

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 33

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EXHIBIT 270

JAMS

SHAWN BIDSAL, AN INDIVIDUAL,)
)
CLAIMANT/COUNTER RESPONDENT,) NO. 17026
)
VS.)
)
CLA PROPERTIES, LLC, A)
CALIFORNIA LIMITED LIABILITY)
COMPANY,)
)
RESPONDENT/COUNTER CLAIMANT.)
)

REMOTE TRANSCRIPT OF PROCEEDINGS

AUGUST 5, 2021

1:07 P.M.

TECKLA T. CLAY, CSR 13125
OFFICIAL REPORTER PRO TEMPORE

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1 APPEARANCES

2 JAMS ARBITRATOR: HONORABLE DAVID WALL

3 FOR CLAIMANT: GERRARD, COX & LARSEN
4 BY: DOUGLAS D. GERRARD
2450 ST. ROSE PARKWAY, SUITE 200
5 HENDERSON, NEVADA 89076
67 FOR RESPONDENT: LAW OFFICES OF RODNEY T. LEWIN
BY: RODNEY T. LEWIN
8665 WILSHIRE BOULEVARD, SUITE 210
8 BEVERLY HILLS, CALIFORNIA 90211

-AND-

9 LEVINE & GARFINKEL
BY: LOUIS E. GARFINKEL
10 1671 WEST HORIZON RIDGE PARKWAY
SUITE 230
11 HENDERSON, NEVADA 8901212 ALSO PRESENT: JUDGE ROB BARE
BEN GOLSHANI
13 SHAWN BIDSAL
JIM SHAPIRO
14
15
16
17
18
19
20
21
22
23
24
25

Thursday, August 5, 2021

Transcript of Proceedings

1:07 p.m.

THE COURT: We're on the record in this arbitration Bidsal versus CLA Properties. I am David Wall the arbitrator in the case, Rodney Lewin, Rob Bare, Mr. Doug Gerrard and Jim Shapiro appearing on behalf of the claimant. The claimant is present Shawn Bidsal, Mr. Lewin, Mr. Garfinkel, Judge Bare on behalf of the respondent CLA which it's representative Ben Golshani is on as well.

Do you need any spellings? I know with Zoom everybody's name is up there. Do you need, do you need anything further at this point?

COURT REPORTER: No thank you.

THE COURT: We reconvened after our hearing on June 25th was truncated and we, I determined that there would be additional briefing. Since the time of that hearing I received a supplemental brief from the respondents on July 9th. I received a supplemental brief on behalf of claimant on July 23rd. Both of those were timely based on the briefing schedule I set forth on June 25th.

So I will turn it over to respondents at

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1 this point. I know Judge Bare you have begun your
2 argument and we stopped you there during it. So you
3 may conclude that argument at this point.

4 MR. BARE: Well thank you Judge Wall. I wanted
5 to sort of simplify this at least in my own mind given
6 the passage of time. And then of course now having the
7 benefit of the recently filed supplemental brief by the
8 opposition. And so I wanted to say really as far as I
9 see this, it's pretty clear that at the end of the day
10 the appropriate decision would be to issue an order
11 that Attorney LeGrand appear to testify in this
12 arbitration.

13 And the reason it's actually in some ways
14 fairly simple I think is that you have an anomaly
15 situation something that imagine if we practice another
16 30 something years we may never see again. We have
17 past legal activities, substantial and material legal
18 events where issues that we want to now discuss in this
19 arbitration have already been broached and discussed.

20 And so this is what's happened of course
21 we know but it's really I think the most salient and
22 relevant part of this analysis it starts with of course
23 the Bidsal versus Golshani district court case at Clark
24 County district court focusing on the timeframe of
25 February 2018. That case has been affectionately

1 referred to as the Mission Square case. If you look at
2 what happened in the Mission Square case in relevance
3 to us, of course there was a notice of deposition of
4 Mr. LeGrand. And I'm going to talk about the specifics
5 from our supplemental briefs that we've provided. But
6 I want to give sort of more of a 10,000 foot view if
7 you will right now.

8 If you look at it's interesting that case
9 again is Bidsal versus Golshani, certainly Mr. Bidsal
10 is there, he's the plaintiff in that district court
11 case. And so certainly as a 50/50 manager in the Green
12 Valley Commerce he's there, and in the Mission Square
13 case the documents and subject matter having to do with
14 the operating agreement of Green Valley Commerce become
15 relevant in that case because the operating agreements
16 were substantially similar as between Green Valley
17 Commerce and Mission Square.

18 So who's participating in this Bidsal
19 Golshani Clark County district court case? Well the
20 name of it again Bidsal Golshani. So the same
21 principals, the same managers, it's 50/50. These are
22 the two guys that are running in the whole dispute
23 about Green Valley Commerce it's their entity, it's
24 their LLC.

25 And you'll see and I'll reference that it

1 comes up in here, you know, all this argument about
2 wait a second Green Valley Commerce is not a party
3 there, not a party there. Well I'm going to suggest
4 and argue I think effectively that that's not so
5 relevant. What's really relevant is requests for the
6 information that's held by Green Valley Commerce and is
7 it privileged. To the extent it is privileged is it
8 then disclosed and used throughout these other cases.
9 That's really the issue.

10 Because most importantly Mr. Bidsal is
11 there. It's his lawsuit in district court, Bidsal
12 versus Golshani. Certainly he's in privity with Green
13 Valley Commerce as one of the 50/50 managers. It's
14 essentially practically speaking it's the same party in
15 my opinion that we're dealing with here. If you look
16 at what that case was really all about.

17 So we have in the Bidsal versus Golshani
18 that LeGrand deposition notice. And look at what
19 happened in regard to that. Again I'll get more
20 specific on it when I get into the individual items.
21 But at this point again with the three cases I want to
22 talk about this 10,000 foot view.

23 In the LeGrand deposition, the notice, all
24 the providing of the documents relevant to the 16.1
25 disclosures and all that, respectfully Mr. Bidsal and

1 the same counsel that you have on this Zoom meeting
2 right now more specifically Mr. Shapiro, respectfully
3 they actively participated in everything having to do
4 with LeGrand's deposition. They did not object. They
5 never asserted privilege at all in everything having to
6 do with Bidsal versus Golshani district court including
7 the deposition of LeGrand. That's case one that stands
8 for the proposition. I think it's an anomaly in that
9 you have all this disclosed material, you have all this
10 testimony by the lawyer Mr. LeGrand and again active
11 participation by the same lawyers and judge that you
12 have here. I've covered that. That's one of three.

13 The second one is of course and I don't
14 know how to pronounce and I've asked, everybody tells
15 me differently. Maybe judge you can tell me, how do
16 you pronounce Judge Steven Haberfeld? Is it Haberfeld
17 or Haberfeld?

18 THE COURT: My understanding it's Haberfeld.

19 MR. BARE: Haberfeld, okay. Of course as you
20 know in just a few months after the reference point
21 I've given in the Bidsal versus Golshani district court
22 case which was February of 2018, May eight 8 and 9 of
23 2018 JAMS has what we can refer to as arbitration one,
24 having to do with what? Having to do with the dispute
25 between Mr. Bidsal and Mr. Golshani having to do with

1 the buy/sell provision in the operating agreement of
2 Green Valley Commerce.

3 But if you look at those parties in Judge
4 Haberfeld JAMS arbitration one, CLA Properties made the
5 demand for arbitration. What is CLA Properties? It's
6 wholly, 100 percent owned by Mr. Golshani. We'll
7 stipulate when we say CLA Properties, we're really just
8 saying Mr. Golshani. He's the only principal, manager,
9 owner of CLA Properties, that's him.

10 And who's the then respondent in that
11 arbitration one? Sean Bidsal, not the entity, but Sean
12 Bidsal. Interesting. Clark County district court
13 case, plaintiff individual Sean Bidsal. Arbitration
14 one with Judge Haberfeld respondent Sean Bidsal
15 represented by again respectfully the same lawyers we
16 have here. And again they actively participate. They
17 don't object or assert any privilege having to do with
18 LeGrand's testimony which was received by Judge
19 Haberfeld.

20 We then have this matter. Well who made
21 the demand for arbitration in this matter? Sean
22 Bidsal. So he appears in all three of these matters
23 with the same counsel. And as we know what happens
24 here in this arbitration as everybody knows resolves
25 only because of the result in the Judge Haberfeld

1 arbitration. In a general sense is that arbitration
2 was all about who gets to buy and who gets to own the
3 Green Valley Commerce properties that came out of the
4 foreclosure.

5 And ultimately Judge Haberfeld rightly so
6 found that Mr. Golshani prevails in that. And so now
7 we have the related, it had to be related of course
8 because given that Mr. Golshani wins with Judge
9 Haberfeld now there's an issue maybe no issue, but of
10 course now there's an issue because we have an
11 arbitration going on. Issue is okay under the Exhibit
12 B waterfall provision given that there is a buy/sell,
13 how is that supposed to work. So it's all related.

14 Certainly it's related. When I say it's
15 the buy/sell provision which started off the Dutch
16 auction and all that. All that is clearly related and
17 directly related to where we're at now that being
18 Exhibit B the waterfall provision given that Mr.
19 Golshani has exercised his writes under the agreement.

20 So what is at issue in all three of these
21 matters that I've just generally outlined that
22 everybody is aware of? What's at issue in all three of
23 the matters where Mr. Bidsal is either the plaintiff,
24 respondent or the demand for arbitration plaintiff, if
25 you will claimant, what's at issue is the Green Valley

1 Commerce LLC operating agreement. That is what is at
2 issue. Everybody knows that.

3 The key issue, what's at issue just like
4 with Judge Haberfeld, respectfully Judge Wall, we all
5 know that, you know, we heard this probably second year
6 of law school within a written agreement if there's
7 some vagueness we can have parole evidence. We can
8 call witnesses. We can try to figure out the party's
9 intent, what was the intent in these documents or
10 contractual provisions that might have some ambiguity
11 or vagueness. Well that's the issue. That has been
12 the issue all along. What is the party's intent?

13 When I say "parties", you know, the issue
14 has always been again with Judge Haberfeld and with
15 you, what is Mr. Bidsal's intent as a manager of Green
16 Valley Commerce? What is Mr. Golshani's intent in
17 working through this buy/sell provision and this
18 Exhibit B waterfall which of course rightly so
19 compliments to Mr. LeGrand was all necessary. Why was
20 it necessary? Because Mr. Golshani put in \$2,834,250
21 into Green Valley Commerce and Mr. Bidsal put in
22 1,215,000. Or put another way Mr. Golshani puts in 70
23 percent of the money.

24 Of course if you're going to have a
25 buy/sell provision where one guy puts in 70 percent of

1 whatever that is four million bucks you have to figure
2 out how to distribute that in fairness given the
3 disparity of the investment. That's where we're at.
4 What has this all been about? What did Judge Haberfeld
5 have to do and respectfully what you are wrapping your
6 mind around?

7 Okay we have some vagueness. We have some
8 interpretation issues. Let's do what we can to figure
9 out how this was supposed to work. What are was
10 Bidsal's intent? What was Golshani's intent? The way
11 this comes out of course Mr. LeGrand just like
12 everybody on this Zoom probably, we can't independently
13 remember a lot from many years ago. Okay we can't. We
14 can't remember all of that. We have to call upon
15 documents, all these e-mails that are disclosed. But
16 what do we actually remember?

17 We're going to take six months, I'm going
18 to walk through this if I'm lucky enough to have the
19 time to do it. It takes six months for LeGrand to work
20 with Bidsal and Golshani and eight drafts to finally
21 get to the Green Valley LLC operating agreement.
22 That's what this lawyer has to have in that
23 circumstance. He happens to have, as shown clearly by
24 testimony that he's given both in the arbitration and
25 in the district court case, Mr. LeGrand clearly has an

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1 understanding practically speaking of the intent that
2 he had as a lawyer which then becomes relevant to the
3 intent.

4 He's the one that's responsible for
5 drafting this thing with these two individuals whether
6 they're clients as Judge Haberfeld sort of represented.
7 Either way it's clear that LeGrand as Judge Haberfeld
8 rightly said is a key witness because he knows and has
9 an understanding of the intent of Bidsal Golshani. And
10 certainly again his intent as a lawyer, he only gets
11 the intent, the six months where there's e-mails back
12 and forth individually with these guys, phone calls to
13 Bidsal by the way for months before Mr. Golshani is
14 involved which I'd like to cover, to formulate as a
15 lawyer his understanding as to the intent of the
16 buy/sell provision and then if it's exercised how the
17 waterfall Exhibit B is supposed to work.

18 Because you know what, it all comes down
19 now in this arbitration the third matter where a
20 gentleman named Sean Bidsal is a litigant, it all comes
21 down to one thing and one thing only, when section 4.2
22 is purchased or sell procedure the buy/sell provision
23 if you will, when it is exercised which it was, how
24 then to deal with the situation under this waterfall
25 provision, excuse me.

Page 12

1 And that's really what it's all about.
2 What did the parties intend in the language having to
3 do with this waterfall provision is really what's in
4 front of you. I will make a representation, it will be
5 quick I hope, as to I felt respectfully, and I'm not
6 trying to, you know, I never by the way I've learned
7 not to play judge any more. But I will say with that
8 as a caveat I would think that an arbitrator or judge
9 would appreciate an offer proof as to where is Mr.
10 Lewin going with this. If we call Mr. LeGrand what by
11 way of an offer of proof are we going to be asking for?

12 I'll cover that in two or three things
13 specifically I'll represent that Mr. Lewin is going to
14 ask him.

15 THE COURT: Let me stop you there for a second,
16 if the offer of proof is intended to contain
17 potentially privileged material I don't want to hear
18 it. I don't need it. What the testimony ultimately
19 might be let's say about a party's intent as
20 communicated to apparently to Mr. LeGrand is not
21 relevant to the inquiry from me that I have to deal
22 with about whether there's been a waiver of attorney
23 client privilege. I don't want --

24 MR. BARE: I can leave it at this if you'd like.
25 I could simply leave it that of course Mr. Lewin wants

1 to ask questions about the party's intent, that being
2 Mr. Bidsal, Mr. Golshani's intent as understood, if
3 understood, which we think it was by Mr. LeGrand as to
4 how essentially the waterfall is supposed to work given
5 that the Judge Haberfeld decision happened and here we
6 are. I can leave it at that if you'd like.

7 Okay. I wanted to now do something that
8 is a little different game plan wise than I had thought
9 about and that is I wanted to go through Mr. Bidsal's
10 supplemental brief because, I want to do this not by
11 way attacking it necessarily as some sort of ploy or
12 strategy. But really I'd like to talk about some
13 things that are mentioned in this brief and let you
14 know what we agree with and let you know what
15 respectfully how we think the law in this situation
16 operates in regard to, you know, the positions taken in
17 the supplemental brief.

18 Would that be helpful? It's maybe a
19 different approach. But I'm going to try to do that
20 and I think it will be helpful. I am looking at the 17
21 page supplemental brief and on page two, again this is
22 the opposition supplemental brief, and on page two line
23 five it's states, "Bidsal's attorneys objected to
24 LeGrand testifying on the basis that only the intent of
25 the parties to the operating agreement, the meaning of

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1 the operating agreement was at issue. And the only way
2 LeGrand could testify regarding the intent of Mr.
3 Bidsal would be to disclose privileged communications
4 between LeGrand and Bidsal during which Mr. Bidsal
5 communicated to LeGrand his intent and understanding of
6 the language of the operating agreement."

7 We agree with that. Of course if we
8 didn't have everything that happened in that Mission
9 Square case and including of course the deposition of
10 LeGrand, and if we didn't have arbitration one with
11 Judge Haberfeld with the testimony of LeGrand of course
12 you have a situation where we agree. The privilege is
13 held by Green Valley Commerce.

14 And only both members since it's 50/50,
15 both members would have to agree to waive a privilege
16 held because companies can only act through the
17 individuals of course. If Green Valley Commerce has
18 the privilege, which they do, we agree. The only way
19 if it exists at all that it could be waived would be
20 both parties have to agree to waive it. Neither party
21 could unilaterally waive it.

22 Obviously in this arbitration Mr. Bidsal
23 in his discretion because he wants Mr. LeGrand to add
24 the evidence of what the intent of the parties, I mean
25 that's really why wouldn't anybody want to know what

1 the intent of the parties were? That's what Mr.
2 Golshani wants to do.

3 And so the idea here is I represent to you
4 that no doubt we agree with Mr. Bidsal's counsel when
5 they say, "hey wait a second the privilege is held by
6 Green Valley Commerce." And it would have to be waived
7 by both. You can't have a unilateral waiver. In fact
8 I know judge that the proceedings before I got involved
9 I read through the transcript and you said that. You
10 said, "wait we can't have a unilateral waiver here."
11 We agree with that.

12 That's not what happened here. This is
13 not an arbitration without the past history where we're
14 trying to get away in some way with Mr. Golshani
15 saying, "I waive and therefore a waiver should be
16 operative." No we would agree that if it wasn't for
17 all this past activity the items would be privileged.
18 Why aren't they? If they are, if there was a privilege
19 at all why are they waived essentially?

20 Well Judge Haberfeld heard it all
21 basically he received a lot of testimony from LeGrand
22 about the intent of the parties. The court reporter
23 there in the arbitration one with JAMS heard it all.
24 The court reporter taking the deposition in the
25 district court case heard it all. For that matter as

1 you probably know arbitration one was appealed. Well
2 first it went to Judge Kishner to approve the
3 arbitration award. All the stuff is in there so Judge
4 Kishner knows all about it. Her law clerk knows all
5 about it probably better than her. You have all that.
6 And where else? The supreme court with the appeal they
7 know, it's all mentioned in there.

8 So what I'm getting to is when I look at
9 their brief they seem to suggest that we don't know
10 that the privilege is held by Green Valley Commerce.
11 So I want to make it clear, we know that's who holds
12 the privilege. We know that under normal circumstances
13 unilateral waiver could never apply.

14 And by the way as a quick, hopefully quick
15 segway to all this, it's come up from time to time you
16 know to the extent there's a privilege, to the extent
17 there's a privilege, to the extent there's a privilege.
18 That's a good point because these two co-managers given
19 that this lawyer decided and everybody knew it there
20 was no objection, Sean didn't object is what, part of
21 what I'm going to read later if I get the time to do
22 it.

23 I mean the protocol was individually deal
24 with Bidsal, individually deal with Golshani for six
25 months in various e-mails reflected in the billings

1 reflected in all the e-mails disclosed. Talk to them,
2 talk to Bidsal on the weekend I'm going to show you
3 that, LeGrand, you know, and come up with this
4 operating agreement.

5 It's interesting all this to the extent
6 there's a privilege because you know what? These two
7 and Judge Habersfeld felt it was joint representation,
8 we agree with that, that's a fair assessment of what
9 was going on here. In any event there's no privilege
10 as between these two joint clients. Whether you want
11 to view them as joint managers or whether you want to
12 view them as two clients or however you want to view
13 them.

14 You know it can't be and it always would
15 have to be if LeGrand talks to Bidsal as they did for a
16 month and a week before they ever talked to Golshani,
17 I'm going to show that too, has all these discussions
18 and both of the parties know that's fine with them, it
19 can't be LeGrand that he is somehow unable to share
20 with Ben you know what Sean told him on the weekend or
21 vice versa. Anything either one of them tells their
22 lawyer the other one gets to know about it and
23 everybody agreed to that. So is that even a privilege
24 really?

25 I mean, but what we have here is we have

1 an invocation late after by the way, and I think,
2 respectfully this is an important thing I think, in
3 this arbitration with you Bidsal called LeGrand as a
4 witness. And he pulled that rug out when? The last
5 day of the testimony as I understand it, the last day
6 of the hearing. Now all of a sudden after all this
7 time he decides, "you know what, we're worried about
8 what LeGrand is going to tell the truth about here on
9 this waterfall. Let's assert privilege." That's
10 what's really going on here. And that's important.

11 I think timing should be important. And
12 you know what when I go through this Wardley analysis,
13 again there's a lot to this I'm sorry it takes a while,
14 but fairness is always in the air of course. I know it
15 always was when you were a judge and as an arbitrator
16 certainly it was with me. I think the 8th Judicial
17 District Court would be proud of the way we were fair.
18 Fairness is always in the air.

19 But you know what? Under Wardley fairness
20 is an element. It's an element to be considered having
21 to do with whether there was a waiver. It's not just
22 in the air, it's also an element to be considered.
23 Fairness. So that goes to the fairness issue.

24 All right going to page three of their
25 brief on line six they say, "importantly the CLA brief

1 failed to identify any testimony of LeGrand divulging
2 any communication with Bidsal about the meaning of the
3 operating agreement." And that's bolded and
4 emphasized. Well I said this already but you know of
5 course it could be most likely LeGrand cannot remember
6 specifically a lot of things that were in these
7 discussions that he billed for and that were at least
8 described in a lot of these e-mails that were disclosed
9 that were just between him and Bidsal. In the e-mails
10 between LeGrand and Bidsal only he doesn't remember the
11 specifics. What does he remember? And we know it
12 because we saw it in Haberfeld. He remembers the
13 intent of the parties.

14 In fact I'm going to cover if I have time
15 questioning the opposition did with him that where
16 clearly he's asked about the intent of the parties.
17 It's real clear that LeGrand knows what was the intent
18 of the parties in the buy/sale provision. And he knows
19 the intent of the parties and what you're dealing with
20 that is this waterfall provision.

21 Page three at the bottom of their brief it
22 seems to be a criticism that I'm going to agree with.
23 "What the CLA supplemental brief does make clear is the
24 real reason CLA is seeking LeGrand's testimony, CLA
25 simply wants LeGrand to testify about the meaning of

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1 the operating agreement language which is what the
2 arbitrator is supposed to decide." What? Look, we
3 think that it's likely that just like Judge Haberfeld,
4 Judge Wall you'd be interested in potentially the most
5 relevant testimony as to the meaning of the operating
6 agreement the waterfall provision, the intent of the
7 party. And just like Judge Haberfeld the lawyer is a
8 great witness having to do with it. And Bidsal made
9 the decision to allow for that up until this last pull
10 the rug out moment.

11 All right. Page 4 of their brief they
12 say, "Judge Haberfeld" at line 7, "Judge Haberfeld
13 decided LeGrand was actually representing CLA and
14 Bidsal instead of GVC." I'm not sure the judge went
15 that far. He in fairness noted, because it was pretty
16 apparent given this way of doing business that LeGrand
17 exercised, he really is representing both these guys.
18 He's dealing with them individually. He did the
19 operating agreement. It took six months, eight drafts.

20 And so the opposition in their
21 supplemental brief says, "well you know Judge Haberfeld
22 thought that these guys were sort of jointly
23 represented" is contradicted by the plain language of
24 the GVC operating agreement. That seems to be an
25 argument standing for the proposition that the judge

1 was wrong. We agree with the judge. We agree with
2 Judge Haberfeld.

3 There was in fairness sort of a, you know,
4 mutual representation of these guys together. You know
5 you can represent as a lawyer, and I know you said I
6 will not get into based upon your direction where
7 there's a conflict of interest. Like you said that's
8 not your province. You're not going to get into
9 conflict of interest, even though of course despite you
10 saying that a large part of the opposition brief gets
11 back into it after you said not to.

12 THE COURT: I didn't say not to get into whether
13 there's a conflict of interest. One issue is whether
14 that conflict is somehow waived. And the other issue
15 is whether if as Mr. LeGrand testified briefly in April
16 I think he's reluctant to, at that time at least was
17 reluctant to testify because of some potential issue
18 with the bar whether I could compel him to do that
19 anyway.

20 MR. BARE: Fair enough.

21 THE COURT: And --

22 MR. BARE: Fair enough. On that note if I
23 could, you know, react or give a comment having to do
24 with that note I would hope it would put you at ease to
25 the extent we can. We want to. What we're asking for

1 is an order that he testify based upon either that a
2 privilege didn't exist. I know it's all about waiver
3 of privilege, so assuming a privilege exists it was
4 waived because of all the things that we've talked
5 about in the course of activity along the way with the
6 same, with Bidsal same lawyers and all that.

7 So that's the order we're asking for is
8 that he be compelled, ordered to testify as you find
9 there's a waiver of privilege. It's at issue, it's
10 fair and any other reason that comes up relevant to
11 what comes up here. And we know that, you know, just
12 like if somebody is a witness and they assert the 5th
13 Amendment we don't know what's going to happen when
14 LeGrand then responds to the order to testify.

15 We know most likely, you don't want to get
16 into and rightly so, the RPCs or does he have bar
17 problems or any of that. But we think it's clear that
18 you can issue an order that he testify. We think he
19 will testify if you issue that order because you know
20 what, the relevant part of his testimony is what was
21 the parties intent when they entered into this
22 operating agreement having again to do with the
23 buy/sell and ultimately the waterfall.

24 My guess is he'd be comfortable. I don't
25 know. But my guess is he'd be comfortable enough to

1 say, "okay there's been a waiver. I can now testify."
2 We'll see what happens. We can't control, neither can
3 you. We can certainly get an order that he testify.
4 And we hope that he then does testify with the waiver
5 of privilege.

6 THE COURT: I mean that was one of the points we
7 had back in April. If there's an issue as to whether
8 he can testify to communications that one party thinks
9 is privileged, a ruling from me for instance that the
10 privilege is waived essentially gives Mr. LeGrand cover
11 on that issue. Okay. I don't know if cover is the
12 right word.

13 MR. BARE: It's a good word.

14 THE COURT: Okay. I can't provide him any cover
15 on the issue of a conflict of interest. So --

16 MR. BARE: Understood.

17 THE COURT: Even if --

18 MR. BARE: We're not asking you to.

19 THE COURT: Even if the waiver of the privilege,
20 what I asked for because one of the discussions we had
21 back in April was the issue of whether the conflict of
22 interest, and I basically said then I think although I
23 haven't looked back at it that after he said, "look the
24 potential of our complaint out there I'm not going to
25 testify." I can't help him with that. I can't help

1 either party with that unless there's some authority
2 out there that says I can compel him to testify when he
3 has a concern about whether there's a conflict of
4 interest. And if there is any such authority, hey
5 provide it to me. Now there hasn't been any because
6 I'm pretty sure there isn't any. And so that was one
7 of the issues that we, that I wanted briefed.

8 And I assume since in neither of your two
9 briefs was that issue really addressed that there isn't
10 any law out there that says I can compel him, I can
11 provide him with the cover necessary to protect him
12 from any bar complaint for a violation of the rules on
13 conflict of interest.

14 MR. BARE: Right other than the JAMS authority
15 that you have which I'm sure you're aware of, we agree
16 with that. We're just again looking for an order that
17 we think is right on point with the any privilege that
18 existed being waived because of the course of conduct,
19 action and what you have you.

20 Getting back to this idea of Judge
21 Haberfeld and, you know, Mr. Bidsal's position that
22 maybe he was wrong when he talked about this joint
23 representation because it's contradicted by the
24 operating agreement, you know, the operating agreement
25 says whatever it does say. The question is not the

1 operating agreement. The question is what happened in
2 the real world. What happened in the Bidsal Golshani
3 district court case was he was deposed, LeGrand. What
4 really happened in arbitration one was he testified.

5 So, you know, the operating agreement of
6 course is binding in so many ways. We know that from
7 arbitration courses, that's the first thing you look
8 at. But in this sense having to do with the
9 attorney/client privilege it's what really happened,
10 was it waived or not waived and, you know, despite what
11 maybe some construct in an operating agreement might
12 say. We agree with the judge that there was in some
13 ways fairly some joint representation going on here.

14 The opposing brief on page 4 line 27 talks
15 about at the end talks about how LeGrand didn't give
16 any advice on the consequences to the terms of the
17 operating agreement to Bidsal, I imagine you know the
18 position might be taken that that's also to Golshani.
19 That flies in the face of common sense and all the
20 evidence.

21 You really mean to tell me that when
22 LeGrand is having multiple phone conversations that he
23 said sometimes is two and three times a day over six
24 months, independent you know sometimes with Bidsal, all
25 the time with Bidsal initially for the first month and

1 a week. And all along the way that he's not telling
2 either party how the agreement would work or how the
3 buy/sell provision, we have some evidence actually of
4 that, of what LeGrand, in the e-mails and what have
5 you. So he did give advice to them. He can't remember
6 exactly again what their positions were other than
7 what's in already these disclosed records. But again
8 LeGrand can offer what was his view as to the intent of
9 the parties.

10 Page six of their brief I'm not going to
11 cover every page. But page six the two head notes
12 there, "Green Valley Commerce was not a party to the
13 first arbitration. Green Valley Commerce was not a
14 party in the Mission Square litigation." So what? Not
15 relevant. It's not relevant based upon what was
16 disclosed. I mean if counsel for Green Valley Commerce
17 is to be a witness and the two managers, the only two
18 managers of Green Valley Commerce are in legal
19 activities and they decide to disclose at that point
20 guess what they're doing? This is not a unilateral
21 disclosure, this is a mutual disclosure. Once it's
22 disclosed, it's disclosed.

23 It would be like these guys coming in here
24 now and saying we're all in an elevator and we talked
25 all about confidential information to someone else in

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1 the elevator. And now that that person wants to talk
2 about it, it's not disclosed. It's pretty simple.
3 When something that's otherwise privileged is disclosed
4 to a third party, it's disclosed and it can be used.
5 It doesn't matter whether Green Valley Commerce is in
6 the first arbitration or in the Mission Square as a
7 named party.

8 The manager Bidsal, again what's the
9 commonality all three of these things Sean Bidsal, same
10 lawyers. So what else can I say on that. It's what
11 was disclosed by lawyers representing Bidsal on issues
12 having to do with what, with Green Valley Commerce and
13 the operating agreement, same issue. It doesn't matter
14 whether they're a party or not.

15 Page eight of their brief they talk about
16 Wardley, the case Wardley that I brought up. This goes
17 to what I just said line 27 page 8 they say, "in the
18 present matter Wardley is inapplicable because Green
19 Valley Commerce never participated in any of the prior
20 litigation." Really? Okay by as a named party
21 certainly that's true. But it's only two members and
22 the lawyers representing Bidsal actively participated,
23 it's the same parties basically. And it's not at their
24 privity with Green Valley. How could they be in more
25 privity it's only two managers and all the same

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1 lawyers.

2 What was disclosed with those lawyers and
3 with Mr. Bidsal, if he chooses to disclose things and
4 allows LeGrand to testify about purportedly all this
5 confidential information, they're now stuck with it
6 when they request him as a witness in this arbitration
7 and pull the rug at the last minute.

8 I'm going to skip a couple of things I was
9 going to say from the brief. I do want to cover some
10 of the specific items we provided by bate stamp
11 reference in such in our supplemental brief. Just a
12 couple more things actually from their brief that I
13 think are important on behalf of my client. Page 10
14 line 17 of the opposition supplemental brief they say,
15 "while the transcript does discuss communications
16 between LeGrand and the members of the company, of
17 course Bidsal Golshani, in reference to the formation
18 of GVC and completing the operating agreement it does
19 not ever reference or discuss any communications
20 between Bidsal and LeGrand regarding the meaning of any
21 specific language of the operating agreement or
22 regarding what Bidsal's intent was."

23 Even if that's true which it's really not
24 practically speaking, so what? That doesn't matter.
25 What matters is based upon all these conversations and

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1 dealings we know LeGrand had with Bidsal which Golshani
2 always gets to know about. Let's stay in the privilege
3 lane, LeGrand knows what the parties intent was. We
4 would hope, respectfully, that just like Judge
5 Haberfeld you would respect that's a really great
6 witness to help you to the extent you need help. He's
7 a relevant witness that knows the intent of the
8 parties.

9 They go on on page 13 line 18 to say,
10 "well Green Valley Commerce was not present at the
11 first arbitration to object." Really? The two
12 managers, the only two managers were there. Bidsal
13 could have objected, same lawyers for Bidsal were
14 there. Are you really trying to tell us, are they
15 trying to sell that because Green Valley Commerce
16 wasn't a named party in the first arbitration that if
17 the lawyers for Bidsal, the only other 50 percent
18 manager of Green Valley Commerce, decides they're going
19 to waive privilege all over the place that now in a
20 different case no, no you can't. That prior
21 disclosure, that prior waiver, that doesn't matter any
22 more. The law never would work that way. Once it's
23 disclosed, it's disclosed.

24 And then I think actually there's
25 something on page 15 it's my last reference that I

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1 think I can say it best right after where the
2 opposition says this is not their burden essentially.
3 But it is their burden if, you know, the law is pretty
4 clear if you assert a privilege it's your burden. But
5 on page 15, line 3 the parties asserting the privilege
6 has the burden, they do say that. After saying that,
7 they don't.

8 But anyway of relevance to this item I'd
9 like to cover they say at line 5, "Bidsal has already
10 established that any communications which Bidsal does
11 not believe exists between himself as a representative
12 of the company and LeGrand as the company's attorney
13 about the meaning of the language to be using --

14 COURT REPORTER: Please slow down.

15 MR. BARE: My apologize to you. I will.

16 THE COURT: Why don't you read that again.

17 MR. BARE: It was a long one. So I'm trying to
18 speed myself up. I apologize. "Bidsal has already
19 established that any communications which Bidsal does
20 not believe exists between himself as a representative
21 of the company and LeGrand as the company's attorney
22 about the meaning of the language to be used in the
23 operating agreement would be privileged as a matter of
24 law under NRS 49.095. The communications if they
25 occurred were not intended to be disclosed to any third

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1 party." That line right there is everything. That's
2 it. I could probably just stop. I don't want to.

3 I need to cover some specific references.
4 Really the communications with LeGrand giving a
5 deposition in Bidsal versus Golshani with LeGrand
6 testifying in front of Judge Haberfeld were not
7 intended to be disclosed to any third party. What
8 about Judge Haberfeld? He's the same type of third
9 party that this brief says in reference to you Judge
10 Wall you don't get to hear because you're a third
11 party. Haberfeld is a third party, same exact
12 situation you're in. What about everybody? What about
13 the court reporters? What about everybody privy to the
14 transcripts?

15 THE COURT: What privileged communications
16 between Mr. Bidsal as a manager member of Green Valley
17 Commerce and Mr. LeGrand, what privileged
18 communications between those two Mr. Bidsal in his role
19 as a manager member of Green Valley Commerce and Mr.
20 LeGrand, what communications specifically that would be
21 privileged were disclosed to Judge Haberfeld? Because
22 what I saw is or even in the deposition in that case
23 what I saw was I don't remember communications. I
24 don't have any specific recollection as to what was
25 said. So what privileged communications were disclosed

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1 specifically?

2 MR. BARE: Well I'm going to cover some them in
3 the specific references that I have that could be
4 arguably privileged. It does go to that issue again
5 we think.

6 THE COURT: Now or later?

7 MR. BARE: Well I'm getting to it next.

8 THE COURT: All right.

9 MR. BARE: I'm getting to it next. I'll try to
10 move as quickly as I can. It's just like there is a
11 lot to this one.

12 THE COURT: I'm not asking you to move quickly.
13 I asked a question. If you tell me "I'm going to
14 answer it later," okay that's fine.

15 MR. BARE: I'd like to answer it partially now
16 if I could please.

17 THE COURT: Sure.

18 MR. BARE: Okay. It stands, it's clear from the
19 evidence, it's common sense but it's also evidence if
20 you look at all these e-mails that were disclosed
21 there's a number of e-mails just between LeGrand and
22 Bidsal that Mr. Golshani is not privy to especially for
23 the first month-and-a-half or so when LeGrand is
24 dealing only with Bidsal having to do with the creation
25 of the operating agreement with Green Valley.

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1 Those e-mails, a position could have been
2 taken that they're privileged. It's the same position
3 that's being taken now. The position taken now is,
4 "wait a second anything that Bidsal and LeGrand talked
5 about is privileged." Well you disclosed tons of
6 e-mails as between only LeGrand and Bidsal about the
7 substance of the Green Valley Commerce operating
8 agreement, the buy/sell provision, how the waterfall
9 was supposed to work. That's a disclosure in and of
10 itself that we know about because we have the e-mails
11 disclosed. But in addition to that --

12 THE COURT: Were they exhibits before Judge
13 Haberfeld or were they just disclosed during the
14 litigation?

15 MR. BARE: In some cases I think both. I mean
16 as I understand it the deposition was read into
17 evidence with Judge Haberfeld as I understand it. I
18 mean Mr. Lewin and Mr. Garfinkel could weigh in on
19 that.

20 THE COURT: I'm talking about the e-mails.
21 There's a fundamental difference between an attorney
22 disclosing to the parties during the course of
23 discovery information because they're each manager
24 members of Green Valley Commerce. And so any
25 privileged information can be shared between those

1 members. There's a difference between that and being
2 disclosed to a third party.

3 MR. LEWIN: Your Honor, would it be helpful for
4 me to shed some light on this issue?

5 THE COURT: I have no idea if it would be
6 helpful.

7 MR. LEWIN: The entirety of Mr. LeGrand's file
8 was disclosed during the deposition and marked by the
9 court reporter. They're in Exhibits 196. I think it's
10 196, 197, 198. The exhibits that were marked in the
11 arbitration were, are exhibits in our case but only
12 portions of them have been admitted so far. There are
13 some of those e-mails that were marked in the
14 arbitration number one that have not yet been admitted
15 into evidence in this case because it depends on what
16 happens with Mr. LeGrand.

17 They were marked, all of the exhibits were
18 marked and admitted into evidence in arbitration number
19 one. Those exhibits were designated in it's, in our
20 operation as 196, 197, 19 if that helps.

21 THE COURT: I don't want to cut to the end of
22 the mystery before I read the rest of it. Is the point
23 here going to be, "hey here's an e-mail, here's two
24 e-mails from Mr. Bidsal to Mr. LeGrand during the time
25 when the operating agreement was being negotiated that

1 became exhibits and were disclosed and therefore
2 there's a waiver of the privilege? Is that going to be
3 the argument today? That's kind of why we're not
4 arguing it back in June. And so that -- because I
5 specifically remembered Mr. Gerrard saying, "look if
6 you're going to point to specific things in the
7 thousands of pages you've added, give us notice if
8 that's where we're going today." I just see us being
9 in the same rabbit hole we were in on June 25th and I
10 really want to avoid that.

11 MR. BARE: Well there's no rabbit hole because I
12 did in the supplemental brief disclose key, I put in
13 there key bate stamp reference points to things I want
14 to cover now.

15 THE COURT: All right let's go.

16 MR. BARE: To show that, so I'll skip over
17 another part of that response and get right to the meat
18 and potatoes of it. I'm sorry this is taking so long.
19 I was asked to analyze the situation and there's
20 probably, unfortunately quite a few moving parts.
21 We're talking about a district court case, a prior
22 arbitration, a whole budge of activities, that happened
23 to waive the privilege. So here we go.

24 I'm referring now to only items that were
25 specifically now disclosed in our supplemental brief by

1 reference either page number or bates number. Exhibit
2 A to our brief, to our initial brief in this, regarding
3 this argument of course was the notice of deposition of
4 David LeGrand. I've already covered with you last time
5 the full extent of what LeGrand did to comply with it
6 these hours on a Sunday and all that.

7 The only thing I want to call up on that
8 this time is on page 3, paragraph 2 of that exhibit.
9 That's the only thing I really want to talk about.
10 It's an interesting paragraph that is if you look at
11 the certificate of service of that notice of deposition
12 of LeGrand it is respectfully received by Mr. Shapiro
13 who's on the call here. Of course he's in the capacity
14 of representing Mr. Bidsal at that time.

15 Page 3, paragraph 2 you can see it there
16 talks about, look it uses a word privilege twice in
17 that paragraph essentially that paragraph to summarize
18 it is, "if you're going to assert a privilege Mr.
19 Shapiro on behalf of Mr. Bidsal respectfully, then go
20 ahead and do it." And that paragraph specifically says
21 right in the beginning paragraph 3 early on privilege
22 if you're going to assert it please assert it.
23 Privilege be asserted. No privilege was asserted.

24 THE COURT: You're talking about Exhibit A the
25 deposition notice? Exhibit A the first page is --

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1 MR. BARE: Page 3 paragraph 2 I believe is what
2 it is.

3 THE COURT: Hold on. Okay here's Exhibit A page
4 3 is right here.

5 MR. BARE: Page 3 of the exhibit.

6 THE COURT: Here's the exhibit, page 1, page 2,
7 page 3.

8 MR. BARE: Could you scroll just a little bit
9 more please?

10 THE COURT: Subpoena duces tecum to David
11 LeGrand there we go.

12 MR. BARE: Okay. Please let's see if you could
13 scroll a little bit more. On my Ipad it comes up
14 different. I don't know why.

15 MR. LEWIN: I think you just passed it right
16 there. It's paragraph number two. I think that's
17 where he's talking about.

18 MR. BARE: That's what it is paragraph 2, for
19 some reason my Ipad says this is page 3.

20 THE COURT: Page 3 of the subpoena.

21 MR. BARE: That's what it is. I apologize for
22 that.

23 THE COURT: It says, "and to the extent you,"
24 that means Mr. LeGrand right, "decline to produce any
25 document upon any claim of privilege, any claim of

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1 privilege, please state about particularity, the
2 privilege claim," and so this is to Mr. LeGrand.

3 MR. BARE: It's to Mr. LeGrand. It's a
4 certificate of service to Mr. Shapiro in regard to
5 representing Bidsal in this matter. So I don't think
6 it's a stretch to say that Mr. Shapiro knows that if
7 there's a privilege to be asserted on behalf of Mr.
8 Bidsal certainly give Mr. LeGrand that information and
9 he'll assert it.

10 THE COURT: There's no privilege.

11 MR. BARE: Well that's the --

12 THE COURT: Hold on. There's no privilege to
13 have LeGrand disclose documents to the other manager
14 member; right?

15 MR. BARE: I agree. And that's why I said, you
16 know, there's a lot to it. You know that's why I said
17 this, you know, sort of editorial comment that we all
18 made to the extent a privilege applied, you know, they
19 asserted a privilege here. I mean that's what's going
20 on. You let me go first I appreciate it, but it's
21 their burden. They're asserting there's some kind of a
22 privilege. And again, we've editorialized. We've made
23 the comment along the way to the extent there's a
24 privilege it's been waived.

25 THE COURT: There's no waiver of the privilege

1 by allowing the lawyer to disclose his file or
2 documents to another manager member SPELSPEL.

3 MR. BARE: That's true. I agree with that 100
4 percent. But practically speaking where is it then
5 going to be used? Are these e-mails that are
6 privileged apparently or maybe they're not privileged
7 but now they're being asserted to be privileged. Are
8 they, where are they going to be used? And where were
9 they used? That's the situation they were used in,
10 disclosed in either in a deposition where LeGrand
11 testified or in the arbitration with Judge Haberfeld
12 that's what we're talking about here.

13 THE COURT: Okay.

14 MR. BARE: Okay. Now I know I've taken some
15 time and I appreciate --

16 MR. Garfinkel: Excuse me Mr. Bare, one second.
17 Let me speak to that and it is important it sounds like
18 because of the questioning. Just so you know the
19 entire record before Judge Haberfeld with all of the
20 exhibits, the transcripts, everything was to be part of
21 the Court record in front of Judge Kishner. But for
22 the motion to, from the arbitrator's award and the
23 counter motion to vacate literally she had three
24 volumes of documents. And I believe, your Honor, all
25 of that is also part of the record before the Supreme

1 Court.

2 THE COURT: Okay.

3 MR. BARE: All right. I'm going to try to take
4 just really not, not, certainly not 45 minutes but
5 certainly 15 or 20. I want to get to something now
6 that it occurs to me might even be the meat and
7 potatoes having to do with the line of questioning that
8 we had so far today respectfully judge that you've
9 provided to me and to us.

10 I want to go through and I'll skip some
11 but I want to go through the specific bates stamped or
12 otherwise specifically referenced items in our
13 supplemental brief and tell you why they're relevant.
14 Hopefully that will give you better insight with all of
15 this.

16 I want to start with Exhibit B which is
17 the 16.1 second supplemental disclosure in the, in the
18 district court case. That's the one again that Mr.
19 LeGrand took 5, 6 hours on a Sunday to provide
20 documents. It's 600 pages of items disclosed having to
21 do with Green Valley Commerce and it's operating
22 agreement mainly.

23 I want to turn your attention please,
24 everybody's attention to Exhibit B bates stamped DL0002.
25 And this is an e-mail from Mr. LeGrand to Mr. Bidsal

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1 only, okay. And I think you're going to see, I'm going
2 to cover some of these, it's going to show you what was
3 really going on here. This is an e-mail June 17th 2011
4 again LeGrand to Bidsal only. The relevant part of
5 this e-mail DL0002, LeGrand says to Bidsal, Golshani
6 doesn't know at the time this is going on, "I did not
7 have Ben's last name." So he doesn't know Ben's last
8 name. "I had to do a lot of work to make this
9 operating agreement work but I crammed a square peg
10 into this one. Do you want a binding arbitration?"

11 But it says this, "call me over the
12 weekend." So that is evidence that we know that
13 LeGrand is speaking on the phone with Mr. Bidsal on the
14 weekends even at this point in time. Take a look at
15 how Mr. Golshani is still referencing Ben. We know
16 that they're talking over the weekend. Keep that date
17 in mind, June 17th 2011. Now DL00022 again here we go,
18 this is another e-mail from Mr. LeGrand to only Bidsal
19 and this is reflective of what's going on. How could
20 it be more clear. Look at this e-mail June 18th, "I
21 still need Ben's last name." He's still Ben blank,
22 00031, e-mail June 23rd again LeGrand only to Bidsal,
23 "I never got Ben's last name."

24 Pretty good evidence that LeGrand is not
25 talking with Golshani. He doesn't know his last name.

1 He's talking only with Bidsal, DL00032, June 27th now
2 another e-mail from LeGrand to Bidsal. What's the
3 subject of this e-mail, the operating agreement. Sean,
4 okay, first name basis that's fine. Sean talks about
5 redline and clean revised of what? The Green Valley
6 Commerce operating agreement. But what else does it
7 again say? "I never got Ben's last name."

8 So Ben Golshani the guy putting in the 70
9 percent is still Ben blank. He doesn't even know his
10 last name yet. And what is in, if you look at DL00059
11 and again I'm trying to move quickly I know you have to
12 find these, or if you care to, DL00059, what do we have
13 there? We have the most I think relevant document
14 respectfully judge that you have to now wrap your mind
15 around given what's happened in this whole story. We
16 have Exhibit B, the waterfall provision. There it is.

17 It's something that Mr. Bidsal is working
18 with Mr. LeGrand on at DL 00059 the waterfall provision
19 Green Valley Commerce. And interesting look at what
20 happens at DL00085. There's a redline version of
21 Exhibit B the waterfall provision a redline version.
22 We all know makes sense I can make argument that I
23 think I can make reasonable conclusions from, redline,
24 LeGrand is working only with Bidsal not working with
25 Golshani yet, that we can see.

1 Redline version of Exhibit B the waterfall
2 provision the same one Mr. Lewin now wants to ask
3 LeGrand questions about. Take a look at DL000085 this
4 redline version. How is Ben referred to there even in
5 the redline version? The guy with the 70 percent, the
6 guy with 2.8 million in. He's Ben blank three times.
7 He's still been blank.

8 Lastly let's go on to see the rest of this
9 little story DL00109. Again exactly what we want to
10 ask about in this arbitration. What do you see at
11 DL00109 Exhibit B another generation of it Ben
12 Golshani, well he's Ben blank still. So let's add this
13 up.

14 June 17th, this e-mail referenced is July
15 22nd, so from June 17th to July 22nd I think that's a
16 month and a week, while the operating agreement that
17 you're asked to make a ruling on having to do with the
18 waterfall provision, Exhibit B the waterfall provision
19 it's appearing in all the e-mails that are disclosed
20 where LeGrand is dealing only with Bidsal. It's a
21 month and a week and Ben is still Ben blank.

22 We want to ask LeGrand about that. Again
23 fairness under Wardley, fairness is an element to this
24 disclosure issue and waiver issue. Look at please
25 DL00137 it's another e-mail this time it's from Bidsal

1 to LeGrand. So again they're dealing with each other
2 without Golshani involved this time it's initiated by
3 Bidsal. What does he ask the lawyer? "Any news from
4 American Nevada?" Wow, what does that tell us?
5 American Nevada is the entity that had the two
6 foreclosure properties, the foreclosure properties that
7 ultimately became the only asset really of Green Valley
8 Commerce.

9 So we have evidence here that Bidsal is
10 having these communications with LeGrand about you know
11 American Nevada, the properties in question, you know.
12 That's advice in order to answer that Mr. LeGrand would
13 have to give him advice. So they're talking to each
14 other. We know for sure common that LeGrand is giving,
15 he's talking to Bidsal on the phone. He's giving him
16 advice. If he doesn't know it, I mean what's something
17 that all lawyers almost always do? They create bills
18 and they bill for their work. Excuse me.

19 DL00197, it's just one, I could skip the
20 others. I gave notice of referencing them now but
21 DL00197 is an invoice from LeGrand. All you need to do
22 is look at that thing. "TC", what does that mean?
23 Telephone call probably. Probably means telephone
24 call. So he's having telephone calls with Bidsal.
25 Look we understand LeGrand can't remember all these

1 telephone calls. So what? But what he does know is
2 the intent of the parties based upon all the dealings
3 of the telephone calls. And that's the subject that we
4 want to get into with them in this arbitration. We
5 have a right to do it. It's fair.

6 And if it wasn't privileged and, you know,
7 they say it was privileged, we know where it's been
8 used and as my two contemporary lawyers Mr. Lewin and
9 Garfinkel can help me out since they were in the
10 trenches on it before my involvement, all this stuff
11 was disclosed all over the place in the arbitration
12 with Judge Haberfeld, in the district court case, in
13 front of Judge Kishner. In the supreme court Bidsal
14 filed an appeal when Kishner confirmed the arbitration
15 award Bidsal filed an appeal in the Nevada Supreme
16 Court. Guess what was all over that? All this stuff.

17 It's been as disclosed as it possibly can
18 and used by the same party Bidsal, with the same
19 lawyers as it possibly could have been up to this
20 point. Probably that's why they did request LeGrand as
21 a witness in this arbitration, which they did do, and
22 then changed their mind at the last minute in front of
23 you and caused all this.

24 All right. I'm going to skip over a few
25 things I wanted to cover with the specific references

1 that was the reason for the supplemental brief to
2 provide them. So just a few more DL00259, now this is
3 an e-mail to both. We now know that certainly LeGrand
4 is dealing with Bidsal and Golshani. And at 00259 we
5 have an e-mail on September 16th to both and he says,
6 "I made some minor edits to schedule B." To what? To
7 schedule B. And he talks about this idea of it has to
8 do with the disparity of the capital investment with
9 Golshani putting in 70 percent. Okay.

10 I'm going to skip over that a couple of
11 things. I'll skip over just to try to finish up.
12 Okay. Last one of references in Exhibit B will be
13 DL0035 one at least the last one I'll mention here,
14 00351. This is a December 10th 2011 e-mail. Now we're
15 back to LeGrand e-mailing Bidsal which is fine because
16 the parties agreed to that procedure.

17 THE COURT: What was the page number I'm sorry?

18 MR. BARE: DL00351 I believe, 351.

19 THE COURT: Okay.

20 MR. BARE: The December 10th 2011 LeGrand to
21 Bidsal. "Sean, did you ever finish revisions? Ben
22 really wants you to get this finished." Okay. And so
23 by that point then we're getting towards where the
24 agreement is ultimately consummated. Well, actually,
25 the agreement what seems to be backdated to me because

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1 it says it was effective as of June 15th 2011, here we
2 are December of 2011 still dealing with things.

3 In any event I did add it up and what I
4 wanted to mention in this line of argument is on the
5 issue of how many drafts of this Green Valley Commerce
6 operating agreement and how much time and how much
7 dealings, this goes to the idea of can LeGrand, is it
8 fair to say as I said before, can he formulate an
9 opinion as to the intent of the parties? Of course he
10 can. There's eight drafts that I found in here, eight.
11 And it goes on from June through December that's six
12 months, sometimes two or three times a day.

13 You know it couldn't be more strong and
14 clear that LeGrand just like Judge Haberfeld said is a
15 great witness on the intent of the parties here. All
16 right. I gave just a few more specific references from
17 other exhibits. If I could have just a point of order
18 minute, I want to see what it is I can skip. Is that
19 okay? Can I just have a moment?

20 THE COURT: Sure.

21 MR. BARE: Okay. I want to do this. In all due
22 respect Mr. Shapiro, Exhibit C which is the deposition
23 of David LeGrand in the district court case where he
24 gave 145 pages of testimony by the way. Page 91 of the
25 deposition is what I'd like to reference. And this is

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1 Mr. Shapiro I believe asking questions of LeGrand. And
2 I think this tells a bit of a story as to whether there
3 was a waiver, you know, an intention to have LeGrand
4 talk about his understanding of the parties intent or
5 you know the lawyer can only give what his
6 interpretation would be.

7 So let's see what happens in this colloquy
8 on page 91 Exhibit C of the deposition of David
9 LeGrand. All right. I'm going to go into my Ipad
10 which I'm not the best at but here it is it looks like
11 page 91, line 9, "Question" and I believe this is from
12 Mr. Shapiro,

13 "Question: Okay it seems that you are
14 aware that the arbitration and the lawsuit so the
15 arbitration and the lawsuit both kind of center around
16 this language in section four of the operating
17 agreement. Is that accurate?"

18 LeGrand line 13, "Answer: Yes."

19 Shapiro line 14, "did you have any
20 discussions with Mr. Garfinkel about section four of
21 the operating agreement and how it should be
22 interpreted or how you interpreted it?"

23 LeGrand: "Yes especially when he looked
24 at the draft of the letter that I prepared to go to
25 you. And you know he asked basically the same question

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1 he asked me today, is this your interpretation? My
2 answer was yes."

3 I'll stop there. Mr. Shapiro elicited
4 that testimony. There's no privilege asserted. I mean
5 he's asking him, LeGrand testified and confirmed that
6 there was this conveyance of interpretation as to the
7 intent certainly of Bidsal, Bidsal and Golshani. And
8 you know when LeGrand is meeting with Mr. Garfinkel
9 counsel who is of course for Mr. Golshani.

10 So I mean I think that is important to
11 mention. I will represent to you and I won't
12 necessarily need to have it called up, I was going to
13 mention page 48 of that same depo, you don't need to
14 pull it up, line 15. Likewise LeGrand talks about
15 subjective perception, excuse me, subjective
16 perspective of the intent of the parties and what's
17 going on here along the way. It's pretty much all over
18 this case.

19 I'll go to the last exhibit, well I've got
20 two more exhibits actually, sorry. Exhibit E, Exhibit
21 E is volume two of the arbitration with Judge
22 Haberfeld. This is on May 9th of 2018, present is Mr.
23 Lewin and Mr. Shapiro for, Shapiro is for Bidsal
24 obviously. And I want to go to this page 296. Let me
25 find that here. I'm not finding it for some reason.

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1 I'm not pulling it up. Thank you for pulling that up
2 page 296. I think this says it all really.

3 And for some reason my Ipad is giving me
4 some difficulty here. That's what I'm trying to pull
5 this up given my level of ability. But 296, thank you
6 for that, line 8 if I could please just read that one
7 paragraph. This is LeGrand, I think this is a good a
8 good thing to look at because it talks about what
9 LeGrand was doing and what he can now provide by way of
10 the intent of the parties.

11 Line 8, "well let me say I want to try to
12 be expressly clear about this," LeGrand says. "Ben and
13 Sean tended to deal at strategic levels more than
14 tactical. And getting focused on tactical it was, I
15 have client that's we go line by line through
16 documents. And I have other clients that kind of just
17 go for the highlights. So when you say their intent,
18 yes in general, was trying to create that which the two
19 of them were agreeing to in the direction that I was
20 being given at the time. And I don't recall any
21 objection from Sean," of course that's Bidsal, "to this
22 approach. Ben was pushing for this approach. I had
23 never done this style before so this was, you know,
24 took some thought. Obviously, it took a lot of time."

25 You know I think that's it for that one.

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1 And thank you for pulling it up again, Judge. That
2 says it better probably than I can as to what was
3 happening all along with this. And it certainly
4 demonstrates that LeGrand has a good grasp of what the
5 intent of the parties would be having to do with now
6 Exhibit B the waterfall provision especially given that
7 it's now in play.

8 All right the last thing is Exhibit F.
9 Your contemporary arbitrator, your contemporary judge
10 Judge Haberfeld Exhibit F is the final award from Judge
11 Haberfeld. You know I went through the AAA arbitration
12 training. I'm now certified as an arbitrator by AAA.
13 I don't think I could ever write a more detailed and
14 better order than this one Exhibit F. It looks like
15 Judge Haberfeld, I can't imagine anybody ever being
16 more specifically and detailed and terrific at writing
17 the orders but we have it.

18 If you look at Exhibit F Judge Haberfeld's
19 order there's things in there that I think are highly
20 relevant and important and I want to cover three
21 paragraphs. First one is paragraph 11 which appears on
22 page 6. This is the one where I want to bring this
23 again. I've talked about it and argued it enough but
24 the importance of the LeGrand testimony is clearly
25 spelled out here in this paragraph 11 on page six

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1 according to Judge Haberfeld.

2 He says, "in a dispute between litigating
3 partners or other parties the testimony of third party
4 witnesses becomes important. This is especially so
5 when the third party witness is unbiased and the
6 drafting lawyer was jointly representing the
7 contracting parties in connection with the preparation
8 of the underlying contract in suit. David LeGrand was
9 that lawyer. And the substance of his testimony is
10 essentially the same as and thus corroborates," it goes
11 on from there. The point of that is we think,
12 respectfully, just like Judge Haberfeld, you know to
13 the extent the law allows we think it's real clear the
14 law not only allows but mandates that when he, LeGrand
15 be ordered to testify here as there's to the extent
16 there's a privileged it's waived.

17 The importance of the testimony because
18 LeGrand happens to remember the intent and has opinions
19 about the intent of the parties which is the ultimate
20 issue having to do with the waterfall provision.
21 Paragraph 12 of Haberfeld's decision I want to bring up
22 because you can see it confirms the reading into
23 evidence of the LeGrand deposition. And you can see
24 that the judge talks about how that was important to
25 the intent issue in there. I'll leave it at that.

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1 And then paragraph 14 of Judge Haberfeld's
2 decision. How could it be more clear as to the
3 importance respectfully to an arbitrator as to
4 LeGrand's testimony on intent of the parties. Look at
5 14. This is what Judge Haberfeld felt regarding it
6 with no objection, with disclosure, no privilege
7 assertion. 14, "when directed to that specific intent
8 provision of section 4.2 during hearing Mr. LeGrand was
9 asked and answered as follows: 'And does that, does
10 that language reflect your then understanding of what
11 the intent of this provision was?

12 Answer: Yes.

13 And that was your understanding of Mr., of
14 what Mr. Golshani and Mr. Bidsal had wanted you to put
15 in?

16 Yes.

17 And was it your understanding that they
18 had both, that was what they both had agreed to; right?

19 Yes.' "

20 And it goes on from there. I'll stop with
21 that. I just want to say that, you know, the judge,
22 Judge Haberfeld clearly felt again that LeGrand's
23 understanding of what the parties intended this is
24 another piece of evidence that is important, relevant
25 and should at least be asked for or ordered and we'll

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1 see what LeGrand does when he appears for his
2 testimony. I think he'll testify. But God only knows.

3 The point is he should, we think should be
4 ordered to do so. I'm going to end with this last
5 little argument and I did skip over the offer of proof.
6 And I'll skip over the law part in our initial brief.
7 I know you'll look at all the law. I was going to make
8 an impassioned Wardley legal argument it's in our
9 brief.

10 The subject issue here, you know, what's
11 at issue? I said it before. What's the subject matter
12 of this arbitration where Mr. Bidsal filed the demand
13 for arbitration? This arbitration Sean Bidsal versus
14 CLA Properties which again is Mr. Golshani, the subject
15 matter at issue really is a necessary component of the
16 buy/sell provision itself, waterfall provision Exhibit
17 B to the operating agreement all because of this
18 disparity of income where or I'm sorry investment
19 where, you know, Ben put in 2.8 million versus 1.2 some
20 million.

21 And I'll certainly respond to any further
22 questions that you have. But, you know, it seems
23 clear, our position of course, abundantly clear that
24 because of the course of history of things this is no
25 unilateral waiver to the extent there even is a

1 privilege. It's a waiver that happens under the law
2 because of the course of disclosure, because now it's
3 been put at issue. And again fairness, I said I
4 wouldn't really go through the legal part of it because
5 I know you'll read it, but I mean the supreme court
6 does talk about to allow the privilege to protect
7 against disclosure of information when somebody put it
8 as a subject matter which it clearly is here would be
9 manifestly unfair and that's Wardley.

10 So in this arbitration Mr. Bidsal by, you
11 know, apparently offering a contrary interpretation to
12 Exhibit B the waterfall provision, he's put these
13 communications that he's had with Mr. LeGrand at issue.
14 And so, but he's waived it all along the way. And it's
15 fair. We ask you for that order.

16 THE COURT: Are you saying that Wardley at issue
17 language means that if Mr. Bidsal puts a contrary
18 interpretation of the operating agreement at issue that
19 he has therefore waived attorney/client privilege as to
20 that issue? That's not how I read Wardley.

21 MR. BARE: Okay. What I am saying is that the
22 subject matter is specific here. It's, you know, the
23 subject matter with Judge Haberfeld was the buy/sell
24 provision who gets to own the property. That was
25 decided in Golshani's favor. So now in this

1 arbitration initiated by Bidsal as far as I can see it,
2 and again you know I have to defer in some ways to Mr.
3 Garfinkel, Mr. Lewin they know the ultimate other
4 issues having nothing to do with waiver or privilege
5 better than me. It seems like the issue put in the
6 subject matter or the issue or issue put in to play is
7 the interpretation, how Exhibit B is supposed to work.

8 So I am saying that if you put that in
9 issue in light of all the prior activity where you've
10 acquiesced in having the attorney give tons of
11 testimony about the operating agreement, the buy/sell
12 provision, the dutch auction and he dealt with as I've
13 shown you now Mr. Bidsal for quite a period of time
14 having to do with Exhibit B and redlines and changes
15 and what have you and talked to him on the weekend and
16 everything else. The fairness aspect comes into play
17 as I've said.

18 Yeah he's put it in issue. Mr. Bidsal has
19 put the interpretation, the intent of the parties, how
20 Exhibit B the waterfall provision is supposed to work.
21 All of that is at issue.

22 THE COURT: I don't see Wardley as an at issue
23 waiver being triggered any time the, a contrary
24 interpretation of a contractual provision is at issue.

25 MR. BARE: I would agree with you.

1 THE COURT: Wardley says at issue waiver occurs
2 when the holder of the privilege pleads the claim or
3 defense in such a way that eventually he will be forced
4 to draw upon the privileged communication at trial in
5 order to prevail. It goes on to say citing, "when the
6 party has the burden of proof on an issue and can only
7 meet that burden of proof by introducing evidence of a
8 privileged nature then it's a waiver." That I agree
9 with. That's not the same as saying, "hey since he's
10 put this provision of the operating agreement at issue
11 he's waived attorney/client privilege on that issue."

12 Otherwise in every contract case where a
13 provision of the contract is at issue we would, we
14 would constitute that a waiver of attorney/client
15 privilege.

16 MR. BARE: Understood. What I'd say to you
17 though is I think you have to look at the chronology of
18 events that got us to the point and really the active
19 participation by Bidsal through counsel and having
20 LeGrand testify at a deposition and prior arbitration.
21 Again the same thing that they now want to stop him
22 from talking about the intent of the parties having to
23 do with the buy/sell and obviously laid it as
24 materially as it can the waterfall provision.

25 I mean the Wardley court talks about the

1 attorney/client privilege being intended as a shield
2 not a sword. And what Bidsal is doing is he's filed
3 this demand for arbitration and he's trying to use this
4 as a sword. It's great to use all this and allow it
5 all to be disclosed and used up to this point now we
6 don't want to hear what LeGrand has to say about the
7 waterfall and to give notice again of LeGrand as a
8 witness here in your arbitration.

9 So they're trying, what they're guilty of
10 is they're trying to use it as a sword. They're not
11 allowed to do that. They can only use it as a shield.
12 They had a chance to use it as a shield when the
13 district court case was going on and the deposition
14 notice came out or potentially when the first
15 arbitration happened to use it as a shield, the
16 privilege. Now they're using it as a sword. They
17 allowed for it to happen. Now they're pulling out
18 their sword which is prohibited by Wardley.

19 THE COURT: Okay. Let me before I turn it over
20 to Mr. Gerrard or Mr. Shapiro, let me back track a
21 little bit on where I was an hour and 15 minutes ago.
22 I don't want an offer of proof that contains privileged
23 information. Okay. So I'm going to back track on that
24 a little bit and lay this out and ask it in a very
25 specific way.

1 My understanding is that in the deposition
2 in the Mission Square case which was ultimately used in
3 the arbitration by Judge Haberfeld that Mr. LeGrand
4 testified and I'm paraphrasing that he had no present
5 recollection other than what was in the documents that
6 made up his file, that he was drawing inferences from
7 what he'd written in the past. That he remembered
8 events in generalities not specifics because of the
9 passage of time, that he did not testify that he had
10 communications with either Mr. Golshani or Mr. Bidsal,
11 the operating agreement. And he couldn't recall
12 specific conversations beyond the documents.

13 And so he was going to basically use the
14 documents to create inferences about what people told
15 him. Okay. So I guess my question is and maybe it's
16 just a yes/no question, do we have a reason to believe
17 that his testimony in 2021 will be different than what
18 he testified to in 2018?

19 MR. BARE: Not in relation to his ability to
20 independently recollect say what he talked to Mr.
21 Bidsal over the weekend on or whatever he talked to
22 anybody on.

23 THE COURT: Okay.

24 MR. BARE: He would have to use all the e-mails,
25 all the disclosed, I mean he was asked to disclosed

1 everything. So either he disclosed everything or he
2 held something back. We don't think he held anything
3 back. He was asked to disclose in fairness to both
4 parties including to Mr. Golshani, he was asked to
5 disclose everything. So we think we have everything by
6 way of communication evidence and all the communication
7 with Bidsal that occurred. We think we have all that.

8 Like I said we would agree that he
9 doesn't, he wouldn't testify any differently now. But
10 in a general sense you did say you were going to back
11 track a little bit on the offer of proof, what I would
12 say to you I'm sure Mr. Lewin will ask Mr. LeGrand
13 questions relevant to the design of the waterfall
14 exhibit, Exhibit B to the operating agreement, in order
15 to return the, you know, the disparity of investment
16 70/30. I'm sure, Mr. -- I mean I know other things
17 he's going to ask. I've talked to Mr. Lewin and I have
18 my notes in front of me.

19 In a very general sense he's going to ask
20 LeGrand about the design of the waterfall exhibit just
21 like LeGrand was asked all about the buy/sell
22 provision. And that's where this, you know, shield
23 sword comes into play.

24 THE COURT: Okay.

25 MR. BARE: It's part and parcel of the same

1 deal.

2 THE COURT: Okay. Mr. Gerrard?

3 MR. GERRARD: Thank you, your Honor. Let's
4 start where you just left off. Your Honor just read
5 from Wardley. He read what's at issue. If you go a
6 little further in that same decision about two more
7 paragraphs after the one that you were reading which
8 starts at, gosh what is this, it's in the middle of
9 page 1197. It starts, "an additional primary criticism
10 of cases," do you see where I'm reading?

11 THE COURT: Yup.

12 MR. GERRARD: Okay. So right after that there's
13 a sentence that talks about this fundamental fairness
14 that Mr. Bare has been talking about for, you know,
15 probably a good 15 minutes of his hour and 40 minutes
16 that he's spent to discuss this. And what, and what
17 the Wardley decision says is quote, "fairness should
18 not simply dictate that because pleadings raise issues
19 implicating a privileged communication, that privilege
20 regarding those issues is waived. Rather fairness
21 should dictate that before litigants raise issues that
22 will compel the litigants to necessarily rely upon
23 privileged information at the trial to defend those
24 issues the privilege as it relates only to those issues
25 can be waived. Allocations of burden of pleading could

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1 not be the basis for depriving privilege holders of
2 their privilege."

3 This is directly contrary to what you just
4 heard Mr. Bare argue. In their world because there is
5 conceivably an issue in this trial that could be
6 discussed by an attorney that had a privileged
7 communication, that means that the at issue doctrine
8 applies and there's a general waiver of anything that
9 could ever come up.

10 THE COURT: That was the substance of my
11 question.

12 MR. GERRARD: Exactly. Let's start at where
13 this is supposed to be. This issue is very simple and
14 straight forward and it doesn't take an hour and 40
15 minutes to decide or to argue. Your Honor asked four
16 questions. Let me go back to those questions to start.

17 You asked first who has the authority in
18 this case to waive the attorney/client privilege for a
19 Green Valley Commerce when there's two members and two
20 managers that are deadlocked. You heard Mr. Bare when
21 he was running through our supplemental briefs say he
22 agreed with our position that it would have required
23 both managers to have ever consented to waive. So that
24 issue is off the table. That issue has been answered.
25 We argued it could only be waived by both managers

1 consenting to waive it. They've agreed to that.

2 So we'll move and they've also agreed that
3 that never occurred. That there was never any decision
4 made by both Mr. Bidsal and Mr. Golshani that they
5 would agree to waive Green Valley Commerce's privilege.
6 So that issue is now resolved.

7 Issue number two that you asked was has
8 there been a waiver of the attorney/client privilege
9 that protects communications between Mr. LeGrand and
10 his client or representatives of those clients. And we
11 have outlined in both of our briefs that no there has
12 never been a waiver. That's where, your Honor, target,
13 is trying to target the argument so that we wouldn't
14 spend an hour and 40 minutes going through it asked an
15 hour ago. Where are the specific conversations, the
16 specific communications between Mr. Bidsal and Mr.
17 LeGrand that have ever been disclosed to a third party?

18 And you asked a question and Mr. Bare said
19 he would answer it later. And it still has not been
20 answered. All that he did is show you a series of
21 e-mails. E-mails in which the formation of the
22 operating agreement was discussed and drafts of the
23 operating agreement were disseminated.

24 None of those e-mails contained any
25 privileged communication between Mr. Bidsal and Mr.

1 LeGrand. That's the whole point here which obviously
2 and for some reason they don't seem to quite grasp.
3 The rules are clear. The rules say at NRS 49.045 which
4 defines a client and NRS 49.055 that defines a
5 confidential. Those rules make it clear that a client
6 includes a representative of the client.

7 Mr. Bidsal as a manager was a
8 representative of Green Valley Commerce and a
9 representative of Mr. LeGrand's client. Mr. Bidsal
10 under NRS 49.105 as a representative of the client can
11 claim the privilege on behalf of the company. His
12 communications with the company's lawyers are
13 privileged under NRS 49.105 if they were confidential.
14 Confidential means they were not intended to be
15 disclosed to third parties at the time the
16 communications were made.

17 Mr. Bare argues well, you know, five, six
18 years after the fact, you know because somebody raised
19 the communication that that means at the time of
20 communications were made they were not intended to be
21 confidential. It's ridiculous. That's not what the
22 rule says. It doesn't say anything remotely close to
23 that. It's at the time the communication was made it
24 has to be intended to confidential.

25 Mr. Bidsal said it in the declaration that

1 is attached to our supplemental brief that he intended
2 these to be confidential. That has never been refuted
3 in any way, shape or form which means that he has the
4 right to claim that his communications with the company
5 attorney as a representative of the company are
6 confidential and privileged under NRS 49.105.

7 The only way for those communications, for
8 that privilege to have been waived in the absence of an
9 agreement between Mr. Bidsal and Mr. Golshani to waive
10 it would be if Mr. Bidsal allowed those communications
11 to be testified about to a third party or disclosed to
12 a third party without him raising the privilege. That
13 has never happened.

14 Mr. Bare was asked specifically over and
15 over to identify where any communication between Mr.
16 Bidsal and Mr. LeGrand was ever testified about. And
17 we walked through every exhibit that he identified.
18 Your Honor, gave them an additional three weeks to go
19 back through all of their exhibits and identify any
20 conversation, any communication to a third party that
21 would support a waiver argument.

22 THE COURT: Can I interrupt you for a second?

23 MR. GERRARD: Please.

24 THE COURT: What about the testimony of Mr.
25 LeGrand regarding satisfying the intent of the parties

1 which appeared to be without objection?

2 MR. GERRARD: Are you talking about his
3 deposition testimony?

4 THE COURT: Yeah.

5 MR. GERRARD: Okay. So the deposition testimony
6 that they pointed out was on page 91 of the transcript.
7 That was the only reference that they gave supposedly
8 this waiver. And this is a question that was asked --

9 THE COURT: Let me pull it up. Hold on. Was it
10 91 if I remember right?

11 MR. GERRARD: 91.

12 THE COURT: Okay.

13 MR. GERRARD: So here we are on page 91 and it
14 says starting at line 9.

15 "Question: Okay it seems that you're
16 aware that the arbitration and the lawsuit both kind of
17 center around this language in section 4 of the
18 operating agreement; is that accurate?

19 Answer: Yes.

20 Question: Do you have any discussions
21 with who with Mr. Garfinkel, about section four of the
22 operating agreement and how it should be interpreted or
23 how you interpreted it?"

24 That is not disclosing a communication
25 between Mr. Bidsal and Mr. LeGrand. That is somebody

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1 that is asking Mr. LeGrand if he gave his
2 interpretation of the agreement to Mr. Garfinkel.

3 THE COURT: And I probably should say I'm
4 looking more at page 48 which I have up on the screen.

5 MR. GERRARD: All right. Let me go to page 48.
6 I've got to get mine up here. Okay so here on page 48
7 says, he's asked about line 1. "In other words when
8 you send a draft to Mr. Bidsal would you then talk to
9 him about the draft?"

10 He said, "well sometimes. Again we had a
11 bunch things going on at one time. So Sean and I had a
12 lot of other things he was engaged with as well during
13 this time that I had no part of as far as I know. So I
14 don't want to characterize, but it was a little harder
15 to get Sean's attention because of the sheer volume of
16 what Sean was dealing with and what we were dealing
17 with. You can see in some of the communication I'm
18 kind of waiting on Sean. Ben had less day-to-day
19 involvement. I think Ben was a little more focused on
20 what he wanted to see."

21 So again do you see any communication
22 disclosed there, any confidential communication between
23 Mr. Bidsal and Mr. LeGrand? Of course not. Down at
24 the bottom of that same page starting at line 21, "so
25 with respect to the operating agreement the draft if

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1 there was something he didn't want in there, would he
2 tell you?

3 Yes.

4 Same with Mr. Golshani?

5 Correct."

6 Is there any testimony anywhere on this
7 page or anywhere in this transcript this is the only
8 page they identify where Mr. LeGrand is asked to
9 divulge the contents a confidential communication
10 between himself and Mr. Bidsal? It never --

11 THE COURT: I'm on 49 now.

12 MR. GERRARD: Okay. It never happens. On page
13 49 in Exhibit 13 you mentioned, "we discussed that you
14 would want to be able to name a price to get bought or
15 by at the offer price. And again that is something
16 that both Mr. Bidsal and Golshani agreed to correct?"
17 So this is a question that's being asked not Mr.
18 LeGrand's testimony.

19 THE COURT: I'm down a couple lines like line
20 13.

21 MR. GERRARD: Okay.

22 "Did Mr. Bidsal express to you that he did
23 not want to go in that direction?

24 I don't recall such a direction from Mr.
25 Bidsal."

1 So again he's still not disclosing any
2 communications that he had, the contents of any
3 confidential communications with Mr. Bidsal. It's just
4 not there. Remember what we're talking about here.
5 They want specifically to call Mr. LeGrand to testify
6 about what the special allocation language of Exhibit B
7 means. They keep calling it a waterfall. But it's
8 special allocation provision. And it's in Exhibit B.
9 And that's what they want to ask him.

10 They want to ask Mr. LeGrand what Mr.
11 LeGrand thinks that it means. Well Mr. LeGrand's
12 opinion of what it means it completely irrelevant
13 unless he gained that understanding from a specific
14 conversation with Mr. Bidsal. And he already stated he
15 has no recollection of any conversations with Mr.
16 Bidsal.

17 So we're right back where we started. You
18 asked for specific, you know, disclosure of specific
19 communications. Because guess what, that's what
20 Wardley requires. Wardley says specifically that, "the
21 party seeking an advantage in litigation by revealing
22 part of a privilege communication, the party shall be
23 deemed to have waived the entire attorney/client
24 privilege as it relates to subject matter of that which
25 was partially disclosed."

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1 Mr. Bare has tried to paint a picture for
2 an hour-and-a-half before he went to legal arguments.
3 The picture he tries to paint is there was some sort of
4 broad brush agreement or waiver through nonaction by
5 Mr. Bidsal of a privilege. But that's not the way that
6 the privilege waivers work. Privilege waivers under
7 Wardley and under federal case law are specific and
8 targeted to the specific communication you're claiming
9 that the waiver was for.

10 It doesn't waive for every communication
11 that whatever happened between an attorney and the
12 client. That's, there's no case law that says that,
13 none. And they haven't cited any. That's what Mr.
14 Bare spent an hour-and-a-half trying to convince your
15 Honor you could do in fairness.

16 Well what Wardley says is if my client Mr.
17 Bidsal put, revealed part of a privilege communication
18 to be used in this litigation that the remainder of
19 that communication there would be a waiver for but only
20 as to the exact communication that was partially
21 disclosed. End of discussion.

22 They can't even point to a specific
23 communication where the waiver ever happened. There's
24 not one single bit of testimony in all the transcripts
25 that they attached or in any e-mail where Mr. LeGrand

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1 says, "this is what Sean and I discussed" and then he
2 gives a privileged communication. There's none. It's
3 not there at all anywhere.

4 And that is specifically what would be
5 required to waive the privilege. And they've already
6 admitted that the client hasn't waived the privilege
7 because that would require both of the consents of both
8 of the managers. In the absence of them showing you a
9 specific communication where my client consented to the
10 waiver by not raising the privilege, the conversation
11 is over.

12 And that's the problem that we've had from
13 the beginning. We've been asking from the beginning
14 what communications exists. My client doesn't think
15 there are any. He doesn't remember having any
16 conversations with Mr. LeGrand where the meaning of the
17 language of the operating agreement was discussed with
18 him. He does not recall that ever happening.

19 And quite interestingly Mr. Bare again
20 tried to paint this chronological picture but he left
21 out the most important thing. The operating agreement
22 when it was executed, it was executed after all of the
23 conversations or communications that were evidenced in
24 any of the e-mails that he identified. It happened in
25 December long after all these e-mails.

1 And what did the operating agreement
2 include at the time it was signed? It included a
3 statement that was put into place by Mr. LeGrand
4 himself at Article 8 section 1 that specifically stated
5 and I quote, "the members have been advised by the law
6 firm that a conflict of interest would exist among the
7 members of the company because the law firm is
8 representing the company and not any individual
9 members." That's the first thing it says.

10 The second thing it says subpart A,
11 subpart D says, "the law firm has not given any advise
12 or made any representations to the members with respect
13 to the consequences of this agreement." Well that is
14 directly contrary to what they're trying to argue now.
15 And Mr. Golshani signed that agreement. You cannot now
16 say that there were representations that were made
17 where the consequences of the agreement were discussed
18 between Mr. LeGrand and Mr. Bidsal or him when because
19 he's estopped from making that argument.

20 There's a clear estoppel argument you
21 cannot make a contrary statement now to what is
22 actually in the agreement that he signed consenting to
23 it. That's exactly what's going on. But yet they
24 still cannot point to any specific conversation where
25 there was any specific waiver. And they can't identify

1 what exactly was waived. They can't identify any
2 conversation where there was a waiver. Let's get back
3 to what this is all about.

4 What this is about is very simple. If
5 they want to ask Mr. LeGrand, "what do you think that
6 this operating agreement language means?" It's
7 completely irrelevant because Mr. LeGrand is not a
8 party to the agreement. And his intent is meaningless.

9 If he testifies, "I discussed what the
10 parties intent was by this language," that would be
11 relevant but it would also be privileged. That
12 privilege has never been waived. When they first tried
13 to bring it up, we raised the privilege. It had never
14 been brought up before. It was never brought up before
15 Judge Haberfeld. It was never brought up in the
16 deposition. It was brought up before your Honor where
17 they wanted to ask him specifically not his opinion
18 about what he thinks the language means, but what he
19 thinks the parties intended with this language. That
20 is privileged. That, there's no privilege waiver for.

21 And so what they really want is to
22 substitute your Honor's determination of what this
23 language means based upon what the parties have
24 actually testified that their intent was and to
25 substitute a third party's belief about what that

1 language means who's not a party to the contract.
2 That's legally irrelevant once again unless it's based
3 upon his communications with the parties. And it's
4 also inadmissible as evidence. Under Nevada rules of
5 evidence he has to have personal knowledge to be able
6 to testify about what the intent of the parties was.
7 There was only one place that personal knowledge could
8 come from, communications with the parties. And that's
9 privileged.

10 So let's get to the other two topics that
11 your Honor asked to be briefed. Topic number three was
12 does the arbitrator have the authority to compel Mr.
13 LeGrand to testify especially when he stated his
14 intention not to testify due to his concerns about
15 violating the attorney/client privilege or the Nevada
16 rules of professional conduct. Well I think the answer
17 to that is a resounding, no.

18 Your Honor, there's been no authority
19 they've provided to your Honor. They're the ones that
20 are asking that he be compelled to testify. They've
21 provided no authority in support of any, you know, your
22 Honor being able to compel him to testify. And we get
23 to the final issue, an issue that they didn't even
24 address in their brief even though it was clearly one
25 of the issues your Honor identified for the briefing.

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1 And that is have the parties waived any conflict of
2 interest with respect to Mr. LeGrand. And obviously
3 they have not.

4 And these are very serious issues. You
5 know I, we briefed them, but let me walk through it in
6 three or four quick minutes. The rules of professional
7 conduct apply to Mr. LeGrand without question. Rule --

8 MR. BARE: I am going to object to this
9 respectfully, because as I took it, and I thought, and
10 if I had it wrong I had it wrong. I want to make the
11 objection because I thought we had it right. Judge at
12 the last convening of this arbitration you said that
13 you don't want to talk about rules of professional
14 conduct, not jurisdiction, I stayed away from that. I
15 could give a lot of expert opinion on rules OF
16 professional conduct. I intentionally stayed away from
17 it.

18 THE COURT: Here's what I think about the rules
19 of professional conduct in any potential conflict. As
20 I said before it's not for me to find that there is a
21 conflict of interest. Okay. That's not my authority.
22 It is the Bar's authority. There's no waiver that I've
23 seen of a conflict of interest such that I could say
24 look I don't need to deal with conflict of interest and
25 the rules of professional conduct because Mr. Bidsal,

1 Mr. Golshani, Green Valley Commerce has waived it. I
2 don't see anything like that.

3 So the only reason I asked either in April
4 or June about waiving a challenge to Mr. LeGrand's
5 possible conflict of interest is if somewhere that was,
6 that was done then I wouldn't have to deal with the
7 issue because there had already been a waiver of the
8 issue. That hasn't occurred. I can't as I said before
9 provide Mr. LeGrand cover for what some might see as a
10 pretty obvious conflict of interest.

11 So I, the fact that that issue A, isn't
12 mine to ultimately resolve and B hasn't been waived so
13 that I don't even have to consider it, those things
14 aren't there. So to an extent you're both correct. As
15 I said before I can't compel, put it this way there are
16 two separate issues, okay. If there was no
17 attorney/client privilege issue and it was just a
18 conflict of interest issue and Mr. LeGrand said, "look
19 I'm not sure I want to do this because I think I have a
20 conflict of interest." He made some comments like that
21 during his testimony before about at some point he
22 didn't know if this could become adversarial or
23 something like that.

24 Let's just say the only issue was
25 potential conflict of interest, okay, if that's all

1 there was and he said, "look I'm not sure I want to
2 testify because there's a possible conflict of interest
3 and I could get in trouble with the Bar," I can't
4 compel him to testify. I can't say to him, "look I'm
5 the arbitrator in this case and I don't really care
6 whether you think you have a concern about violating
7 the rules of professional conduct. I'm going to compel
8 you to testify." That's what I was talking about in
9 April.

10 If there was some stipulation, some
11 express waiver of the conflict of interest issue then I
12 could say, "look it's not an issue. You've got cover
13 because there's a stipulation. There's a waiver."
14 That's the whole reason I was asking for it back in
15 April. That isn't there.

16 I can't protect him from any conflict of
17 interest. I have no idea since April whether he's
18 decided, "hey I don't have a conflict of interest. I
19 don't, the rules of professional conduct don't scare me
20 I'm going to testify anyway." I have no idea. What I
21 was concerned about in April, what I was still
22 concerned about throughout up to today is there are
23 two, in my mind, discreet issues.

24 The second one is a potential conflict of
25 interest for Mr. LeGrand. There's been no evidence to

1 me that that conflict of interest has been waived.
2 There is no, I can't help him with that. Okay.
3 There's no law that says even if he has doubts about
4 whether he has a conflict and doesn't want to testify
5 that I can force him to. I wasn't aware of any. I
6 didn't think there was back in April. I gave everybody
7 a chance to see if there was. Like me, you probably
8 found nothing.

9 So that's where we stand on the two
10 separate issues. That's where I stand on the two
11 separate issues. So I'm not sure Mr. Gerrard if I need
12 to have a recitation other than what's in the brief
13 about how the rules of professional conduct apply.
14 That's a long-winded --

15 MR. GERRARD: That's fair enough. I appreciate
16 that. Obviously it was an issue you asked us to brief.
17 We did brief it. They did not brief it. And you at
18 the last hearing said they would not be allowed to make
19 any additional arguments that were not included in
20 their first brief. That's the ruling of the, of your
21 Honor. And so obviously they've never addressed it.
22 And we'll stand on what we've submitted to your Honor
23 because we think there's a very clear, a very stark,
24 conflict of interest by the evidence that we've
25 submitted that Mr. Golshani retained Mr. LeGrand to

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1 represent him individually and even gave him the
2 letters that were, that were being sent by Mr. Bidsal
3 when he was, when there was this exercise of the
4 buy/sell provisions that happened and asked for him to
5 comment on those to Mr. Golshani about Mr. Golshani's
6 rights taking one side against the other.

7 So I won't go any further than that
8 because it's quite obvious and quite apparent. But I
9 raised it when they wanted to call Mr. LeGrand as a
10 witness because I wanted there to be no mistake that we
11 believe that there is a very serious conflict and we
12 will not waive that conflict and that that could place
13 Mr. LeGrand in jeopardy on his license. So your Honor,
14 you know --

15 THE COURT: Let me stop you with something right
16 there and add on to what I said before. Okay. Issue
17 number one attorney/client privilege is not in my mind
18 an issue of whether Mr. LeGrand can testify at all.
19 It's an issue of whether he can testify regarding
20 information that might be privileged.

21 MR. GERRARD: Sure.

22 THE COURT: Issue number two is there a conflict
23 of interest is probably an issue for him about whether
24 he can testify at all. So that's part of the different
25 way I see these discreet issues.

1 MR. GERRARD: And I agree with that. And as to
2 issue about whether he can testify at all related to
3 the privilege issue only, there is a big problem from
4 that. The problem is Mr. Golshani has already
5 testified he has no personal knowledge or recollection
6 of these events other than what is in the documents.
7 So the point is and I thought we made this in both our
8 original brief and in our supplemental brief, if the
9 only reason they're calling Mr. LeGrand to testify is
10 for him to give his opinion about what he thinks the
11 agreement means, that's inappropriate. Because number
12 one he hasn't been disclosed as an expert. Number two
13 his opinion about what the agreement means is
14 completely irrelevant unless it's based upon his
15 communications which are themselves privileged.

16 So if your Honor says he can not testify
17 about the privileged communications, then there's
18 nothing left for him to testify about.

19 THE COURT: Right.

20 MR. GERRARD: And that's the point. Your Honor,
21 unless you have any questions, you know, look I could
22 go on for an hour hour and 40 minutes as well. But
23 there's nothing, this is not a complicated issue. It's
24 very straight forward. Either there is a privilege or
25 there isn't. And there clearly is. They've never

1 refuted that the privilege exists. And they never
2 refuted that GVC has never waived that privilege. The
3 only possible waiver could be the arguments about at
4 issue or there was my client divulged a portion of a
5 privileged communication to benefit himself. And they
6 have not established either of those things under
7 Wardley.

8 And as a result the answer to the question
9 that your Honor asked about whether or not there's
10 there is a privilege, yes, and has it been waived, no,
11 makes for a pretty easy decision I think by the Court.
12 Unless you have other questions I will leave it with
13 that.

14 COURT REPORTER: Your Honor, this is the court
15 reporter. We've been going for two hours. I'd like to
16 have a break.

17 THE COURT: Off the record.

18

19 (Recess)

20

21 THE COURT: Okay we have all counsel present.
22 We're back on the record. Judge Bare I'll turn it back
23 over to you. I don't know if someone else on your team
24 was going to address final argument?

25 MR. BARE: Thank you Judge Wall. I promise to

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1 be quick. I know Mr. Gerrard didn't like the hour and
2 40 minutes. I wanted to be comprehensive. I
3 appreciate the opportunity to do that. Mr. Gerrard
4 indicated that Mr. Bidsal intended these communications
5 with Mr. LeGrand to be confidential. And I think that
6 speaks to the whole situation that we have here. I
7 mean how could they be confidential, really, if two, if
8 the lawyer according to the operating agreement even
9 isn't representing them individually, if it's a joint
10 as Judge Haberfeld said jointly. That's interesting
11 that Bidsal is saying all this was intended to be
12 confidential.

13 That just didn't make a lot of sense in
14 formulating this 50/50 Green Valley, you know,
15 business. But let's assume we can believe Mr. Bidsal
16 intended these to be confidential. I mean, again they
17 disclose all the e-mails, all the communications.
18 That's what the subpoena asks for. That's what was
19 delivered as far as our understanding was for Mr.
20 LeGrand, again with Mr. Shapiro receiving the service
21 of the request. So I think you have that.

22 Just a couple more points, Mr. Gerrard
23 said and I wrote it down, that LeGrand's intent is
24 meaningless. That's what he said. Judge Haberfeld
25 said something altogether different. In the dispute

1 between litigating partners and other parties the
2 testimony of the third party witness becomes important.
3 This is especially so when the third party witness is
4 unbiased and a drafting lawyer. David LeGrand was that
5 lawyer. Your contemporary arbitrator would disagree
6 with Mr. Gerrard's assertion that LeGrand's testimony
7 is meaningless. In fact, it is the polar opposite to
8 that of course.

9 Mr. Gerrard talked about the idea of what
10 he said words that we're not intending to ask LeGrand
11 what he thinks about the language in what I call the
12 waterfall provision Exhibit B. In fact we do. Of
13 course we do. Just like it happened this whole time.
14 Because just like Judge Haberfeld felt LeGrand is a
15 vital and essential witness having to do, he happens to
16 know that. Like I've said, a lot of lawyers I think
17 all of us actually if you dealt with the one off some
18 years ago you might not be able to provide insight as
19 to what when you drafted something and designed
20 something, when you drafted the waterfall Exhibit B,
21 you know, how you designed it, why you designed it,
22 what your opinion is as to how it's supposed to
23 operate.

24 Given that it was six months, eight drafts
25 and all these inputs and all these discussions with

1 Bidsal that have been disclosed to us in these e-mails,
2 of course LeGrand is a vital witness. And, you know,
3 what else can I say on that.

4 The last thing I'll say is I thought it
5 was interesting when you put up page 48 and Mr. Gerrard
6 stopped right before the passage where Mr. LeGrand said
7 what? Mr. LeGrand on page 48 where Mr. Gerrard stopped
8 said words about relating his subjective perspective,
9 subjective perspective. That's really the heart of
10 this whole thing is in this demand for arbitration.

11 Mr. Bidsal after the course of history
12 apparently disagrees that's why this has been demanded,
13 disagrees with how or wants to present a disagreeable
14 position with how the waterfall is supposed to work now
15 that Mr. Golshani gets to only Green Valley Commerce.
16 We want to ask, Mr. Lewin is going to do it of course,
17 a gentleman who it's been my pleasure to get to know
18 through this, Mr. Lewin is going to ask again how it
19 was designed from LeGrand's perspective. And that
20 would be relevant of course in fairness to what the
21 parties intended. And at the end of the day that's the
22 decision that you want to make.

23 So I think it's all there. It's, this has
24 been disclosed. It's been utilized. We got hit over
25 the head, you know, with a sword. And that's not what

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1 this is supposed to be. They could have shielded, they
2 didn't. Now they're pulling out a sword and trying to
3 kill us with it as to the most relevant witness of all
4 that we think is in that category and so did Judge
5 Haberfeld. And we hope you do too. Thanks.

6 THE COURT: Okay. I appreciate it, obviously I
7 will issue a detailed order on this. But I think it
8 makes sense to tell you where I'm going to go so that
9 we can reach the rest of our scheduling issues now
10 since I have everyone here.

11 Back in April when Mr. LeGrand was going
12 to testify and Mr. Gerrard and Mr. Shapiro objected on
13 behalf of Mr. Bidsal, there were certain discreet
14 issues that I asked to be briefed. Issue one was
15 essentially with respect to attorney/client privilege,
16 who has the authority to waive it for Green Valley. We
17 have agreement that Green Valley Commerce holds the
18 privilege, that there was a requirement since they were
19 both 50/50 that each would have to expressly waive it,
20 that one couldn't waive it for the other or for Green
21 Valley Commerce. So the privilege is held by Green
22 Valley Commerce.

23 With respect to communications between
24 David LeGrand and Sean Bidsal as a member or manager of
25 Green Valley Commerce I asked for a briefing as to

1 whether that has been waived with respect to discreet
2 issues we have which is the intent of the parties
3 regarding the allocation provision in Exhibit B of the
4 operating agreement. I have reviewed everything that
5 has been presented, all of the briefs, it is my
6 determination that there is not an express waiver.
7 There's not an implied waiver. There's not a waiver by
8 conduct in the prior proceedings.

9 Respondents have suggested that there's an
10 at issue waiver under Wardley. I sort of communicated
11 already that I don't believe that respondent's take on
12 the Wardley case is correct. I don't think it's as
13 easy as saying since the operating agreement and the
14 intent of the parties has been placed at issue that
15 waives attorney/client privilege under Wardley because
16 Wardley as I pointed out, as Mr. Gerrard pointed out is
17 much more specific than that.

18 Wardley says that an at issue waiver
19 occurs when the holder of the privilege needs the claim
20 or defense in such a way that eventually he or she will
21 be forced to draw upon the privileged communication at
22 trial in order to prevail. That's not where we're at.
23 The Nevada Supreme Court went onto quote, excuse me the
24 Harvard law review to say, "when the party asserting
25 the privilege bears the burden of proof on an issue and

1 can meet that burden only by introducing evidence of a
2 privileged nature waiver is clearly warranted." That's
3 not the circumstance we have.

4 Wardley talks about fairness. The
5 fairness is rooted in one party using a portion of a
6 privileged communication to either prosecute or defend
7 a case and claiming privilege for the rest of it. And
8 fairness dictates that that can't be allowed. That it
9 can't be in that circumstance used as a sword and a
10 shield.

11 I don't see a waiver by those e-mails. I
12 don't see a waiver in the testimony of Mr. LeGrand
13 previously. And part of it is based upon the fact that
14 if he doesn't recall conversations with Mr. Bidsal, he
15 doesn't recall the specifics of any of those
16 conversations, I don't see how unless his testimony is
17 going to change and it doesn't sound fundamentally like
18 anybody thinks it is, that he's going to say suddenly
19 now I remember conversations.

20 I'm going off of his sworn testimony
21 before as an officer of the Court really and I'm
22 relying on that. So the issue of whether there has
23 been a waiver of the attorney/client privilege or
24 communications between Mr. Bidsal as a manager member
25 of Green Valley Commerce and Mr. LeGrand it's my

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1 understanding that there has not been a waiver of that
2 privilege. That privilege has not been waived. And
3 that Wardley wouldn't apply for me to find that there
4 is an at issue implied waiver.

5 Conflict of interest issue I've already
6 sort of discussed. I don't find that there has been
7 any waiver of conflict of interest especially since it
8 needs to be done in writing under the rules of
9 professional conduct. Nor do I find that I could
10 compel Mr. LeGrand to testify even if he had
11 reservations of whether there would be a conflict of
12 interest.

13 So the written order will be somewhat more
14 robust than what I have just laid out. But it's
15 important I think that you know what that order is
16 going to say as a bottom line. I don't know whether
17 and I don't think it was entirely known at the end of
18 April whether, whether there's going to be any
19 additional testimony. I know that Mr. Lewin referenced
20 the fact that he may want to recall Mr. Golshani but I
21 thought it was in relation to what Mr. LeGrand might
22 testify to.

23 I agree with Mr. Gerrard that Mr.
24 LeGrand's testimony about what the intent of the
25 parties was regarding the allocation provision would be

1 relevant. But it's based upon his communications in
2 part with Mr. Bidsal, those are privileged. And so I'm
3 not sure what else Mr. LeGrand could testify to that
4 would be relevant in our proceeding. So I don't know
5 if you want to still call Mr. LeGrand. I don't know if
6 you have any other witnesses. I seem to recall there
7 was a health problem about another witness back in
8 April. I don't remember his name.

9 MR. LEWIN: Mandevich, Henry Mandevich.

10 THE COURT: Henry Mandevich right. He had a
11 health issues on the last day or the day before. I
12 don't know substantively what there is left to present
13 at the arbitration hearing or whether we want to
14 schedule it for, whether you want it for final
15 arguments, whether you want it live or Zoom. For
16 purposes of discussing those housekeeping matters I
17 don't know if we need to keep the court reporter here
18 if she's got somewhere to go. But let me start with
19 Mr. Lewin.

20 MR. LEWIN: Your Honor I'd like, I think what I
21 need to do is digest what your order is going to be.
22 There is some, there are some documents and issues
23 having to do with other things having to do with Mr.
24 LeGrand's testimony other than having to do with
25 privileged communications that I'm assuming that you're

1 talking about oral communications because he has
2 already produced all the e-mails. Those e-mails have
3 been disclosed I think by both parties, both Mr. Bidsal
4 and CLA in connection with this arbitration. So I
5 think I need to regroup with Mr. Garfinkel and discuss
6 what we, you know, need to do with those perhaps enter
7 into a stipulation see if we can stipulate to the
8 admissibility. Some of those e-mails have to do with
9 the issue having to do with drafting and it's focusing
10 in on Mr. Gerrard's testimony, his argument here today
11 about estoppel in the operating agreement.

12 The operating, if we're going to address
13 the issue of drafting which I have raised before that I
14 believe is covered by Judge Haberfeld's determination
15 already but the operating agreement does say that the
16 agreement was drafted by Mr. LeGrand. Taking up Mr.
17 Gerrard's estoppel argument if he's going to raise
18 that, if he's saying that Mr. Golshani is estopped to
19 dispute the issues having to do with Mr. LeGrand who he
20 represented and so forth, I think the same paint brush
21 covers the issue of drafting.

22 So the issue is that if one of the issues
23 having to do with Mr. LeGrand's testimony had to do
24 with the sequence of the, some of the sequence of the
25 eight operating agreements and how they came about. If

1 that's going to be, continue to be an issue, he may
2 still, that maybe an issue for him to testify.

3 I personally don't see how it's a conflict
4 of interest for Mr. LeGrand to come in and testify
5 about a fact one way or another, that doesn't raise a
6 conflict. It maybe a conflict in drafting the
7 agreement. Just coming in to testify under oath I
8 don't see that raises a conflict. The issue on
9 privilege is something else you've ruled on. I'd like
10 to regroup and figure out what we need to do.

11 THE COURT: Do we know if Mr. LeGrand would
12 testify?

13 MR. LEWIN: I did ask him yesterday I told him
14 we were having a hearing today. I think he will be
15 willing to testify. I think he wanted to see what your
16 order was going to say. So, and so I can't, it was yes
17 but, we just don't know.

18 THE COURT: Okay.

19 MR. LEWIN: I think that's the next step also.

20 THE COURT: So are you saying for scheduling
21 purposes you need to see my order first?

22 MR. LEWIN: I can sort of see what your order is
23 coming out. The question I was raising is whether
24 there is going to be additional testimony whether that
25 would be Mr. Golshani, Mr. Bidsal, Mr. Golshani, Mr.

1 Bidsal or Mr. LeGrand. I don't know. I would say we
2 can schedule something. I think all that testimony
3 would be rather short. Maybe we can enter into some
4 agreements with Mr. Gerrard and Mr. Shapiro. We can
5 schedule something, get something on calendar. So that
6 we don't, so we're not, we're not going off months and
7 months away. I would like to suggest we do schedule.

8 THE COURT: Okay. So you're saying if I
9 schedule a day down the road, here's the thing, this
10 order is not going to come out today. I have an
11 arbitration hearing tomorrow. I've got a mediation on
12 Monday. It's not going to come out until probably
13 sometime next week. So I don't necessarily, I mean are
14 you saying we can schedule a full day down the road
15 today and if that involves a little bit of testimony
16 and then final argument great. If it involves just
17 final argument, great. Can we do that?

18 MR. LEWIN: That's correct. Whether we can get
19 everything done in one day, I can't say. I have to
20 think that through in terms of what we want to offer.
21 I don't have a lot more to offer, something to offer.

22 THE COURT: Hold on. Mr. Garfinkel.

23 MR. Garfinkel: Do you think, how much time do
24 you think we need to kind of sort of digest this?
25 Maybe what we can do is schedule another call with the

1 arbitrator in a week or two and then try and come up
2 with a, with a schedule after we give it some thought.
3 How does that work? Judge does that work for your
4 schedule? Schedule something in a week or two we can
5 come back to you and say this is what we want to do.
6 Does that make sense?

7 THE COURT: I want to here from Mr. Gerrard.

8 MR. GERRARD: Judge, we want to get this over
9 with. At the conclusion of the last day of the
10 arbitration Mr. Lewin represented that Mr. LeGrand was
11 his last witness. And you specifically asked him if
12 there would be any other witnesses and they said "no".
13 So the suggestion that now, you know, that they might
14 want to put on two or three more witnesses when they
15 have already represented they were done other than Mr.
16 LeGrand I think is inappropriate.

17 And I want to get a date certain if
18 possible right now today while everybody is here when
19 we can finish this arbitration not wait for another two
20 weeks and then try to schedule with your Honor and then
21 at that point, you know, let's just schedule it. Let's
22 get it done. My client has been waiting for, you know,
23 already four months because of this issue that they
24 raised that they wanted when your Honor could have
25 decided it on the day of the arbitration. Here we are

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1 four months later when we finally get a decision.

2 THE COURT: I will say that on April 27th my
3 notes show that Mr. Lewin talked about calling
4 witnesses after Mr. LeGrand's testimony like maybe Mr.
5 Bidsal and Mr. Golshani.

6 MR. GERRARD: If that's your recollection, if
7 that's what Mr. Lewin says I'm fine with that. My
8 recollection was we asked him right then on that last
9 date if you had any more witnesses and you asked about
10 Mr. Mandevich he said he's not going to testify. You
11 asked about anybody else and my recollection was that
12 he said this was his last witness.

13 MR. SHAPIRO: Your Honor I can pull up the
14 transcript.

15 MR. LEWIN: The issue is that's exactly what I
16 did say. I said depending on what happened to Mr.
17 LeGrand, Mr. Bidsal, Mr. Golshani. And I'm still not
18 sure. As I said I have to digest your ruling but I'm
19 still not sure whether that ruling will prohibit Mr.
20 LeGrand from testifying on any issue. There maybe
21 issues that do not have to do with any privilege
22 communications that he might be able to testify to.

23 I also want to point out that this delay,
24 this delay, if they had raised this issue at the time
25 by way of a motion in limine when they designated Mr.

1 LeGrand and we designated Mr. LeGrand we would have
2 covered this before the arbitration started. This
3 delay is not caused by us.

4 THE COURT: And I'm not attributing fault. Can
5 we --

6 MR. SHAPIRO: Can I make one short argument?

7 THE COURT: Yes.

8 MR. SHAPIRO: Thank you.

9 MR. GERRARD: Can we let the court reporter go?

10 THE COURT: I don't know.

11 MR. LEWIN: I'm fine with the court reporter
12 leaving. I'll let Mr. Shapiro make this point.

13 MR. SHAPIRO: The point is this your Honor we
14 were supposed to be done in April. There was a
15 continuance. We've rested our case and now Mr.
16 Golshani and his counsel had four months to go through
17 with a fine tooth comb the transcript and try and
18 recreate the case. That's a huge disadvantage. We
19 need to end this in fairness. And they shouldn't be
20 allowed to call any new witnesses beyond Mr. Bidsal or
21 Golshani or if they decide to call Mr. LeGrand but
22 that's it.

23 It should be limited to the issues of Mr.
24 LeGrand's testimony otherwise they get four months to
25 pour through and reanalyze their case and try to

1 present a new case because they didn't like how the
2 first case went. In fairness we do need to get this
3 wrapped up. The other concern we have is just the
4 length of time that has now elapsed since the testimony
5 was given. It's going to be more and more delays.
6 It's just going to create more problems to try and come
7 to recall testimony and to give a good decision. And
8 so we strenuously want to get this over sooner than
9 later.

10 THE COURT: Okay. All right. Since we just
11 have housekeeping left any objection to releasing the
12 court reporter?

13 MR. LEWIN: No.

14 MR. GERRARD: No, your Honor.

15 THE COURT: You're free to log off.

16 (Proceedings concluded at 3:42 p.m.)

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1 JAMS

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3 SHAWN BIDSAL, AN INDIVIDUAL,)
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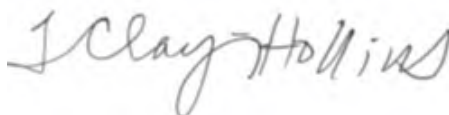
4 CLAIMANT/COUNTER RESPONDENT,) NO. 17026

5 VS.)

6 CLA PROPERTIES, LLC, A)
7 CALIFORNIA LIMITED LIABILITY)
COMPANY,)

8 RESPONDENT/COUNTER CLAIMANT.)

9
10 I, TECKLA CLAY, CSR NO. 13125, OFFICIAL
11 REPORTER OF THE SUPERIOR COURT OF THE STATE OF
12 CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY
13 CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH 98
14 COMPRISE A FULL, TRUE AND CORRECT REMOTE TRANSCRIPT OF
15 PROCEEDINGS TAKEN IN THE ABOVE ENTITLED CAUSE ON
16 AUGUST 5th, 2021 DATED THIS 30TH DAY OF AUGUST, 2021.

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25 TECKLA CLAY, CSR NO. 13125

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[& - affectionately]

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[sounds - talks]

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EXHIBIT 271

1

JAMS

2

BEFORE HONORABLE DAVID T. WALL (Ret.), ARBITRATOR

3

* * * * *

4

5 SHAWN BIDSAL, an individual,)

6 Claimant/Counter-Respondent,)

7 vs.) JAMS Ref No. 1260005736

8 CLA PROPERTIES, LLC, a)

9 California limited liability)

10 company,)

11 Respondent/Counterclaimant.)

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TRANSCRIPT OF PROCEEDINGS

ARBITRATION

CLOSING ARGUMENTS, PAGES 1381 - 1593

Taken on Wednesday, September 29, 2021

By a Certified Court Reporter

At 9:02 a.m.

Via Zoom Videoconference Link

Reported by: Dawn Bratcher Gustin, CCR 253, RPR, CRR

Job No. 46511

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24 SHAWN BIDSAL
BENJAMIN GOLSHANI
25 SPENCER LEWIN, Law Offices of Rodney T. Lewin

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I N D E X

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CLOSING STATEMENTS

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1 P R O C E E D I N G S

2 THE ARBITRATOR: Let's go on the record.

3 Appearances for the record on behalf of
4 Claimant.

5 MR. GERRARD: Doug Gerarrd and Jim Shapiro on
6 behalf of Shawn Bidsal. Mr. Bidsal is also present.

7 THE ARBITRATOR: Okay. I'm getting a fair
8 amount of feedback on your audio there, Jim. I don't
9 know why.

10 MR. SHAPIRO: The reason is because we're using
11 Doug's -- Doug, can you mute yours?

12 THE ARBITRATOR: You guys are in the same room?

13 MR. SHAPIRO: Yeah.

14 THE ARBITRATOR: Yeah, that's the problem.

15 MR. SHAPIRO: It's gone now.

16 So I'm going to stay muted. Doug is going to
17 be the one who is going to speak most of the time,
18 although I will be addressing the exhibits. And so I
19 will speak for that and then keep mine muted. We
20 shouldn't have too much of a feedback issue.

21 THE ARBITRATOR: Okay. So we are still doing
22 appearances. And Mr. Bidsal is here as well; right?

23 MR. SHAPIRO: Yes, Mr. Gerrard, Mr. Shapiro,
24 Mr. Bidsal.

25 THE ARBITRATOR: And on behalf of Respondent

1 CLA Properties.

2 MR. LEWIN: Rodney Lewin and Louis Garfinkel on
3 behalf of CLA, and Mr. Golshani is also present.

4 THE ARBITRATOR: And Spencer Lewin?

5 MR. LEWIN: Spencer Lewin is attending as my
6 assistant.

7 THE ARBITRATOR: Okay. So we had a discussion
8 off the record, partially off the record, regarding
9 Respondent's position as set forth in their September
10 27th, 2021, letter regarding Exhibit 200.

11 Mr. Shapiro, do you wish to respond?

12 Now your audio is off altogether. You are
13 muted somehow.

14 MR. SHAPIRO: There we go. Can you hear me?

15 THE ARBITRATOR: All right. Yes, now I can.

16 MR. SHAPIRO: So our position is just what we
17 set forth in the letter, which is when Doug and I
18 started looking into this and talking to Shawn, all
19 three of us had the same exhibit. It was an exhibit
20 that was introduced after arbitration had already
21 started. So it wasn't something that was exchanged in
22 advance, and we just had the two pages.

23 I don't know that we necessarily have a huge
24 objection to the first page coming in. It's just that
25 according to our record, that's all that the three of us

1 had, and because it was consistent, that was our
2 position, is that's what came in.

3 THE ARBITRATOR: Well, it sure seems like all
4 three pages were handed out at some point during the
5 testimony. Mr. Gerety, he obviously had it, I think all
6 three pages, during his testimony. The record seems to
7 establish that.

8 I don't really see a whole lot of prejudice.
9 So I'm going to allow Exhibit 200 as substituted,
10 Mr. Lewin, to be the operative Exhibit 200 for purposes
11 of the record. All right?

12 And which -- you've attached it, but there were
13 some erratas that were attached. Which email -- why
14 don't you just do a new email, a new upload to Jim's
15 access with the substituted Exhibit 200.

16 MR. LEWIN: Very well.

17 THE ARBITRATOR: All right. As to Exhibit 88.

18 MR. LEWIN: Yes, Your Honor.

19 Look, I've read the opposition. The point that
20 was made both during the hearing and up to now is that
21 the Country Club -- and the evidence is that the Country
22 Club operating agreement and the Green Valley operating
23 agreement were signed at the same time, that Exhibit
24 B -- Exhibits A and B are the same, and it's only
25 offered not to litigate any issues with respect to

1 Country Club, but it's offered to show what the
2 understanding of Exhibit B is because Mr. -- in one of
3 his emails that was introduced by Mr. Bidsal, Exhibit
4 36, he responds to a question that Mr. Golshani makes
5 concerning -- which ostensibly appears to be concerning
6 Country Club, but the response that he has having to do
7 with what's -- that, you know, what -- how distributions
8 are going to be made is relevant. It's an admission
9 with respect to the interpretation of Exhibit B.

10 So what we're offering Exhibit 88 for is not to
11 litigate anything having to do with Country Club; it's
12 to show that -- what Mr. Bidsal's understanding of
13 Exhibit B was.

14 THE ARBITRATOR: I get that, but, I mean, I had
15 intentionally not admitted evidence regarding what took
16 place with Country Club. Whether -- whether there's
17 properties within Country Club that are similar to the
18 arrangements in -- in Green Valley Commerce, you know,
19 the interpretation of the operating agreement for my
20 purposes in Green Valley Commerce is specific to Green
21 Valley Commerce. You know, whether we're -- whether
22 we're talking about Exhibit B to the operating agreement
23 or the formula, it's all specific to the way business
24 was done under Green Valley Commerce in terms of, you
25 know, separate properties and parceling them out and how

1 they're treated and the cost segregation and all of
2 that.

3 So I'm not going to expand this arbitration to
4 take evidence on whether Country Club was treated the
5 same way or business was operated in the same manner as
6 it might affect the intent of the parties in
7 interpreting the operating agreement because I don't
8 think it's relevant.

9 As I said previously, I know Exhibit 36, I
10 think, is in, but I'm not inclined to change the ruling
11 on Exhibit 88.

12 Mr. Shapiro, I don't know if you want to add
13 anything to that. I sort of jumped in, but I thought
14 I'd just give you my inclination.

15 MR. SHAPIRO: Your Honor, your inclination is
16 correct, and we agree with it.

17 THE ARBITRATOR: Okay. So Exhibit 200 will be
18 substituted and is in. Exhibit 88, I am not going to
19 reconsider the decision not to admit it that took place
20 during the -- I don't know, April hearing? I forget.

21 Okay. That's on the record in the transcript.
22 So I wouldn't be inclined to write a separate order on
23 that.

24 Other than that, it's -- it's closing
25 arguments. I begin with counsel on behalf of Bidsal. I

1 know we have a counterclaim, and I think we had
2 discussed whether there would be an additional argument
3 regarding the counterclaim as a sort of a surrebuttal.
4 I think I had said previously that that would be
5 appropriate.

6 I got to tell you, you know me well enough by
7 now that some of this is going to be sort of interactive
8 where I'm going to jump in with questions because I
9 think it's germane to my consideration of the issues.
10 If somebody has an objection to that, that's fine, lodge
11 it now, and we will -- and I won't do it that way. But
12 that's my inclination.

13 Hold on. One more thing.

14 I don't specifically recall -- I'm looking
15 now -- I don't specifically recall if the arbitration
16 provision or any agreement has a time period for an
17 award. I don't think it did. I just wanted to kind of
18 let you guys know that it's probably going to take me a
19 couple weeks to put this together. I can't tell you
20 that I'm going to have it within seven days or ten days
21 given other things I have going on and the fact that
22 it's going to be pretty detailed. So I might need 30
23 days to get this.

24 MR. GARFINKEL: Your Honor, this is Louis
25 Garfinkel. And Doug and Jim, you can correct me, Rod, I

1 thought it was 30 days.

2 THE ARBITRATOR: I don't know. I don't
3 remember. And I don't have it in my original notes.

4 MR. GARFINKEL: I believe it's 30 days, Your
5 Honor. And --

6 THE ARBITRATOR: Think it's in the arbitrat- --
7 in the operating agreement?

8 MR. GARFINKEL: Yeah, I believe it's 30 days.

9 MR. GERRARD: Yeah, I don't recall there being
10 anything, Your Honor, in the operating agreement, but 30
11 days is fine with us.

12 THE ARBITRATOR: Okay.

13 MR. GARFINKEL: I do believe that because the
14 issue came up in the appeal about Judge Haberfeld's --
15 Judge Haberfeld's --

16 THE ARBITRATOR: Yeah, that one was, like,
17 eight months; right?

18 MR. GARFINKEL: Yeah. I mean, the point is --
19 stipulated to it, Judge, but regardless, it became an
20 issue in the last arbitration, and so that's why I say I
21 believed it was 30 days.

22 THE ARBITRATOR: All right.

23 MR. GERRARD: It is 30 days. Jim just
24 confirmed that.

25 MR. LEWIN: I'm looking -- I'm looking at

1 the operating agreement, 30 days --

2 MALE VOICE: -- in 14.1 of the --

3 THE COURT REPORTER: I don't know who's
4 talking.

5 THE ARBITRATOR: Okay. One at a time for the
6 court reporter, please.

7 All right. So the operating agreement says 30
8 days. Thirty days should be enough for me. If it
9 isn't, I guess I can send an email out before the 30
10 days expires asking for a stipulation for an additional
11 15 days or something like that. But it's not going
12 to -- it's not going to be eight months. It's not going
13 to be eight months.

14 Okay. That being done, Mr. Gerrard, I'm going
15 to turn it over to you. And, you know, obviously I have
16 read everything that's been submitted.

17 MR. GERRARD: Thank you, Your Honor.

18 Before I begin, I just want to thank you for
19 all of your time spent on this matter. I know we're
20 paying you for that time, but you've been very
21 attentive, and it's been obvious from your questions and
22 comments that you understand what's going on.

23 I will say, however, that this closing is going
24 to be longer than I originally anticipated it would be
25 because of the long delay from the time that this

1 arbitration started. I -- when I went back and read
2 through the transcript, I realized that there were many
3 things that I did not remember anymore because it had
4 been, you know, more than three months since we started.
5 And so we're going to err on the side of caution and
6 make sure that we cover all the evidence. Let me see if
7 I can share screen here so I can do this.

8 Okay. So Your Honor, I told you in my opening
9 that what this case is about is primarily the
10 interpretation of two provisions of an operating
11 agreement, that being Exhibit B to the operating
12 agreement and the buy/sell language that's in Section 4
13 of the operating agreement.

14 And I told you at the beginning that as you
15 listened to the evidence, you would see that this
16 operating agreement presents a simple concept. That
17 concept is that all income is to be split 50/50 between
18 the members and that at some point in the future when
19 the property is sold, each member is to get their
20 original cash contribution back, and all the
21 appreciation from the property is to be split 50/50.

22 That's the simple concept. Split all income
23 50/50, each member gets their money back eventually when
24 there's a sale, and all appreciation to be split 50/50.

25 Interestingly enough, the formula in the

1 buy/sell language works exactly the same way. The
2 appreciation under the formula is to be split 50/50 with
3 the selling party getting their original money back.
4 What CLA is arguing in this case is that Bidsal should
5 not get his 50 percent share of the appreciation from
6 the sales of Buildings C, B, and E.

7 CLA wants to take advantage of Mr. Bidsal.
8 What Mr. Bidsal has argued from the beginning is that
9 the actions he took were taken to protect CLA by paying
10 back its share of capital associated with each sale,
11 even though the language of the operating agreement did
12 not require that step to be taken by Mr. Bidsal.
13 Mr. Bidsal, as you've seen from the evidence, was never
14 taking advantage of CLA. That's the fundamental crux of
15 this case.

16 When the arbitrator interprets the absolutely
17 ambiguous language of the operating agreement, is it
18 going to be interpreted to carry out the fundamental
19 intent of the agreement on a reasonable basis, or is it
20 going to be interpreted in a manner that allows CLA to
21 take advantage of Mr. Bidsal, because that's what this
22 arbitration is about.

23 So I just talked to you about what the simple
24 business model is. And remember, as we go through all
25 the evidence, you are going to see that all of it,

1 including the way that the operating agreement was set
2 up and the way that the parties acted, intent -- shows
3 the intent that at all times all income is to be split
4 50/50. Not just rents, but all income. And eventually
5 each member would get their -- their return of their
6 capital.

7 What Mr. Golshani wants is to change the
8 agreement. Mr. Golshani, as I mentioned, does not want
9 Mr. Bidsal to get his share of the appreciation from
10 these three different sales, and this entire case is
11 about Mr. Goshani -- not Goshani, I'm sorry, but
12 Golshani -- attempting to use the ambiguities that exist
13 in the operating agreement to take advantage of
14 Mr. Bidsal.

15 So from the beginning this was about
16 Mr. Golshani wanting to participate in a real estate
17 investment to benefit by Mr. Bidsal's experience.
18 Mr. Bidsal had extensive experience in acquiring and
19 managing income-producing properties, and Mr. Golshani
20 did not have that experience and wished to participate.
21 And the plan from the beginning was to acquire secured
22 debt, to convert the debt into fee simple title to the
23 underlying property or the collateral, and to manage
24 that company to generate income. Period. Exclamation
25 point. The original intent was not to sell the

1 property. It was to generate rents.

2 Now, throughout this presentation, Your Honor,
3 I have given you the references for all the things I'm
4 going to tell you that are either to the exhibits and
5 where in those exhibits this information is provided,
6 and also I have made reference to the transcript of the
7 proceedings. Usually you'll see that in a parenthetical
8 with just numbers.

9 So from the beginning, the idea was to set up a
10 new entity to own and operate the property -- not sell
11 it, but own and operate. And that is shown very clearly
12 in Exhibit 5. On the very first page of Exhibit 5,
13 which is the operating agreement, there is a reference
14 to the business of the company. And when you look at
15 that reference to the business of the company, nowhere
16 in that reference does the words "selling property"
17 appear.

18 It says, quote:

19 "The business of the company shall mean
20 acquisition of secured debt, conversion of such
21 debt in a fee simple title by foreclosure,
22 purchase, or otherwise, and operation and
23 management of real estate."

24 Nothing in the business of the company set forth
25 in the operating agreement says anything about selling

1 property as a part of the business of the company.

2 Now, this is going to become important because
3 it goes into why the language of the operating agreement
4 was set up the way that it was, why Exhibit A -- Exhibit
5 B language is the way that it is, why the language in
6 the formula for the buy/sell is the way that it is.

7 Now, in this simple business model, as I said,
8 the equity was going to be split 50/50. Why? Why was
9 it going to be 50/50? Because the parties agreed that
10 they had equal risk in this venture.

11 It's fascinating to have listened to the
12 evidence and the questions from Mr. Lewin where he
13 attempts repeatedly throughout the course of the
14 arbitration to talk about they have a disproportionate
15 interest. There was no disproportionate interest. Just
16 because Mr. Golshani put up more cash, does not mean
17 that they had a disproportionate interest. It was only
18 through Mr. Bidsal's experience that they got this
19 opportunity, and it was only through Mr. Bidsal's
20 management that it turned into what it did. And there
21 was no question that they had equal risk. That's why
22 they agreed that it was a 50/50 membership. Not 70/30.
23 There's no disproportionate risk. The parties agreed
24 what the risk was.

25 So this is manifested very clearly in Exhibit A

1 to the operating agreement, which very clearly says that
2 all income, loss -- I'm sorry -- income, gain, loss,
3 deduction, or credit is to be allocated 50/50 to each
4 member. Now, it is subject, of course, to some special
5 allocation language or preferred allocation language
6 that is in Exhibit B, but we have to remember what a
7 preferred allocation is. We'll talk more about that
8 later, but a preferred allocation is an exception to the
9 general rule under the tax code.

10 So under the simple business model, what was
11 the fundamental things that mattered? First, that each
12 member would share equally in any appreciation of the
13 company's property. That is a fundamental precept of
14 this concept that they put together in this operating
15 agreement manifested both by Exhibit A and Exhibit B to
16 the operating agreement and by the formula; and
17 secondly, that upon the sale of all the property or an
18 exercise of the buy/sell provision, that each member
19 would get their initial cash contribution returned and
20 get its 50 percent of any appreciation.

21 We talked about the language in Section 5.1
22 which is -- you know, the numbering is really screwy
23 because this agreement was very poorly drafted -- but
24 we're talking about, of course, Exhibit A to the
25 operating agreement, and here is where we see the actual

1 language. Well, in Section 5.1, remember there's some
2 important words. The words are "distributive share."
3 Each member's distributive share of income, gain, loss,
4 deduction, or credit is to be determined as follows,
5 meaning what your distributions would be.

6 And then we go to 5.1.1 that refers you to
7 5.1.1.1, and in that section is where we see this
8 language that says that all items of income, gain, loss,
9 deduction, or credit are to be allocated among the
10 members in accordance to the -- in proportion to their
11 percentage interest, which is the 50/50 interest,
12 subject, of course, to the preferred allocation
13 schedule.

14 Now, both Mr. Gerety and Mr. Wilcox testified
15 that the words income, gain, loss, deduction, or credit
16 cover everything that this company had, including
17 depreciation. Depreciation is a deduction. So
18 depreciation is also supposed to be split 50/50, as
19 we'll cover later.

20 So in this operating agreement, we have an
21 Exhibit B. And Exhibit B is set up rather strangely
22 because it has different language at the top of Exhibit
23 B, as Your Honor remembers, and then some other language
24 at the bottom of Exhibit B.

25 At the top of Exhibit B, the language is very

1 different from what is on the bottom, but this -- at the
2 top it has this language:

3 "Cash distributions from capital
4 transactions" -- doesn't say here what that
5 is -- "shall be distributed per the following
6 method between the members of the LLC."

7 And then it goes on in another sentence. In
8 that sentence, new sentence:

9 "Upon any refinancing event and upon the sale
10 of company asset," singular, "cash is
11 distributed according to a step-down
12 allocation.

13 So here, at least at this point in the language,
14 we see two different concepts. First of all, we're
15 talking about cash distributed from capital transactions
16 is going to be under this preferred allocation schedule,
17 and then it talks about a refinancing event or the sale
18 of the company's asset.

19 Now, under Mr. Bidsal's interpretation of this
20 language, as you already well know, the capital would
21 only be returned if there was a sale of all the
22 company's assets or a cashout refinancing. And that's
23 consistent with this second sentence of the first
24 paragraph. There was no reason that that sentence would
25 even be in the operating agreement unless that was the

1 case.

2 Now we go to the bottom. At the bottom of the
3 Exhibit B, there's two paragraphs. The first of those
4 two says:

5 "Cash distributions of something called profits
6 from operations shall be allocated and
7 distributed 50 percent to Bidsal and 50 percent
8 to CLA."

9 Right after that, we have a paragraph that talks
10 about what profits from operations means. And that is
11 this language. It says:

12 "It's the express intent of the parties that
13 cash distributions of profits refers" -- to
14 what? -- "to distributions generated from
15 operations resulting in ordinary income" -- and
16 now he makes a contrast -- "in contrast to cash
17 distributions arising from capital transactions
18 or nonrecurring events such as the sale of all
19 or a substantial portion of the company's
20 assets or cash out financing."

21 Again, we'll have a little grammar lesson later
22 on in this presentation to talk about that language,
23 but, again, just as it was in the first paragraph, there
24 is a description of what the capital transactions or the
25 nonrecurring events would be, a sale of all or a

1 substantial portion of the company's assets or cash-out
2 financing.

3 Okay. So Mr. Golshani's position is that
4 this -- these words, "cash distributions of profits,"
5 refers solely to rents received through operations, and,
6 interestingly, the only -- that only rents are divided
7 50/50 and everything else, interest and gains from
8 sales, are supposed to be allocated and distributed
9 70/30. This came from Mr. Gerety. Mr. Gerety made the
10 argument that the express intent language in the last
11 paragraph of Exhibit B must mean that if something is
12 not a capital transaction as that is defined in the tax
13 code, then -- then it must be -- in other words, it's
14 one way or the other. It's either ordinary income from
15 rents or it's everything else, which falls under his tax
16 definition of a capital transaction.

17 And of course, as I pointed out here, he
18 doesn't use a definition from the operating agreement
19 for that. He uses the definition of what a capital
20 transaction is for purposes of the Internal Revenue
21 Code.

22 Mr. Golshani's position is also that the plan
23 was always for the company to buy the note, get the
24 underlying property, and then sell the buildings to turn
25 a profit.

1 Now, this is really important, Your Honor, and
2 I hope that you picked up on it. The reason that we
3 made such a big issue out of what the intent was -- and
4 as we walk through the evidence you'll see this -- the
5 parties vis-a-vis whether they were planning to sell the
6 property or not from the outset is that if they had no
7 intent from the outset to sell the property, then the
8 language of Exhibit B and the language of the formula
9 makes sense.

10 If -- because at the time that all these things
11 were being done, as we'll see later, the company only
12 owned one asset at the beginning when these things
13 were -- this language was first formulated, and that was
14 a note. And then later when the operating agreement was
15 actually signed, it just owned some parcels of real
16 property, but still, by that point in time, there was no
17 intent to sell.

18 But the point is at the time that this language
19 of Exhibit B and the language of the formula were
20 drafted -- were put together and formulated and put into
21 the drafts of the operating agreement, at those points
22 in time, the company only owned one asset.

23 And so to sell that one asset would be a sale
24 of everything that the company had and would result
25 easily in a repayment of each party's capital and

1 certainly would meet the -- the description of Exhibit B
2 for what would trigger the special allocation language.

3 So we made a point throughout the arbitration,
4 and I'm sure Your Honor saw it, showing what was going
5 on because these -- the language of these two provisions
6 is hopelessly ambiguous. But by seeing what was going
7 on, it's easier to understand what it was that the
8 parties were trying to do and what this language was
9 intended to do.

10 In response to that, you saw a huge effort by
11 Mr. Golshani through his testimony to say no, no, no,
12 the plan was not ever to simply manage the property and
13 collect rents. The plan was always from the beginning
14 to sell these properties; to subdivide it, to create
15 more value, and then sell it. And I have listed here
16 all the many times that he said that, all the different
17 pages of the transcript where he makes this argument.

18 Well, it's really important that you keep this
19 in mind because, as I'll point out in a minute, they
20 can't have it both ways. If the plan was always to
21 subdivide and increase the value of the individual
22 buildings and then realize that value through selling
23 the buildings, then that -- that's the argument we've
24 heard from Mr. Golshani as to why everything should be
25 at a 70/30 split.

1 Now, here's Mr. Bidsal's position: That the
2 members planned to own and operate the property and were
3 to equally share all the profits and share equally all
4 the appreciation and receive a return of all their cash
5 contributions -- when? -- only upon a sale of all the
6 assets or a cash-out refinancing.

7 What is the evidence that we've seen that
8 supports Mr. Bidsal's position? Well, the operating
9 agreement in Exhibit A that talks about all income gain
10 and deductions are to be allocated 50/50, perfectly
11 consistent with what Mr. Bidsal has testified what was
12 supposed to happen.

13 On September 16th, when Exhibit B language was
14 first added, the company owned the only single asset,
15 which was the note. And the first time that we ever see
16 this Exhibit B language being added in the drafts is in
17 Exhibit 91, which was on September 16. And it makes
18 perfect sense if all that there was was one asset, and
19 you read this as if their company only had one asset,
20 then Exhibit B makes perfect sense.

21 Next, even after the property was acquired on
22 September 22nd and subdivided on October 7th, there was no
23 attempt to market or sell the buildings until nearly a
24 year later in August of 2012.

25 Next, Golshani received all of the tax returns,

1 and all of the tax returns show a 50/50 allocation of
2 all gain from every sale, and he never objected to any
3 of those until 2016.

4 Next, Mr. Golshani received all the
5 distribution schedules at the time of each sale which
6 gave a breakdown of how the distributions were
7 calculated, and he received the distribution checks, and
8 he never objected to the 50/50 allocations or the
9 distributions until after the sales had all been
10 completed, the year after they had all been completed.

11 Next, we have all the tax returns. The tax
12 returns, each and every one of them, show an allocation
13 50/50 of all of the gain, which is completely consistent
14 with what Mr. Bidsal is saying was the intent, but it's
15 inconsistent with Mr. Golshani's position.

16 We have the testimony of Mr. Main. Jim Main
17 was the accountant. He reviewed the documents and
18 reviewed the operating agreement, and he allocated
19 things -- all of the gain from every sale 50/50 on the
20 company's tax returns, which were all provided to,
21 again, Mr. Golshani.

22 We have the testimony of Mr. Wilcox, who is an
23 expert on how this language is to be interpreted, and he
24 likewise said the only way that you can reasonably
25 interpret this language is the way that Mr. -- the way

1 that Mr. Bidsal did interpret it, which is that the
2 special allocation language was never triggered unless
3 there was a sale of all -- or substantially all the
4 assets.

5 Finally, and I think this is most important of
6 all, you have the language of the buy/sell formula
7 itself, which is designed to give each member back 50
8 percent of appreciation plus what the original cash
9 contribution measured at the date the property was
10 acquired. Think about that for a minute, Your Honor.

11 If the formula gives back the capital
12 contribution measured at the date the property was
13 acquired, it does not contemplate sales of individual
14 buildings, because if it did, why would it say that you
15 are going to get your cash contribution back the way it
16 was originally? Because if there was a sale of all or
17 substantially all the assets, it would make sense, but
18 otherwise it doesn't make sense. If your plan was, from
19 the beginning, to sell each building individually or to
20 sell some of them -- sell the property off piecemeal,
21 this language makes no sense.

22 Now, perhaps one of the most interesting things
23 that came out of this arbitration is that Mr. Golshani's
24 position actually supports Mr. Bidsal. And this is
25 extremely important. And this came directly from their

1 expert as well as from Mr. Wilcox. Look, Your Honor, if
2 the company was in the business of buying a secured
3 note, converting it to fee title, and then operating the
4 property to collect rents, it explains why Exhibit B is
5 set up to only return cash contributions when all the
6 property is sold. Because the business of the company
7 is not to sell property; it's to generate rental income.
8 And so it makes perfect sense that if they reached the
9 point where they decided now we're going to liquidate
10 the property, that's the point where they would generate
11 a return of capital to all the members.

12 However, if you accept CLA and Gerety's
13 argument that the intent was always to subdivide and
14 sell off the buildings, if that was the business plan of
15 this company as they've so vociferously argued, then
16 that means that the buildings became the inventory of
17 the business, and the sale of each building would have
18 resulted in ordinary income, which under Exhibit B is
19 unequivocally supposed to be split 50/50.

20 So they can't have it both ways. Either the
21 plan was to sell the -- was just to collect rents and
22 then if -- once they've sold everything, then there
23 would be a return of capital, or if the plan was to
24 sell -- was to subdivide and sell off the buildings,
25 then under the very express language of Exhibit B, those

1 would be cash distributions of profits from operations,
2 which have to be split 50/50.

3 So there is no way for them to win this
4 argument, because one way it's split 50/50 and the
5 special allocation language was never triggered, unless
6 there's a sale of all the assets, and the other way, it
7 would never be triggered.

8 Now, let's talk about the buy/sell formula and
9 why it's ambiguous and why this Court has to listen to
10 parol evidence in order to interpret it. This is the
11 formula: It's fair market value minus cost of purchase
12 times .5, meaning take each member's half, and then add
13 back in the capital contribution of the offering member
14 measured at the time of the purchasing the property
15 minus prorated liabilities.

16 The term "fair market value," even though Your
17 Honor doesn't have to decide it, is ambiguous because it
18 specifically refers to Section 4.2 of the operating
19 agreement when you look at the definition. And Section
20 4.2 describes the price the offering member thinks is
21 the fair market value of what? Not of the company, of
22 the remaining member's interest. It's a value of an
23 interest. So if you dispute that value, then there's a
24 provision in 4.2 for you to obtain an MAI appraisal of
25 the underlying property owned by the company.

1 This appraisal procedure in 4.2 is for -- to
2 appraise the value of the property owned by the company.
3 So what does the term "fair market value" actually refer
4 to? At the beginning of 4.2, it says it's the value of
5 a membership interest, but in the body of 4.2, it tells
6 you to determine that by getting a value of the assets
7 that are owned by the company. So, of course, it
8 creates an ambiguity.

9 The term "COP" is ambiguous because it means --
10 by definition in Section 4.1, it means cost of purchase
11 as, quote, "it specified" -- and that's the way it
12 appears, the language -- "as it specified in the escrow
13 closing statement at the time of the purchase of each
14 property owned by the company."

15 So the only way under this agreement that you
16 get COP is to look at an escrow closing statement for a
17 purchase price of property owned by the company.
18 Obviously there is no escrow closing statement from the
19 time of the purchase of any property other than the
20 Greenway property, and all of the members admitted that,
21 and this is their -- the reference to their testimony.

22 So of course that creates an ambiguity because
23 that couldn't have been what the parties intended, is
24 that the cost of purchase would only refer to some
25 property that was purchased later on. There is only one

1 escrow statement, and that's for the purchase of a note
2 that the date -- the date -- I'm sorry. There's only
3 one -- only an escrow statement from the purchase of the
4 note that the date this language was proposed, and the
5 only thing that came after that was the Greenway escrow
6 statement.

7 The term "capital contribution" is ambiguous
8 because it always stays fixed as the contribution at the
9 time of purchasing the property, and because, other than
10 Greenway, the company never purchased any property. So
11 according to the language of the operating agreement,
12 the capital contribution number would have to be what it
13 was on the date that the Greenway property was
14 purchased. The formula does not contemplate sales of
15 individual properties, as we mentioned earlier, and it
16 certainly does not contemplate a 1031 exchange.

17 So after highlighting those issues, Your Honor,
18 I'm going to now run through -- and this will be
19 quicker, but I'm going to run through the summary of the
20 evidence that we've seen because those ambiguities
21 create a situation where Your Honor has to interpret
22 that language in a reasonable manner by looking at,
23 obviously, the parol evidence that exists. So let's
24 start at the beginning.

25 There was a deed of trust note. It was

1 executed by Green Valley Commerce Center, LLC, who was
2 the borrower originally that owned this property for
3 8- -- for a little over \$8 million. That note was
4 secured by a deed of trust and by a separate assignment
5 of leases and rents.

6 In the assignment of rents, paragraph 1, the
7 rents are assigned from the borrower to the lender, and
8 that's an absolute assignment. But then the lender
9 assigns back a license for the borrower to receive and
10 hold the rents, and the borrower is allowed to hold the
11 rents for the lender until or unless a default occurs,
12 and even when a default occurs, the borrower is still
13 holding the rents for the lender.

14 However, under that assignment, there is no
15 credit that will be given for rents until the, quote,
16 "money collected is actually received by the lender."
17 So there's no credit against the loan until the money is
18 received by the lender under the express terms of the
19 assignment, and, most importantly, no credit will ever
20 be given for any rents that are received, quote, "after
21 foreclosure or other transfer of the trust property."

22 Well, obviously we know in this case what
23 happened. In 2010, Mr. Golshani indicated a desire to
24 take advantage of Mr. Bidsal's experience and wanted to
25 get involved in these real estate projects. What was

1 Mr. Golshani's experience up to that point in time? He
2 had managed only one condo project in the early 1990s
3 prior to deals that he entered into with Mr. Bidsal.
4 That was his only management experience. And he had
5 ceased all real estate activities in 1992. So it had
6 been nearly 20 years since Mr. Golshani had had any
7 experience with real estate, and his real estate
8 experience was extremely limited. He had never done
9 anything like what it was that Mr. Bidsal showed him how
10 to do.

11 And so at the end of 2010 and early 2011,
12 Mr. Bidsal and Golshani looked at several opportunities
13 for investing together. In early 2011, Mr. Bidsal
14 decided he wanted to bid on the Green Valley Commerce
15 note, and he qualified his company, Real Estate -- Real
16 Equities, LLC, to bid through auction.com by providing
17 evidence of full proof of funds to auction.com. That's
18 uncontroverted in the record.

19 There is zero evidence for Mr. Golshani's claim
20 that his credit card was ever used to qualify for
21 bidding. He said it, but under the best evidence rule,
22 he did not ever provide any actual evidence. I mean, if
23 it was really done, he would have documents that would
24 show that his credit card was transmitted to be used in
25 the -- his -- his proof of funds was what was used to

1 purchase this property, but it simply isn't true, and
2 they provided no evidence of it.

3 Then on May 19th of 2011, Real Equities was the
4 successful bidder at the auction, and it entered into a
5 purchase agreement, which is Exhibit 1, to purchase the
6 note. It is true that Mr. Golshani attended the auction
7 with Mr. Bidsal. It is true that they discussed what
8 the bids were going to be as it went on, but it was not
9 Mr. Golshani that was bidding. It was Mr. Bidsal that
10 was bidding. And Mr. Bidsal told Mr. Golshani that if
11 he wanted to participate, he would have to put up 70
12 percent of the money for a 50 percent interest in a new
13 company that would own the note.

14 Immediately thereafter, just like as you can
15 see about seven days later, Mr. Golshani -- I'm sorry --
16 Mr. Bidsal filed articles of organization with the
17 Secretary of State of Nevada and set up Green Valley
18 Commerce, LLC, which I just refer to as GVC. There was
19 no operating agreement at that time, and Mr. Bidsal
20 obviously was shown as the sole managing member.

21 On May 31st, Mr. Bidsal, through Real Equities,
22 LLC, assigns his rights to purchase the note to the new
23 company. And on June 3rd, the two parties put up their
24 money for the purchase of this note. Mr. Golshani put
25 up \$2,834,250 for a 50 percent interest, and Mr. Bidsal

1 put up \$1,215,000. But what else did Mr. Bidsal
2 contribute? Why is it that there is a 50 percent
3 interest for each instead of 70/30? Well, it's because
4 Mr. Bidsal also contributed the opportunity to purchase
5 this note, his expertise in having found the
6 opportunity, and his management services.

7 On June 17th, the deed of trust for the
8 underlying note was assigned to Green Valley Commerce.
9 Now, between June and September of 2011, drafts of an
10 operating agreement for GVC were circulated between
11 David LeGrand, who was the attorney for the company,
12 Mr. Bidsal, and Mr. Golshani.

13 On September 16th, which is an important date,
14 Mr. LeGrand sent changes to the proposed Exhibit B to
15 the operating agreement in response to Mr. Golshani's
16 questions. This is the first draft of the operating
17 agreement that included this express intent language
18 that we see at the very bottom of Exhibit B. As of the
19 date of this draft of the operating agreement, the
20 buy/sell language still did not have the formula in it
21 that we're dealing with in this case.

22 So we can draw a line in the sand. As of
23 September 16th, this -- this is -- there's -- this is the
24 first time we have the full Exhibit B language, and we
25 still don't have the formula. And what did the company

1 own as of that date? One asset. A note. And if you
2 look at this language with that in mind --

3 THE ARBITRATOR: Hold on. Hold on. Your
4 audio -- or you froze for a couple minutes after you
5 said the first version.

6 MR. GERRARD: Oh, okay.

7 What I said, Your Honor, is this Exhibit B is
8 the first -- I'm sorry. This September 16th draft of the
9 operating agreement is the first draft that included the
10 express intent language in Exhibit B. So it's the first
11 one that has all the language that we have in Exhibit B.
12 And it's all -- but as of that date, the formula that we
13 have now in the buy/sell agreement was not there.

14 THE ARBITRATOR: Okay.

15 MR. GERRARD: So if you draw a line in the sand
16 as of this date, we can see that as of this date, GVC
17 held only one asset, a note. And if you read the
18 language of Exhibit B in the context of and with the
19 perspective of the company only owns one asset, a note,
20 then the language that we have in Exhibit B, at the very
21 beginning of Exhibit B that talks about the sale of
22 company asset, singular, it makes perfect sense.

23 Now, on September 22nd we have an email from
24 Mr. Golshani to Mr. Bidsal that is the first place that
25 the buy/sell language ever shows up, and that's Exhibit

1 67. And this shows exactly who it is that came up with
2 the buy/sell language. It wasn't Mr. Bidsal, and it
3 wasn't Mr. LeGrand. It was Mr. Golshani.

4 On September 22nd, a lot of things happened in
5 this company. That's the date that the deed in lieu of
6 foreclosure agreement between GVC, the new entity, and
7 the former borrower, American Nevada, was entered into.
8 The deed in lieu agreement is very important.

9 In Section 2.2A, it makes it clear that the
10 liens, meaning the deed of trust lien that was held by
11 GVC, was not going to be released through this deed in
12 lieu agreement. The liens were not being converted into
13 title in the property as we were -- Mr. Lewin repeatedly
14 argued. This document is very clear in saying that
15 those liens would survive the closing of the deed in
16 lieu of foreclosure.

17 Section 2.10 of that agreement talks about a
18 transfer of \$295,000 and change in collected rents.
19 When's the transfer supposed to take place? At the
20 closing.

21 Section 2.11 talks about a transfer of \$74,000
22 and change in security deposits. These are very
23 specific terms in the agreement. And we have an escrow
24 closing statement from that date that reflects an actual
25 transfer of the 295,000 and change in rents -- that's

1 what it says right on the escrow closing statement --
2 and 74,000 and change in security deposits. Well, the
3 escrow closing statement, what does it not show? It
4 does not reflect any purchase price for property. All
5 it has -- all it shows is the money that was being
6 transferred through the deed in lieu of transaction.

7 Now, there was also -- there was on the same
8 day a grant, bargain, sale deed that was recorded. As
9 in any escrow, the escrow company never releases the
10 money until after they record. We have a grant,
11 bargain, sale deed that was recorded, and on that date
12 what did Green Valley own after the recordation? They
13 owned one parcel of real property comprised of eight
14 buildings and a second parcel comprised of a parking
15 lot.

16 And on that same date as a part of the closing
17 of the transaction, Green Valley Commerce issued to the
18 borrower a Form 1099-C, which is a cancellation of debt,
19 for \$3,994,582, which included \$311,265 in interest.
20 What does that mean? It means that when these rents
21 were received after the recordation of the deed, they
22 could not have been applied to a debt which no longer
23 existed.

24 We heard all kinds of argument that starts with
25 Mr. Gerety, because his job was to try to find offsets,

1 that somehow these rents that were collected should have
2 been characterized as a return of capital because it was
3 really a payment of interest, but that's not possible
4 under the documents. The documents clearly say what it
5 is, which is rents, and the rents weren't received until
6 after the debt had been forgiven. So of course it was
7 not applied as a payment against the debt, nor could it
8 have been under the assignment of rents agreement or
9 under the deed in lieu of foreclosure agreement. Both
10 of them are very clear in stating just the opposite of
11 what Mr. Golshani's position is.

12 So the next thing that happens is October 7th of
13 2011, there's a record of survey that is reported. That
14 record of survey resulted in a subdivision of the two
15 parcels into nine legal parcels for tax purposes. And
16 the reason this was done was explained by Mr. Bidsal in
17 his testimony.

18 He said the reason he did this was to permit
19 the company to take advantage of accelerated
20 depreciation -- not because they had a plan to sell the
21 properties at the time, but because he was trying to
22 accelerate depreciation. And at this date, there's no
23 evidence of any intention to sell any of the property.
24 We hear Mr. Golshani saying that was his plan, but there
25 was nothing that supports it, not a single email, not a

1 single document discussing this with a broker, no
2 listing agreements. There's nothing.

3 Now we move forward to November. November 29th
4 and 30th, in those two dates, Mr. Golshani and
5 Mr. LeGrand discussed and inserted the final buy/sell
6 language which included the formula into the draft
7 operating agreement. Remember we first saw this formula
8 back in September as it had been transmitted by
9 Mr. Golshani. Now it gets inserted into the draft
10 operating agreement. And as of this date when the
11 formula gets inserted, what did the company hold? Nine
12 separate legal parcels. And according to all the
13 testimony, other than Mr. Golshani's claim, there was no
14 intent to sell any of the property at this time.

15 But as I pointed out at the bottom right here
16 with those references, Mr. Golshani maintained
17 throughout the arbitration that the plan was always from
18 the beginning to subdivide and sell, and that's
19 important because they can't have it both ways, as we
20 talked about earlier.

21 So then we see that the operating agreement is
22 finally signed on December 10th, and the parties
23 understood it would be effective as of June of 2011.
24 Now, Mr. Golshani admitted that he read the operating
25 agreement in its entirety before he signed it and that

1 he could have told Mr. Bidsal he was inaccurate if he
2 had any issues with it.

3 From 2011 when the property was first acquired
4 in September to mid-2012, American Nevada Company -- I
5 think it's actually corporation -- but they had been
6 managing the property before, and they managed --
7 continued to manage the property after GVC took title
8 until Mr. Bidsal took over management in mid-2012.

9 American Nevada prepared the accounting records
10 including the 2011 general ledger that Mr. Lewin and
11 Mr. Gerety tried to seize on to say that somehow the
12 rents should be characterized as interest because
13 somebody booked it that way on a 2011 general ledger
14 that was not even prepared by Mr. Bidsal.

15 In March of 2012, a declaration of CC&Rs was
16 recorded for GVC, which created covenants and rules for
17 all the buildings which were now numbered A, B, C, D, E,
18 F, G, H, and a common area of parking lot. And these
19 CC&Rs were important because they give rights to the
20 owners of each of these individual parcels, which at the
21 time was all owned by GVC. But if they were sold off,
22 it gives third parties rights to use the common areas
23 and that parking lot. And ultimately they are required
24 to pay money associated with the maintenance.

25 The next thing of importance is in June of

1 2012, the 2011 tax return was filed, and it was received
2 by CLA, and it reflects \$169,225 in rents and \$311,265
3 in interest, all of which was allocated 50/50 and
4 distributed 50/50 to each member. If Mr. Golshani
5 thought that the interest, as he calls it, was supposed
6 to be 70/30, why didn't he say anything? This was, of
7 course, a notice to CLA of this distribution.

8 And it's important to note that even though
9 Mr. Gerety went back as far as he could to find anything
10 that he could seize upon to produce the amount of money
11 that was supposed to be paid to Mr. Bidsal for his
12 interest, that the statute of limitations ran on any
13 effort to recover this in June of 2018. There's a
14 six-year statute of limitations under NRS 11.190(1)(b)
15 because this is based upon a contract, the operating
16 agreement.

17 The way that allocations and distributions are
18 supposed to be made are governed by the operating
19 agreement, and if Mr. Golshani thought it was done
20 wrong, he was on notice of it because he received the
21 tax return. He had six years to do something about it,
22 and he never did. So that's a red herring where they're
23 trying to recover something they never would have any
24 legal right to recover.

25 So now we move forward to August of 2012. On

1 August 13th is the first date that we see any effort to
2 sell any of the properties. This is when marketing
3 materials were sent from Mr. Jeff Chain to Mr. Bidsal to
4 advertise the buildings for sale. This is Exhibit 50.
5 There is no evidence of any effort to sell these
6 properties that's shown by any documents prior to this
7 date. Now, Mr. Bidsal said it was shortly before this
8 when a decision was made by the members that they wanted
9 to sell pieces of the property.

10 And, again, the reason this is important is
11 taking into context what the company owed at the time
12 that this Exhibit B language was created so that we can
13 interpret it around the ambiguities that were there.

14 The next thing that happens is in September of
15 2012, there is a sale of Building C for \$1,025,000. The
16 net sales proceeds of 898,000 and change, which also
17 included a \$75,000 note from the buyer, is what was
18 generated from this sale.

19 It wasn't until the following year, remember
20 September 2012 to March of 2013, that the -- that we
21 knew what was going to be left over from the sale
22 because they had put it up for a 1031 exchange with an
23 accommodator, and the Greenway property was purchased
24 using the sale proceeds for \$790,000 with closing costs,
25 \$803,726.

1 It was at this time in March of 2013 when
2 Mr. Bidsal and Mr. Golshani first discussed the
3 individual sales would not trigger the preferred
4 allocation waterfall of Exhibit B, and they agreed at
5 this time to divide the excess proceeds from any
6 individual sales by paying back the tax cost allocation
7 associated with each property on a 70/30 basis and then
8 dividing the appreciation 50/50, consistent with what
9 the intent of the operating agreement was from day one
10 because, of course, the operating agreement does not
11 contemplate selling off these properties one at a time.

12 And this is -- the reference is in the record
13 where Mr. Bidsal testified about those discussions. And
14 consistent with that, in March of 2013 right after those
15 discussions, Mr. Bidsal sent a distribution breakdown to
16 Mr. Golshani showing how the distributions of the
17 remainder from the sale of Building C after the 1031
18 exchange was going to be made and showing that the
19 remaining cost basis of Building C was being distributed
20 on a 70/30 basis. And Mr. Golshani accepted the
21 distribution breakdown and the check without any
22 objection.

23 In March of 2013 is when we have the cost
24 segregation study that was completed, and that's Exhibit
25 18. And it segregated out the allocable amount of the

1 original basis between all of the eight parcels and the
2 parking lot. And I asked Mr. Golshani several times in
3 his direct examination and in his cross-examination if
4 he had any problems with the cost segregation study, and
5 he said, no, that that's the way that it had been
6 carried on their tax returns, and he had no objections
7 with it. So --

8 (Interruption from Zoom audio
9 difficulties.)

10 THE COURT REPORTER: I'm sorry, I lost your
11 audio.

12 MR. GERRARD: So on the one hand, they say
13 no -- so on the one hand, Mr. Golshani testified
14 repeatedly they have no issue with the cost segregation
15 study. That was his testimony. But Mr. Lewin tried to
16 elicit testimony multiple times that there's a
17 difference between the original amount paid for the
18 property, which if you look back at -- at the original
19 escrow closing statement, which was Exhibit Number 3,
20 that showed that the total price paid was \$4,048,939.
21 So there's a difference between that and this total
22 number of \$3,967,000. But this is the way that the
23 numbers were carried forward on the company's books
24 throughout the duration of its existence, and
25 Mr. Golshani said he had no problems with that.

1 So in September of 2013, the 2012 tax return is
2 filed, and it's received by CLA. He admitted receiving
3 it. It reflected income of 338,000 and change, which
4 was all allocated 50/50.

5 Now we skip forward for a year to September of
6 2014 when the 2013 tax return was filed and, again,
7 received by CLA. It reflects \$115,000 in rents and
8 \$110,000 in gain from the sale of Building C after the
9 1031 exchange had been completed and after they had
10 collected more money on the \$75,000 note. That \$110,000
11 was very clearly divided 50/50 on the tax returns.

12 Now, it's interesting that -- well, I'll skip
13 that for now.

14 Then we move forward to November of 2014. This
15 is when the sale of Building E took place for \$850,000
16 with net proceeds that is shown there of 797-, and the
17 distribution breakdown, again, was provided to CLA which
18 showed the cost basis of \$427,000 plus the cost of the
19 sale of 52,000, totaling 479-, was being distributed
20 70/30, but the gain on the sale of that building of
21 317,000 was being distributed 50/50.

22 Now, it's really interesting, and Your Honor,
23 I'm sure, remembers this because you took pretty copious
24 notes, but I asked very specifically to Mr. Golshani if
25 he received all these distribution breakdowns from the

1 sale of all three buildings, and he admitted to
2 receiving the breakdown from the sale of buildings, and
3 he admitted receiving the distribution breakdown from
4 the sale of Building B, but the transaction in the
5 middle, this one, of B, he at first said, "Oh, I don't
6 know if I got that. I don't know if I received that
7 one."

8 Obviously he doesn't want to admit receiving it
9 because it puts him on notice that there was
10 distributions being made on a 50/50 basis of the gain --
11 not like that's going to help him because it was also
12 reflected in the tax return, which he certainly did get.
13 But it's very important that Your Honor remember that at
14 the end of Mr. Golshani's examination when I
15 cross-examined him after Mr. Lewin asked him questions,
16 which happened two -- or, like, a month after this
17 arbitration started, on pages 1242 and 43 of the
18 transcript, Mr. Golshani admitted that he had received
19 all three of the distribution breakdowns, not just the
20 one for C and E.

21 So obviously the gain of 317- was distributed
22 50/50. Mr. -- CLA received two checks. They received
23 one check for its 70 percent of the cost basis and a
24 second check for 143,000 and change, which was its 50
25 percent of the gain. Again, why was he getting two

1 checks? If everything was supposed to go 70/30 as they
2 have claimed until he received back all of the capital,
3 why was he getting two distribution checks?

4 Obviously Mr. Golshani knew exactly what was
5 going on because it had been discussed right after the
6 sale of Building C what they were going to do. He just
7 wants to change that now to take advantage of the
8 situation. He received the distribution breakdown. He
9 received the two checks. He cashed them without any
10 objection.

11 Then we move to February of 2014. This is when
12 the 2000- -- well, this date's wrong. Let's see. It's
13 obviously wrong. It should be -- give me one second,
14 here, Your Honor, because I obviously put a date in
15 wrong.

16 Yeah, this should say February 27, 2015. It's
17 out of order. But on February 27 of 2015 is when the
18 2014 tax return was filed and received by CLA. It
19 reflects \$198,000 rental income and \$410,000 of gain,
20 all of which was allocated 50/50, and the gain was
21 distributed 50/50.

22 Now, this is really important. Mr. Gerety
23 testified that when CLA received its tax returns and saw
24 that the gain from every sale was allocated 50/50,
25 quote:

1 "...it would have immediately known it didn't
2 get the distributions that it was now claiming
3 were due."

4 So their own expert has admitted that these tax
5 returns put them on notice. And it's not just
6 Mr. Gerety's testimony. Mr. Golshani said he had a
7 personal accountant that could have explained the tax
8 returns to him. He also admitted -- and this was really
9 important -- that he reviewed his tax returns and his
10 K-1s each year to determine how his capital account had
11 gone up or down and, obviously, from that he saw how
12 allocations were being made because it's right there on
13 the K-1s.

14 So Mr. Golshani knew all along what was
15 happening. Mr. Golshani also had the right to review
16 the Green Valley Commerce records at any time by going
17 to Mr. Bidsal's office and looking at them. But not
18 only did he never take advantage of that at any time
19 before this arbitration started, he never even went
20 there after the arbitration. He's never once gone to
21 Mr. Bidsal's office to look at the records.

22 Mr. Bidsal's actions have obviously been very
23 and completely transparent throughout this entire
24 history of this Green Valley Commerce company. He
25 repeatedly discussed with Mr. Golshani what was being

1 done. He sent emails to Mr. Golshani describing what
2 was being done. He sent distribution breakdowns to
3 Mr. Golshani that Mr. Golshani approved from the sale of
4 every building. He sent him the checks, two checks,
5 from each transaction at which there was gain. He sent
6 them tax returns each year that clearly reflected what
7 was going on. It's impossible to believe that
8 Mr. Golshani did not know what was going on.

9 Finally, in August 2015 was the sale of
10 Building B for 617,000 and change generating net
11 proceeds of 584,000. There was a distribution breakdown
12 again provided to CLA, which they've admitted they
13 received. It showed a cost basis of 284,000 being
14 distributed 70/30 with the gain of 333,000 being
15 distributed 50/50. And, again, CLA received two checks:
16 One for the 70/30 distribution, one for the 50 percent
17 of gain. Never objected. Never said there was any
18 problems. Just cashed the checks without any objection.

19 Then we move to January of 2016. Here is where
20 the first discussion arises about anything related to
21 distributions. Mr. Bidsal sent an email to an assistant
22 of Mr. Golshani's named Lita explaining the member's
23 agreement that the cost basis, which he called the
24 capital, from each sale was being distributed 70/30 and
25 the profits distributed 50/50.

1 Now, this wasn't a complaint that had been
2 received from Mr. Golshani, and it's important to
3 remember that. Mr. Golshani says, "Oh, I was
4 complaining in 2015 and 2016, at the beginning of 2016."
5 There's nothing to support that. Nothing. This was one
6 of Mr. Golshani's assistants asking for an explanation
7 of what she was seeing. Obviously she hadn't been
8 paying attention before or had some question.

9 Then Mr. Bidsal testified that he has a meeting
10 in January or February where he, again, explained this
11 to Mr. Golshani, we assume, because Lita must have
12 discussed it with Mr. Golshani. But there is a meeting
13 in January or February of 2016 where, again, Mr. Bidsal
14 goes over what they had agreed to clear back in 2013 and
15 2012.

16 And on April 4th, the 2015 tax return was filed
17 and received by CLA. And, again, this reflected
18 \$229,000 in rental income and 333,000 in gain, all of
19 which was allocated 50/50 and the gain distributed
20 50/50. And, again, it was all sent to Mr. Golshani.

21 Now, to determine -- to determine if he was
22 getting correct allocations and distributions,
23 Mr. Golshani testified that he went by what was on his
24 tax return. Now, I bolded this for a reason, Judge. If
25 he really wants Your Honor to believe that he didn't

1 have any idea what was going on despite his testimony
2 that every year he reviewed his K-1s and his tax returns
3 and his testimony before that he received all of the
4 distribution breakdowns and Mr. Golshani's -- I mean
5 Mr. Bidsal's testimony about how they discussed this
6 after the bill of sale -- sale of Building C, how they
7 were going to make distributions, this testimony should
8 put that issue to bed.

9 Mr. Golshani said that for his own
10 determination of whether he was getting the correct
11 allocations and distributions, that he went always by
12 what was on his tax return. So he has admitted that all
13 those tax returns he got for 2012, '13, '14, and now
14 '15, which all show allocation of gain on a 50/50 basis,
15 that he was reviewing them, that he knew what was going
16 on, and that he was fine with it. Because the 2013
17 return shows the Building C gain allocated 50/50, the
18 2014 return shows the Building E gain allocated 50/50,
19 and the 2015 return shows the Building B gain allocated
20 50/50. So Mr. Golshani has admitted that he was fine
21 with what was going on.

22 Now, in April of 2016, April 22nd to be
23 specific, is Mr. Golshani's first written complaint
24 about the way that Mr. Bidsal was distributing too much
25 money to himself. Mr. Golshani argued that any money in

1 excess of net profit from rent must be divided 70/30,
2 and that's a quote from Exhibit 36.

3 Of course, he never complained about the
4 distributions from Building C or Building E
5 distributions. The only thing that he was talking about
6 was Building B.

7 Now, in response to this, Mr. Bidsal sent an
8 email to Mr. Golshani, and this is really important, and
9 I -- because Exhibit 36 has multiple emails, I gave you
10 the actual reference of the Bates label, Judge, of
11 what -- which one of those it is.

12 But in this email, Mr. Bidsal explains to
13 Mr. Golshani again how the distributions are being made
14 equally to each member according to this agreement they
15 have from way back in 2012. And then he -- he actually
16 tells Mr. Golshani to refer to his notes, Mr. Golshani's
17 notes, from their prior discussions about how
18 distributions are being made, because they discussed it,
19 and Mr. Golshani took notes, and Mr. Bidsal watched him
20 take the notes. And so he said, "Go back and look.
21 You'll see we talked about this way back at the time of
22 the sale of Building C."

23 In late 2016 to early 2017, the relationship
24 between Mr. Bidsal and Mr. Golshani became strained, and
25 this was because of expenses related to operating the

1 properties. Mr. Bidsal was managing the properties, and
2 he agreed to do that without taking any management fee
3 or broker's fee for putting new tenants in place as a
4 part of what he had contributed to the company; however,
5 he never agreed that he would bear all the expenses
6 associated with that. In other words, if you have to
7 pay, for instance, outside accountants to prepare tax
8 returns or you had to -- you know, you got expenses
9 associated with the direct management, and he wanted
10 those expenses to be reimbursed because he never agreed
11 that he would cover all the expenses as a part of
12 managing the property, and Mr. Golshani refused. And so
13 that led to Mr. Bidsal making an offer to part ways with
14 Mr. Golshani.

15 In March of 2017, the 2016 tax return was filed
16 and received by CLA. Now, I did not include in the
17 summary that the 2017, '18, and '19 tax returns were
18 also sent because they don't really have anything to do
19 with what Your Honor's deciding.

20 Now we get to the offers, Your Honor. In July
21 of 2017, Mr. Bidsal made an offer to purchase Golshani's
22 membership interest in GVC based upon a fair market
23 value number of \$5 million, and that's set forth in
24 Exhibit 37. After Mr. Golshani's offer was sent also in
25 July of 2017, Mr. Bidsal and Mr. Golshani had a meeting,

1 an in-person discussion, to discuss what each would
2 receive if one bought out the other.

3 Remember, that Section 4.2 of the operating
4 agreement states:

5 "The remaining member shall have 30 days within
6 which to respond in writing to the offering
7 member by either accepting the offering
8 member's purchase offer," that's the first
9 option, "or rejecting the purchase offer and
10 making a counteroffer to purchase the interest
11 of the offering member based upon the same fair
12 market value formula according to the formula
13 that's set forth after this."

14 Well, this is interesting. We know that
15 Mr. Golshani did not accept the offering member's
16 purchase offer so that he had to elect number 2. And if
17 he elected number 2, number 2 is very specific in what
18 happens. Number 1, it means that the original purchase
19 offer is rejected. And, number 2, it means that a
20 counteroffer is made. Both of those two things, a
21 rejection and a counteroffer, have legal significance,
22 and they also demonstrate how ambiguous this agreement
23 actually is.

24 CLA's counteroffer was made on August 3rd, which
25 meant that they had to close escrow according to the

1 operating agreement within 30 days, but the counteroffer
2 has no purchase price. How can you close escrow when we
3 don't even know what it is that they are offering to
4 pay?

5 What is a counteroffer? Well, under the law,
6 under the legal definition of a counteroffer, the
7 definition is, quote:

8 "An offer that is a new offer that varies the
9 terms of the original offer and that ordinarily
10 rejects and terminates the original offer."

11 Well, we go back to the language of the
12 operating agreement. It also says that it was going to
13 be a rejection of the original offer in subpart 2, and
14 it uses the term "counteroffer," which of course is a
15 rejection and a termination of the original offer.

16 But what does that mean in terms of the
17 language of Section 4 of the operating agreement? Well,
18 what it means is that CLA's new offer technically made
19 it the offering member under Section 4.1, which should
20 have given Mr. Bidsal the right to object to that offer
21 by asking for an appraisal.

22 Now, that's not before Your Honor today, but
23 what it does is it demonstrates just how ambiguous this
24 agreement is, because under the definitions in Section
25 4.1 of the operating agreement, technically Mr. Golshani

1 and CLA became an offering member by definition once
2 they had rejected the original offer.

3 So Mr. Bidsal's response was to elect the
4 option under Section 4.2 to get an appraisal. And there
5 was a letter that was sent by Mr. Lewin on August 28,
6 2017, and that letter, again, states that CLA has the
7 money to close, and he attached a bank statement, but it
8 provided no payment. It provided no money. And as of
9 this date, they never even stated what they thought the
10 purchase price was going to be.

11 And on August 31st, Mr. Shapiro sends a letter
12 back claiming the right to an appraisal. And then on
13 September 2nd, 2017 -- this is a critical date because
14 this is the date that they have admitted in their
15 interrogatory responses was the last day for
16 Mr. Golshani and CLA to complete the purchase under the
17 terms of the agreement. The operating agreement says
18 they have 30 days. This is the end of the 30 days.

19 So what happened on this date? Did they
20 complete the purchase? Did they tender any payment of
21 any kind? Did they even tell us what the amount of
22 money was that they were planning to pay? None of those
23 things happened.

24 So now let's look at a summary of a few of the
25 key things we heard from some of the other witnesses.

1 From Jim Main, Jim Main said he prepared all the tax
2 returns for Green Valley Commerce. He also testified
3 that he relied upon the operating agreement to determine
4 how to allocate the profits, losses, and gains from the
5 sales and to determine what a capital transaction was.
6 He testified -- well, before we leave that last one,
7 this is kind of important, the last -- the last point
8 there that you see on the screen.

9 Mr. Main is a -- an experienced accountant, and
10 he interpreted this agreement, as you are going to see
11 in a minute, in exactly the same way that Mr. Wilcox
12 interpreted it and exactly the same way that Mr. Bidsal
13 interpreted it, and he did that on his own. He
14 allocated all gains on a 50/50 basis under the terms of
15 the operating agreement.

16 He also gave some testimony that was important.
17 And remember, Mr. Golshani testified that the reason he
18 first questioned the amounts of distributions is because
19 he saw on a K-1 that his capital account percentage was
20 greater than 70 percent and that Mr. Bidsal's was less
21 than 30 percent, and he could not understand how that
22 could possibly happen.

23 And Mr. Main testified how that happens. He
24 said changes in the capital account percentages is
25 caused by a difference between cash available for

1 distribution and the accounting income, which are two
2 different things. The accounting income takes into
3 account depreciation. And so he very clearly testified
4 that this -- changes in these capital account
5 percentages was caused not by over-distributions, as has
6 been claimed by Mr. Golshani, but by simple differences
7 created by depreciation, changing the difference between
8 cash available for distribution and between the
9 accounting income.

10 Jim Main also testified that the gain from all
11 sales was allocated 50/50 and that he did not handle the
12 distributions. And he testified that all types of
13 income were allocated 50/50 in consistent -- because on
14 the tax returns consistently with Sections 4.1.1.1 and
15 4.1.2. He also testified that depreciation is a
16 reduction of ordinary income; so it is an ordinary
17 deduction. Depreciation being a deduction against
18 rental income and rental income being the ordinary
19 income, it gets allocated on the basis of the 50/50
20 percentage interest.

21 Mr. Main also testified that he read that last
22 paragraph of Exhibit B, the "It is the express intent"
23 language, to mean that unless there was a sale of all or
24 substantially all of the Green Valley Commerce assets,
25 everything was to be distributed on a 50/50 basis. So

1 this is again consistent with Mr. Wilcox's
2 interpretation and Mr. Bidsal's interpretation.

3 Now, let's talk about a few of the keys that we
4 heard from Mr. Wilcox's testimony. Mr. Wilcox, first of
5 all, unlike the other two accountants that you heard
6 from, he practices exclusively in income taxation for
7 partnerships, LLCs, S corporations, and high net worth
8 individuals. None of the other two accountants you
9 heard from have that same experience. He testified that
10 allocations and distributions of income is governed by
11 the operative documents, in this case by the operating
12 agreement, not by the tax code, which was inconsistent
13 with what Mr. Gerety did.

14 He testified that the K-1 reports to the member
15 that -- that member's share of the net income, it
16 reports their distributions, and it shows the capital
17 accounts. The K-1 would disclose how income and gain is
18 being allocated, and the tax returns showed how
19 distributions were being made.

20 He testified that under Internal Revenue Code
21 Section 704(a) and (b) -- which are expressly
22 referenced, as you remember, Your Honor, in Exhibit A to
23 the operating agreement -- saying that the special
24 allocations had to be made in accordance with Section
25 704(a) and (b) of the code. And he states that under

1 those sections, that allocations and distributions are
2 to be made based upon what the operating agreement says
3 as long as it has substantial economic effect.

4 You remember I asked Mr. Gerety, did these
5 operating agreement provisions have substantial economic
6 effect? He said, yes, that they did, and, as a result,
7 he admitted that it should have been the language of the
8 operating agreement that controlled how distributions
9 and allocations were made, yet that's exactly contrary
10 to what he did.

11 What Mr. Gerety did is he tried to use a tax
12 code definition of capital transaction and substitute
13 that for what the operating agreement defines a capital
14 transaction as.

15 Mr. Wilcox also testified that the general rule
16 for this company was to allocate everything 50/50 and
17 that the preferred allocations are exceptions to the
18 general rule that apply only in specifically denominated
19 instances. He said that the special allocation language
20 is triggered by, one, the refinancing event or the sale
21 of a company asset, which is singular, meaning if the
22 company sold its only asset, and he said that the term
23 "capital transaction," as I mentioned, would not be
24 defined by the tax code but by the operating agreement,
25 which is the opposite of what Mr. Gerety did.

1 Now, let's have a little grammar lesson,
2 because we heard from Mr. Lewin repeatedly -- he spent
3 time asking each of the witnesses that interpreted this,
4 especially Mr. Wilcox, if they knew what these things
5 meant.

6 So the words "In contrast" -- this is from the
7 last paragraph of the operating agreement in Exhibit B.
8 The words:

9 "In contrast to cash distributions arising from
10 capital transactions are nonrecurring events,
11 such as a sale of all or a substantial portion
12 of the company's assets or cash-out financing."

13 This phrase that I have put in italics is what
14 we referred to as a modifying phrase. It modifies the
15 nouns transactions, capital transactions, and events,
16 nonrecurring events. In other words, it is describing
17 what these two nouns -- a capital transaction and a
18 nonrecurring event is. That's what we refer to as a
19 modifier or a modifying phrase.

20 Mr. Wilcox actually testified to that in his
21 testimony, that this was -- he considered this to be a
22 modifier of the words "capital transactions" and
23 "nonrecurring events." Mr. Lewin obviously disagrees
24 with that, but that's the way that this sentence is
25 structured.

1 Then, again, a modifier is a word, phrase, or a
2 clause that describes something or makes its meaning
3 more specific. Modifiers function as adjectives or
4 adverbs. So obviously the words that were used to
5 describe such as a sale to -- used to describe a capital
6 transaction or a nonrecurring event was, quote:

7 "...such as a sale of all or a substantial
8 portion of the company's assets or cash-out
9 financing."

10 That language appears there for a reason. It's
11 not just surplusage. It's there because it's consistent
12 with what's in the first paragraph of Exhibit B and
13 because it's consistent with the simple concept that
14 this operating agreement was designed for, that capital
15 would be returned when there was a sale of all the
16 assets.

17 THE ARBITRATOR: Mr. Gerrard, let me interrupt
18 for a second. Pick a spot where it makes sense to take
19 about a five-minute break. How much more do you think
20 you have?

21 MR. GERRARD: I would say 15 minutes.

22 THE ARBITRATOR: Okay. Let's take about a
23 five-minute break now. We've been going about an hour
24 and a half or so, not all of yours, but including the --

25 MR. GERRARD: Could I just finish this one

1 simple thought --

2 THE ARBITRATOR: Sure.

3 MR. GERRARD: -- right here? I'd just wanted
4 to finish the grammar part.

5 THE ARBITRATOR: I'm pretty sure "grammar" is
6 a-r, but go ahead.

7 MR. GERRARD: Oh, I know. I was doing this
8 late last night.

9 So the next thing that we have to talk about is
10 the word "or" that appears here. The word "or" is what
11 we referred to as a coordinating conjunction. The word
12 "or" appears between "capital transactions" and
13 "nonrecurring events." A coordinating conjunction joins
14 items that are of equal importance in a list. A
15 conjunction, which is also called a connective, is a
16 word such as and, because, but, for, if, and or and
17 when. And conjunctions are used to connect phrases,
18 clauses, sentences.

19 In this case, as I pointed out before, it's a
20 coordinating conjunction, which is different from
21 Mr. Lewin's interpretation where he says it's a
22 disjunctive. The word "or" can be a disjunctive. The
23 definition of a disjunctive is something expressing an
24 alternative or opposition between the meanings of the
25 words connected with the disjunctive conjunction "or."

1 But "or" is not always a disjunctive. As I pointed out,
2 it can also be a connective.

3 And in this case, in this sentence, "capital
4 transactions or nonrecurring events," the word "or" is
5 not a disjunctive because it is not stating that a
6 capital transaction is an alternative to or the opposite
7 of a nonrecurring event. Instead, these two are equal
8 items in a list of things which are contrast -- in
9 contrast to cash distributions and profits.

10 Okay, Your Honor.

11 THE ARBITRATOR: All right. We'll take five
12 minutes. And then we'll reconvene for the last 10 or 15
13 minutes of Mr. Gerrard's, and then we'll go into
14 Mr. Lewin. All right?

15 MR. GERRARD: Thank you.

16 (A recess was taken from 10:32 a.m. to
17 10:39 a.m.)

18 THE ARBITRATOR: Mr. Gerrard, I'll let you go.

19 MR. GERRARD: Okay. Thank you.

20 So pick up where we were. We were going over
21 the testimony of Mr. Wilcox.

22 So he also testified that none of the three
23 sales triggered the special allocation language. The
24 tax returns -- and Mr. Main, likewise, did not treat
25 those sales as triggering the special allocation

1 language. He also testified that because the special
2 allocation language was never triggered, the manner in
3 which Bidsal made distributions of sale proceeds
4 benefited CLA because, of course, he had no obligation
5 to distribute any of the proceeds as a return of
6 capital, but he chose to do that after consultation with
7 Mr. Golshani because he thought that that was the only
8 appropriate way to do it or fair way to do it since the
9 idea was that as -- when -- when all the property was
10 sold, there would be a return of capital. It was
11 originally contemplated it would all be sold at once.

12 Mr. Wilcox also testified that the way that
13 Mr. Bidsal distributed the sale proceeds was fair to
14 Golshani, and it would have resulted in Mr. Golshani
15 receiving, ultimately, all of his money back. And it
16 also kept -- and this is important -- it kept both
17 parties equally at risk in a 50/50 limited liability
18 company. He testified the members agreed what each was
19 providing to the company was worth 50 percent of the
20 ownership and that the parties had agreed that they had
21 equal risk and equal reward, and there was no
22 disproportionate risk to Mr. Golshani because they had
23 already agreed that the risk was 50/50 to each of them.

24 Mr. Wilcox also testified that it is -- was not
25 reasonable to use the price of the -- of Greenway in the

1 defined term cost of -- the COP definition, cost of
2 purchase definition, because it would not give
3 Mr. Bidsal his 50 percent of the gain from the sale of
4 Building C. It would be reasonable to use the basis of
5 Building C as the COP number as that would give
6 Mr. Bidsal his 50 percent of the gain from that
7 building. And, again, he pointed out that this formula
8 was not designed to take into account a 1031 exchange.

9 He also testified, just as we heard from
10 Mr. Main, that the -- that depreciation is an element of
11 ordinary income. It's part of the operating income, and
12 it's to be allocated 50/50 to each member.

13 Mr. Gerety's position that depreciation is a
14 capital event and had to be split 70/30, Mr. Wilcox said
15 that's not supported by the operating agreement by his
16 experience as an accountant or by the tax code.

17 Mr. Wilcox also testified that the changes in
18 capital account percentages is a result of depreciation,
19 which is a noncash item, a deduction to ordinary income,
20 resulting in more distributable cash than net income.
21 So, again, he said the same thing that Mr. Main said,
22 that there was a reason that capital account percentages
23 would change, and it's not from over-distributions.

24 So let's now talk about the issues Your Honor
25 has to decide. The first issue you have to decide is

1 the tender issue. And I appreciate, Your Honor, as I go
2 through, that you've already signaled what your thoughts
3 were about tender, but I want to make sure that -- that
4 you understand what our position is.

5 So the first issue is does CLA still have a
6 right to purchase Mr. Bidsal's membership interest,
7 which is a critical issue. And the second issue related
8 to tender is is Mr. Bidsal still an owner of GVC and --
9 and if CLA has never performed its oblig- -- if CLA has
10 never performed its obligation to pay the purchase
11 price.

12 So Section 4.2 of the operating agreement is
13 very clear in requiring a cash payment to be made within
14 30 days of the counteroffer. It's never been done.
15 There's no question it's never been done. Not only has
16 it never been done, but the first time we ever even
17 heard what the number is of what they considered to be
18 the purchase price was after their expert got involved
19 in this arbitration. And not only was it never made, it
20 was not even attempted.

21 Your Honor made reference to a stay that arose
22 out of the other -- first arbitration and the
23 confirmation. Well, that stay did nothing to prohibit a
24 tender. It has nothing to do with -- with the -- with
25 whether or not Mr. Golshani and CLA could put the money

1 up to perform. And it's very common when there is a
2 dispute about a purchase price to pay the undisputed
3 portion or to deposit it with the Court, but you have to
4 make an attempt to perform, because under the law if you
5 make no attempt to perform, then you lose your rights.
6 And that's really the important thing. As I pointed
7 out, Mr. Golshani never identified any purchase price at
8 any time.

9 So here's the law in Nevada: It's the
10 generally accepted rule that a promise to make a payment
11 at a later date or upon -- or once a certain condition
12 has been satisfied cannot constitute a valid tender.

13 Well, what they've said here is "we couldn't make the
14 payment because we didn't know what you would accept."

15 Well, that's not the law. The law is that they
16 have to pay what they believe is the amount that's owed.
17 And if they have done that, then they can argue that
18 they have performed, even if the amount is wrong. But
19 they've never done anything. Under the Perla Del Mar
20 Avenue Trust case, which I've referenced here which is a
21 controlling 2020 Nevada Supreme Court decision, the
22 Court stated:

23 "In order to serve the same function as the
24 production of money, a written offer of payment
25 must communicate a present offer of timely

1 payment. The prospect that payment might occur
2 at some point in the future is not sufficient
3 for a court to conclude that there has been a
4 tender."

5 Again, I repeat, the prospect that payment might
6 occur at some point in the future is not sufficient for
7 a court to conclude that there has been a tender. And
8 this, of course, they cite to Am. Jur. on tender, which
9 recognizes the general rule that an offer to pay without
10 actual payment is not a valid tender.

11 Now, obviously we know Mr. Golshani has
12 admitted he never opened an escrow, and he never made
13 any payment. We know from Mr. Bidsal's testimony and
14 from the facts that Mr. Bidsal never refused to perform
15 if a purchase price had been paid. What he refused to
16 do is to open a joint escrow because there was no
17 agreement on a purchase price. But that did not prevent
18 Mr. Golshani from opening an escrow or from making a
19 deposit with the Court or making a payment in some
20 fashion.

21 No attempt to pay the money or deposit within
22 30 days means under the operating agreement CLA failed
23 to perform within the terms of the contract and
24 forfeited its rights to purchase. And that's what the
25 law is.

1 Now, the other concept that comes into play
2 here is specific performance. If their argument is, as
3 Your Honor alluded to, that they couldn't perform for
4 some reason because Mr. Bidsal somehow prevented them
5 from performing, then the law of specific performance
6 comes into play. The law of specific performance says
7 that specific performance sought by a purchaser of real
8 property may be denied if the purchase price is not
9 tendered when due.

10 So, again, it all goes back to the same thing,
11 whether you want to say that it's just straight law
12 tender where they had to actually perform within the
13 time called for by the contract, they clearly did not do
14 that. If their argument is Mr. Bidsal prevented it in
15 some fashion, they still have to tender it, the amount
16 that's due, that's the law, and they have not done it.

17 So CLA has asserted throughout this arbitration
18 that the effective date of the sale was September 2nd,
19 2017, which was 30 days after the counteroffer was made.
20 So I'm going to walk you, Your Honor, through what that
21 means.

22 If you accept that they still have the right to
23 purchase and that the sale was effective as of September
24 2nd, if that's true, then this is what Mr. Bidsal is
25 entitled to: He's entitled to the purchase price of

1 \$1,889,010.35, which is set forth in Schedule 5 of
2 Exhibit 201, and I'm going to walk Your Honor through
3 those schedules in a minute. He's also entitled to
4 interest on that sum that should have been paid in
5 September of 2017 at the statutory rate found in NRS
6 99.040, and that would amount right now to \$495,800.

7 Here is the schedule that shows the calculation
8 of the interest that's through the current date. And as
9 Your Honor can see -- I can make it bigger, but what
10 Mr. -- in this Schedule 6 of Exhibit 201, Mr. Wilcox
11 used the date of September 2nd, 2017, and then he
12 calculated through each change of the statutory rate
13 and -- and in his schedule that is in evidence in
14 Exhibit 201, it ends at December of 2020, and I asked
15 him to run it for this demonstrative exhibit to now
16 complete that by running it through September 30th or,
17 essentially, the current date. And that's how you get
18 to the \$495,000 number.

19 Mr. Bidsal would also be entitled to management
20 and broker's fees from September 2nd to the present in an
21 amount that would be determined in a bifurcated
22 proceeding that we bifurcated this until Your Honor
23 decided this issue. Because if he no longer owned the
24 property and yet he was managing it, then he would be
25 entitled to be paid for his management because he's no

1 longer an owner; so he would have had no obligation to
2 be managing it.

3 He would also be required to return the
4 distributions that he had received after September 2nd of
5 2017 because he would no longer be an owner. That
6 totals \$395,835. I'll show you how we arrived at those
7 numbers.

8 First of all, if we look at this first
9 schedule, this is a schedule that shows all the
10 distributions from the beginning of this company to the
11 end, Your Honor, that went to each member. And you can
12 see that Mr. Bidsal received distributions in 2018 of
13 \$175,000 and in 2019 of a hundred -- of \$80,500. So if
14 you -- if you add those two numbers to the amount of
15 distributions he got after September 2nd of 2017, which
16 are shown in Schedule 10 of Exhibit 201, which is the
17 difference between \$145,000, which is the total
18 distributions he received in November -- can you see
19 that?

20 So at the bottom of this schedule, you'll see
21 that there's two distributions that Mr. Bidsal received
22 in the year of 2017. The first was from February -- the
23 first one was received in -- on February 9th of 2017, and
24 the second on November 20th. So what Mr. Wilcox did is
25 he said everything, of course, that was disbursed in

1 February was long before the sale date; so he would get
2 all of that. So all we're talking about is the
3 distribution amount from November, which Mr. Bidsal's
4 share of that was 145,000.

5 So what he did is he took the number of days
6 from February 9th to September 2nd and the number of days
7 from September 2nd to the end of the year and used that
8 to create a proration amount. And so he would have --
9 of the 145,000 that was distributed in November, he said
10 he would have been entitled to 72 percent of that using
11 the date up through September.

12 And so if you take -- if you take that into
13 account, you take the difference between the amount that
14 he was entitled to of 104,000 and subtract that from
15 that 145,000 and then you add all those numbers
16 together, then you come up with the 40,335, which is the
17 prorated amount, the 175,000, the 180,500, and that
18 gives you total distributions of 395,835 that occurred
19 after September 2nd in 2017. So that's the amount that
20 Mr. Bidsal would have to return if you used that
21 September 2nd date as the effective date.

22 Mr. Bidsal would also be entitled to return of
23 the taxes that he paid on the \$395,000 because he paid
24 that obviously in reliance upon the terms of the
25 operating agreement, and that would be damages to him

1 because he's already paid them.

2 Now, if the Court determines that the sale can
3 still close but uses a current effective date, meaning
4 they never performed but for some reason -- which I
5 can't fathom right now -- that the Court says that you
6 are going to still allow them to perform even though
7 they never tendered and they never specifically
8 performed, then he would be entitled, again, to the
9 purchase price of 1,889,000. He still would be entitled
10 to the interest because the sale was supposed to have
11 closed back in 2017. So he's lost the right of all that
12 money to the current date.

13 He would also be entitled to keep the
14 distributions that he's received up to the present time.
15 So he would get to keep the 395,835 and -- but there
16 would be no management fees or broker fees. So we
17 wouldn't have to have any bifurcated, you know, portion
18 of this arbitration. He would just keep the purchase
19 price and the interest and keep the distributions he's
20 already received, and that would be the end of it.

21 Now, we have to talk about what Your Honor has
22 to decide, which is the application of the formula. So
23 this is a very -- of course, the crux of the case and
24 the most important thing. Here's the formula the Court
25 is supposed to apply. Let's talk about the application

1 of it.

2 First, we know fair market value number is
3 590-. That's fixed. That's easy. But the COP part of
4 that formula is defined as -- COP means cost of purchase
5 as it's specified in the escrow closing statement at the
6 time of purchase of each property owned by the company.
7 Well, as we've already covered, there is no escrow
8 closing statement from the time of a purchase of a
9 property owned by this company except for Greenway. So
10 what that language -- if you use what that language
11 says, then the COP would be \$803,726.18 because that's
12 the cost of the Greenway property. If you use what's
13 reasonable, then you would use \$3,136,430.58. That
14 comes from Exhibit 201, Schedule Number 3.

15 And here is that schedule. So what that
16 schedule shows -- whoops. All right -- is that -- what
17 Mr. Wilcox has done with this schedule is he's taken the
18 original cost of all the buildings. You can see them
19 all at the top.

20 THE ARBITRATOR: Right.

21 MR. GERRARD: And Greenway, he's just carried
22 over the original basis or the attributable cost basis
23 of Building C that was used to acquire Greenway. So
24 that just carries forward the 399,193 that was formerly
25 Building C.

1 And so he's got all of those numbers, and then
2 he carries them down to the next line you can see, which
3 is including now only the buildings that still exist; so
4 taking out the buildings that have been sold and
5 carrying down the cost of purchase of Greenway at the
6 basis of Building C. And if you use those numbers --
7 so, again, using the cost of purchase from the original
8 note as attributable -- attributed by the cost
9 segregation study to each property and taking out the
10 ones that have been sold, what's left is 3,136,430.

11 And so we, doing what we believe is reasonable
12 instead of just applying the exact language of the
13 formula, believe that that's the number that should be
14 used. Of course, that's to the benefit of Mr. Golshani
15 and CLA. That doesn't have any benefit at all to
16 Mr. Bidsal. As you'll see, if we applied the actual
17 language of the formula, it would highly favor
18 Mr. Bidsal, but we have not done that because we don't
19 think that's what the reasonable interpretation of the
20 agreement is based upon what it was intended to do
21 rather than what the awful draftsmanship left it be.

22 So then we go to the next part of the formula,
23 which is the capital contribution. Of course that,
24 according to the language of the agreement, says it's
25 measured at the, quote, "time of purchasing the

1 property." Well, the only purchase of property that
2 exists is the purchase of the Greenway property. That's
3 the only property that was ever purchased by Green
4 Valley Commerce.

5 If we use that date, then Mr. Bidsal's capital
6 contribution on that date before he had received any
7 return of money is 1,215,000. So if we use the formula
8 based upon what it says, that's what he would get. What
9 we believe is reasonable is to reduce that by the
10 amounts that he received back from the sales of
11 Buildings B and E. And that would -- and C, I'm sorry.
12 And that would give you the number of \$957,225. And we
13 see that, of course, again in Schedule 4 to Exhibit 201.

14 Again, this is where Mr. Wilcox shows all the
15 payments of capital that have been made on the first
16 line or the first section. At the top is Mr. Bidsal;
17 the bottom is CLA Properties. And you can see that he
18 received payments of 28,581, 143,954, and 85,237 from
19 the sale of those three buildings. So if you take that
20 out of the 1,215,000, that gives you the number that we
21 just indicated, which is 957,225.

22 THE ARBITRATOR: Can I interpose a question?

23 MR. GERRARD: Please.

24 THE ARBITRATOR: I have all those numbers, by
25 the way, and I understand how he got to the numbers, and

1 I understand how Mr. Gerety got to his.

2 My question is on the effective date. If, for
3 instance, hypothetically I said that the effective date
4 is not September 2nd, 2017, and not today -- and this is
5 mostly declaratory until and unless the Nevada Supreme
6 Court issues a ruling on the appeal from Judge Kishner's
7 order. So if I said the effect- -- you know, if I
8 didn't use that September 2nd, 2017, as the effective
9 date; he's still a member; he would be, under your
10 theory, entitled to keep the distributions that he
11 received in the latter part of '17 and then '18, '19,
12 '20 and whatever beyond that, why would he -- why would
13 he be able to recover interest if -- if it's his
14 position that the -- that the transaction didn't -- the
15 effective date of the transaction is not September 2nd,
16 2017?

17 MR. GERRARD: Well, because that's what the
18 agreement requires. The operating agreement says that
19 you have to make the payment in all cash within 30 days
20 of the date that it was offered in August of 2017. And
21 Mr. Bidsal has been deprived of the use of that money
22 from that point on. You know, he's an investor in real
23 estate. He can make a lot of money, as has been
24 demonstrated through this entire proceeding. He knows
25 how to take that money and to put it to use and to

1 significantly increase what it is that that money is
2 into something else.

3 And if he's lost that opportunity because CLA
4 has refused to perform, then of course he's entitled
5 under the law to the money at the time that the contract
6 says he's entitled to it, which is within 30 days of
7 when the offer was made. And if he didn't get it, he's
8 entitled, when he does it, to interest from that period
9 to now.

10 THE ARBITRATOR: All right.

11 MR. GERRARD: That's basic contract law, and
12 it's what is required by this contract. This contract
13 says when that money has to be paid. So that's the
14 reason why we believe he would still be entitled to
15 interest.

16 THE ARBITRATOR: Unless Mr. Bidsal is the
17 reason -- or unless Mr. Bidsal didn't perform so as to
18 make the transaction close in September. For instance,
19 if he had -- if he had accepted the counter, I get it,
20 but -- all right.

21 MR. GERRARD: And just to take that to its next
22 and logical conclusion, we have just walked through the
23 specific performance case law --

24 THE ARBITRATOR: Right.

25 MR. GERRARD: -- as we have the tender case

1 law. And it's all unequivocally clear that Mr. Golshani
2 and CLA, they don't have the right to sit back and say
3 because we have a dispute over what the purchase price
4 should be, that we have no obligation to pay whatever
5 amount we believe is at least the undisputed amount, in
6 other words, what we believe that number should be.
7 That money had to be paid at the beginning, and
8 Mr. Bidsal was entitled to it at that point in time.
9 And that never happened, and that's the reason why he's
10 entitled to interest, because it had to be paid under
11 the contract at that time.

12 So if they want to -- in other words, you can't
13 choose. You can't pick and choose. You can't say,
14 well, we still have the right to purchase because you
15 made an offer back in -- in August of -- or, I mean,
16 July of 2017, and that gave us a purchase right that we
17 still want to exercise now. You can't say we want to
18 take those rights without performing the obligations
19 that are associated with that right. So it's either you
20 don't have the right anymore, or, if you do, you have to
21 comply with those terms that were associated with it,
22 meaning you had to make a payment at that time.

23 Mr. Bidsal never stopped them from opening
24 escrow. He never stopped them from paying any money.
25 He never told them ever that he wouldn't accept the

1 money. He just said he didn't know what they were
2 offering because they never gave a purchase price, and
3 they never put up any money.

4 THE ARBITRATOR: But doesn't the operating
5 agreement allow for the arbitration of certain disputes,
6 including, for instance, the purchase price under the
7 formula, and no interest would accrue from that and in
8 the normal course until the determination in the dispute
9 resolution process would be concluded; right?

10 MR. GERRARD: Well, I don't think that's true.
11 I mean, yes, there is a dispute resolution process, but
12 that does not relieve you of the obligations under the
13 contract. In other words, just because you might need
14 the assistance of an arbitrator to decide, you know,
15 what those terms are does not mean that those terms are,
16 you know, suspended or something of that nature. You
17 know, they -- and that's -- that's -- I guess it gets to
18 the heart of this whole thing.

19 You could say, Judge -- and we have said that
20 when you look at this entire proceeding, it's all about
21 CLA trying to take advantage of the things that they
22 liked about the operating agreement while trying to
23 distance themselves from the obligations that come along
24 with those rights. Remember, it's a contract. You
25 don't get to say I have the right to purchase, but I'll

1 do it whenever I want. I'll do it whenever I get around
2 to it. I'll do it whenever I decide what the purchase
3 price is.

4 They didn't file this arbitration asking to
5 know the purchase price; we did. They -- they could
6 have at any time paid what the amount was that they
7 believe was the purchase price, but they chose not to do
8 that for obvious reasons. They didn't want to part with
9 the money. But if you don't part with the money, the
10 law says you have no specific performance rights,
11 meaning it doesn't matter what Your Honor would say at
12 that point about what the language means, because if you
13 didn't at least make the tender or pay the purchase
14 price that was undisputed, you've lost the rights.

15 THE ARBITRATOR: All right. All right. I get
16 it.

17 MR. GERRARD: So back to the buy- --

18 THE ARBITRATOR: Do you have much more?

19 MR. GERRARD: So back to the buy/sell formula,
20 the last element is minus prorated liabilities. If you
21 go by what the contract says, there is a liability on
22 the books for \$68,998 that would have to be subtracted
23 from the formula. If you go by what is reasonable, it
24 should be zero because the evidence is undisputed that
25 the deposit money that was received has at all times

1 been held. It's never been distributed; it's always
2 been held.

3 So what we're dealing with -- and by the way,
4 that \$68,000 number, that's the current amount. You
5 know, that's the current amount of deposits that are
6 being held and the current liability.

7 So if the money has never been disbursed, from
8 a practical perspective, there is no liability because
9 we're holding the actual money. So it would have to be
10 offset by an asset that's never been distributed.

11 So if you take that all into account, if we go
12 by what the buy/sell formula says, it would be
13 \$5 million less the amount paid for Greenway of 803-,
14 gives you 4.1 million. Take half of that, a little more
15 than 2 million, add back in Mr. Bidsal's entire capital
16 contribution of 1.2 million, subtract the liabilities,
17 and if we follow the express language of the formula, we
18 get a purchase price of \$3,244,138. That's what the
19 language says.

20 If you're being asked, Judge, to apply this
21 formula and apply the language of the operating
22 agreement to give CLA the right to purchase at what the
23 agreement actually says, that's what they have to pay.
24 If you're accepting that what it actually says and what
25 they're trying to do is take advantage of Mr. Bidsal,

1 what is reasonable is not actually what this agreement
2 says because it's full of ambiguities, meaning you can't
3 pick and choose. You can't say, well, I want you to
4 strictly enforce one part of this agreement that says I
5 have the right to purchase while strictly enforcing the
6 rest of it that talks about what the actual formula is
7 and what it means.

8 But we're saying you should do what's
9 reasonable, even though that's not in Mr. Bidsal's
10 favor. What's reasonable, we've said, is the 5 million
11 less the 1- -- less 3.1 million, which gives you the
12 1.8 million. Take half of that, it's 941,000. Add to
13 that 957,000, which is the -- his share of the capital
14 that had not been paid back. Don't subtract any
15 liability, and it's 1,889,000. That's a huge
16 difference. The difference between what's reasonable
17 and what the contract says is over \$1,300,000 that would
18 be in Mr. Bidsal's favor.

19 We have never taken that position, even though
20 that's what the contract says, because we're not trying
21 to take advantage of Mr. Golshani and CLA like
22 Mr. Golshani is trying to take advantage of Mr. Bidsal.
23 And this number that I just gave you is in Schedule 5 of
24 Exhibit 201.

25 Then we deal with the rents issue. Mr. Gerety

1 said, oh, we get to deduct from the COP or from the
2 actual amount -- actually not the COP, but from the
3 amount that's owed, money that he claims was
4 over-distributed because of rents. Well, Mr. Golshani
5 admitted in his testimony that rents are ordinary income
6 to be distributed 50/50, which I thought was really
7 interesting since, you know, their expert's trying to
8 subtract that. Mr. Wilcox testified it doesn't matter.
9 Even if it wasn't interest, it's still ordinary income.
10 So no matter how you slice it, the way it turns out is
11 the same.

12 The deed in lieu agreement results in all
13 accrued principal and interest being forgiven before the
14 rents were ever received. The rents were received after
15 the grant, bargain, sale deed was recorded. And we've
16 already seen the language of the assignment agreement
17 that says it can't be applied as a payment against the
18 loan because the loan had already been forgiven. The
19 deed in lieu agreement characterizes it as rent, not a
20 payment of interest. The deed in lieu escrow closing
21 statement reflects it's a transfer of net rents. The
22 only person that calls it something other than that is
23 Mr. Gerety and Mr. Lewin, and they call it that because
24 they are trying to create offsets.

25 Let's look at the depreciation issue. The

1 operating agreement very clearly in Exhibit A at Section
2 5.1.1.1 states that all income -- items of income, gain,
3 loss, or credit are allocated 50/50. That includes
4 depreciation, and depreciation is clearly an element of
5 ordinary income, yet Mr. Gerety still tries to subtract
6 for depreciation from what the amount is that would be
7 due to Mr. Bidsal.

8 Let's talk about the problems with the Gerety
9 opinion. First of all, and I can't overemphasize this,
10 his assignment, he admitted, was to look for offsets to
11 the purchase price that Mr. Golshani was going to have
12 to pay to Mr. Bidsal, not to take into account the
13 reasonable interpretation of what the parties intended
14 from the beginning. No. His job, his description of
15 his assignment, was to look for ways for Mr. Golshani to
16 avoid his obligation to pay Mr. Bidsal.

17 He has no credibility since these issues were
18 created specifically to avoid the payment obligation
19 rather than to try to interpret the agreement in a
20 manner that's reasonable between the parties. It was
21 just ridiculous.

22 The problems with Mr. Gerety's opinion that
23 Mr. Bidsal received 777,000 of excess distributions are
24 as follows:

25 First, he included distributions from 2018 and

1 '19, which the Court hasn't made any decision on it yet.
2 You know, when -- was that at a time when Mr. Bidsal was
3 the owner still or not?

4 Second, he includes in this the rents received
5 through the deed in lieu agreement as if they had to be
6 split 70/30 when it's very apparent that they were
7 always ordinary income, that they could not be applied
8 as a credit against the debt because the debt had, A,
9 disappeared because it had been forgiven at the time of
10 the closing of the deed in lieu agreement and because
11 they're received as rents, not as a payment against the
12 loan.

13 Next, he tried to say that the depreciation
14 should be split 70/30 rather than 50/50, and that's
15 inconsistent with tax law. It's inconsistent with the
16 operating agreement. And finally, he, of course,
17 claimed that every sale of the property should have been
18 split 70/30, but he's not using a definition from the
19 operating agreement to discern what triggers the
20 waterfall, meaning what is a capital transaction. What
21 he used instead was the tax definition of a capital
22 transaction.

23 Now, before we leave that, I, again, tell you
24 what I told you at the beginning of this closing
25 argument, which is you can't have it both ways. If the

1 business of this company was to manage real property and
2 collect rents, income-producing properties and to hold
3 until some point in the future you just sell everything
4 off, if that was the business of this company, then that
5 makes Exhibit B very understandable. It's no longer
6 ambiguous if you view it from that perspective. And if
7 you view it from that perspective, then the special
8 allocation language was never triggered and Mr. Bidsal's
9 agreement with Mr. Golshani about how to distribute
10 money from single sales are clearly not contemplated by
11 the operating agreement. There's a reasonable way to do
12 it. He didn't have to do it that way, but he was doing
13 it that way so that there would be a gradual return of
14 the capital from the sale of buildings.

15 But the opposite of that, as I pointed out in
16 the beginning, is also true, which is that if you treat
17 this the way that they are now asking the Court to treat
18 it, that this was always about flipping property, that
19 you are going to get one property, you are going to
20 subdivide it into smaller parcels and sell them off as
21 inventory of the company, then those sales generated
22 ordinary income and also had to be distributed 50/50
23 even under their interpretation.

24 Now, Mr. Gerety also gave an opinion about the
25 amount that should be paid to Mr. Bidsal, and he said it

1 was 1,598,000. He said that's the purchase price.
2 Well, the difference between what Mr. Wilcox came to and
3 what Mr. Gerety came to as the purchase price under the
4 formula is about \$290,000. The primary difference is
5 that Mr. Wilcox uses the rollover of the cost basis for
6 Building C and Gerety uses the new purchase number for
7 the Greenway property in an obvious attempt to not
8 permit Mr. Bidsal to share in the appreciation from the
9 sale of that property.

10 And if you use that literal reading, if you
11 say, no, we have to use that number because the formula
12 says that you have to look at purchase price from an
13 escrow statement, well, you can't have it both ways. If
14 you use that language, then that means that the whole
15 COP is the number paid for Greenway because there is no
16 escrow statement reflecting a purchase price for any
17 remaining property.

18 So, again, it's obvious that Mr. Gerety was
19 doing exactly what he was asked to do, which is to pick
20 and choose the things that he liked and ignore the
21 things that he doesn't like. And you can't have it both
22 ways. You either use an express application of the
23 defined term, which clearly benefits Mr. Golshani -- I
24 mean Mr. Bidsal, and it would result in the number going
25 up by about a million dollars, or you use, you know --

1 which would have -- which would have -- which would
2 allow you to use the Greenway purchase price.

3 THE ARBITRATOR: Right. I understand.

4 MR. GERRARD: Gerety also adds the full price
5 of the parking lot to the COP while Mr. Wilcox deducts
6 the prorated share of the three buildings sold as they
7 now all have an interest in that parking lot.

8 Well, Your Honor, I think that what you've seen
9 from this run-through of the evidence and the facts is
10 that there's two ways to interpret this language. One
11 is to do what is reasonable based upon what the intent
12 of the parties was, and the other is to -- to apply the
13 language strictly the way that it appears in the
14 agreement.

15 THE ARBITRATOR: And do you want to get out of
16 share screen? Is that what you were trying to do?

17 MR. GERRARD: I'm always trying to do something
18 that I'm unable to do.

19 THE ARBITRATOR: All right.

20 MR. GERRARD: And that's where we're at, Your
21 Honor, is that, you know, you have that -- that's the
22 stark difference between our position and Mr. Golshani's
23 position. Mr. Golshani's position is I want to take
24 advantage of Mr. Bidsal; I want to look for any sort of
25 deduction I can come up with; I do not want you to apply

1 strictly the language of the formula; I only want you to
2 apply the parts that I think you should apply.

3 Mr. Bidsal has said from the beginning, I don't
4 think you can apply the formula or the operating
5 agreement the way that it's written because it has too
6 many ambiguities. It just doesn't make sense given what
7 it is that was intended, but you can understand what was
8 intended by looking at what was going on at the time
9 that that language was drafted. And you get to choose
10 between those two things, but you can't pick and choose.
11 You can't pick part. You either apply the language
12 completely, which clearly benefits my client, or you
13 don't apply the language, and you come to a reasonable
14 position, which means you can't pick and choose what to
15 apply and not to apply, which is exactly what
16 Mr. Golshani and Mr. Gerety and Mr. Lewin did.

17 Thank you, Your Honor.

18 THE ARBITRATOR: All right. Either Mr. Lewin
19 or Mr. Garfinkel.

20 MR. LEWIN: It's going to be me, Your Honor.

21 THE ARBITRATOR: All right.

22 MR. LEWIN: Your Honor, first of all, I share
23 what Mr. Gerrard has said. We appreciate your
24 attention. I can tell from the arbitration hearing that
25 you really were paying attention and you really did

1 understand what was being said.

2 I have a presentation that I have prepared, but
3 I want to touch on a few -- just touch on a few -- in an
4 outline basis a few of the things that Mr. Gerrard said
5 just to sort of highlight a couple of ideas about that.

6 First of all, he repeatedly said that the
7 agreement wasn't well-drafted, it was awful
8 draftsmanship full of ambiguities and -- and we agree
9 that the -- there is ambiguities in it. He also said --
10 and I think that's important because when he's trying
11 to -- when he is -- when we're trying to interpret this
12 agreement, you have to look at the entire -- what the
13 agreement is, and it has drafting problems.

14 He also said, and I think this was interesting,
15 that Mr. -- that the deal was that the income was to be
16 shared 50/50 until there's a sale of all the property.
17 I'm going to get into that in my presentation, but I
18 just wanted you to think about that.

19 What that means for -- essentially, for each
20 party, that their capital is tied up forever because
21 there's no time limit on this LLC. And I suggest that
22 that cannot possibly have been the agreement for reasons
23 I'll go into later.

24 He also said that Mr. Bidsal and Mr. Golshani
25 had equal risk. Well, I don't know how you would have

1 equal risk if Mr. Golshani is putting two thirds of
2 his -- putting two or three times the money that
3 Mr. Bidsal is. And that's -- that just seems to be
4 elemental.

5 And I want to point out when we get to Exhibit
6 B that while -- and I'm not going to get into how the
7 actual final agreement was -- what was -- all the
8 changes that were made and how that actually took place
9 because that has already been decided in the first
10 arbitration. But I want to point out that in this
11 agreement, it's got a very curious position --
12 proposition. It's got a proposition that while the
13 50- -- that the LLC -- that the 50/50 allocation was
14 changed from 70/30 to 50/50, but the loss allocation was
15 not.

16 So somehow in this Exhibit B, Mr. -- even
17 though Mr. Golshani and Mr. Bidsal are equal owners,
18 this equal risk provision has Mr. Golshani sharing the
19 losses 70 percent to 30 percent.

20 He talked about the -- the -- and, again, I'm
21 going to go into this. He's talking about Mr. Main's
22 testimony of tax returns, which I suggest is a red
23 herring. He doesn't -- Mr. Bidsal does not want to
24 distinguish between the tax allocations that were made
25 for tax reporting purposes and the allocations of cash,

1 which Mr. Main said a couple of times is different
2 than -- it's different than -- cash is different than
3 tax allocations. It's totally two different animals.

4 Yes, allocations were made on the tax returns
5 on a 50/50 basis, but under the priority return of the
6 waterfall, the cash is allocated 70/30. Now, we're
7 going to get into what constitutes a capital transaction
8 or not, but that's -- that failure of Mr. Bidsal to
9 recognize that is the underpin of their contesting and
10 their analysis of how the cash gets distributed. They
11 want to say because it's on the tax return, that means
12 how the cash goes. That's not the way even Mr. Main
13 said, Mr. Wilcox said, or Mr. Gerety.

14 They talked about the formula and talking about
15 COP failing to recognize that the document says each
16 property, but they -- the note by itself is property.
17 And Mr. Wilcox agreed with that. So did Mr. Gerety.
18 The note by itself is property. It may not be real
19 property, but it's -- it is -- it's property. So if you
20 wanted to go by a strict -- you know, if you take their
21 position that you have to go by what property was owned
22 at the time on September 16, the property that was owned
23 was the note, and that's property.

24 This last -- I'm just trying to cover -- touch
25 on these last -- the -- in the -- in the discussion on

1 Section 4.2, what Mr. Gerrard failed -- fails to point
2 your attention to and what he failed to point the
3 attention to and tried to avoid in the underlying
4 arbitration and even in the appeal is the specific
5 intent provision that -- that belies on -- on the bottom
6 of paragraph 4.2, which sets forth no matter how this
7 is -- what -- the intent of how that formula was to be
8 applied on an offer to buy.

9 They want to relitigate the first arbitration.
10 This issue of how that formula was intended to -- you
11 know, how the -- the CLA's right to purchase and the
12 right to tender are subsumed in the first arbitration.
13 If they had -- if they had a claim that was
14 unenforceable, that was the time to raise it. The fact
15 that it wasn't raised and the fact that we have a
16 judgment there is -- indicates -- that then gets -- that
17 tender issue is gone.

18 He talks about the statute of limitations as
19 going to the -- as going to the -- goes to the -- to the
20 rent issue. He failed to acknowledge that what
21 Mr. Wilcox said and what Mr. Gerety said, they both
22 acknowledged that the part of the money that was
23 allocated for times before the purchase of the note
24 would be a return of capital.

25 And just on the issue of statute of

1 limitations, he only addressed the statute of
2 limitations on the \$300,000. We have an argument on the
3 statute of limitations, but I just want to point out at
4 the beginning that what we are doing in terms of
5 deciding what -- deciding the purchase price now, that
6 does not -- that -- the allocation of returns of capital
7 are not subject to the return of -- it is not subject to
8 the statute of limitations on -- that goes back to 2011.

9 Finally, before I get into my -- very
10 interesting to see Mr. Gerrard's doubling down on this
11 issue of interest, that if they -- if you decide that
12 the -- that the date of sale is going to be other than
13 September 2, 2017, that they are still entitled to
14 interest because that's what the contract says. The
15 contract demands he had to perform -- he had to perform
16 and he had to close within 30 days.

17 Well, think about that. If, in fact, the
18 performances -- CLA has the right to demand that
19 Mr. Bidsal convey his membership interest on September 2
20 as well. And by doubling down on the fact that they get
21 interest from that date is just a reflection of the fact
22 that their position is that the contract requires that
23 transaction to close on September 2nd; and, therefore,
24 that's the date that CLA -- that -- the dates that CLA's
25 purchase of membership interest should go back to.

1 And the issue, as I said -- and the -- and just
2 to -- just to go back on the -- he cited the Perla case.
3 You'll see that the Perla case says a tender's not -- no
4 tender is required where it's clear it's not going to be
5 accepted.

6 So with that, I just wanted to give a little
7 bit of a -- some high points that I observed during
8 Mr. Gerrard's speech.

9 MR. GARFINKEL: Your Honor, this is Louis
10 Garfinkel. I'm looking at the screens, and it looks
11 like there's -- some of them are frozen, and I don't see
12 Rodney Lewin. Are you able to see Mr. Lewin? Or it
13 might be on my end, or is it your -- or everyone is
14 seeing the same thing?

15 THE ARBITRATOR: No, I've got it. I've got
16 him.

17 MR. GARFINKEL: Okay.

18 THE ARBITRATOR: Are you on speaker view or
19 gallery view?

20 MR. GARFINKEL: I'm on gallery view right now.

21 THE ARBITRATOR: Okay. I have him.

22 MR. GARFINKEL: Yeah, I -- it's kind of
23 strange. I have everybody. Everyone seems -- I now
24 have Mr. Lewin back, but it seems like everyone is
25 frozen on mine except me. So I just wanted to make sure

1 there wasn't a problem. Thanks, Judge.

2 THE ARBITRATOR: All right.

3 MR. LEWIN: And so, Your Honor, as I said --
4 there's a number of issues that I am going to cover in
5 my closing statement. First, I'd like to start by
6 saying what this case is truly not about. It's not
7 about Ben Golshani or CLA trying to take advantage of
8 Mr. Bidsal. If anyone has taken advantage of anyone in
9 this case, it's Mr. Bidsal who has taken money that he
10 wasn't entitled to, and he has taken what Judge
11 Haberfeld has -- has claimed are outcome determinative
12 positions, not only in the first arbitration but in this
13 one.

14 It's also not about Mr. Bidsal being a nice guy
15 or Mr. -- the evidence shows that Mr. Bidsal has by --
16 by refusing to proceed with the transaction after the
17 first arbitration, he has diminished the proceeds from
18 owning Green Valley that CLA would otherwise be entitled
19 to after it purchased his interest. And that has
20 been -- I don't -- held by Judge Haberfeld or by Judge
21 Kishner to be a breach of his agreement.

22 The evidence shows that Mr. -- at Mr. Bidsal's
23 request, Mr. Golshani put up the entire deposit,
24 404,000, as well as 70 percent of the capital ahead of
25 so much as even a draft of -- was not made, you know,

1 being prepared. Now, not only did he do that with
2 respect to Green Valley, but he also did it with respect
3 to another property purchased at the same auction,
4 County Club. So between Green Valley and Country Club,
5 Golshani had contributed almost \$4 million all without
6 the benefit of an operating agreement or any written
7 agreement. And that's at page 1052, line 6, through
8 1053, line 30.

9 Although Mr. Golshani took all the risk and put
10 up the lion's share of the monies, Mr. Bidsal delayed
11 the process of preparing the operating agreement, and
12 during that period, Golshani's name was not even on any
13 official document, which put Mr. Golshani's investment
14 at great risk. So who was being the nice guy here?

15 Oh. This gets -- it also -- here's how the
16 case got started: On July 7, Mr. Bidsal was under no
17 time pressure to make an offer and could have performed
18 whatever analysis and due diligence he wanted. He
19 initiated a buy/sell agreement, the buy/sell process
20 under Section 4.2 of the CLA operating agreement.
21 Although it was labeled an offer, CLA could not ignore
22 it. As the recipient, CLA was under the gun to either
23 accept the amount of the fair market value as stated in
24 the letter or switch sides and buy again using the fair
25 market value or demand an appraisal.

1 We're not going to relitigate the first
2 arbitration here, but I just want to point out once
3 again that Section 4.2 specifically says that -- that
4 the only person with the right to demand an appraisal is
5 the remaining member, in other words, that would be CLA
6 if they decide that they don't think that the fair
7 market value -- they don't accept the fair market value
8 that was offered.

9 Mr. Bidsal thought Mr. Golshani's money was
10 tied up in other projects and he had health problems.
11 That was testified by Mr. Golshani at 1140- -- pages
12 1146 and 1147. He was not in a position to buy him out,
13 and, therefore, he made a lowball offer under the
14 buy/sell provisions. But instead of selling, CLA, as --
15 as entitled to do, offered to buy instead of sell with
16 the calculated fair market value set by Mr. Bidsal.

17 On August 5, Mr. Bidsal set the motion in
18 dispute -- set the dispute -- set the matter into
19 dispute, refused to sell based on the fair market value
20 that his letter had sent, and instead demanded an
21 appraisal. CLA demanded that Mr. Bidsal proceed to
22 close escrow within the 30 days required by the
23 operating agreement, but --

24 THE COURT REPORTER: Are you reading, sir?

25 MR. LEWIN: Yes. I'll slow down.

1 THE ARBITRATOR: And I know all of this stuff;
2 right? I mean, this is all -- this is kind of
3 historical stuff that I obviously already know. I am
4 not trying to foreclose your -- your ability to make a
5 presentation, but we know -- I mean, I know this stuff.

6 MR. LEWIN: I understand, Your Honor.

7 THE ARBITRATOR: All right.

8 MR. LEWIN: But the point I'm making here is
9 that at the time that Mr. Bidsal made his offer and at
10 the time that CLA elected to buy instead of sell, there
11 was no dispute as to -- there was really no dispute as
12 to what the formula was. Mr. Bidsal would like Your
13 Honor to believe he made the offer to buy CLA's
14 membership interest without knowing exactly how much he
15 would have to pay, and Mr. Bidsal simply said here's my
16 computation of COP, and here's my contributed capital,
17 and here's yours, and that if Mr. Golshani had any
18 objection to the matter, it could have been raised back
19 in 2017.

20 What happened is that Mr. Bidsal's contentions
21 were not even raised by Mr. Bidsal until the second
22 arbitration, and we end up addressing it in 2021 instead
23 of 2017.

24 As I mentioned, both Judge Haberfeld and Judge
25 Kishner found that Mr. Bidsal's contentions were, quote,

1 "outcome determinative," and I suggest that's the same
2 outcome determinative positions they're taking in this
3 arbitration.

4 So we know -- we know that there's three --
5 there's -- there are -- in addition to fair market
6 value, there's three other elements: COP, capital
7 contribution of the selling member, and outstanding
8 liabilities. But even when Mr. Bidsal initiated this
9 arbitration, he did not reveal what he calculated to be
10 COP or his contributed capital, much less liabilities.
11 We only found this out in the answers to interrogatories,
12 and that was only after Your Honor ordered him to do so.
13 That's in the supplemental answers that are Exhibit 164.

14 In fact, Mr. Bidsal has not proven his
15 compliance with Article 2, Section 14.1 by -- in failing
16 to require the -- required attempt to settle the dispute
17 before issuing the arbitration. And the reason for
18 that, I submit, is because his purpose is to delay.
19 Once he -- so once -- so we -- CLA has a counterclaim
20 and -- but -- and -- regarding improper distribution,
21 and another element that was omitted during
22 Mr. Gerrard's presentation, that when CLA elected to buy
23 instead of sell, he was told not to make any more
24 distributions -- that was Exhibit 38 -- and he did -- on
25 a number different occasions, but he continued to do so

1 anyways.

2 The -- I don't quite understand this whole idea
3 how -- the idea that Mr. Golshani is trying to take
4 advantage of Mr. Bidsal and Mr. Bidsal is just being a
5 nice guy because I do think there are issues concerning
6 the -- what could have been a reasonable dispute about
7 how to handle the COP could have been addressed in 2017.
8 The only purpose I can see for that is to try to gain
9 sympathy from Your Honor to try to show that Mr. Bidsal
10 has the right to artificially create a frivolous
11 interpretation of the agreement and try to say that he's
12 being reasonable by -- he is -- he should be
13 accommodated because he's being reasonable.

14 One of the -- one of the things that supports
15 that theory is that how Mr. Bidsal just was -- he was a
16 nice guy in allowing Mr. Golshani to participate in the
17 purchase of the Green Valley note. That was false.

18 Jeff Chain, Bidsal's long-time broker,
19 testified that he had identified that opportunity as
20 well as many others for the parties, and Mr. Bidsal and
21 Mr. Golshani drove up from Los Angeles and inspected
22 hundreds of properties. Mr. Golshani also testified
23 similarly. There's no dispute Mr. Golshani put up the
24 nonrefundable deposit of \$404,250, and, as Mr. Bidsal
25 himself admitted, buying a note has -- has significant

1 risk. But many things that it -- could be -- take
2 place: the seller's bankruptcy, the seller's refusal to
3 turn over -- to make payments, the seller's refusal of
4 funding foreclosures. It's any number of things that
5 could cause the transaction not to proceed. And if any
6 reason the transaction did not proceed, it was only
7 Mr. Golshani's money that was at risk. That was
8 testified by Mr. Bidsal at pages 64 to -- 694 and 695.

9 Now, Mr. Gerrard glossed over the fact that --
10 that -- how the property was actually acquired maybe
11 wanting to create the impression that it was only
12 Mr. Bidsal's control; it was Mr. Bidsal's opportunity.
13 He was just letting Mr. Golshani in.

14 Mr. Chain testified that both Bidsal and
15 Golshani had been working together at the auction
16 deciding what to bid and when to bid. It contradicted
17 Mr. Bidsal's testimony that the Green Valley opportunity
18 was just his and that he was making all the decisions.
19 That testimony was by Mr. Bidsal, but some of his other
20 testimony was an out-and-out lie. And Mr. Chain's
21 testimony can be found at pages 1059 and 1060 of the
22 transcript.

23 The point -- the point being is if Mr. Bidsal
24 is willing to lie on a little thing like this, then why
25 should he be believed on the big stuff?

1 Now, the uncontradicted testimony was that
2 before the Green Valley note was acquired, Mr. Bidsal
3 and Mr. Golshani had reached an understanding about how
4 they would work together. This -- this understanding
5 was testified by Mr. Golshani at pages 1008 through
6 1011, 1014 through 1016, and 1018 through 1019 of the
7 transcript.

8 The main points of this going-forward
9 understanding were that they would form an entity to
10 take title to any property or note that they would
11 acquire. They would both be the managers. Bidsal would
12 be the day-to-day manager doing the property management
13 and accounting. The net rent and interest income as
14 shown on their tax returns would be divided 50/50. The
15 balance would be distributed 70/30 until the capital
16 accounts were equalized. And with respect to Green
17 Valley, they would work to acquire the note, try to
18 reach an agreement with the borrower to exchange the
19 note for title and -- and that's -- and, if not, simply
20 foreclose on the note which was in default, after which
21 they would subdivide it and sell some of the parcels
22 that they would get -- so they could get some of their
23 investment capital back.

24 Also, Mr. Bidsal would invest only --
25 originally 40 percent of the necessary money and receive

1 50 percent of the profits from the rents, but that --
2 and that 40 percent was later reduced to 30 percent.

3 And lastly, that there would be a way to
4 disassociate by including in the agreement a provision
5 that, for whatever reason, if we don't want -- and I'm
6 going to quote Mr. Golshani there -- that, for whatever
7 reason, if we don't want to be together or someone is
8 not -- doesn't want to work in Las Vegas or whatever,
9 there should be a way to separate without having to go
10 to court. Famous last words, by the way.

11 Now, there was a discussion during the hearing
12 as to whether or not there was an application of the
13 statute of frauds and the superseding effect of the
14 operating agreement. It must be remembered that the
15 operating agreement was not signed until December 2011.
16 And long before that, Mr. Golshani and CLA had worked
17 together and bid and purchased properties. They
18 purchased the Green Valley note, and they purchased the
19 Country Club property.

20 So this understanding or oral agreement, even
21 if superseded by the written agreement, is very relevant
22 to explain the parties' understanding of the working
23 relationship and interpreting the operating agreement
24 and, in particular, the provisions of Exhibit B.

25 And I note that there's no integration clause

1 in this operating agreement. It -- I just want to point
2 out it is beyond belief that these two gentlemen are
3 going -- were going to put up millions of dollars,
4 especially from Mr. Golshani, who said he was going to
5 put up 70 percent of the money, without having an
6 understanding about how this was going to take -- how
7 this was going to operate in real time if the properties
8 were acquired. And -- and that is -- and so I think
9 that is -- this understanding is something that is very
10 pertinent to this proceeding.

11 So what happens after that? LeGrand --
12 Mr. Bidsal hires Attorney David LeGrand to prepare an
13 operating agreement for Green Valley and negotiate the
14 deed in lieu foreclosure, and we know in September the
15 property was acquired by that deed. But even before the
16 conversion of the note into title, Green Valley had
17 begun the process to subdivide in order to make partial
18 sales.

19 Now, was there conversation that if they had an
20 opportunity to sell all of the property or some of them?
21 I would imagine that in the normal course of events,
22 that took place. That's not unreasonable. By
23 September -- and I want to point out that it's September
24 16, and that's Exhibit 91 that Mr. Gerrard pointed to --
25 the work to divide the Henderson property into nine

1 parcels had been finished. That's reflected in
2 Exhibit 7, page 1394, which shows that the subdivision
3 survey was completed by August 2, 2011.

4 Now, the operating agreement wasn't signed
5 until December. So on October 29, LeGrand was still
6 sending out drafts, as shown by Exhibit 6. Exhibit 6 at
7 page -- and -- on Exhibit 6, what does that show? On
8 page 1 -- on page -- pardon me, on page 2, it shows that
9 LeGrand had sent a -- well, let's start over.

10 The first page of it on November -- on Exhibit
11 6 shows that on November 29, LeGrand sends out a draft,
12 another draft of the operating agreement. On -- and by
13 the way, that -- and on December 2nd, according to
14 LeGrand's billing, he has a telephone conversation with
15 Bidsal regarding Bidsal's, quote, "modification" end
16 quote, to the draft operating agreement.

17 Why is that important? It's because they --
18 because their position is that it's all Ben's language
19 that goes into this operating agreement. It's not true.

20 On December 10, LeGrand -- again on page 3 of
21 Exhibit 6, LeGrand sends an email to Bidsal asking if
22 Bidsal, quote, "ever finished the revisions," to which
23 Bidsal replied on December 12 that the operating
24 agreements, plural, are signed and -- are finished and
25 signed. That's page 3.

1 In the final -- and I know that in the final
2 operating agreement, which is Exhibit 5, percentage of
3 ownership interest in Exhibit B has been changed from
4 70/30 in favor of Golshani to 50/50 as shown on
5 Exhibit -- as shown on Exhibit 91 and 5.

6 So I'm not going to spend a lot of time
7 about -- talking about who drafted the Section 4 given
8 that Your Honor has earlier stated that, quote, "I don't
9 think it's before me to determine who drafted the
10 buy/sell provision or the formula." That's at
11 transcript page 90. I would just point out that Judge
12 Haberfeld ruled that Mr. Bidsal was the principal
13 drafter. But -- and I know that Mr. Bidsal has appealed
14 that decision, but until -- unless and until Judge
15 Haberfeld's decision is reversed, and Judge Kishner as
16 well, that Mr. Bidsal has no right to challenge the
17 determination that he --

18 MR. GERRARD: Judge, I hate to interrupt. I
19 don't like to interrupt somebody's closing, but I just
20 have to say Mr. Lewin has repeatedly made reference to
21 Judge Haberfeld. There's nothing in this record.
22 There's no evidence other than the arbitrator's award
23 that's a part of this record. Mr. Lewin was quoting
24 language that's not in the arbitrator's award. He's
25 making arguments about what's in the -- supposedly what

1 he thinks happened. I just want to point out that
2 that's not in evidence. That's not --

3 THE ARBITRATOR: Well, the arb- -- Judge
4 Haberfeld's award does reference who he thought was the
5 drafter and why. Honestly, I mean, it's -- it's --

6 MR. GERRARD: I'm just point- -- I just don't
7 want us to go down a path where there's references to
8 what happened and supposedly in this other proceeding
9 that isn't a part of any evidence in this case. And the
10 only thing that's in this case is the arbitrator's
11 award. And I can guarantee you that it doesn't say
12 anything about a breach.

13 MR. LEWIN: There's also a judgment.

14 THE ARBITRATOR: Right. But it -- I get it. I
15 understand it. I kind of have made my position known.
16 You know, obviously Mr. LeGrand wasn't able to testify,
17 you know, as potentially someone who drafted it, but --
18 all right. But we can move on. I understand.

19 MR. LEWIN: Okay. So -- but my point is
20 until -- until that judgment -- that Judge Haberfeld's
21 decision and Judge Kishner's decision is reversed, our
22 position is that Bidsal has no right to challenge the
23 determination that he was the principal drafter.

24 How many times can you raise the same
25 contention? It was raised in number -- number --

1 arbitration number one, and it wasn't bought. Even if
2 there was not a judgment in which Mr. Bidsal was
3 determined to be the principal drafter, there's a
4 recital in the operating agreement, Article 8, stating
5 that, quote, "this agreement has been prepared by David
6 G. LeGrand, as legal counsel for the company," unquote.
7 That should be the end of this meritless contention,
8 especially given the arguments that were made by
9 Mr. Bidsal when we had the discussion about whether
10 Mr. LeGrand was going to be permitted to testify where
11 they -- they referred to the recitals in that article,
12 it's Article 8, as being binding by the parties such as
13 who LeGrand was representing and what advice he had
14 given.

15 So it was -- so, in essence, it was Mr. Bidsal
16 who made the last changes to the agreement. After
17 Mr. LeGrand sent -- as I said, he was making
18 modifications after Mr. LeGrand sent the November 29
19 draft. There would be no reason for LeGrand to ask
20 Bidsal if he finished revisions unless Bidsal told him
21 he was going to revise it. And Mr. Bidsal has admitted
22 that Mr. -- he -- that both he and Mr. Golshani, quote,
23 massaged the language of what ended up in Section 4.
24 That's in the transcript at page 1081.

25 That Mr. Golshani may have been a stenographer

1 for both he and Mr. Bidsal does not mean he was the
2 drafter. And finally, even were he, Mr. Golshani, the
3 drafter, which he wasn't, a draftsmanship determination
4 is merely one consideration out of many in contract
5 interpretation. It is as stated in the case of Easton
6 Bus. Opp. vs. Town Executive Suites, 126 Nev. 119 at
7 131, a, quote, "rule of last resort."

8 And to top it off, the real issues in this case
9 revolve around Exhibit A and B and the -- and the -- and
10 what -- and the parties and their experts have agreed to
11 a variation from the strict language of the formula to
12 take into account for the sales of three buildings and
13 the returns of capital. There's no evidence whatsoever
14 that Mr. Golshani drafted any part of Exhibits A and B.

15 THE ARBITRATOR: That's kind of the point, to
16 me. The fact that everyone believes that you can't
17 literally apply the formula and other parts of the
18 operating agreement make it less important, to me, who
19 the drafter was since both sides agree that there's
20 ambiguity and that there's drafting issues. That was
21 kind of my point all along. But all right.

22 MR. LEWIN: So going -- and now to -- now to go
23 to the -- so what I think are the issues before you.

24 Mr. Gerrard has already admitted, and I agree,
25 that fair market value is unconditionally determined at

1 \$5 million.

2 The second element is COP. And we -- so you
3 start with the operating agreement of what is defined as
4 COP. It is defined in the agreement as, quote, "the
5 cost of purchase as it specified in the escrow closing
6 statement at the time of purchase of each property owned
7 by the company." The word "it" is probably a typo. It
8 should be "is" or the word "is" is omitted. Not the
9 first time a word was omitted in this operating
10 agreement.

11 Since it refers to the time of purchase of each
12 property, it clearly anticipates that there was going to
13 be more than one purchase. And there were two such
14 purchases in this case. First, the initial purchase of
15 the note, which I -- as I indicated the note is
16 property. And since there's no definition of the word
17 "property," it should be given -- literally described as
18 being the purchase of a note. And that note was -- you
19 know, was later converted to title.

20 The second purchase was the Greenway property.
21 Now, the suggestion that the absence of a closing
22 statement for obtaining a fee title to the Henderson
23 property and conversional note is, in my opinion, just
24 silly. There was a lot of time spent about this issue
25 in the arbitration, and that assertion, even if it

1 was -- even if it was still being made by Bidsal's own
2 position, which I think he is, it's belied by his
3 positions. When looking at the definition of COP, it
4 says "property owned by the company."

5 It's also before -- and it also bears noting
6 that prior to the initiation of this arbitration, in
7 Exhibit 111, which was a sort of -- a summary of sales
8 and payments made by Bidsal -- sales of property and
9 distributions made by Bidsal, Mr. Bidsal identified
10 the -- as the, quote, "acquisition," end quote, cost of
11 Green Valley as the cost of the note, \$4,048,959. So
12 the acquisition cost of Green Valley was never really in
13 dispute until this arbitration when Mr. Bidsal is trying
14 desperately to avoid -- to avoid the -- the outcome of
15 some of his actions.

16 So what's missing in the definition of COP is
17 any statement as to when the property is owned. And
18 there's two possibilities: Either it was owned at the
19 time of the offer or ever owned. If it was the latter,
20 then there is a closing statement for the note. Both it
21 and the EMR closing statement for Greenway would be
22 included in the COP. If it would be interpreted as
23 owned at the date of the offer, then the cost of the
24 sold properties should be deducted and the cost of the
25 purchased properties should be added to the original

1 COP. And that's essentially what has happened, although
2 we have some disagreement.

3 Mr. Bidsal can hardly quarrel with his saying
4 ever at the time that it was owed. This is the position
5 that he took in his answers to -- his supplemental
6 answer to Interrogatory Number 20 -- Number 2, which is
7 marked as Exhibit 164. And those are the answers -- and
8 that position was -- was Mr. Bidsal concealed when he
9 failed to provide that information initially. And we
10 only received that from -- we got an order from Your
11 Honor.

12 Both Mr. Bidsal's supplemental answer and
13 Mr. Wilcox's calculation of COP include the cost of the
14 purchase of the note and the sub- -- and subtraction of
15 the cost of the buildings ever owned, but sold, as well
16 as reducing the initial capital contribution by the
17 returns of capital in order to arrive at the claimed
18 purchase price.

19 Now, the absurdity of the position that there
20 is no -- there is no escrow closing statement or
21 purchase price for the Henderson property is
22 demonstrated by Mr. Bidsal's own testimony where he
23 admitted that the cost of purchasing the Henderson
24 property is the cost of the note.

25 Put up Document 22, would you please.

1 Well, I'll just quote the testimony. I had the
2 testimony copied so you could read along, but I'll just
3 quote it. These are -- this is a question-answer that I
4 asked of Mr. Bidsal.

5 "Question: At the time the Green -- at the
6 time Green Valley acquired title to the
7 property, the cost of purchase of that property
8 included the cost of the note, the payment to
9 auction.com, and all other expenses incurred in
10 connection with acquiring title to the
11 property?

12 "Answer: Yes."

13 Then it's at page 718, line 3 through 14:

14 "Question: Well, what you just answered a
15 minute ago, you said the cost of purchasing the
16 property was all those costs that I just
17 identified. Isn't that -- isn't that the cost
18 of the COP?

19 "Arbitrator Wall: Is that a yes or a no?

20 "Mr. Lewin: Yes.

21 "Answer: No.

22 "Question by Mr. Lewin: Okay. And why not?

23 "Because we went through a process of
24 allocating and assigning valuations to
25 different parcels at a later date."

1 So what do we make of this? It's clear that
2 Mr. Bidsal and his experts, by their testimony and
3 their -- and this -- and the evidence that has been
4 presented, have abandoned the notion that strict
5 compliance with the language is appropriate, and they're
6 taking the position agreed to by CLA that the proper
7 methodology is to do -- both account for the sales and
8 purchases of property and returned capital. I hope that
9 this alone would be enough to prove once and for all
10 that the suggestion that there's no value being assigned
11 to Henderson because of a lack of a closing statement is
12 and was just nonsense.

13 And I -- and I note is that in -- in connection
14 with a deed of lieu -- in a deed of lieu, there would
15 not necessarily be an escrow; so there wouldn't be a
16 closing statement. Now, I pause and note that CLA was
17 prepared to live with its initial belief that the COP
18 was the cost of the note plus the cost of Greenway
19 without any reduction, and Bidsal's capital contribution
20 is for 1.2 million initially made without any reduction
21 at all.

22 But I agree with Mr. Gerrard that is not
23 reasonable, and since both experts and the parties have
24 agreed strict compliance with the words is not to be
25 used and that, rather, reductions not -- perhaps not

1 covered by the language of the formula were to be
2 allowed on discuss- -- to likely discuss the points in
3 which the parties don't agree.

4 Now -- so it's -- what is clear is that from
5 the -- both Mr. Bidsal and Mr. Wilcox don't dispute the
6 cost of the note forms the basis for the determination
7 of COP but just believe that the cost segregation study
8 numbers are what are to be used instead of the full
9 purchase price for the cost of the note.

10 So we agree on this much. The starting point
11 for the COP for the Henderson property was the cost of
12 the note and that the allocated cost of the sold
13 prop- -- parcels should be deducted just as we reach
14 different -- but we just read different figures for the
15 reasons I will discuss.

16 And with respect to using the cost segregation
17 study, we have no problem with using that if the total
18 of the individual parcels equal the cost of the note.
19 But if you -- if you take the -- do the math, it's
20 \$81,767 short. I referred to that during the hearing as
21 the missing 282,000.

22 What appeared -- so what is apparent is that
23 when the cost segregation study was prepared, the
24 allocated costs for the property of \$87,767 [sic] was
25 deducted. Both Mr. Bidsal and Wilcox used the basis set

1 forth in the cost segregation study with, as it says on
2 the last page of that study, numbers supplied by Bidsal
3 and that those numbers were \$3,967,182.38 instead of no
4 closing statement which is -- which was \$4,048,949.
5 That's a -- Mr. Gerrard pointed you to the Wilcox
6 Schedule Number 3 which shows that.

7 However, while the cost segregation study is
8 relevant to increasing the allowable depreciation
9 expense that could be taken, it has really nothing to do
10 with the cost of purchase. The cost of the purchase is
11 the cost of the purchase. And the difference between
12 the cost of the note and the starting amount before
13 deductions for sold parcels is missing -- is one --
14 \$81,767 short, and the reason for that has never been
15 explained.

16 Now, Mr. Gerrard originally argued that in his
17 opening statement, that the basis for the original nine
18 parcels should be used on the cost segregation study
19 because "for tax purposes" -- and I'm quoting -- "for
20 tax purposes they applied essentially the original basis
21 paid for the note." He just ignored the 81,767 and as
22 did Mr. Wilcox. And no one has ever explained what
23 happened to it. It just disappeared.

24 At page 413 at line 24, Mr. Wilcox testified
25 that he took the original allocation of the purchase of

1 the note, applied that to the properties they
2 subdivided; however, he, again, doesn't mention the
3 87- -- I'm just -- I'm just going to refer to that as
4 the missing 81,000. He doesn't refer to the missing
5 81,000, and it's not mentioned anywhere in his
6 schedules. He never accounts for it and never
7 investigated it.

8 I asked him, quote -- I asked him on page 534:

9 "Did you ever find out why the cost of
10 4,048,000 was not actually used for the cost
11 segregation study?

12 "I never looked into that -- into why they were
13 off about 50,000.

14 "Question, it's actually about 82,000.

15 "Answer: Is it 82-? I never looked into it."

16 So -- and then I -- and then I later asked him
17 on page 535 if he knew if the \$82,000 was distributed:

18 "Question:" -- beginning at line 12, quote:

19 "Do you know whether that \$82,000 was
20 distributed?

21 "Answer: I saw no evidence of it being
22 distributed."

23 Now, to be fair, I should note that

24 Mr. Gerety --

25 THE ARBITRATOR: Do we need this screen up

1 still, or are you done with this page?

2 Yeah. Great. Thanks.

3 MR. LEWIN: We're done with it. We're done
4 with it.

5 THE ARBITRATOR: All right.

6 MR. LEWIN: To be fair, I should note that
7 Mr. Gerety accepted and used the same starting point as
8 Mr. Wilcox. So his COP is also short \$81,767. And
9 besides -- starting at page 917, he testified, quote:

10 "In terms of determining COP, you used the
11 amount that was set forth in the cost
12 segregation study?

13 "Answer: For the buildings that were still in
14 existence, yes, I did."

15 So -- so both accountants missed this
16 discrepancy, but it can and should be rectified. There
17 were three sales and one purchase that has to be
18 accounted for. So in determining COP, the original cost
19 of the note should be used subtracting the cost of the
20 sold buildings and then increasing the cost of Greenway
21 and adding in -- and the -- and in that way the missing
22 100 -- \$81,767 gets accounted for.

23 Now I'd like to turn to Greenway. In 2000- --
24 in 2012, Green Valley sold Building C. To avoid paying
25 taxes on the gain, Green Valley decided to do a 1031

1 exchange. The fact that for income tax purposes it was
2 called an exchange doesn't make it an exchange. It's
3 strictly a tax benefit which allowed the seller time to
4 find another property and use the cash in the sale of
5 one property to later buy a new property and avoiding
6 tax on the gain from the sale of the first property by
7 retaining as the tax basis for the new property the tax
8 basis of the sold property.

9 But there was never a simultaneous transfer of
10 the old for the new; so there never was a real exchange.
11 What actually took place, there was a sale of
12 buildings -- one parcel and the purchase of another.
13 The two transactions did not take -- even take place in
14 the same year much less the same time that it would be
15 true of a real exchange.

16 So we believe that the COP for the cost of
17 the -- for -- should have been reduced by the cost of
18 the -- the sale -- the cost of -- let me start over.

19 Our position is that the COP for the cost of
20 the nine parcels should be -- have been reduced by the
21 cost of Building C and increased by the cost of
22 Greenway.

23 Now, to avoid concluding the true cost of
24 Greenway, which is far greater than the cost of Building
25 C, Mr. Bidsal and Mr. Wilcox rely on the tax treatment

1 of the sale, not really what occurred, and included only
2 the original cost of C as the cost of Greenway claiming
3 the cost basis of the sold property fixes the cost basis
4 of Greenway for COP purposes. That's at page 363.

5 The problem with this analysis is that, while
6 the cost basis carried forward for tax purposes, it does
7 not fix the COP. That the relationship of the income
8 tax treatment with the cost of purchase as those words
9 appear in the agreement is unwarranted -- unwarranted
10 and perhaps best illustrated by this: If Greenway had
11 been obtained 181 days or more after the transfer of
12 Building C, the transaction would not have qualified for
13 tax treatment, tax-free treatment. There is nothing in
14 Section 4.2 of the agreement that hints that the
15 determination of the cost of purchase is dependent on
16 whether a new acquisition is made before or after 180
17 days beyond the date of Green Valley's transfer of the
18 property.

19 To say that the sale of C and the purchase of
20 Greenway was an exchange if the purchase would have been
21 180 days of the sale of C but not an exchange if it
22 closed one day later makes no sense. It confuses the
23 allowance of having to pay tax on being with a true
24 exchange.

25 So I think we have to look at what the parties

1 were intending to accomplish when they agreed to the
2 formula. I agree -- I agree that the formula
3 demonstrates they were trying to allow a selling -- a
4 selling member to get the benefit of -- of the gain in
5 the property. They assumed that if one started with the
6 seller's capital contribution and then added any excess
7 of the value of the Green Valley property or its cost,
8 that the gain would be one element but not the only
9 element in determining the company value, thus the --
10 and thus the fair market value of the membership
11 interest. But determining the fair market value must
12 include, by necessity, the current value of the real
13 property which Green Valley owns, not which it has
14 already disposed of.

15 Each of the experts as well as Mr. Bidsal
16 agreed. The profit is what Bidsal controlled when he
17 made his offer to purchase CLA's interest and set the
18 fair market value. He set the price and was in control
19 of calculating the profit. Gerety, he included, or
20 should have included, what the actual value of Greenway
21 was when he set the fair market value at \$5 million. He
22 could have set it at \$6 million or at 7 or 8. He could
23 have guaranteed that he got every nickel and dime of
24 gain that -- or profit out of -- out of Greenway. But
25 the fact is he made a lowball offer and counted on CLA

1 not being able to buy.

2 What proof do we have of that? The answer is
3 plenty. First, we have Mr. Bidsal's testimony
4 concerning the prices he listed the Green Valley
5 properties for sale -- for sale in 2017 before he made
6 his offer. He had received broker evaluations for just
7 the Henderson properties, that's the Nevada properties,
8 for more than \$6 million and received an offer for
9 Greenway to be somewhere between one point -- which he
10 had testified was somewhere between 1.5 and \$1.8
11 million. This is at -- found in his transcript at 782,
12 lines 1 through 16.

13 Second, and perhaps even more telling,
14 Mr. Bidsal's refusal to sell his membership interest
15 unless CLA paid him based on a \$6.3 million fair market
16 value as opposed to the \$5 million that he had offered.
17 That's found at -- testimony at page 1158, line 20, to
18 1159, line 9. This was not disputed.

19 So Mr. Bidsal knew what the value of the
20 company was. He chose to try to take advantage of CLA.
21 Now, who's the nice guy here? He controlled the fair
22 market value, and instead he was gambling that
23 Mr. Golshani, who he knew had health problems, would not
24 exercise the election to buy instead of sell.

25 So what should be included as part of the COP