 22 sale of all or substantially all of the company's
15:38:42 23 assets. Mr. Bidsal's recovery would be subject to the
15:38:42 24 waterfall; right?

15:38:47 25 MR. GERRARD: Objection. Vague and ambiguous.

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15:38:50 1 Incomplete hypothetical.

15:38:52 2 THE ARBITRATOR: I'll overrule the objection.

15:38:55 3 Mr. Wilcox, if you can answer the question as

15:38:58 4 stated.

15:38:58 5 BY MR. LEWIN:

15:39:02 6 **Q. Do you have the assumed facts in mind?**

15:39:03 7 A. No, I got the facts. I just want to clarify.

15:39:08 8 You are saying \$500,000 receivable. Somebody has

15:39:13 9 offered to buy the entire company, everything, for

15:39:16 10 \$5 million?

15:39:17 11 **Q. Right.**

15:39:17 12 A. And the question is would that trigger the

15:39:21 13 waterfall?

15:39:21 14 **Q. Yes.**

15:39:22 15 A. And the answer is yes.

15:39:23 16 **Q. Okay. Now, let's assume one more fact. Let's**

15:39:30 17 **assume Mr. Bidsal says, Wait a second. Those are rents.**

15:39:35 18 **I'm not only entitled to my share from the sale, but I**

15:39:39 19 **should get a disproportionate allocation of the debt**

15:39:41 20 **because that -- those accounts receivable arise from**

15:39:45 21 **rents which I have a 50 percent interest in as opposed**

15:39:48 22 **to a 30 percent interest.**

15:39:51 23 **Do you have that fact in mind?**

15:39:53 24 A. Uh-huh.

15:39:54 25 **Q. Under the facts as I've presented them, he would**

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1 still -- the waterfall would still be triggered and he
2 would not have any income -- any additional 20 percent
3 credit for the debt that's being acquired; right?

4 MR. GERRARD: Objection. Incomplete
5 hypothetical. We don't know what the other costs of
6 sale are, so we don't know where the waterfall would
7 end. We don't have enough information to answer that
8 question.

9 MR. LEWIN: I'm sorry. You're right. I just
10 mean he would not have any claim for 50 percent based on
11 the fact that the debt is rent that is being sold --
12 debt arising from rent.

13 THE ARBITRATOR: I'll allow it if you can answer,
14 Mr. Wilcox.

15 THE WITNESS: So is this a yes or no question?

16 BY MR. LEWIN:

17 Q. No. You can answer. I just want to make sure
18 you understand the facts. The facts are that -- there's
19 this dichotomy. There's a half a million dollars' worth
20 of rent that Mr. Bidsal has a greater percentage
21 interest in.

22 A. He has a 50 percent in the rent versus a
23 30 percent.

24 Q. And on the other hand, it's a sale of all the
25 assets that triggers a waterfall. So if it's a sale of

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15:41:04 1 all the assets, his 50 percent claim, it's assumed and
15:41:11 2 the waterfall triggered; right?

15:41:13 3 A. The waterfall -- yes. What happens in the
15:41:18 4 waterfall, the first thing, Step 3, is that we get
15:41:24 5 everybody's capital accounts paid back. It really
15:41:26 6 doesn't matter whether that \$500,000 receivable is -- it
15:41:33 7 just is going to be part of what's paid back in the
15:41:36 8 total scheme of it.

15:41:37 9 Q. Now, let's say that we were in 2008 again,
15:41:42 10 revisited, and instead of \$5 million for the company,
15:41:45 11 someone only offers \$2.5 million. And we don't -- and
15:41:51 12 we still have the same amount that's owed. At that
15:41:53 13 point in time, Mr. Bidsal still -- the money is
15:42:00 14 scheduled -- the waterfall is triggered, and his claim
15:42:03 15 for the 50 percent is assumed in the sale of the
15:42:06 16 company's -- the company; right?

15:42:08 17 A. No, I don't agree with that. Under that
15:42:11 18 scenario, the distribution would come out 70-30,
15:42:18 19 assuming there was not enough to get to the next step --
15:42:20 20 the final step.

15:42:21 21 Q. Right. That's right. That's what I'm saying.
15:42:24 22 You and I are agreeing now for a change.

15:42:26 23 A. Okay. We're in agreement.

15:42:27 24 Q. I said it's 70-30 because it's a sale of
15:42:30 25 substantial -- of the assets, and it goes down the

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15:42:32 1 waterfall.

15:42:32 2 A. Agreed.

15:42:33 3 Q. And Mr. Bidsal's claim for 50 percent of the debt

15:42:37 4 is assumed in that waterfall distribution?

15:42:39 5 A. Correct.

15:42:39 6 Q. Okay. And so does that now give you an

15:42:45 7 explanation of why this provision is in this specific

15:42:52 8 intent paragraph?

15:42:55 9 MR. GERRARD: Objection. Calls for speculation

15:42:57 10 as to what the parties' intent was at the time they --

15:43:00 11 THE ARBITRATOR: Yeah. And the way it's phrased,

15:43:02 12 I'm going to sustain the objection.

15:43:04 13 BY MR. LEWIN:

15:43:04 14 Q. Do you believe that's a possible explanation

15:43:06 15 for -- as to why the part -- they talk about the sale of

15:43:12 16 a substantial portion of the company's assets?

15:43:15 17 MR. GERRARD: Same objection.

15:43:16 18 BY MR. LEWIN:

15:43:16 19 Q. To cover that eventuality?

15:43:18 20 THE ARBITRATOR: I'll allow it.

15:43:22 21 A. That could be one reason.

15:43:35 22 BY MR. LEWIN:

15:43:35 23 Q. I just want to make sure I covered this already.

15:43:38 24 You read the assignment of leases and you read the deed

15:43:41 25 of trust. It was your opinion that the amount of rents

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15:43:44 1 that the borrower was accumulating and holding, that
15:43:51 2 those rents actually -- the lender had an interest in
15:43:55 3 those and the borrower was holding those on behalf of
15:43:58 4 the lender; right?

15:43:58 5 A. Correct.

15:44:01 6 Q. So when the borrower paid the \$295,000 to -- as
15:44:09 7 part of the deed in lieu, it was actually transferring
15:44:12 8 money that the lender already had the rights to; right?

15:44:16 9 A. Yes.

15:44:18 10 Q. Let's say -- this is an example. We're in Las
15:44:34 11 Vegas. Someone goes -- wins -- someone makes a lot of
15:44:44 12 money playing poker. And he owes you some money, and he
15:44:47 13 pays you \$10,000 from his poker winnings paying off your
15:44:55 14 debt --

15:44:56 15 MR. GERRARD: Paying off what debt? You're
15:45:00 16 assuming there's a debt?

15:45:02 17 BY MR. LEWIN:

15:45:02 18 Q. Let's say someone who owes you \$10,000 for your
15:45:05 19 services wins money at poker. This is gambling money;
15:45:10 20 right? And then he pays you that \$10,000 from that
15:45:14 21 gambling money. That doesn't change the nature of what
15:45:16 22 he's paying you. He's paying you money; he's not paying
15:45:19 23 you gambling money. The fact that it's gambling money
15:45:21 24 doesn't make any difference; right?

15:45:22 25 A. That fact that it's gambling money doesn't

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15:45:23 1 matter.

15:45:23 2 Q. In other words, the name of how you -- how you
15:45:26 3 characterize something doesn't necessarily define what
15:45:29 4 it is; right?

15:45:29 5 A. In your example --

15:45:30 6 MR. GERRARD: Just a second.

15:45:33 7 Objection. Incomplete hypothetical.

15:45:33 8 THE ARBITRATOR: I'm going to sustain that
15:45:35 9 objection.

15:45:35 10 BY MR. LEWIN:

15:45:35 11 Q. Let me phrase that a little bit differently. If
15:45:53 12 a client of yours wins at blackjack and turns over the
15:45:56 13 cash to you to pay your bill for accounting services, is
15:46:00 14 what you received considered gambling income or
15:46:03 15 accounting income?

15:46:04 16 A. It's called accounting income.

15:46:09 17 Q. And if a borrower turns over rents to -- if a
15:46:20 18 borrower turns over money that it collected as rents to
15:46:23 19 a lender, it doesn't mean that it's rent money; it's
15:46:28 20 just money that was owed to the lender; right?

15:46:31 21 MR. GERRARD: Same objection. It's an incomplete
15:46:32 22 hypothetical. We don't know enough facts to answer that
15:46:35 23 question.

15:46:36 24 THE ARBITRATOR: I'm going to sustain the
15:46:37 25 objection because it's just -- it presupposes that

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15:46:41 1 there's not any agreement between the lender and the Page 565
15:46:45 2 borrower that rents have to be forwarded in this bucket
15:46:50 3 and principal has to be forwarded in this bucket and
15:46:53 4 interest has to be forwarded in this bucket. So I don't
15:46:56 5 understand the question.
15:46:57 6 BY MR. LEWIN:
15:46:57 7 Q. So prior to the deed in lieu agreement and the
15:47:02 8 assignment of leases and rents, the borrower was
15:47:05 9 accumulating money that it had not paid to the lender
15:47:13 10 towards the debt owed under the note. That's how you
15:47:17 11 understand it; right?
15:47:17 12 A. That's what the deed in lieu agreement says, yes.
15:47:20 13 Q. Okay. And those -- the borrower owed that money
15:47:26 14 as interest or principal under the note; right?
15:47:31 15 A. You say "that money" --
15:47:35 16 Q. Well, any money. All rent money. Under the
15:47:38 17 assignment of leases, all rents collected were being
15:47:40 18 held by the borrower for the benefit of the lender?
15:47:42 19 A. Yes.
15:47:42 20 Q. Not as payment of rent, as payment of -- of
15:47:45 21 payments under the note; right?
15:47:48 22 MR. GERRARD: Objection. Incomplete
15:47:51 23 hypothetical. Calls for speculation. There's no
15:47:53 24 foundation.
15:47:53 25 THE ARBITRATOR: If you know.

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15:47:57 1 I mean, I kind of want -- you've kind of plowed
15:48:00 2 this ground, but I'll let you have a little more.
15:48:03 3 MR. LEWIN: Okay. If I get a quick answer, I'll
15:48:07 4 get out of it.
15:48:07 5 BY MR. LEWIN:
15:48:07 6 Q. So my question is the borrower was holding money
15:48:11 7 under -- you've read all the loan documents now; right?
15:48:14 8 A. Yes.
15:48:15 9 Q. Okay. Including the assignment of leases and
15:48:18 10 rents?
15:48:19 11 THE ARBITRATOR: We covered that.
15:48:19 12 BY MR. LEWIN:
15:48:19 13 Q. Okay. So my point is when the borrower was
15:48:22 14 holding money, he was accumulating rents, but the money
15:48:27 15 that -- to be paid to the lender was payments under the
15:48:30 16 note, which would be principal and interest; right?
15:48:33 17 Before the deed in lieu agreement.
15:48:34 18 A. Yeah.
15:48:35 19 Q. So the fact that -- in the deed in lieu
15:48:40 20 agreement, they talk about amounts of rents that had not
15:48:42 21 been paid to the lender. The only thing that the
15:48:44 22 borrower owed to the lender was principal and interest;
15:48:46 23 right?
15:48:47 24 A. At that point.
15:48:47 25 Q. And the concurrent closing of the deed in lieu

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15:48:55 1 agreement where there's a conveyance and the rent -- the
15:48:59 2 amounts that have been accumulated as rent are payouts
15:49:03 3 to each other doesn't change the nature of what those
15:49:07 4 monies were. In other words, they were rents that were
15:49:09 5 being accumulated for the benefit of the lender; right?

15:49:12 6 MR. GERRARD: Objection. Lack of foundation.

15:49:15 7 THE ARBITRATOR: I'm going to sustain the
15:49:18 8 objection and ask that we move on.

15:49:21 9 MR. LEWIN: Okay. Very well.

15:49:23 10 THE ARBITRATOR: Thanks.

15:49:24 11 BY MR. LEWIN:

15:49:24 12 Q. Now, we talked about security deposits. You said
15:49:29 13 security deposits were not prorated liabilities; right?

15:49:34 14 A. I did not include -- yes. I did not include them
15:49:38 15 in the liabilities.

15:49:38 16 Q. If the financial statements of Green Valley
15:49:41 17 are -- if their security deposits are shown as a
15:49:43 18 liability, then they are a liability; right?

15:49:45 19 A. Yes. Under the -- as you described it, yes.

15:49:51 20 Q. Well, under generally accepted accounting
15:49:55 21 principles, regardless of whether or not the landlord
15:49:59 22 has money in the bank to pay the security deposits, the
15:50:04 23 obligation to pay the security deposits is still a
15:50:06 24 liability; right?

15:50:07 25 A. Correct.

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1 Q. And that is why the amount of security
2 deposits -- if there is any -- should be shown on the
3 financial statements; right?
4 A. Correct.
5 Q. And on Green Valley there is an amount that is
6 shown on the financial statements; right?
7 A. Correct.
8 Q. And if -- and the security deposits, if there are
9 distributions that take into account -- that include the
10 amount of money that was transferred from the borrower
11 as a security deposit -- I think it was \$74,000 at one
12 point; right?
13 A. Yes.
14 Q. If there were -- if there were distributions that
15 would have -- that would include amounts attributable to
16 those security deposits, that would be what kind of
17 distribution? Would that be income from operations or
18 would that be a capital distribution?
19 A. That one would be -- if you're distributing those
20 security deposits, it almost feels like you're taking
21 them into income. So then I would say it would be a
22 50-50 -- it should be a 50-50. Otherwise, why would you
23 be distributing them? You have a liability there. So I
24 guess I could argue either way on that one.
25 Q. Okay. Well, let's see how you argue it in the

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15:52:06 1 deposition.

15:52:07 2 Would a distribution of security deposits if it

15:52:13 3 is carried as a liability on the books of the company be

15:52:18 4 ordinary income?

15:52:18 5 A. No.

15:52:19 6 Q. Okay. It would be then a capital distribution;

15:52:22 7 right?

15:52:22 8 A. If the security deposit is kept on the books of

15:52:25 9 the company?

15:52:25 10 Q. Right.

15:52:26 11 A. It would not be ordinary income. And that --

15:52:29 12 that would be an argument that it could be a capital --

15:52:32 13 return of capital.

15:52:33 14 Q. Okay. So you have ordinary income is one bucket;

15:52:38 15 right?

15:52:38 16 A. Uh-huh.

15:52:39 17 Q. And that's -- we've talked about what ordinary

15:52:41 18 income consists of. Is it correct that if there's --

15:52:45 19 any income -- any distribution that's not a distribution

15:52:48 20 of ordinary income is by definition a distribution of

15:52:52 21 capital unless it's a capital return?

15:52:55 22 MR. GERRARD: Objection.

15:52:55 23 MR. LEWIN: I'll rephrase the question.

15:52:57 24 BY MR. LEWIN:

15:52:57 25 Q. Is it correct that any distributions other than

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15:53:02 1 what would be considered profit distributions from --
15:53:07 2 from operations from ordinary income -- anything over
15:53:10 3 and above -- any distributions other than that would be
15:53:14 4 a return of capital; right?

15:53:15 5 A. No. That's not what I've testified to.

15:53:17 6 Q. Well, I didn't ask you what you testified to. I
15:53:18 7 asked you if that's the truth. What would it be?

15:53:22 8 MR. GERRARD: I'm going to move to strike the
15:53:24 9 first part of the answer, which is argumentative.

15:53:26 10 THE ARBITRATOR: That will be granted.

15:53:27 11 But what would it be?

15:53:28 12 A. It would be -- if there was no capital
15:53:34 13 transaction, it would be a distribution subject to the
15:53:36 14 50-50 because it would be a distribution resulting from
15:53:40 15 income of the operations. So it would be a 50-50
15:53:44 16 distribution.

15:53:45 17 BY MR. LEWIN:

15:53:45 18 Q. Well, we just talked about the security deposits.
15:53:48 19 What would that be, if that's not -- that's not an a
15:53:50 20 income from operations?

15:53:51 21 A. So I agreed with --

15:53:54 22 MR. GERRARD: Here. I'm just going to object on
15:53:56 23 the basis of relevance because there's no indication, no
15:53:58 24 evidence, not a scrap that the security deposits have
15:54:02 25 ever been distributed. So why are we even talking about

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15:54:05 1 this?

15:54:05 2 MR. LEWIN: Distribution doesn't have to do

15:54:07 3 anything with prorated labilities. We just heard --

15:54:10 4 MR. GERRARD: That's not my objection.

15:54:12 5 MR. LEWIN: We just heard Mr. Wilcox on this. I

15:54:12 6 have a point I'm trying to make here. Let me see if I

15:54:15 7 can get it without an objection.

15:54:16 8 THE ARBITRATOR: All right.

15:54:17 9 BY MR. LEWIN:

15:54:17 10 Q. The only distributions that Mr. Bidsal is

15:54:22 11 entitled to on a 50-50 basis are cash distributions of

15:54:29 12 profits from operations that -- resulting in ordinary

15:54:34 13 income. You agree with that?

15:54:36 14 A. Yes.

15:54:37 15 Q. Okay. If there's a distribution that is not a

15:54:45 16 distribution of profits generated from operations

15:54:53 17 resulting in ordinary income, then it has to be

15:54:57 18 something -- it has to be a capital distribution. Isn't

15:55:02 19 that true?

15:55:02 20 MR. GERRARD: Objection. Misstates what the

15:55:03 21 document says. We've been over this like four or five

15:55:07 22 times already.

15:55:08 23 MR. LEWIN: No, this is a whole different

15:55:10 24 question.

15:55:10 25 MR. GERRARD: You've asked these same questions

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15:55:11 1 already. You already asked if it's capital --

15:55:14 2 MR. LEWIN: Okay. Can we just have the objection

15:55:16 3 ruled on?

15:55:17 4 THE ARBITRATOR: All right. To me, it's an

15:55:18 5 incomplete question because I don't really understand --

15:55:24 6 MR. LEWIN: I guess I'm not making the question

15:55:26 7 clear.

15:55:26 8 THE ARBITRATOR: All right. Let's try then.

15:55:28 9 BY MR. LEWIN:

15:55:28 10 Q. Here's the point I'm getting to -- maybe I

15:55:34 11 phrased it wrong.

15:55:36 12 As I said before, Mr. Bidsal -- we've talked

15:55:37 13 about when Mr. Bidsal's entitled to 50-50. Any

15:55:41 14 distribution to where Mr. Bidsal's not entitled to a

15:55:46 15 50-50 distribution of profits needs to be distributed

15:55:51 16 70-30 according to the operating agreement; isn't that

15:55:53 17 correct?

15:55:53 18 A. If he's not entitled to 50-50, he's entitled --

15:55:55 19 it should be 70-30.

15:55:56 20 Q. Okay.

15:55:58 21 MR. LEWIN: Thank you, Doug. Finally got my

15:56:01 22 point across clearly.

15:56:01 23 BY MR. LEWIN:

15:56:03 24 Q. Okay. Let's talk about the parking lot. Looking

15:56:08 25 at your schedule, you say, Look, the parking lots --

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15:56:20 1 there were easements that were given when the properties
15:56:22 2 were sold, so effectively the properties -- a portion of
15:56:27 3 those parking lots had been sold, because Green Valley
15:56:33 4 doesn't have any -- those rights are only (inaudible).

15:56:33 5 THE REPORTER: I'm sorry. I didn't hear you.

15:56:33 6 MR. LEWIN: It only has rights subject to the
15:56:33 7 easements.

15:56:33 8 And he said...

15:56:42 9 THE WITNESS: Yes.

15:56:45 10 BY MR. LEWIN:

15:56:45 11 Q. Okay. And therefore, you say -- but just to be
15:56:54 12 clear, there's been no deed conveying fee title interest
15:56:58 13 to any portion of the parking lot; right?

15:56:59 14 A. That is correct.

15:57:00 15 Q. Okay. So Green Valley is still the owner of the
15:57:04 16 common area; right?

15:57:05 17 A. Correct.

15:57:06 18 Q. And you say what Mr. Bidsal did when he sold
15:57:13 19 these -- when he sold B and E, and perhaps even C,
15:57:19 20 was -- there was a cost allocation. C didn't make any
15:57:25 21 difference because that was rolled over, but with B and
15:57:27 22 E, he allocated what the cost was and then divided the
15:57:31 23 gain -- allocated the cost 70-30, the gain 50-50?

15:57:34 24 A. Yes.

15:57:34 25 Q. You with me so far?

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1 A. Yes.

2 Q. But that cost that he used did not include the

3 allocated cost of the parking lots; is that correct?

4 A. That's correct.

5 Q. In other words -- let's use round numbers. If he

6 sold two properties and he allocated costs of \$300,000

7 for each property, but the cost -- the allocable share

8 of the parking lot was 50,000 he should have used -- got

9 another \$50,000 to distribute 70-30; right?

10 A. If that's what he did, yeah, I agree with you.

11 Q. Isn't that one of the reasons why -- one of the

12 disagreements between you and Mr. Gerety? Mr. Gerety

13 says, Look, he hasn't sold it and he hasn't allocated

14 the cost on it, so we have to use the COP from the

15 parking lot as it is, because he's never given him his

16 share of the cost that was on the sales? That's really

17 the disagreement; right?

18 A. That is one of our disagreements, but you're

19 mixing apples and oranges.

20 Q. Okay. So if we were to use your number, then

21 Mr. -- use your number taking the allocable share of the

22 COP for the two parking lots -- two buildings in the

23 parking lots -- three, actually -- then CLA should get

24 credit or get some kind of additional distribution for

25 that part that has not been allocated in the

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15:59:05 1 distribution of proceeds; right?

15:59:06 2 A. Yeah, I would agree with that.

15:59:09 3 Q. Did you ever ask Mr. Bidsal why he didn't

15:59:16 4 allocate a portion of the parking lot on these transfers

15:59:21 5 when he was considering cost?

15:59:23 6 A. No, just like I didn't ask him why he included

15:59:26 7 cost of sales as part of his return in capital. I

15:59:30 8 didn't agree with that either.

15:59:31 9 Q. Just to make it clear, your reducing the COP by

15:59:46 10 the reason of the sales relating to the parking lots

15:59:51 11 included a part of the common area as though it had been

15:59:56 12 sold; right?

15:59:56 13 A. That is correct.

15:59:57 14 Q. If we were to -- I don't want to go back to this

16:00:39 15 295-, but I have a question here because I don't think I

16:00:42 16 covered it.

16:00:43 17 If we were to assume that the \$295,000 was for

16:00:46 18 the payment of past due interest for periods that are

16:00:50 19 set forth in the deed in lieu agreement, would it be

16:00:54 20 right that the portion of interest payment that precedes

16:00:58 21 Green Valley's acquisition of the note should be treated

16:01:00 22 as a return of capital?

16:01:02 23 A. No. I disagree with that.

16:01:04 24 Q. Well, let me read your answer to that. I just

16:01:08 25 read the question.

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16:01:09 1 A. Okay.

16:01:10 2 Q. Let me read your answer. It's at page 154,

16:01:17 3 line 23. The whole question and answer is at 154,

16:01:22 4 line 23 through 155, line 11. I'm not going to repeat

16:01:28 5 the question because I read it verbatim.

16:01:31 6 "Answer: If the portion of the interest prior to

16:01:33 7 that, I'd have to see the calculation of it. Was that

16:01:36 8 interest? Was there a default interest rate? I mean,

16:01:38 9 all of those things could come into it, but I could see

16:01:42 10 that that would be -- that I could see that would be --

16:01:45 11 the answer to that question would be yes just dependent

16:01:49 12 on the facts."

16:01:51 13 It correctly recorded that you said yes; right?

16:01:55 14 MR. GERRARD: That's not what you said. You

16:01:57 15 said, Yes, depends on the facts.

16:01:59 16 A. It's only half the answer.

16:02:00 17 BY MR. LEWIN:

16:02:00 18 Q. But the facts are -- you need to see the facts to

16:02:03 19 be able to determine how much was interest for the

16:02:06 20 period before the acquisition of the note; right?

16:02:08 21 A. Correct.

16:02:08 22 Q. And if you could determine that the payment was

16:02:11 23 for interest before the note was acquired, that --

16:02:17 24 without anything else, then that would be a return of

16:02:19 25 capital?

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16:02:20 1 A. Based on those limited facts, yes.

16:02:23 2 Q. Okay. Let's talk about the interest that you
16:02:35 3 calculated. You said you calculated the interest
16:02:40 4 pursuant to NRS -- I think you said 90.040; is that
16:02:45 5 correct?

16:02:45 6 A. I believe it's 090.

16:02:49 7 Q. Okay. In fact, you used a varying amount of
16:02:57 8 interest; right? In other words, you recalculated
16:03:00 9 interest as though it were postjudgment interest; right?

16:03:04 10 A. Correct.

16:03:05 11 Q. So do you know what the prime interest rate,
16:03:11 12 or -- strike that.

16:03:12 13 What interest rates did you use? What was your
16:03:14 14 source of interest rates?

16:03:15 15 A. What was the source of the interest rate?

16:03:17 16 Q. Yes.

16:03:17 17 A. NRS -- I believe it's 090.

16:03:19 18 Q. So -- and that sets forth what the interest
16:03:22 19 rate's to be calculated on judgments; right?

16:03:23 20 A. Right.

16:03:24 21 Q. What was the interest rate -- strike that.

16:03:34 22 When did you believe that the contract had been
16:03:37 23 entered into in order to begin the start period?

16:03:40 24 A. I based my calculation on what the attorneys
16:03:44 25 might -- told me to assume that that was -- to assume

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16:03:48 1 that that was the date the interest started accruing. Page 578

16:03:50 2 Q. What was that date?

16:03:52 3 A. I believe it was September 2nd.

16:03:57 4 Q. September 2?

16:03:57 5 A. Pardon me?

16:03:58 6 Q. Is it September 2?

16:03:59 7 A. September 2. I think it was September 2.

16:04:00 8 Q. My question was did you give any consideration as

16:04:03 9 to the date when the contract was entered into?

16:04:08 10 THE ARBITRATOR: What contract?

16:04:10 11 MR. LEWIN: The agreement -- the election to --

16:04:18 12 CLA's election to buy would be the date -- I think that

16:04:22 13 would be the date -- the date that the agreement was

16:04:26 14 formed.

16:04:27 15 THE ARBITRATOR: August 3rd?

16:04:27 16 MR. LEWIN: August 3rd.

16:04:31 17 MR. GERRARD: So I obviously have to object to

16:04:33 18 the question because it misstates the evidence and it

16:04:36 19 misstates the operating agreement. It doesn't say there

16:04:39 20 is a new contract that exists on that date. The

16:04:41 21 contract was in the operating agreement.

16:04:44 22 MR. LEWIN: Well, I'm going to get to that.

16:04:47 23 THE ARBITRATOR: If you think the August 3rd date

16:04:48 24 is more appropriate, I'm going to go with that -- or do

16:04:52 25 you have an opinion?

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16:04:54 1 THE WITNESS: You know, I didn't make an -- I
16:04:55 2 don't have an opinion on that. I used the date that I
16:04:57 3 was asked to use.
16:04:58 4 BY MR. LEWIN:
16:04:58 5 **Q. Is there a reason why you used the postjudgment**
16:05:04 6 **interest rate?**
16:05:04 7 A. Again, I was told to assume --
16:05:08 8 MR. GERRARD: I'm sorry. You're calling it a
16:05:10 9 postjudgment interest rate rather than just the Nevada
16:05:12 10 legal rate of interest?
16:05:14 11 MR. LEWIN: Yes.
16:05:15 12 MR. GERRARD: Okay. I'm going to object to the
16:05:16 13 question. It mischaracterizes what the statute says.
16:05:18 14 THE ARBITRATOR: I'm going to sustain that
16:05:20 15 objection. It's one of the things we use it for, but
16:05:24 16 it's not a postjudgment rate.
16:05:26 17 MR. LEWIN: The interest rate -- there's two ways
16:05:29 18 those interests are calculated. I don't want -- do I
16:05:34 19 need -- I don't want to go into it now, but our position
16:05:36 20 is that his calculation of the interest rate is wrong.
16:05:39 21 THE ARBITRATOR: Okay.
16:05:40 22 BY MR. LEWIN:
16:05:40 23 **Q. So in any case, you used the portion of the --**
16:05:48 24 **you calculated on interest with a varying amount of**
16:05:54 25 **interest every six months?**

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16:05:55 1 A. That is correct.

16:05:56 2 Q. Okay. Did you discuss -- never mind.

16:06:10 3 Did you discuss whether or not it was appropriate

16:06:14 4 to -- do you know what money could have been earned if

16:06:25 5 Mr. Bidsal had gotten paid and put it into a bank as

16:06:30 6 opposed to using the legal rate of interest?

16:06:32 7 MR. GERRARD: Objection. Calls for speculation.

16:06:33 8 THE ARBITRATOR: Well, if the question is, Do you

16:06:34 9 know.

16:06:36 10 A. Generally. Maybe half a percent. Maybe 1 or

16:06:42 11 2 percent if he got a long-term CD.

16:06:45 12 BY MR. LEWIN:

16:06:45 13 Q. Let's say between --

16:06:48 14 A. Was the question what would he have earned had

16:06:51 15 the money been put in the bank?

16:06:53 16 Q. That's right.

16:06:54 17 MR. GERRARD: Okay. Not what could have been

16:06:55 18 earned if -- I understand. I misunderstood the

16:06:56 19 question. I'm sorry.

16:06:56 20 BY MR. LEWIN:

16:06:56 21 Q. If he got a long-term -- the interest rates that

16:07:03 22 he could have received at financial institutions is less

16:07:05 23 than the interest rate he could have received under the

16:07:08 24 Nevada rate of interest -- right? -- legal rate of

16:07:10 25 interest.

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16:07:11 1 A. Yeah. I agree with that.

16:07:12 2 Q. And did you have any discussions with anybody of

16:07:15 3 whether or not it was appropriate that Mr. Bidsal should

16:07:16 4 be rewarded for breaching the contract by getting -- by

16:07:20 5 refusing to consummate the sale and getting a larger

16:07:24 6 amount of interest than he could have obtained

16:07:26 7 elsewhere?

16:07:28 8 MR. GERRARD: Objection. Argumentative.

16:07:29 9 THE ARBITRATOR: Sustained.

16:09:32 10 MR. LEWIN: Nothing else.

16:09:32 11 THE ARBITRATOR: All right. Before we take a

16:09:37 12 break and then do redirect -- I hesitate to ask

16:09:42 13 questions because I'm afraid it's going to open up a

16:09:46 14 whole new can of worms, but.

16:09:46 15 FURTHER EXAMINATION

16:09:46 16 BY THE ARBITRATOR:

16:09:48 17 Q. I need you to kind of square with me your opinion

16:09:52 18 in terms of interpretation of the operating agreement.

16:09:52 19 A. Okay.

16:09:54 20 Q. Take a look at Exhibit B. It says near the

16:10:00 21 bottom "Cash distributions of profits from operations

16:10:06 22 shall be allocated and distributed 50-50"; right?

16:10:10 23 A. Correct.

16:10:10 24 Q. And then there's a paragraph talking about what

16:10:15 25 the express intent of the parties mean when it says

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16:10:19 1 "cash distributions of profits"; right?

16:10:21 2 A. Correct.

16:10:22 3 Q. And it says it "refers to distributions generated

16:10:26 4 from operations resulting in ordinary income"?

16:10:30 5 A. Correct.

16:10:30 6 Q. That defined "cash distributions of profits";

16:10:34 7 right?

16:10:34 8 A. Okay.

16:10:35 9 Q. In Exhibit B. Are you with me?

16:10:37 10 A. Yup. I'm with you.

16:10:39 11 Q. Okay. Is that -- do you read Exhibit B to say

16:10:45 12 "only" cash distributions of profits as defined in that

16:10:49 13 following paragraph -- that's the only thing that's

16:10:53 14 divided 50-50?

16:10:56 15 And in fairness, I want you to square that with

16:11:02 16 Exhibit A, 5.1.1 that says "items of income, gain, loss,

16:11:16 17 deduction, or credit shall be allocated among the

16:11:21 18 members in proportion to their percentage interests" --

16:11:25 19 which is the 50-50 -- "subject to the preferred

16:11:28 20 allocation."

16:11:29 21 So does my question make sense, I guess? Square

16:11:36 22 those two with me in terms of whether Exhibit B says to

16:11:40 23 you, "The only thing that's separated 50-50 is cash

16:11:43 24 distributions of profits as defined in the paragraph

16:11:46 25 below," or if it's broader than that based on Exhibit A?

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16:11:50 1 A. Okay. So 5.1.1.1, that's -- just to be clear,
16:11:57 2 that's talking about the allocation of income amongst
16:12:01 3 the partners, not the distribution of cash. But it's
16:12:04 4 talking about the allocation of income amongst the
16:12:07 5 partners.

16:12:07 6 Q. Okay.

16:12:08 7 A. And it's basically saying there, as you just
16:12:12 8 read, all of those things -- income, gain, loss,
16:12:15 9 deductions -- all of those items are going to be
16:12:17 10 allocated to the members. Again, not distributions, but
16:12:21 11 that's what's going to show up on your K-1 as income.

16:12:26 12 Q. All right.

16:12:28 13 A. And then it says "as set forth in B" --
16:12:31 14 obviously -- "subject to the preferred allocations
16:12:34 15 contained in Exhibit B."

16:12:35 16 Q. Right.

16:12:36 17 A. So we're going to do -- this just says, Okay, all
16:12:44 18 these things are going to get allocated. Now we're
16:12:46 19 going to go over to Exhibit B.

16:12:47 20 Exhibit B, the first thing is -- that we look at
16:12:51 21 is the question of when does the preferred allocation
16:12:56 22 kick in. Nothing new there; right?

16:12:59 23 Q. Right.

16:13:00 24 A. And my opinion is that the preferred allocation
16:13:07 25 doesn't necessarily kick in here because we haven't sold

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16:13:13 1 the company asset. Or -- then further clarifies
16:13:19 2 substantially all -- or all of the assets or a
16:13:24 3 substantial portion. So, you know, you kind of square
16:13:27 4 those two together.

16:13:29 5 So my interpretation of this is number one, we
16:13:33 6 never get to the waterfall. That is clearly my belief.
16:13:37 7 You never get to the preferred allocation because of
16:13:42 8 that.

16:13:44 9 Then we go down to what your original question
16:13:46 10 was, and that is cash distributions of profits from
16:13:49 11 operations. There's just really a lot of ambiguity
16:13:54 12 there. Because we got cash distributions of profits
16:13:56 13 from operations. Well, cash distributions of profits
16:13:59 14 from operations, that is cash that is generated by
16:14:06 15 operations. Rent minus property taxes minus whatever --

16:14:10 **16 Q. Depreciation?**

16:14:11 17 A. And minus depreciation.

16:14:13 18 So we're going to end up with more cash than we
16:14:17 19 have profits. Now, the thing that -- the big reason
16:14:21 20 that I believe that that 50 percent applies to all of
16:14:27 21 the distributions generated from -- or distributions of
16:14:32 22 cash generated by operations is because -- the big
16:14:36 23 argument is depreciation. Does -- do we -- part of
16:14:42 24 those -- part of the cash that we have -- the reason
16:14:46 25 that cash to distribute is in excess of net income is

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16:14:51 1 because of depreciation. We've established that.

16:14:54 2 So what do we do with that now? Is that going to

16:14:57 3 be a 50-50 or a 30-70? Well, income -- the net income

16:15:05 4 gets allocated 50-50 -- the income from operations. So

16:15:12 5 why -- unless we were in a situation where we would sell

16:15:18 6 all our assets, why would we distribute that

16:15:22 7 depreciation -- that cash that is made available because

16:15:25 8 of the depreciation deduction, why would we distribute

16:15:30 9 that 70-30 when really it's allocated to everyone on a

16:15:34 10 50-50 basis? Now --

16:15:36 11 **Q. Allocated under 5.1.1.1?**

16:15:38 12 A. Right. Exactly.

16:15:39 13 **Q. And are we conflating terms when we call -- take**

16:15:49 14 **what Mr. Bidsal did with Properties B and E, distributed**

16:15:56 15 **the portion of the proceeds equal to the basis in the**

16:16:05 16 **cost segregation report --**

16:16:07 17 A. Right.

16:16:07 18 **Q. -- 70-30, and the rest, which we have called**

16:16:11 19 **"gain" --**

16:16:12 20 A. Right.

16:16:12 21 **Q. -- is that different? There's "gains" also**

16:16:20 22 **referenced in the allocation provision of 5.1.1.1, which**

16:16:27 23 **is to be distributed pursuant to the membership's**

16:16:29 24 **interest. Is that the --**

16:16:30 25 A. Yup. You got it.

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16:16:32 1 Q. It's gain either way?

16:16:33 2 A. Yeah.

16:16:34 3 Q. Or is it a different definition of gain?

16:16:36 4 A. No, that's -- that's the gain I think it's

16:16:37 5 talking about.

16:16:38 6 Q. Okay. Because in that allocation provision, I

16:16:46 7 mean, there's income, but the way the business is set

16:16:50 8 up, there's no other gain; right? Or is there?

16:16:52 9 A. No, this business is going to have gain from

16:16:56 10 income or gain from two sources: Sale of property or

16:17:00 11 rent minus expenses.

16:17:04 12 Q. That's income, though; right?

16:17:05 13 A. Yeah. And here's another reason why I believe

16:17:08 14 that you have to allocate the distribution that's coming

16:17:15 15 from depreciation -- you know, that excess cash over and

16:17:18 16 above income -- when the property is sold, that

16:17:24 17 depreciation has to get recaptured. And it gets

16:17:29 18 allocated -- again, going back to 5.1.1.1 -- it gets

16:17:35 19 allocated 50-50. Otherwise, you just get a result that

16:17:38 20 makes no sense.

16:17:39 21 THE ARBITRATOR: All right. So let's take a

16:17:52 22 break.

16:17:53 23 ***

16:17:53 24 (RECESS TAKEN FROM 4:17 P.M. TO 4:32 P.M.)

16:20:44 25 ***

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16:20:44 1 THE ARBITRATOR: Mr. Wilcox, you realize you are Page 587
16:32:52 2 still under oath?
16:32:54 3 THE WITNESS: Yes, sir.
16:32:59 4 THE ARBITRATOR: All right.
16:33:01 5 Mr. Gerrard?
16:33:01 6 FURTHER EXAMINATION
16:33:04 7 BY MR. GERRARD:
16:33:04 8 Q. As usual, the judge anticipated the very
16:33:06 9 questions I was going to ask. I know you've been here a
16:33:09 10 long time, and I know you're tired. And I want to make
16:33:11 11 sure we get this right, and it's clear.
16:33:14 12 So when you look at the operating agreement in
16:33:16 13 Section 5.1.1.1 that the judge talked about -- let's
16:33:21 14 open up to that. This is Exhibit A to Exhibit 5.
16:33:28 15 A. Okay.
16:33:29 16 Q. And we start -- the language at the beginning of
16:33:31 17 5.1 says that "Each member's distributive share of all
16:33:35 18 the income, gain, loss, deduction, or credit," and at
16:33:38 19 the end of that paragraph says "shall be determined as
16:33:41 20 follows"; correct?
16:33:41 21 A. Correct.
16:33:42 22 Q. Okay. So we start from premise that
16:33:45 23 everything -- that any distributions that they get --
16:33:47 24 their share of all income, gain, loss, deduction, or
16:33:50 25 credit -- is going to be determined by the following,

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16:33:53 1 and then it goes to 5.1.1.1; correct?

16:33:56 2 A. Correct.

16:33:56 3 Q. And you just read through that with the judge

16:34:00 4 where it says "items of income, gain, loss, deduction,

16:34:02 5 or credit shall be allocated among the members in

16:34:05 6 proportion to their percentage interests as set forth in

16:34:08 7 Exhibit B."

16:34:10 8 You see where I'm reading?

16:34:11 9 A. Yes.

16:34:11 10 Q. All right. And what is the percentage interest

16:34:12 11 in Exhibit B?

16:34:14 12 A. 50-50.

16:34:15 13 Q. Okay. So according to this Section 5.1 and

16:34:20 14 5.1.1.1, what is the general rule for this company?

16:34:26 15 A. The general rule is that income will be allocated

16:34:31 16 50-50.

16:34:32 17 Q. And gain; correct?

16:34:33 18 A. And gain.

16:34:34 19 Q. Doesn't it say "gain"?

16:34:35 20 A. All of these items: Income, gain, loss,

16:34:37 21 deduction. So all -- yeah.

16:34:38 22 Q. All right. So even the gain from any sale of

16:34:41 23 property is supposed to be allocated and distributed

16:34:44 24 50-50 unless this special allocation language in

16:34:48 25 Exhibit B is triggered; correct?

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16:34:49 1 A. That is correct.

16:34:50 2 Q. Okay. So this concept -- let's go back to

16:34:57 3 Exhibit B. Do you see that -- the one sentence that was

16:35:05 4 read to you by Mr. Lewin that says "Cash distributions

16:35:09 5 of profits from operations shall be allocated and

16:35:11 6 distributed 50 percent to Shawn Bidsal and 50 percent to

16:35:13 7 CLA Properties, LLC."

16:35:15 8 Do you see that?

16:35:15 9 A. Yes.

16:35:16 10 MR. LEWIN: That's not exactly what it says.

16:35:18 11 THE ARBITRATOR: That's exactly what it says. He

16:35:19 12 just read it.

16:35:19 13 MR. GERRARD: I just read it verbatim.

16:35:23 14 BY MR. GERRARD:

16:35:23 15 Q. Does that sentence somehow change the general

16:35:29 16 rule of allocations and distributions set forth in

16:35:33 17 Section 5.1.1.1 of the operating agreement?

16:35:36 18 A. No. No.

16:35:38 19 Q. Okay. So if I'm understanding this correctly,

16:35:42 20 everything is distributed, and all gain -- not just

16:35:47 21 profits from operations, but all gain of any kind -- and

16:35:51 22 all deductions, which would include depreciation -- all

16:35:55 23 those things are all allocated and distributed on a

16:35:58 24 50-50 basis unless this special allocation step-down

16:36:04 25 allocation language is triggered?

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16:36:06 1 A. Correct.

16:36:07 2 Q. So if that's the case, then is it your opinion --

16:36:15 3 am I understanding what your testimony was -- that

16:36:18 4 this -- that you looked to the step-down allocation to

16:36:22 5 see if what it is that's being sold is a capital

16:36:27 6 transaction under the definition of the operating

16:36:31 7 agreement?

16:36:31 8 A. Correct.

16:36:32 9 Q. And if it is, then is that a 70-30 split?

16:36:37 10 A. If it falls under the -- if it's preferred -- if

16:36:40 11 it falls under the special allocations, the preferred

16:36:42 12 allocation, then it would be 70-30.

16:36:44 13 Q. Okay. So meaning if it is a capital transaction

16:36:46 14 as defined in the operating agreement, it is a 70-30

16:36:46 15 split?

16:36:49 16 A. Correct.

16:36:49 17 Q. And if it is not a capital transaction as defined

16:36:52 18 in the operating agreement, what would the split be of

16:36:56 19 the gain?

16:36:56 20 A. It would be a 50-50 split.

16:36:57 21 Q. Okay. And that would apply even if it was a sale

16:37:00 22 of what for tax purposes is a capital asset; correct?

16:37:04 23 A. Correct.

16:37:04 24 Q. So if you sold a piece of real property, which

16:37:08 25 for tax purposes -- in other words, when the company

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16:37:10 1 pays taxes -- the IRS calls that a capital asset;
16:37:13 2 correct?
16:37:14 3 A. That's correct.
16:37:14 4 Q. And it determines what the taxes are for a
16:37:17 5 capital asset as distinguished from ordinary income;
16:37:20 6 correct?
16:37:20 7 A. Right. Yes.
16:37:21 8 Q. There's different tax rates for those two
16:37:24 9 different things?
16:37:24 10 A. Correct.
16:37:25 11 Q. Assuming it's a long-term capital gain; right?
16:37:29 12 A. Correct.
16:37:29 13 Q. So if there is a sale by this company of a
16:37:35 14 building which results in the company paying taxes on
16:37:40 15 capital gain taxes, meaning the IRS calls it a capital
16:37:45 16 transaction, does that mean that the step-down
16:37:49 17 allocation language has been triggered?
16:37:51 18 A. No, it does not.
16:37:53 19 Q. And that is because why?
16:37:58 20 A. That is because that doesn't meet the definition
16:38:01 21 of a capital transaction from the operating agreement.
16:38:03 22 Q. All right. So to be clear, and just to make sure
16:38:08 23 I can move off of this forever, the general rule is
16:38:11 24 50-50 everything -- gains from sale of capital -- what
16:38:16 25 the IRS would call a capital asset included; correct?

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16:38:19

1 A. Correct.

16:38:19

2 Q. The only exception to that is if it's a capital

16:38:22

3 transaction as defined in the operating agreement,

16:38:25

4 Exhibit B?

16:38:25

5 A. I agree.

16:38:26

6 Q. Okay. Now, while we're on this, Mr. Lewin asked

16:38:30

7 you if there was any place in the operating agreement --

16:38:32

8 he asked you this twice -- where it talked about

16:38:36

9 allocating depreciation 50-50 between the members. And

16:38:42

10 I thought you said no. Is that still your testimony?

16:38:46

11 A. No. That -- 5.1.1.1 talks about income, gain,

16:38:53

12 loss, deductions -- so that would fall under the 50-50

16:38:57

13 allocation.

16:38:57

14 Q. Okay. Because depreciation is a?

16:39:00

15 A. Deduction.

16:39:01

16 Q. Deduction, okay. Let's move off of that.

16:39:08

17 Let's talk about the interest again. I hate to

16:39:11

18 do this to you, but let's take a look at Exhibit 11.

16:39:29

19 You weren't here for this, but there was testimony

16:39:32

20 earlier that -- there's an email on the second page of

16:39:35

21 Exhibit 11. I'm sorry. Let me get you to the right

16:39:37

22 place.

16:39:37

23 On the second page of Exhibit 11, there's an

16:39:39

24 email from something called dgllawyer@hotmail.com to

16:39:46

25 chrischilds@anclv.com. Do you see where I'm looking?

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16:39:49 1 A. Yes.

16:39:50 2 Q. And you weren't here for this testimony, but

16:39:52 3 there was testimony that was given that Chris Childs was

16:39:54 4 the attorney that represented the former owner of the

16:39:57 5 property before the deed in lieu. Okay?

16:39:59 6 A. Okay.

16:40:01 7 Q. And this email says "Chris, we calculate the

16:40:04 8 total forgiveness on the deed in lieu as follows: The

16:40:07 9 principal forgiveness is \$7,994,582 minus 4 million.

16:40:13 10 Total principal forgiven is 3,994,582."

16:40:18 11 And the next paragraph is a little hard to read

16:40:21 12 because something's on there. It says "Looks like

16:40:24 13 interest forgiven is March 6th to September 6, 2011,

16:40:31 14 49,695.99 per month plus the 16 days per diem."

16:40:34 15 So then it says -- basically it's talking about

16:40:38 16 interest being forgiven is like \$311,265.12.

16:40:43 17 MR. LEWIN: I can't read that.

16:40:43 18 MR. GERRARD: I know. I'm going to show you

16:40:43 19 something that will make it clearer.

16:40:43 20 BY MR. GERRARD:

16:40:47 21 Q. Do you see the number?

16:40:47 22 A. Yes.

16:40:47 23 Q. Turn to the first page of Exhibit 11. This is a

16:40:55 24 1099-C, sometimes referred to as a 1099-COD. Do you

16:41:00 25 know what that is?

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16:41:00 1 MR. SHAPIRO: The first page of Exhibit 11? Or
16:41:03 2 you mean the page before?
16:41:04 3 MR. GERRARD: No. The first page.
16:41:10 4 BY MR. GERRARD:
16:41:10 5 Q. What is the purpose of a 1099-COD?
16:41:13 6 A. It is to report when debt has been canceled.
16:41:18 7 Q. Okay. So this matches up with the email we just
16:41:23 8 saw, which shows that there was a cancellation of debt
16:41:25 9 of \$311,265.12 for interest and \$3,994,582. Do you see
16:41:35 10 that?
16:41:35 11 A. Yes.
16:41:36 12 Q. Okay. So according to this document, all of the
16:41:41 13 accrued interest that was owed on the note originally
16:41:46 14 was forgiven; correct?
16:41:48 15 A. According to this document, yes.
16:41:50 16 Q. And reported to the IRS as forgiven; correct?
16:41:52 17 A. Yes.
16:41:52 18 Q. Okay. And all of the principal of the loan was
16:41:55 19 forgiven; correct?
16:41:56 20 A. Not all of the principal.
16:41:58 21 Q. Well, yeah. All -- it shows the amount that was
16:42:02 22 forgiven, 3.9, almost 4 --
16:42:04 23 A. Almost 4 million in principal was forgiven.
16:42:07 24 Q. Okay. Now, let's once again go back to the deed
16:42:11 25 in lieu agreement. Let's make this quick. That is

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16:42:18 1 exhibit number...

16:42:26 2 A. 8.

16:42:26 3 Q. Yup. All right. Now, couple of things I want to

16:42:38 4 cover with you.

16:42:39 5 First of all, do you remember you were asked a

16:42:41 6 question where you were asked, Did the property interest

16:42:47 7 that was held by Green Valley Commerce as a lender --

16:42:53 8 meaning as deed of trust lender -- right? -- did that

16:42:56 9 property interest -- was it converted into title to the

16:43:00 10 property? Do you remember being asked that?

16:43:02 11 A. Yeah.

16:43:02 12 Q. Okay. And Mr. Lewin was very specific about

16:43:07 13 saying that that interest was converted into title. So

16:43:11 14 let's take a look at what happened to the actual

16:43:14 15 interest pursuant to this agreement.

16:43:16 16 Let's look at page 2 of the agreement, which is

16:43:19 17 Bidsal 1430. Let's look at Section 2.2 -- well, first

16:43:27 18 of all, 2.1 says that the borrower was going to transfer

16:43:32 19 all of its right, title, and interest in the property

16:43:35 20 through an absolute conveyance; correct?

16:43:38 21 A. Correct.

16:43:38 22 Q. All right. And that conveyance is the document

16:43:44 23 that we see as Exhibit 10; correct?

16:43:48 24 A. Yes.

16:43:50 25 Q. So they actually provided a deed -- a conveyance

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16:43:55 1 of all of their rights to this property; correct?

16:43:59 2 A. Correct.

16:44:00 3 Q. Now let's go back to Section 2.2 of the deed in

16:44:05 4 lieu agreement, which is Exhibit 8. And look at

16:44:10 5 Section A. It says the borrower and lender acknowledge

16:44:12 6 and agree as follows: The liens -- which is a defined

16:44:16 7 term if we look at the...

16:44:28 8 THE ARBITRATOR: 1B?

16:44:31 9 MR. GERRARD: Do you see it, Judge? Oh, there it

16:44:31 10 is.

16:44:33 11 BY MR. GERRARD:

16:44:34 12 Q. So if you look at 1B on the first page, "liens"

16:44:37 13 is a defined term, which says "under the terms of a loan

16:44:43 14 made by lender's predecessor to borrower on or about

16:44:46 15 July 17, 2007, called the loan, the property is subject

16:44:49 16 to certain liens, assignments, and security interest."

16:44:54 17 Okay? Collectively, the liens. Do you see that?

16:44:56 18 A. Yes.

16:44:56 19 Q. So that takes into account the assignment of

16:44:59 20 rents that Mr. Lewin was talking about, any other liens

16:45:03 21 that they had -- which would include the deed of

16:45:05 22 trust -- any security interest, which obviously would

16:45:08 23 include the deed of trust -- everything.

16:45:09 24 So let's look now at 2.2A on the next page. It

16:45:14 25 says "The liens are not released or relinquished in any

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16:45:18 1 manner or respect whatsoever, but rather shall remain
16:45:22 2 valid and continuous and in full force and effect unless
16:45:25 3 and until released by a written instrument executed and
16:45:29 4 filed for record in the public records of Clark County,
16:45:32 5 Nevada."

16:45:32 6 Do you see that?

16:45:33 7 A. Yes.

16:45:33 8 Q. And then the next paragraph says "There shall be
16:45:35 9 no merger of the liens with the title of the lender to
16:45:40 10 the property by virtue of the conveyance evidenced by
16:45:45 11 the transfer documents as defined below and the liens on
16:45:48 12 one hand and title to the property on the other shall
16:45:52 13 remain nonmerged, separate, and distinct."

16:45:55 14 Do you see that?

16:45:55 15 A. I do.

16:45:56 16 Q. Does that look to you like there was a conversion
16:45:59 17 of these liens into a real property interest? Into
16:46:03 18 title to the property, I should say?

16:46:05 19 A. No.

16:46:06 20 Q. Okay. Now, let's talk about the security
16:46:19 21 deposits for just a minute. You acknowledge that for
16:46:22 22 purposes of accounting, those deposits are properly
16:46:26 23 shown on the company's books and records as a liability
16:46:29 24 of the company; correct?

16:46:30 25 A. Correct.

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16:46:31 1 Q. The obligation to repay those security deposits
16:46:33 2 remains as an ongoing liability of the company; correct?
16:46:36 3 A. Correct.
16:46:36 4 Q. Is there any offsetting credit on the company's
16:46:42 5 books and records that offset that obligation?
16:46:45 6 A. Yeah. The cash.
16:46:46 7 Q. Okay.
16:46:47 8 A. The cash collected from the security deposit.
16:46:49 9 Q. Okay. And so in a real world sense, is there any
16:46:54 10 actual liability -- not an accounting liability, but an
16:46:57 11 actual liability -- that the company has related to those
16:47:02 12 security deposits?
16:47:03 13 A. As long as the company has the cash, there is no
16:47:07 14 liability.
16:47:07 15 Q. And again I ask you the same question I asked you
16:47:11 16 earlier: Did you ever see any evidence that the
16:47:13 17 deposits have ever been distributed in any manner?
16:47:18 18 A. No.
16:47:19 19 Q. Okay. Back to the agreement we were just looking
16:47:26 20 at just one more time -- the deed in lieu agreement,
16:47:30 21 Section 2.10. Mr. Lewin asked you if these rents had
16:47:39 22 been collected by the borrower on behalf of the lender.
16:47:45 23 Let's look at what 2.10 actually says. It
16:47:50 24 says -- without reading the whole introductory
16:47:54 25 paragraph, it talks about the number. It says the

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16:47:58 1 borrower will transfer lender the amount of \$295,258.93,
16:48:05 2 quote, "which amount represents the net rents from the
16:48:10 3 property that have not previously been paid to lender or
16:48:15 4 lender's predecessors in interest."

16:48:18 5 Does it say anywhere in this paragraph that the
16:48:22 6 owner of the property was collecting these rents on
16:48:24 7 behalf of the borrower?

16:48:25 8 A. No.

16:48:26 9 Q. Now, I ask you once again: Were these rents that
16:48:34 10 were being held by the borrower, were they paid to Green
16:48:41 11 Valley Commerce, who was lender at the time that Green
16:48:45 12 Valley Commerce obtained the note?

16:48:46 13 A. No, they were not.

16:48:48 14 Q. When were these monies that are called rents in
16:48:55 15 the deed in lieu agreement -- when were these monies
16:48:59 16 transferred to Green Valley Commerce?

16:49:03 17 A. Once Green Valley Commerce obtained fee simple
16:49:05 18 title to the property.

16:49:06 19 Q. Okay. So when Green Valley Commerce became the
16:49:09 20 owner of the property; correct?

16:49:10 21 A. Right.

16:49:12 22 Q. And again, look at Exhibit 9. In the escrow
16:49:19 23 statement that -- where the money was actually
16:49:21 24 transferred, what are they called?

16:49:23 25 A. Net rents.

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16:49:24 1 Q. Does it say anywhere in here "payment of interest
16:49:27 2 on prior loan where all the interest was forgiven"?
16:49:30 3 A. No.
16:49:30 4 Q. I'd like you to look at Exhibit 91, and then I'm
16:49:43 5 just going to ask you a quick question to follow-up on
16:49:48 6 that.
16:49:48 7 A. Did you say 9-9?
16:49:50 8 Q. 91.
16:49:51 9 A. 91.
16:50:02 10 Q. Now, this is a timing issue. Tell me when you
16:50:03 11 got that opened.
16:50:04 12 A. I got it.
16:50:05 13 Q. All right. Exhibit 91 is an email dated
16:50:08 14 September 16, 2011. Do you see that?
16:50:09 15 A. Yes.
16:50:09 16 Q. Okay. Attached to this email is a version of the
16:50:14 17 operating agreement as of that date, what language had
16:50:18 18 been drafted. I'd like you to turn to the back of this
16:50:23 19 and look at Exhibit B.
16:50:23 20 A. Okay.
16:50:31 21 Q. Do you see in the first paragraph where it talks
16:50:34 22 about "upon the sale of company asset"?
16:50:37 23 A. Yes.
16:50:37 24 Q. Okay. Now, as of September 16, 2011, what assets
16:50:46 25 were owned by this company?

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16:50:49 1 A. At that point in time, the -- as of what date? Page 601
16:50:56 2 September? The note.
16:50:57 3 Q. September 16th.
16:51:01 4 A. The note.
16:51:02 5 Q. Is it fair to say that on September -- as of
16:51:05 6 September 16, 2011, the company only held an asset --
16:51:10 7 one asset -- a note?
16:51:11 8 A. That is true.
16:51:14 9 Q. Now, Mr. Lewin tried to characterize the deed of
16:51:18 10 trust and the assignment of rents and all those things
16:51:21 11 as assets, but under the terms of those agreements --
16:51:24 12 you reviewed them -- those are security documents;
16:51:26 13 correct?
16:51:26 14 A. Correct.
16:51:27 15 Q. The actual asset is the note -- the obligation to
16:51:30 16 pay -- that's what's carried on the books as an asset;
16:51:33 17 correct?
16:51:33 18 A. Correct.
16:51:34 19 Q. You don't carry on the books of the company a
16:51:36 20 deed of trust as an asset, do you?
16:51:38 21 A. No.
16:51:38 22 Q. Now, there was a question asked of you which I
16:51:52 23 think just because it's a long day and you're tired,
16:51:55 24 maybe you didn't catch. So I'm going to ask you again.
16:51:58 25 There was a question asked to you by Mr. Lewin.

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16:52:00 1 He said -- he was asking you if Exhibit B was not
16:52:05 2 followed in the sale of Building C, E, and B.
16:52:10 3 THE ARBITRATOR: And you're back to the operating
16:52:13 4 agreement?
16:52:13 5 MR. GERRARD: Yes, operating agreement.
16:52:18 6 BY MR. GERRARD:
16:52:18 7 Q. This is a simple question. When you were
16:52:23 8 answering his questions about whether Exhibit B was
16:52:25 9 followed or not followed, were you thinking whether the
16:52:29 10 special allocation language was triggered or not, or
16:52:31 11 were you actually thinking whether all of Exhibit B was
16:52:34 12 followed or not?
16:52:38 13 A. Was Exhibit B being followed? No. In general,
16:52:42 14 because the special allocation language had not been
16:52:45 15 triggered.
16:52:46 16 Q. Okay. Is it fair to say that for all testimony
16:52:50 17 that you've given in this case, that you've never
16:52:52 18 changed your opinion on that issue?
16:52:54 19 MR. LEWIN: Objection. His testimony speaks for
16:52:58 20 itself.
16:52:58 21 THE ARBITRATOR: The question is whether he's
16:53:02 22 changed his opinion on that topic.
16:53:04 23 MR. LEWIN: Does that mean we're going to go back
16:53:07 24 over all his testimony? Because that's what's --
16:53:10 25 THE ARBITRATOR: Maybe.

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16:53:12 1 A. I have not changed my opinion.

16:53:14 2 BY MR. GERRARD:

16:53:14 3 Q. Okay. So it remains your opinion that the
16:53:16 4 special allocation language was never triggered at any
16:53:19 5 time?

16:53:19 6 A. That is correct.

16:53:21 7 Q. And so do you believe that this -- let me ask the
16:53:25 8 same question Mr. Lewin asked, but in a different way.

16:53:28 9 Do you believe that the special allocation
16:53:31 10 language of Exhibit B has at all times been complied
16:53:35 11 with?

16:53:35 12 A. Yes. Yes. It's never been triggered, so yeah.

16:53:40 13 Q. You were also asked a question about -- that
16:53:59 14 there was a difference between the cost of the note on
16:54:01 15 the purchase escrow statement for the note and what the
16:54:05 16 cost segregation study picked up as that number. Do you
16:54:10 17 remember?

16:54:10 18 A. I do.

16:54:10 19 Q. And Mr. Lewin said it was around 80-something
16:54:14 20 thousand dollars. Do you recall that?

16:54:15 21 A. I do.

16:54:16 22 Q. Okay. If -- and he was asking you hypothetical
16:54:20 23 questions about if that money had been distributed,
16:54:25 24 would that result in a capital transaction. And my
16:54:28 25 question is very simple.

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16:54:30

1 If that money had been distributed -- I want you

16:54:33

2 to segregate in your mind between what is a capital

16:54:37

3 transaction for the operating agreement and what is a

16:54:39

4 capital transaction for tax purposes. Okay?

16:54:43

5 A. Okay.

16:54:44

6 Q. So if that money that makes up the difference --

16:54:47

7 if it had been distributed at any time, would that have

16:54:52

8 triggered the special allocation language, meaning was

16:54:54

9 it a capital transaction, or would it have been a

16:54:57

10 capital transaction for purposes of the operating

16:54:59

11 agreement?

16:54:59

12 A. If it was distributed as a -- it would not be

16:55:08

13 distributed pursuant to a capital transaction because

16:55:11

14 there hadn't been a capital transaction.

16:55:12

15 Q. Okay. But for purposes of tax law -- in other

16:55:15

16 words, how it has to be shown on the tax return -- would

16:55:19

17 you consider any portion of that -- if that money had

16:55:22

18 been distributed, would you consider any of that to be

16:55:25

19 subject to capital gains treatment on a tax return?

16:55:28

20 A. No.

16:55:28

21 Q. Okay. Mr. Lewin also asked you about the formula

16:55:36

22 that's at the heart of what we're here for in Exhibit 5.

16:55:40

23 And the question that he asked you was, Does that

16:55:45

24 formula reference adding back cash in hand. Do you

16:55:52

25 remember him asking you that?

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16:55:53

1 A. Yes.

16:55:54

2 Q. Okay. And there's nothing -- it doesn't say

16:55:56

3 anything about adding back cash in hand; correct?

16:55:59

4 A. Correct.

16:56:00

5 Q. And isn't that because the value that we're

16:56:04

6 talking about in the formula -- the FMV value -- is for

16:56:08

7 a membership interest, not for assets owned by the

16:56:12

8 company?

16:56:12

9 A. That is correct. It is for the membership

16:56:14

10 interest.

16:56:15

11 Q. So you wouldn't expect there to be anything

16:56:19

12 adding back in an asset that belonged to the company;

16:56:21

13 correct?

16:56:22

14 A. Correct.

16:56:22

15 Q. And on the same topic -- we covered this, I

16:56:30

16 thought, but Section 4.2 -- because it was extensively

16:56:37

17 referenced -- what is your understanding of what the

16:56:43

18 word "FMV" or "fair market value" is pertaining to

16:56:50

19 according to the definitions in 4.1 and 4.2? Is it

16:56:54

20 pertaining to the members' membership interest, or --

16:56:58

21 that's being purchased -- or to all the assets of the

16:57:00

22 company?

16:57:00

23 A. It's related to the membership interest.

16:57:03

24 Q. Okay. Now, I think you acknowledge that a

16:57:05

25 member, to determine what the value of the other

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16:57:08 1 member's membership interest is, would likely be looking
16:57:11 2 at the assets of the company to try to come up with what
16:57:15 3 that value is; correct?

16:57:15 4 A. Right.

16:57:16 5 Q. But the definition is talking about just
16:57:20 6 membership interest; correct?

16:57:21 7 A. Yes, just membership interest.

16:57:23 8 THE ARBITRATOR: But both of them?

16:57:26 9 MR. GERRARD: It just talks about the one
16:57:27 10 interest being sold.

16:57:29 11 THE ARBITRATOR: Both membership interests
16:57:31 12 together is what I understood the FMV to mean, because
16:57:36 13 then we're subtracting out COP and then dividing it in
16:57:40 14 half; right?

16:57:41 15 THE WITNESS: Correct. Correct.

16:57:47 16 MR. GERRARD: Yes -- no. Let's look at the
16:57:49 17 actual definition. That's not what it says.

16:57:49 18 BY MR. GERRARD:

16:57:53 19 Q. Let's take a look. The words say "Any member may
16:57:56 20 give notice to the remaining member that he or it is
16:57:59 21 ready, willing, and able to purchase the remaining
16:58:01 22 members' interests for a price the offering member
16:58:05 23 thinks is the fair market value."

16:58:07 24 A. Okay.

16:58:09 25 Q. Making reference to the interest being purchased;

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16:58:11 1 correct?

16:58:11 2 A. Correct.

16:58:12 3 Q. Okay. Now, let's talk about this whole

16:58:29 4 reoccurring and nonreoccurring thing. I think we can

16:58:31 5 cover it in one question.

16:58:33 6 For this company, when it sold the first

16:58:35 7 property, was that a nonreoccurring event at that point

16:58:38 8 in time?

16:58:39 9 A. Yes.

16:58:40 10 Q. As soon as it sold a second property, or any

16:58:44 11 properties thereafter, would the sale of a piece of

16:58:46 12 property be a nonreoccurring event?

16:58:50 13 A. It would be a nonrecurring event.

16:58:52 14 Q. It would be a reoccurring event or a non --

16:58:54 15 A. A nonreoccurring event. If you sell -- if you

16:58:58 16 sell a property, the first property sale would be

16:59:02 17 nonreoccurring -- would be nonrecurring.

16:59:06 18 Q. And then as soon as you sell a second one, so now

16:59:08 19 it's happened a second time, would the second sale be

16:59:12 20 nonreoccurring or reoccurring?

16:59:14 21 A. So the second sale would be a -- if you talked

16:59:20 22 about -- if you talked about making all those sales

16:59:22 23 right at the same time, they would be recurring. But if

16:59:26 24 it's a -- if it's spread out, it would be nonrecurring

16:59:30 25 events. They would be -- if you do it all at the

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16:59:33 1 same -- if you -- I'm sorry.

16:59:39 2 Ask me the question one more time.

16:59:41 3 **Q. I know it's been a long day.**

16:59:43 4 **If you sell one piece of property and that's all**

16:59:46 5 **that was ever sold, would that be a nonreoccurring event**

16:59:50 6 **for the company?**

16:59:50 7 A. That would be a nonrecurring event.

16:59:53 8 **Q. If the company sells two pieces of property so**

16:59:55 9 **there's been one sale and then later another sale, would**

16:59:57 10 **the second sale be considered nonreoccurring?**

17:00:00 11 A. Yes. That's correct. It would be considered

17:00:04 12 nonreoccurring.

17:00:06 13 **Q. Wouldn't it be considered reoccurring?**

17:00:08 14 MR. LEWIN: Objection. Argumentive. He's

17:00:10 15 arguing with his own witness.

17:00:10 16 THE ARBITRATOR: That's not argumentive. I think

17:00:11 17 he's trying to clarify.

17:00:14 18 BY MR. GERRARD:

17:00:14 19 **Q. Wouldn't it be considered reoccurring because now**

17:00:15 20 **you have more than one sale?**

17:00:16 21 A. So the way I'm trying to answer this is that

17:00:25 22 the -- if we have reoccurring events --

17:00:33 23 THE ARBITRATOR: Let me stop right here.

17:00:33 24 MR. GERRARD: Okay.

17:00:35 25 THE ARBITRATOR: I don't know if there's a

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17:00:37 1 difference between "reoccurring" and "recurring," which

17:00:43 2 is what Exhibit B says. But they're different words.

17:00:47 3 So I don't know if we're intentionally using them

17:00:51 4 interchangeably or not.

17:00:54 5 MR. GERRARD: I'm glad you pointed that out

17:00:56 6 because I didn't notice that. So let me use the right

17:00:57 7 word.

17:00:57 8 THE ARBITRATOR: So it's not "reoccurring," as in

17:01:00 9 occurred again; it's "recurring"; right?

17:01:03 10 MR. GERRARD: Right.

17:01:04 11 THE ARBITRATOR: Okay. All right. I don't know

17:01:08 12 if that changes anything, but.

17:01:10 13 THE WITNESS: Okay. So --

17:01:11 14 BY MR. GERRARD:

17:01:11 15 Q. So if you sell -- if a company is in the

17:01:14 16 business -- is in business, and if it sells a piece of

17:01:18 17 property -- only engages in a sale of property one time,

17:01:22 18 would you agree with me that that is nonreoccurring

17:01:25 19 because it's never happened before?

17:01:26 20 A. That is a nonrecurring event.

17:01:28 21 Q. Okay. So if the company then sells a second

17:01:31 22 piece of property and a third piece of property, would

17:01:36 23 those be recurring events because they've now happened

17:01:39 24 multiple times?

17:01:41 25 MR. LEWIN: Your Honor, the question's been asked

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17:01:43 1 and answered. He asked the question, he didn't like the
17:01:45 2 answer, now he's trying to get him to answer
17:01:47 3 differently.

17:01:48 4 MR. GERRARD: I'm trying to get him to clarify.

17:01:49 5 THE ARBITRATOR: I think there's some confusion
17:01:51 6 on this issue, but all right.

17:01:56 7 THE WITNESS: Under this operating agreement?

17:01:57 8 BY MR. GERRARD:

17:01:57 9 **Q. Yes.**

17:01:57 10 A. Under the operating agreement, would that be a --
17:02:00 11 so the operating agreement basically says nonrecurring
17:02:04 12 events such as a sale of substantially all the property.
17:02:05 13 So under the operating agreement, it would be -- if it
17:02:09 14 didn't constitute -- basic operating agreement explains
17:02:15 15 nonrecurring as a sale of all or substantially all.

17:02:18 16 **Q. Okay. So do you believe that the sales that**
17:02:22 17 **occurred in this case were nonrecurring events?**

17:02:26 18 A. I do.

17:02:29 19 **Q. Under the definition you just gave in the**
17:02:30 20 **operating agreement?**

17:02:31 21 MR. LEWIN: Objection. Again, he's arguing with
17:02:33 22 his own witness, Your Honor.

17:02:34 23 THE ARBITRATOR: Understood.

17:02:37 24 A. "Cash distributions arising from capital
17:02:42 25 transactions or nonrecurring events" -- that would be a

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17:02:45 1 capital transaction; right? Not "right." I'm not Page 611
17:02:50 2 asking you that.
17:02:50 3 BY MR. GERRARD:
17:02:50 4 Q. Well, that's what I'm asking. I'm trying to
17:02:52 5 understand this. I'm trying to understand what --
17:02:57 6 because you just referred to the definition and you said
17:03:00 7 under the definition that a nonrecurring event is the
17:03:03 8 sale of all or substantially all of the assets of the
17:03:06 9 company?
17:03:06 10 A. Right.
17:03:07 11 Q. So did that happen? Was there ever a sale of
17:03:10 12 all --
17:03:10 13 A. No. There was not ever a sale of substantially
17:03:13 14 all or all of the assets of the company.
17:03:14 15 Q. So then by definition, has there been a
17:03:18 16 nonreoccurring event?
17:03:19 17 A. No.
17:03:20 18 Q. Okay. You were also asked if Mr. Main made a
17:03:41 19 mistake in the preparation of the tax return based upon
17:03:45 20 this characterization of the rents as interest. Do you
17:03:48 21 remember that?
17:03:48 22 A. Yes.
17:03:49 23 Q. Do you think it's Mr. Main that characterized
17:03:53 24 the rents as interest, or was it whoever prepared the
17:03:59 25 general ledger that we looked at?

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17:04:03 1 MR. LEWIN: Objection. Calls for speculation. Page 612

17:04:04 2 THE ARBITRATOR: If he knows.

17:04:06 3 A. I know the general ledger characterized it as

17:04:11 4 interest, so I'm assuming Mr. Main just followed the

17:04:14 5 general ledger.

17:04:15 6 BY MR. GERRARD:

17:04:15 7 Q. Okay. Now, you were asked an interesting series

17:04:24 8 of questions at the very beginning -- and this will be

17:04:27 9 my last thing I want to cover.

17:04:29 10 You were asked if you thought you needed to speak

17:04:32 11 with a whole list of people that Mr. Lewin identified in

17:04:36 12 order to arrive at your opinions. Do you remember that?

17:04:38 13 A. I do.

17:04:39 14 Q. Why didn't you believe you needed to speak with

17:04:43 15 those people to arrive at your opinions?

17:04:44 16 A. I had documentation to rely upon.

17:04:48 17 Q. Okay. So is your -- are your opinions based upon

17:04:51 18 the records of the company and the operating agreement?

17:04:53 19 A. They are.

17:04:54 20 Q. And did those documents tell you what has

17:04:58 21 actually transpired?

17:04:59 22 A. I believe they did, yes.

17:05:01 23 Q. Do the tax returns describe exactly what happened

17:05:04 24 with all of the distributions and allocations that have

17:05:07 25 been done?

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17:05:08 1 A. Yes.

17:05:08 2 Q. Did you believe that you needed to ask somebody

17:05:13 3 what those documents were telling you to explain to you

17:05:17 4 what those documents were telling you?

17:05:18 5 A. No.

17:05:19 6 MR. GERRARD: Okay. I have nothing further.

17:05:21 7 THE ARBITRATOR: All right. Anything else,

17:05:22 8 Mr. Lewin?

17:05:23 9 MR. LEWIN: I have a few more questions.

17:05:26 10 THE ARBITRATOR: All right.

17:05:26 11 FURTHER EXAMINATION

17:05:26 12 BY MR. LEWIN:

17:05:26 13 Q. So essentially the determination by His Honor of

17:05:34 14 what constitutes a capital transaction is -- will be

17:05:38 15 determinative of whether or not in your opinion the

17:05:42 16 sales of property -- a sale of a property is subject to

17:05:45 17 Schedule B or not; right? That's the primary issue?

17:05:49 18 A. Correct.

17:05:49 19 Q. And the only definition -- the only place where

17:05:57 20 there's any sort of a definition of a capital

17:06:01 21 transaction for the purpose of Exhibit B is in

17:06:04 22 Exhibit B; right?

17:06:05 23 A. It's in Exhibit B.

17:06:07 24 Q. Mr. Gerrard just asked you a question looking at

17:06:10 25 Exhibit 91 about there was only one asset of the

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17:06:12 1 company. Can you turn back to that for a second? And Page 614
17:06:22 2 I'm presuming he did that to indicate -- I don't want to
17:06:27 3 presume what he did, but -- do you have Exhibit 91?
17:06:30 4 It's in the black book.
17:06:32 5 A. Exhibit 91 is the draft operating agreement.
17:06:35 6 Q. That's right. Exactly. Just turn to the page
17:06:38 7 that's Bates stamped 1083. It's the last page.
17:06:56 8 If you remember --
17:07:00 9 MR. GERRARD: Hang on. The witness is not ready.
17:07:02 10 THE WITNESS: Okay.
17:07:03 11 BY MR. LEWIN:
17:07:03 12 Q. So he was asking you whether -- there was
17:07:06 13 only assets -- there was only one asset as of
17:07:10 14 September 16th. You said yes, the note; right?
17:07:15 15 A. That would be my -- yeah.
17:07:18 16 Q. But --
17:07:19 17 A. That was my answer, yes.
17:07:20 18 Q. But the schedule here -- the preferred allocation
17:07:24 19 schedule contemplates that there's going to be more than
17:07:28 20 one asset; right?
17:07:29 21 A. Well, the preferred allocation schedule only
17:07:34 22 refers to the company asset.
17:07:38 23 Q. It says -- we're talking about "the sale of
17:07:40 24 company asset"?
17:07:40 25 A. Yeah.

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17:07:41 1 Q. Okay.

17:07:42 2 A. If you look at just that phrase, it says "company

17:07:46 3 asset."

17:07:46 4 Q. But you see that it added the term "from capital

17:07:46 5 transactions," plural.

17:07:50 6 Do you see that? That was added.

17:07:50 7 A. I do see that.

17:07:51 8 Q. And then at the bottom, it says "a substantial

17:07:55 9 portion of the company's assets."

17:07:57 10 Do you see that? At the bottom, the last page,

17:08:00 11 the part that was added in.

17:08:02 12 A. Okay.

17:08:02 13 Q. Do you see that? It says "assets"; right?

17:08:05 14 A. "Substantial portion of the company's assets,"

17:08:07 15 yes.

17:08:08 16 Q. So this was designed to -- with the contemplation

17:08:13 17 that there's going to be more than one asset, possibly

17:08:17 18 more than one capital transaction; right?

17:08:19 19 A. Yeah, maybe.

17:08:20 20 Q. That's the way you read it; right?

17:08:24 21 A. Yeah. It refers to the sale of a substantial

17:08:27 22 portion of the company's assets.

17:08:29 23 Q. Assets, plural. Capital transactions, plural.

17:08:33 24 Does that give you any further information as to whether

17:08:36 25 or not there's a word missing where it says "sale of

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17:08:39 1 company asset"?

17:08:41 2 MR. GERRARD: Objection. Calls for speculation.

17:08:41 3 THE ARBITRATOR: Well --

17:08:43 4 MR. LEWIN: His opinion.

17:08:44 5 THE ARBITRATOR: Right.

17:08:45 6 A. No. Eleven years, and -- no. Doesn't change my

17:08:49 7 opinion.

17:08:50 8 BY MR. LEWIN:

17:08:50 9 Q. Then I just -- I'm going to go through this fast.

17:08:55 10 My explanation is probably going to take more time.

17:08:58 11 Mr. Gerrard asked you about the deed in lieu

17:09:04 12 agreement. And if you could turn -- first of all, he

17:09:08 13 said, Well, there's nowhere in this document that says

17:09:10 14 that they're holding the rent for the lender. Do you

17:09:13 15 remember you said, Yes, that's true?

17:09:16 16 MR. GERRARD: I don't think that's what I said,

17:09:17 17 but that's okay. I said they collected from the lender.

17:09:21 18 BY MR. LEWIN:

17:09:21 19 Q. But you did read the assignment of leases and

17:09:23 20 rents, which specifically says when the borrower is in

17:09:25 21 default, it's collecting the rents for the benefit of

17:09:29 22 the lender and holding it for the lender -- right? --

17:09:32 23 for payments of interest and principal. Right?

17:09:35 24 A. I read that, yes.

17:09:37 25 MR. GERRARD: I have to object. Mr. Lewin has

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17:09:40 1 been testifying nonstop about what he thinks this

17:09:43 2 assignment of rents agreement says, and he's not stating

17:09:48 3 the language the way the agreement says. It doesn't say

17:09:50 4 they're holding it for payment of principal and

17:09:52 5 interest, which is what he just said.

17:09:53 6 THE ARBITRATOR: I haven't seen it, so --

17:09:57 7 MR. GERRARD: Yeah, so I objected earlier, and I

17:09:57 8 said best evidence rule.

17:09:59 9 MR. LEWIN: But he's seen it, and he's the one

17:10:01 10 who's testifying.

17:10:02 11 MR. GERRARD: You're asking him --

17:10:04 12 MR. LEWIN: Look, we all know -- really, Doug,

17:10:07 13 you've read the assignment of rents and leases. You've

17:10:12 14 seen the security agreement. You know the purpose --

17:10:14 15 THE ARBITRATOR: You're testifying now, so.

17:10:18 16 MR. LEWIN: Well, so is he.

17:10:20 17 MR. GERRARD: No, I just said you're reciting the

17:10:22 18 language. We don't have that language, and it doesn't

17:10:23 19 say that.

17:10:24 20 MR. LEWIN: I'm asking him. It's

17:10:26 21 cross-examination. He read the documents.

17:10:27 22 MR. GERRARD: All right. Go ahead.

17:10:27 23 THE ARBITRATOR: Next question.

17:10:28 24 BY MR. LEWIN:

17:10:28 25 **Q. Look at paragraph 317.**

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17:10:31	1	THE ARBITRATOR: Of what?	Page 618
17:10:31	2	MR. LEWIN: Oh, I'm sorry. Of Exhibit 8. Page 8	
17:10:31	3	of the agreement.	
17:10:33	4	MR. GERRARD: Page 8 of the deed in lieu?	
17:10:39	5	MR. LEWIN: Deed in lieu.	
17:10:40	6	BY MR. LEWIN:	
17:10:40	7	Q. It says "The borrower requested conveyance of	
17:10:43	8	title to the property in lieu of the exercise of the	
17:10:46	9	lender's remedies under the loan documents."	
17:10:49	10	Do you see that part?	
17:10:50	11	A. Yes.	
17:10:51	12	Q. You understood under the loan documents that	
17:10:59	13	there was a right of foreclosing the property; right --	
17:10:59	14	A. Yes, under the trust deed.	
17:11:02	15	Q. -- exercising the rights under the guarantee?	
17:11:03	16	A. Yes.	
17:11:05	17	Q. And instead of doing that, the borrower decided	
17:11:13	18	to give title to the lender; is that correct?	
17:11:18	19	A. The borrower is -- the borrower -- I'm sorry.	
17:11:30	20	The lender through this deed in lieu obtained, yes.	
17:11:34	21	Q. So the answer's yes?	
17:11:35	22	A. Yes. The answer is yes. I had to think all the	
17:11:38	23	pieces through.	
17:11:38	24	(Interruption in proceedings.)	
17:11:38	25	///	

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17:12:36 1 BY MR. LEWIN:

17:12:36 2 Q. Looking quickly at Exhibit 10, the deed. Both

17:12:47 3 the -- there's an escrow closing statement on September

17:12:56 4 22nd, the deed was recorded September 22nd, and the deed

17:12:58 5 in lieu agreement was signed September -- I think it was

17:13:03 6 recorded --

17:13:04 7 MR. GERRARD: They're all the same date. We'll

17:13:06 8 stipulate.

17:13:06 9 BY MR. LEWIN:

17:13:06 10 Q. It says "The consideration for the deed being

17:13:11 11 full satisfaction of the obligations secured by the

17:13:14 12 certain deed of trust, assignment of rent, security

17:13:17 13 agreement, and fixture filing" --

17:13:19 14 A. I'm sorry. Where are you reading from?

17:13:19 15 THE ARBITRATOR: You're going to have to do that

17:13:20 16 again. We didn't get that.

17:13:22 17 BY MR. LEWIN:

17:13:22 18 Q. In the second paragraph, it says "This deed is an

17:13:25 19 absolute conveyance, grantor having sold the property to

17:13:28 20 grantee for the fair, adequate consideration. In

17:13:31 21 addition to the above, recited in full satisfaction of

17:13:34 22 the obligations under the loan documents."

17:13:36 23 It sets forth what the loan documents are.

17:13:37 24 A. Okay.

17:13:38 25 Q. So did you -- doesn't that -- what was the

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17:13:50 1 consideration that is given? It's for \$1 plus release
17:13:55 2 of the loan documents; isn't that correct?
17:13:59 3 MR. GERRARD: Hold on for a second. I have to
17:14:01 4 object to your question was broader than what the
17:14:04 5 language was you just read. It doesn't say release of
17:14:07 6 the loan documents. One of the loan documents by
17:14:10 7 definition is the deed of trust. And it doesn't say the
17:14:10 8 deed of trust being released.
17:14:13 9 MR. LEWIN: It says satisfaction of the
17:14:13 10 obligations.
17:14:14 11 MR. GERRARD: Secured by.
17:14:17 12 MR. LEWIN: Secured by.
17:14:18 13 MR. GERRARD: Right.
17:14:24 14 Was there a question?
17:14:26 15 MR. LEWIN: I withdraw that.
17:14:27 16 BY MR. LEWIN:
17:14:27 17 Q. The last area. We talked about the allocations
17:14:41 18 under 5.1. His Honor asked you some questions about it;
17:14:45 19 Mr. Gerrard asked you some questions about it. And you
17:14:48 20 talked about the fact that there was some income that
17:14:56 21 was -- such as depreciation or gain that was allocated
17:14:59 22 50-50 that under the waterfall would be distributable
17:15:05 23 70-30. Do you understand? We had that conversation.
17:15:08 24 MR. GERRARD: I'm going to object to that.
17:15:08 25 That's not what the witness's testimony was.

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17:15:10 1 THE ARBITRATOR: That's not the conversation I Page 621
17:15:12 2 had with him.
17:15:13 3 BY MR. LEWIN:
17:15:13 4 Q. Well, let me ask you a question. It is not
17:15:16 5 uncommon where -- it's not uncommon in your experience
17:15:18 6 where there's different allocations of income and
17:15:23 7 different distribution schedules; right?
17:15:24 8 A. That can happen, yes.
17:15:27 9 Q. In your experience, especially when there's a
17:15:29 10 disproportionate amount of capital, that is usually the
17:15:33 11 case; right?
17:15:33 12 A. Yes, that can happen.
17:15:34 13 Q. It is usually the case; right?
17:15:38 14 MR. GERRARD: Objection. Calls for speculation.
17:15:38 15 BY MR. LEWIN:
17:15:41 16 Q. In your experience?
17:15:41 17 THE ARBITRATOR: In his experience.
17:15:43 18 You may answer.
17:15:43 19 A. Yeah, that's common.
17:15:45 20 BY MR. LEWIN:
17:15:45 21 Q. And part of the reason why there's
17:15:48 22 disproportionate allocations of distributions when
17:15:53 23 there's disproportionate capital contributions is to
17:15:56 24 ameliorate some risk to the person who's putting up more
17:16:00 25 money; right?

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17:16:02 1 MR. GERRARD: Now I have to object. That calls Page 622
17:16:03 2 for speculation as to why the parties would ever include
17:16:05 3 that language.
17:16:05 4 THE ARBITRATOR: If you know.
17:16:07 5 A. And I really don't. It depends on the
17:16:10 6 circumstances, so.
17:16:12 7 BY MR. LEWIN:
17:16:12 8 Q. In other words, it's negotiated?
17:16:13 9 A. It's negotiated.
17:16:14 10 Q. And the document -- is there any indication in
17:16:20 11 this document that that was not -- that the
17:16:21 12 disproportionate distributions was not negotiated?
17:16:23 13 A. I can't speak to that. I don't know.
17:16:26 14 Q. I'm just saying, did you see anything in the
17:16:28 15 document that indicates that it wasn't?
17:16:29 16 A. No.
17:16:30 17 Q. Okay. So --
17:16:37 18 A. Let me correct that. Although it does appear
17:16:40 19 there is some negotiation because of Exhibit 91. There
17:16:43 20 was some back and forth, so apparently there was some
17:16:46 21 negotiation.
17:16:48 22 MR. LEWIN: Okay. I don't have anything further.
17:16:51 23 MR. GERRARD: Nothing further.
17:16:53 24 THE ARBITRATOR: I think you're done.
25 (The proceedings concluded at 5:16 p.m.)

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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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