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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
BEFORE THE GRAND JURY

---000---

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
PLAINTIFFS,)	INDICTMENT
)	
V.)	NO. 211045
)	
RONALD R. GONZALES,)	
JOSEPH AUGUST GUERRA III, AND)	
NORCAL WASTE SYSTEMS, INC.,)	
)	
DEFENDANTS.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SAN JOSE, CALIFORNIA

VOLUME 13
PAGES 2161-2340

MAY 17, 2006
PROCEEDINGS

JUNE 20, 2006
CLOSING ARGUMENT AND INSTRUCTIONS

JUNE 21, 2006
INDICTMENT

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SUE HERFURTH, CSR #9645

2163

1 SAN JOSE, CALIFORNIA

MAY 17, 2006

2

3

PROCEEDINGS:

4

(ROLL WAS CALLED BY THE FOREPERSON.)

5

MR. FINKELSTEIN: THANK YOU. WHY DON'T WE CALL

6

OUR NEXT WITNESS.

7

GERALD SILVA,

8

CALLED AS A WITNESS, HAVING FIRST BEEN DULY SWORN, TESTIFIED

9 AS FOLLOWS:

10 THE WITNESS: I DO.

11 EXAMINATION:

12 BY MR. FINKELSTEIN:

13 Q. GOOD MORNING, MR. SILVA. COULD YOU STATE YOUR FULL
14 LEGAL NAME FOR THE REPORTER.

15 A. GERALD ALLEN SILVA.

16 Q. AND CAN YOU SPELL YOUR MIDDLE AND LAST NAME.

17 A. A-L-L-E-N, S-I-L-V-A.

18 Q. WHERE DO YOU WORK, MR. SILVA?

19 A. CITY OF SAN JOSE.

20 Q. WHAT IS YOUR POSITION?

21 A. I'M CITY AUDITOR.

22 Q. AND HOW LONG HAVE YOU BEEN THE CITY AUDITOR FOR THE
23 CITY OF SAN JOSE?

24 A. 21 YEARS.

25 Q. AND YOU WERE APPOINTED BY THE CITY COUNCIL; IS THAT
26 CORRECT?

27 A. THAT IS CORRECT.

28 Q. AND COULD YOU TELL US BRIEFLY YOUR EDUCATIONAL

SUE HERFURTH, CSR #9645

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1 BACKGROUND?

2 A. I GRADUATED FROM SACRAMENTO STATE WHEN IT WAS STILL
3 A COLLEGE BACK IN 1967. AFTER GRADUATION, I WENT INTO
4 PUBLIC ACCOUNTING. I WENT TO WORK FOR THE FIRM OF ERNST AND
5 ERNST, AND I DID THAT FOR FOUR YEARS; THEN WENT TO WORK FOR
6 THE CALIFORNIA AUDITOR GENERAL'S OFFICE, WORKED THERE SEVEN
7 YEARS.

8 THEN I WENT TO ARIZONA AND STARTED A PERFORMANCE
9 AUDIT FUNCTION FOR THE ARIZONA AUDITOR GENERAL'S OFFICE.
10 AND AFTER THREE-AND-A-HALF YEARS, GOVERNOR BABBITT APPOINTED
11 ME TO STATE BUDGET DIRECTOR FOR THREE-AND-A-HALF YEARS, AND
12 I WAS RECRUITED TO THE POSITION OF CITY AUDITOR BACK IN
13 1985.

14 Q. DO YOU HOLD ANY LICENSES FROM THE STATE OF
15 CALIFORNIA?

16 A. I DO. I'M A CERTIFIED PUBLIC ACCOUNTANT.

17 Q. ARE YOU ALSO LICENSED AS A CERTIFIED PUBLIC
18 ACCOUNTANT BY THE STATE OF ARIZONA?

19 A. I WAS. I LET THAT LAPSE BECAUSE OF THE EDUCATION
20 REQUIREMENTS.

21 Q. WHAT IS THE JOB OF THE SAN JOSE CITY AUDITOR'S
22 OFFICE?

23 A. THE JOB OF THE SAN JOSE CITY AUDITOR'S OFFICE IS TO
24 PROVIDE INDEPENDENT, OBJECTIVE AND ACCURATE INFORMATION TO
25 THE CITY COUNCIL AND OTHER STAKEHOLDERS IN A TIMELY MANNER.

26 Q. NOW, IN THE YEAR 2000, YOU'RE AWARE THAT THE CITY
27 OF SAN JOSE ISSUED A REQUEST FOR PROPOSALS FOR RECYCLE PLUS

28 SERVICES?

SUE HERFURTH, CSR #9645

2165

1 A. UH -- YES.

2 Q. AND DO YOU RECALL THAT THERE WAS AN INITIAL VOTE BY
3 THE CITY COUNCIL ON THE SELECTION OF HAULERS ON OCTOBER 10,
4 2000?

5 A. YES.

6 Q. AND DO YOU RECALL THAT THE CITY COUNCIL DIRECTED
7 YOUR OFFICE TO PERFORM A REVIEW AUDIT OF THE SELECTED
8 HAULERS?

9 A. YES. WOULD YOU LIKE ME TO READ THE SPECIFIC
10 DIRECTION TO MY OFFICE?

11 Q. SURE.

12 A. IS IT ALL RIGHT IF I BRING MATERIAL UP HERE?

13 Q. SURE.

14 A. THERE WAS A MEMO ISSUED ON OCTOBER 10 THAT THE CITY
15 COUNCIL APPROVED. THE MEMO WAS FROM MAYOR GONZALES; VICE
16 MAYOR FRANK FISCALINI; AND COUNCILMEMBERS CINDY CHAVEZ, PAT
17 DANDO, AND CHARLOTTE POWERS. THERE WERE SEVEN SPECIFIC
18 DIRECTIONS TO MY OFFICE AND THEN TO THE ADMINISTRATION AND
19 THEN THREE SUBPARTS.

20 PART FIVE DIRECTED THE CITY AUDITOR TO PERFORM A
21 REVIEW OF ALL RECOMMENDED HAULERS TO DETERMINE THE
22 RECOMMENDED ADEQUACY OF THEIR PROPOSALS AND THEIR FINANCIAL
23 CAPABILITY TO PERFORM.

24 ALSO, A SUBDIRECTION TO MY OFFICE WAS FOR THE CITY
25 AUDITOR TO INCLUDE IN ANY AUDIT OF THE RECOMMENDED HAULERS
26 THEIR FINANCIAL CAPABILITY TO ACQUIRE ESSENTIAL CAPITAL
27 EQUIPMENT, INCLUDING ASSESSING THE EFFECTIVENESS OF THE
28 SPLIT CONTENT TRUCKS AND WHETHER CONTRACTS HAD RECENTLY BEEN

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1 LOST, CREATING A POTENTIAL NEGATIVE IMPACT ON THE FINANCIAL
2 ASSESSMENTS.

3 Q. JUST FOR THE RECORD, LET ME SHOW YOU GRAND JURY
4 EXHIBIT 14. IS THIS THE MEMO THAT YOU HAVE BEEN QUOTING
5 FROM?

6 A. YES.

7 Q. AND DID YOUR OFFICE PERFORM THE REQUESTED REVIEW?

8 A. WE DID.

9 Q. AND WAS THAT UNDER YOUR SUPERVISION?

10 A. IT WAS. IN FACT, I WORKED DIRECTLY ON THE AUDIT
11 WITH ONE OF MY AUDIT SUPERVISORS, SHARON ERICKSON, WHO IS
12 NOW THE CITY AUDITOR FOR THE CITY OF PALO ALTO. SHE AND I

13 WORKED ON IT TOGETHER FOR LESS THAN TWO MONTHS. WE ACTUALLY
14 ISSUED THE REPORT ON, I THINK IT WAS DECEMBER 8, AND WE WERE
15 GIVEN DIRECTION ON OCTOBER 10.

16 MR. FINKELSTEIN: I'M GOING TO HAVE MARKED AS THE
17 NEXT GRAND JURY EXHIBIT, WHICH WOULD BE GRAND JURY 138, A
18 CERTIFIED COPY OF WHAT APPEARS TO BE YOUR AUDIT REPORT.

19 THE FOREPERSON: SO MARKED.

20 (AN EXHIBIT WAS MARKED FOR IDENTIFICATION AS GRAND
21 JURY EXHIBIT 138.)

22 BY MR. FINKELSTEIN:

23 Q. COULD YOU TAKE A LOOK AT IT FOR A MOMENT AND VERIFY
24 FOR US THAT WE HAVE THE RIGHT REPORT.

25 A. YES, THAT'S IT.

26 Q. OKAY. THANK YOU.

27 NOW, IF YOU'LL TURN TO THE SHEET RIGHT AFTER THE
28 COVER SHEET, THERE APPEARS TO BE A DECEMBER 8, 2000 LETTER

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1 FROM YOU TO THE MAYOR AND MEMBERS OF THE CITY COUNCIL; IS
2 THAT CORRECT?

3 A. CORRECT.

4 Q. AND IN THIS REPORT -- IN THIS LETTER, YOU MAKE

5 REFERENCE TO PROVIDING A DRAFT COPY OF THE REPORT TO THE
6 THREE RECOMMENDED CONTRACTORS FOR THEIR REVIEW AND COMMENTS
7 ON THE DRAFT REPORT'S CORRECTNESS AND ACCURACY, CORRECT?

8 A. THAT'S A STANDARD PRACTICE IN MY OFFICE. WHEN WE
9 ISSUE A REPORT ON A DEPARTMENT OR ANOTHER ENTITY, WE GIVE
10 THEM THE OPPORTUNITY TO REVIEW THE DRAFT AND PROVIDE US WITH
11 COMMENTS AND/OR WRITTEN RESPONSES.

12 Q. SO MY FIRST QUESTION IS, BECAUSE THIS IS A FORMAL
13 INVESTIGATION, JUST TECHNICALLY FOR THE RECORD, IS IT TRUE
14 YOU DID PROVIDE TO NORCAL, THE OTHER SELECTED VENDORS AND
15 THE ENVIRONMENTAL SERVICES DEPARTMENT A DRAFT OF YOUR
16 REPORT?

17 A. YES.

18 Q. DID YOU GET ANYTHING BACK FROM NORCAL?

19 A. UH -- WE DIDN'T GET ANYTHING BACK IN WRITING. IF
20 WE WOULD HAVE -- IN FACT, TO BE PRECISE ABOUT THIS, WE WERE
21 UNDER A LOT OF TIME CONSTRAINT HERE. THIS IS A PRETTY HEFTY
22 REPORT. AND WE WERE REALLY CHALLENGED, SHARON AND I,
23 BECAUSE WE DON'T KNOW ANYTHING ABOUT THE GARBAGE BUSINESS,
24 SO WE HAD TO LEARN A LOT REAL FAST, AND WE HAD TO PREPARE
25 THIS REPORT.

26 NORMALLY, WHAT WE DO IS GIVE AN ENTITY THAT WE'VE
27 AUDITED THREE WEEKS TO DO A WRITTEN RESPONSE. WE DIDN'T
28 HAVE TIME TO DO THAT HERE, SO IT WAS ESSENTIALLY AN

1 OPPORTUNITY FOR THEM TO REVIEW IT AND GIVE US ANY COMMENTS.

2 I CAN'T REMEMBER SPECIFICALLY IF WE GOT COMMENTS
3 FROM NORCAL, BUT IF WE DID, WE WOULD HAVE INCORPORATED THEM
4 INTO THE REPORT. YOU ANTICIPATED MY NEXT QUESTION. ANY
5 COMMENTS YOU GOT THAT YOU FELT WERE RELEVANT TO ISSUES IN
6 THE REPORT, YOU WOULD HAVE INCORPORATED THEM IN SOME
7 FASHI ON.

8 A. YES.

9 Q. EVEN IF YOU DISAGREED WITH THEM?

10 A. YES. WE WOULD HAVE ATTRIBUTED THOSE COMMENTS TO
11 THOSE ENTITIES.

12 Q. LET ME DIRECT YOUR ATTENTION NEXT TO PAGE FIVE OF
13 THE REPORT -- I'M SORRY. PAGE 26 OF THE REPORT.

14 A. YES. I HAVE THAT ONE TAGGED TOO. SOMEHOW I KNEW
15 YOU WERE GOING TO GET THERE.

16 Q. DO YOU KNOW WHAT I'M JUST DISCOVERING?

17 A. WHAT'S THAT?

18 Q. OUR CERTIFIED COPY IS NOT CORRECT. IT SEEMS TO BE
19 MISSING THE EVEN NUMBERED PAGES.

20 A. UH-OH. WELL, WHAT I SAW EARLIER LOOKED LIKE MY
21 REPORT, THE PARTS THAT I SAW.

22 Q. I TAKE IT THE CERTIFIED REPORT WAS A TWO-SIDED
23 REPORT?

24 A. YES.

25 Q. I THINK THEY ONLY COPIED ONE SIDE.

26 A. IS THE OTHER SIDE IN THE BACK PART OF THE REPORT?

27 Q. IT IS FOR SOME OF THE ATTACHMENTS OR THE PAGES.

28 BUT THE BULK OF THE REPORT, THE NUMBERED PAGES, IS ONLY A

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1 ONE-SIDED COPY. SO NOW WE KNOW THAT EVEN CERTIFIED COPIES
2 ARE NOT ALWAYS ACCURATE.

3 A. I GUESS. AND I WILL AMEND MY PREVIOUS STATEMENT
4 ABOUT WHETHER THAT'S MY REPORT. WOULD YOU LIKE --

5 Q. IS THAT AN EXTRA COPY?

6 A. NO, BUT CAN WE SHARE?

7 Q. NO. BUT UNFORTUNATELY, AND I HATE TO DO THIS TO
8 YOU, WE NEED A RECORD BECAUSE THIS IS A FORMAL PROCEEDING,
9 AND I JUST DON'T THINK -- WE CAN PROBABLY GET ONE, BUT IT'S
10 GOING TO TAKE -- WHY DON'T WE TAKE A RECESS. THERE IS AN
11 INVESTIGATOR OUTSIDE --

12 A. I CAN HAVE SOMEONE FROM MY OFFICE BRING ONE DOWN.

13 MR. FINKELSTEIN: THAT WOULD BE GREAT.

14 THE FOREPERSON: LET'S RECESS FOR 15 MINUTES.

15 BEFORE WE DO, MR. SILVA, LET ME READ YOU AN

16 ADMONITION OF CONFIDENTIALITY.

17 THE FOREPERSON: YOU ARE ADMONISHED NOT TO REVEAL
18 TO ANY PERSON, EXCEPT AS DIRECTED BY THE COURT, WHAT
19 QUESTIONS WERE ASKED OR WHAT RESPONSES WERE GIVEN OR ANY
20 OTHER MATTERS CONCERNING THE NATURE OR SUBJECT OF THE GRAND
21 JURY'S INVESTIGATION WHICH YOU LEARNED DURING YOUR
22 APPEARANCE BEFORE THE GRAND JURY, UNLESS AND UNTIL SUCH TIME
23 AS THE TRANSCRIPT OF THIS GRAND JURY PROCEEDING IS MADE
24 PUBLIC. VIOLATION OF THIS ADMONITION MAY BE PUNISHABLE AS A
25 CONTEMPT OF COURT.

26 DO YOU UNDERSTAND THAT?

27 THE WITNESS: I DO UNDERSTAND THAT.

28 MR. FINKELSTEIN: THANK YOU VERY MUCH.

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1 THE FOREPERSON: WE WILL RECESS THEN FOR ABOUT 15
2 MINUTES.

3 MR. FINKELSTEIN: MORE OR LESS.

4 (A BRIEF RECESS WAS TAKEN.)

5 MR. FINKELSTEIN: MR. SILVA, I WANT TO THANK YOU
6 NOW FOR PROVIDING US A COMPLETE COPY OF THE REPORT.

7 THE WITNESS: AND I WILL ATTEST TO ITS
8 CERTIFICATION.

9 MR. FINKELSTEIN: I WILL ASK TO HAVE MARKED AS
10 EXHIBIT 139 WHAT APPEARS TO BE A COPY OF AN AUDIT REPORT
11 PREPARED IN DECEMBER 2000 IN CONNECTION WITH A REVIEW OF THE
12 RECOMMENDED CONTRACTORS FOR THE RECYCLE PLUS 2002 PROGRAM.

13 THE FOREPERSON: SO MARKED.

14 (AN EXHIBIT WAS MARKED FOR IDENTIFICATION AS GRAND
15 JURY EXHIBIT 139.)

16 BY MR. FINKELSTEIN:

17 Q. FOR THE RECORD, CAN YOU TAKE A LOOK AT THIS EXHIBIT
18 139 AND VERIFY THAT WE NOW HAVE ALL OF THE PAGES OF THE
19 REPORT.

20 A. YES.

21 Q. OKAY. SO LET'S SEE IF I CAN NOW FIND PAGE 26. ON
22 PAGE 26, YOU HAVE A SECTION OF THE REPORT ENTITLED POTENTIAL
23 UNION ISSUES.

24 A. THAT'S CORRECT.

25 Q. WHAT WAS THAT SECTION MEANT TO ADDRESS?

26 A. IN NORCAL'S PROPOSAL FOR SINGLE-FAMILY DWELLING
27 PICKUP, THEY ASSUMED THAT THEIR DRIVERS WOULD WORK A
28 NINE-AND-A-HALF HOUR DAY; HOWEVER, WE DETERMINED THAT THEY

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2171

1 HAD A COLLECTIVE BARGAINING AGREEMENT WITH TEAMSTERS LOCAL
2 350, THE SAME ONE THAT COVERED A MAJORITY OF THE
3 EMPLOYEES CURRENTLY SERVING THE CITY OF SAN JOSE. AND
4 ACCORDING TO NORCAL, IT HAD DEVELOPED A HEALTHY WORKING
5 RELATIONSHIP NEGOTIATED BY THEIR COLLECTIVE BARGAINING
6 AGREEMENT --

7 Q. YOU NEED TO SLOW DOWN A BIT FOR THE REPORTER.

8 A. SORRY. I TEND TO TALK FAST.

9 OUR CONCERN WAS THIS: THAT A NINE-AND-A-HALF HOUR
10 DAY EQUATES TO A 47-AND-A-HALF HOUR WORK WEEK. THE
11 COLLECTIVE BARGAINING AGREEMENT WITH LOCAL 350 PLACED A
12 LIMIT OF 45 HOURS PER WEEK ON THE NUMBER OF HOURS A HAULER
13 CAN REQUIRE A DRIVER TO WORK. SO THAT'S A PROBLEM.

14 Q. OKAY.

15 A. WHICH MEANS THAT A DRIVER COULD THEORETICALLY
16 REFUSE TO START A ROUTE IF THEY WERE GOING TO EXCEED THEIR
17 45 HOURS A WEEK; HOWEVER, WE POINTED OUT IF THEY START THE
18 ROUTE, THEY ARE OBLIGED TO FINISH IT, EVEN IF THEY GO OVER
19 THEIR 45 HOURS.

20 SO WE SAID IF THEY HAVE TO ADHERE TO A 45-HOUR
21 WEEK, THAT IS GOING TO CAUSE PROBLEMS FOR THEM BECAUSE THEY
22 ARE GOING TO HAVE MORE ROUTES. MORE ROUTES EQUALS MORE
23 TRUCKS. AND ONE OF THE THINGS I LEARNED WHEN I WAS GETTING
24 EDUCATED ABOUT THE SANITATION BUSINESS IS THAT GARBAGE
25 TRUCKS ARE THE MOTHERSHIP OF COSTS. EVERYTHING REVOLVES
26 AROUND TRUCKS.

27 AND SO WHAT WE WERE ABLE TO CALCULATE WAS THAT, ON
28 AVERAGE, EVERY TRUCK THAT YOU PUT IN PLAY WOULD COST BETWEEN

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1 \$160,000 AND \$190,000 A YEAR. THAT INCLUDES LABOR, IT
2 INCLUDES MAINTENANCE, GAS, AND IT INCLUDES THE DEPRECIATION
3 OF THE TRUCK OVER A 10-YEAR PERIOD.

4 SO TO THE EXTENT THEY WERE GOING TO HAVE TO ADD
5 TRUCKS, THEY WERE GOING TO HAVE A PROBLEM IF THEY HAD TO
6 ADHERE, STRICTLY ADHERE TO WHAT THE COLLECTIVE BARGAINING
7 AGREEMENT REQUIREMENT WAS OF NOT WORKING MORE THAN 45 HOURS
8 A WEEK.

9 Q. WHY WAS IT AN ISSUE WHETHER OR NOT THEY WERE GOING
10 TO HAVE TO INCUR ADDITIONAL COSTS BEYOND WHAT THEY HAD
11 ESTIMATED IN THE PROPOSAL?

12 A. WE WERE SUPPOSED TO EVALUATE THEIR OPERATIONAL AND
13 THEIR FINANCIAL CAPACITY TO PERFORM UNDER THE PROPOSAL UNDER
14 THEIR CONTRACT. WE THOUGHT THIS WOULD BE PROBLEMATIC FOR
15 THEM.

16 FOR EXAMPLE, WE CALCULATED IN OUR REPORT THAT WE
17 THOUGHT THEY WERE GOING TO NEED AN ADDITIONAL EIGHT TRUCKS.

18 BASED ON OUR CALCULATION OF THE LIMIT ON THE 45
19 HOURS, BASED ON OUR CALCULATION OF HOW LONG WE THOUGHT A

20 ROUTE WAS REALLY GOING TO TAKE THEM VERSUS WHAT THEY HAD
21 ESTIMATED, WE THOUGHT THEY WERE TOO LOW ON THE AMOUNT OF
22 TIME. AND TOO LOW ON THE AMOUNT OF TIMES FOR ROUTES MEANS
23 MORE TRUCKS.

24 SO WE ESTIMATED, AND THIS ALSO GOT PROBLEMATIC
25 WITH THE FACT THAT WE DIDN'T KNOW WHERE THEIR MATERIAL
26 RECYCLING FACILITY WAS GOING TO BE. THE LOCATION OF THEIR
27 TRANSFER STATION FOR YARD TRIMMING DISPOSAL WAS DOWN IN SAN
28 MARTIN, WHICH WAS GOING TO PRESENT A REAL PROBLEM FOR THEM

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2173

1 IN TERMS OF GETTING THE MATERIAL THERE AND GETTING BACK TO
2 THEIR ROUTES.

3 WE THOUGHT THAT THEY HAD SIGNIFICANTLY
4 UNDERESTIMATED HOW MUCH TIME IT WAS GOING TO TAKE THEM TO DO
5 A TYPICAL ROUTE. THEY HAD ESTIMATED SOMETHING LIKE 170
6 MINUTES. WE SAID IT WAS GOING TO BE LIKE 210 OR 211. BIG
7 DIFFERENCE.

8 SO WE ADDED ALL THAT TOGETHER AND WE SAID WE THINK
9 THEY ARE SHORT ABOUT EIGHT TO TEN TRUCKS. THAT'S A MILLION
10 A YEAR PLUS. WE SAID THAT COULD BE PROBLEMATIC TO THEM.

11 Q. THIS IS NORCAL WHO SAID THIS?

12 A. YES. WE WERE LOOKING AT NORCAL.

13 Q. WHO SPECIFICALLY AT NORCAL INDICATED THAT AN
14 UNANTICIPATED OR ADDITIONAL \$1 MILLION A YEAR EXPENSE COULD
15 BE PROBLEMATIC, DO YOU RECALL?

16 A. THEY DIDN'T SAY THAT WOULD BE, IT WAS OUR
17 CONCLUSION.

18 Q. OH, IT WAS YOUR CONCLUSION?

19 A. BUT THEY DIDN'T SAY IT WOULDN'T BE.

20 Q. WHAT WAS YOUR CONCLUSION BASED ON?

21 A. AGAIN, OUR CONCLUSION WAS BASED UPON THEIR ESTIMATE
22 OF THE NUMBER OF TRUCKS THEY WERE GOING TO USE, THE NUMBER
23 OF HOURS PER WEEK THAT THEIR DRIVERS WOULD WORK, BASED ON
24 THE NUMBER OF MINUTES THAT THEY THOUGHT A TYPICAL ROUTE WAS
25 GOING TO TAKE.

26 WE CAME UP WITH SOME FORMULAS FOR CALCULATING
27 THESE THINGS THAT I THOUGHT WERE PRETTY GOOD, AND THEY
28 SEEMED TO WORK.

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1 Q. I THINK I DIDN'T ASK A GOOD QUESTION. I WAS
2 FOCUSED ON THE \$1 MILLION A YEAR UNDERESTIMATE OF THE COST.
3 I GUESS I WAS TRYING TO UNDERSTAND WHETHER YOU DREW ANY
4 CONCLUSIONS ABOUT HOW SIGNIFICANT OR INSIGNIFICANT THIS

5 WOULD BE TO NORCAL IN ITS ABILITY TO FINANCIALLY PERFORM THE
6 CONTRACT.

7 A. WE SAID, AS SHOWN ABOVE, STRICT ADHERENCE TO A
8 NINE-HOUR WORKDAY COULD CAUSE NORCAL -- WE DID AN ESTIMATE
9 OF TRUCK AND LOAD REQUIREMENTS.

10 AS SHOWN ABOVE, STRICT ADHERENCE TO A
11 NINE-HOUR WORKDAY COULD CAUSE NORCAL TO ADD AS
12 MANY AS EIGHT TRUCKS AND ONE LOADER, NOT COUNTING
13 SPARE TRUCKS OR LOADERS, AT AN ESTIMATED COST TO
14 NORCAL OF \$162,000 PER YEAR PER TRUCK.

15 AGAIN, THAT'S YOUR COST CENTER, YOUR TRUCKS. THIS
16 WOULD ADD A SIGNIFICANT ELEMENT OF COST FOR NORCAL.

17 Q. AND THE COST, YOU CONCLUDED BECAUSE IT WOULD ADD A
18 SIGNIFICANT ELEMENT OF COST FOR NORCAL, YOU FELT THAT IT
19 MIGHT IMPACT ON THEIR ABILITY FINANCIALLY TO PERFORM THE
20 CONTRACT.

21 A. THAT'S CORRECT.

22 Q. AND SO YOUR ESTIMATE WAS JUST IN BALLPARK NUMBERS,
23 \$162,000 PER TRUCK PER YEAR ADDITIONAL TIMES EIGHT TRUCKS,
24 ROUGHLY \$1 MILLION A YEAR?

25 A. THAT'S CORRECT.

26 Q. SO CAN WE ASSUME, THEN, THAT IF NORCAL WAS LIKELY
27 OR MIGHT INCUR AN ADDITIONAL UNANTICIPATED \$1 MILLION A YEAR
28 ADDITIONAL COST, AN UNANTICIPATED \$2 MILLION A YEAR

1 ADDITIONAL COST WOULD HAVE EVEN GREATER SIGNIFICANCE TO
2 THEIR FINANCIAL ABILITY TO PERFORM THE CONTRACT?

3 A. UH-HUH. IT WOULD BE TWICE AS SIGNIFICANT, YEAH.

4 Q. NOW, LET ME SHOW YOU WHAT'S BEEN MARKED AS EXHIBIT
5 15 IN THIS GRAND JURY INVESTIGATION. IT'S ENTITLED ADDENDUM
6 TO AGREEMENT BETWEEN NORCAL AND CWS. I'M JUST PARAPHRASING
7 HERE.

8 WHAT IT PROVIDES IS TWO THINGS. IN THE FIRST
9 PARAGRAPH THERE'S A RECITAL THAT PURPORTS TO STATE WHAT THE
10 PARTIES, NORCAL AND CWS, HAVE LEARNED. IT SAYS ESSENTIALLY
11 THE CITY MAY REQUIRE THEM TO PAY HIGHER WAGES AND BENEFITS
12 THAN SET FORTH IN THEIR PROPOSAL.

13 DO YOU SEE THAT PARAGRAPH?

14 A. UH -- OKAY.

15 Q. SO THE FIRST PARAGRAPH IS A RECITAL THAT SAYS THAT
16 THE CITY --

17 A. I SEE IT.

18 Q. -- MAY REQUIRE HIGHER WAGES AND BENEFITS PACKAGES
19 THAT ARE DIFFERENT FROM CWS'S CURRENT WAGES AND BENEFITS
20 PACKAGES. DO YOU SEE THAT?

21 A. YES, I DO.

22 Q. THEN DO YOU SEE THAT IN THE NEXT PARAGRAPH, NORCAL

23 AGREES TO REIMBURSE CWS FOR THE DIFFERENCE BETWEEN THE WAGES
24 AND BENEFITS IN THE PROPOSAL VERSUS THE HIGHER WAGES AND
25 BENEFITS THAT THE CITY MIGHT REQUIRE. DO YOU SEE THAT?

26 A. YES, I DO.

27 Q. AND YOU'LL NOTICE THAT THIS DOCUMENT IS DATED
28 OCTOBER 9, 2000, WHICH WOULD BE THE DATE BEFORE THE FIRST

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2176

1 COUNCIL VOTE, CORRECT?

2 A. YES.

3 Q. HAVE YOU SEEN THAT DOCUMENT BEFORE?

4 A. I HAVE NOT. I DON'T REMEMBER SEEING IT.

5 Q. AT THE TIME YOU WERE WORKING ON THIS AUDIT FOR THE
6 CITY COUNCIL, WERE YOU AWARE OF THIS ADDENDUM TO THE
7 SUBCONTRACT BETWEEN NORCAL AND CWS?

8 A. UH -- I'M NOT SURE IF I WAS. I DO KNOW THAT DURING
9 OUR AUDIT WE DID COME ACROSS AN E-MAIL THAT THAT SAME
10 GENTLEMAN, DAVE DUONG -- I'M SORRY. IT WAS VICTOR DUONG,
11 THE VICE PRESIDENT, SENT TO MAYOR GONZALES, DATED OCTOBER 9,
12 THE SAME DATE SHOWN HERE. AND IT STATED:

13 CALIFORNIA WASTE SOLUTIONS, INC. WILL PAY
14 SORTERS HIRED PURSUANT TO THE CITY OF SAN JOSE'S
15 RECYCLE PLUS CONTRACT AWARD WAGES AND BENEFITS AT

16 LEAST EQUIVALENT TO THOSE PRESENTLY BEING PAID TO
17 WORKERS OCCUPYING THOSE POSITIONS UNDER THE
18 CURRENT AGREEMENTS IN SAN JOSE.

19 Q. RIGHT. BUT THAT E-MAIL DOESN'T DISCLOSE ANYTHING
20 ABOUT NORCAL HAVING TO ABSORB THAT EXTRA COST, DOES IT?

21 A. NO.

22 Q. AND SO ISN'T THE SIGNIFICANT FACT HERE THAT NORCAL,
23 UNDER THIS AGREEMENT, WHICH NORCAL'S PRESIDENT HAS TOLD US
24 UNDER OATH WAS ESTIMATED TO RUN ABOUT \$2 MILLION A YEAR
25 DURING THE LIFE OF THE CONTRACT, HAD SOME IMPACT ON NORCAL'S
26 ABILITY FINANCIALLY TO PERFORM UNDER THE AGREEMENT, CORRECT?

27 A. YES.

28 Q. AND IS THAT SOMETHING THAT YOU WERE MADE AWARE OF

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2177

1 BY ANYONE DURING THE TIME YOU WORKED ON YOUR AUDIT?

2 A. NO. IF I WOULD HAVE KNOWN ABOUT THAT, I WOULD HAVE
3 INCLUDED IT IN MY REPORT, BECAUSE I TRY TO INCLUDE
4 EVERYTHING IN THERE OF WHICH I WAS AWARE THAT COULD IMPACT
5 NORCAL'S ABILITY TO PERFORM UNDER THE CONTRACT.

6 Q. AND IN TERMS OF SIGNIFICANCE, IF NORCAL'S PRESIDENT
7 HAD TESTIFIED THAT THE IMPACT OF THIS ADDITIONAL \$2 MILLION

8 A YEAR EXPENSE FOR REIMBURSING CWS FOR ADDITIONAL LABOR
9 COST, HE ESTIMATED WOULD HAVE RESULTED IN CHANGING WHAT THEY
10 ANTICIPATED WAS A \$1 MILLION A YEAR PROFIT INTO A \$1 MILLION
11 A YEAR LOSS, WHAT WOULD YOU HAVE MADE OF THAT IF YOU HAD
12 KNOWN THAT FACT?

13 A. I THINK I WOULD HAVE CERTAINLY INCLUDED IT IN THE
14 REPORT. I THINK IT IS SIGNIFICANT, AND WE WOULD HAVE
15 CHARACTERIZED AS WE CHARACTERIZED THE NINE-HOUR ESTIMATE AND
16 SOME OF THE TIME ESTIMATES, THAT IT WOULD ADD A SIGNIFICANT
17 ELEMENT OF COST. AND IN FACT I THINK AT ONE TIME WE EVEN
18 CHARACTERIZED THEIR ABILITY TO MAKE A PROFIT.

19 Q. YES. PAGE 39.

20 A. OKAY. GOOD.

21 Q. WHY DON'T WE TURN TO PAGE 39.

22 A. I DON'T HAVE A 39.

23 Q. 19, SORRY. MY COPY IS A LITTLE BLURRY. PAGE 19.
24 THE LAST LINE ON PAGE 19.

25 A. EACH COMPANY CAREFULLY CONSIDERED THE OPERATIONAL
26 REQUIREMENTS OF EACH PROBLEMATIC ELEMENT OF THE PROPOSAL AND
27 THEN ALLOCATED LABOR, OPERATING CAPITAL AND MISCELLANEOUS
28 COSTS OF THOSE ELEMENTS. EACH COMPANY STRUCTURED THEIR

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1 PROPOSED RATES TO INCLUDE PROFIT.

2 Q. WHY DID YOU INCLUDE IN YOUR REPORT THE FACT THAT
3 EACH COMPANY HAD STRUCTURED THEIR PROPOSAL TO INCLUDE A
4 PROFIT?

5 A. WE WERE ABLE TO LOOK AT THEIR PROPOSED CHARGES AND
6 WHAT THEY ESTIMATED THEY WOULD GET IN THE WAY OF A RETURN ON
7 THEIR INVESTMENT, AND WE SAW THAT ALL THREE COMPANIES HAD
8 ANTICIPATED THAT THEY WOULD MAKE MONEY.

9 WE DID INDICATE IN THE REPORT THAT WE WERE ABLE TO
10 LOOK AT SOME PROPRIETARY INFORMATION BUT WERE NOT ABLE TO
11 KEEP IT, WE HAD TO RETURN IT.

12 Q. RIGHT. BUT I GUESS MY QUESTION IS, WHY WAS THE
13 QUESTION OF WHETHER OR NOT THE HAULERS WOULD BE MAKING A
14 PROFIT, WHY WAS THAT SOMETHING YOU SPOKE TO IN YOUR REPORT?

15 A. BECAUSE IF THE COMPANY WAS NOT GOING TO MAKE A
16 PROFIT, THEN THAT WOULD PUT THEM AT SOME RISK THAT THEY
17 WOULDN'T BE ABLE TO PERFORM UNDER THE CONTRACT.

18 Q. I SEE. SO THAT WOULD MEAN THIS ADDITIONAL
19 UNDISCLOSED \$2 MILLION A YEAR ESTIMATED COST FOR ADDITIONAL
20 LABOR COST, WHICH ACCORDING TO NORCAL'S CEO WOULD HAVE HAD
21 THE EFFECT OF FLIPPING A \$1 MILLION A YEAR PROFIT TO A \$1
22 MILLION A YEAR LOSS WOULD HAVE BEEN, IN YOUR MIND, I GUESS,
23 SOMETHING VERY SIGNIFICANT FOR THE DECISION MAKERS TO KNOW
24 ABOUT BEFORE ULTIMATELY SELECTING A FINAL LIST OF HAULERS?

25 A. YES. AND LET ME PUT THIS IN CONTEXT IF I MAY.

26 IN THE BACK OF THE REPORT WE PREPARED A

27 SPREADSHEET THAT SHOWED ALL OF THE VARIOUS ELEMENTS OF
28 PROPOSALS, OF ALL OF THE PROPOSALS. NOT JUST THE ONES THAT

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1 WERE SELECTED, BUT ALL. NORCAL, USA WASTE, GREEN TEAM, AND
2 REPUBLIC. WHEN WE LOOKED AT -- THERE IT IS.

3 Q. WHICH APPENDIX ARE YOU LOOKING AT?

4 A. APPENDIX B-1.

5 Q. B AS IN BOY?

6 A. YES. UNDER SUBSECTION "BASE SERVICE RATES," THAT'S
7 A, AND THEN THERE'S ANOTHER SECTION 2 WHERE IT SAYS
8 "SINGLE-FAMILY DWELLING RECYCLING SERVICE." IT SHOWS
9 COLLECTION, WHICH IS A COST PER UNIT PER MONTH.

10 AND IF YOU LOOK AT NORCAL, IT SAYS \$4.37. AND
11 THEN UNDERNEATH IT, IT SAYS PROCESSING, COSTS PER UNIT PER
12 MONTH, AND IT SHOWS ZERO.

13 THE OTHER PROPOSERS SHOW, USA WASTE SHOWS 19
14 CENTS, GREEN TEAM SHOWS \$3.76.

15 REPUBLIC DIDN'T SHOW ANYTHING.

16 GREEN TEAM DISTRICT B, \$5.56. NORCAL FOR DISTRICT
17 B, ZERO.

18 USA WASTE, \$2, ET CETERA, ET CETERA.

19 THE SIGNIFICANCE OF ZERO FOR NORCAL WAS THE
20 CONTRACTUAL AGREEMENT THAT WE WERE TOLD THEY HAD, AND WE SAW
21 IN THEIR ORIGINAL PROPOSAL WITH CWS, CALIFORNIA WASTE
22 SOLUTIONS, THAT SAID THAT NORCAL WOULD DELIVER THE RECYCLED
23 MATERIALS TO CWS AT THEIR MATERIAL RECYCLING FACILITY,
24 WHEREVER THAT WAS GOING TO BE. BECAUSE THAT WAS ONE OF THE
25 PROBLEMS, IT DIDN'T EXIST AT THE TIME. SO THERE WAS A BIT
26 OF UNCERTAINTY ABOUT THAT, AND THAT TOO COULD HAVE COST
27 IMPLICATIONS, WHICH WASN'T POINTED OUT IN THE REPORT.
28 BUT IN EXCHANGE FOR THE MATERIALS THAT THEY WERE

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1 GOING TO GIVE TO CALIFORNIA WASTE SOLUTIONS THAT THEY COULD
2 THEN PROCESS, AND THEY WOULD RECLAIM THE RESALE VALUE OF
3 THIS SALVAGE VALUE OF THE MATERIALS. THAT WAS THE PAYMENT
4 TO CALIFORNIA WASTE SOLUTIONS FROM NORCAL, THEY GAVE THEM
5 THE MATERIALS. CALIFORNIA WASTE SOLUTIONS PROCESSED IT,
6 THEY GOT TO KEEP ANY PROCEEDS FROM THE SALVAGE VALUE OF
7 THOSE MATERIAL PROCESSING. THAT WAS THE ARRANGEMENT.

8 SO WHATEVER COST CALIFORNIA WASTE SOLUTIONS HAD TO
9 PAY WAS THEIR RESPONSIBILITY, INCLUDING LABOR. SO IF THEY
10 PAID ONE LABOR RATE VERSUS ANOTHER, THAT WAS THEIR BUSINESS
11 AND THAT'S WHAT THEY WOULD BE RESPONSIBLE FOR DOING. THAT

12 WAS OUR UNDERSTANDING OF THE ARRANGEMENT.

13 Q. IN OTHER WORDS, BASED ON YOUR REVIEW OF THE
14 PROPOSAL, AND NOT KNOWING ABOUT THIS OCTOBER 9 ADDENDUM,
15 YOUR CONCLUSION WAS EVEN IF CALIFORNIA WASTE SOLUTIONS WAS
16 GOING TO INCUR HIGHER WAGE AND BENEFIT COSTS, THAT WOULD NOT
17 IMPACT NORCAL'S FINANCIAL ABILITY TO PERFORM BECAUSE NORCAL
18 HAD NO OBLIGATION, SO YOU THOUGHT?

19 A. EXACTLY.

20 Q. TO CWS?

21 A. EXACTLY. NOW, THAT ASSUMPTION WAS SUBSEQUENTLY
22 BOLSTERED BY THE AGREEMENT THAT NORCAL SIGNED WITH THE CITY.

23 NOW, I CAN'T BE PRECISE ON THE LANGUAGE, BUT AS I
24 UNDERSTAND IT, IT SAYS THAT THE AGREEMENT INCORPORATES THE
25 PROPOSAL THAT NORCAL SUBMITTED TO THE CITY AND ANY
26 AGREEMENTS OUTSIDE OF THAT ARE --

27 Q. WE'LL GET THE AGREEMENT HERE, WE'LL GET THE
28 LANGUAGE.

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1 A. WHICH BASICALLY MEANS IF NORCAL ENTERED INTO THAT
2 AGREEMENT, A SIDEBAR AGREEMENT WITH CALIFORNIA WASTE
3 SOLUTIONS, AND THAT WAS DIFFERENT THAN THEIR PROPOSAL,

4 TOUGH.

5 Q. WELL, LET ME GET -- WE HAVE EXHIBIT 26, WHICH IS
6 THE AGREEMENT, AND THERE ARE TWO PROVISIONS. I JUST WANT TO
7 MAKE SURE WE ARE AS PRECISE AS WE CAN BE.

8 FIRST ON PAGE 69, THERE IS WHAT WE LAWYERS REFER
9 TO AS AN INTEGRATION CLAUSE. IT'S LABELED "ENTIRE
10 AGREEMENT." WHAT THIS CLAUSE SAYS, BASICALLY, YOU
11 UNDERSTAND IT SAYS THAT THE AGREEMENT THAT NORCAL HAS WITH
12 THE CITY IN WRITING, WITH THIS AGREEMENT, SUPERSEDES ANY
13 OTHER AGREEMENTS, ORAL OR WRITTEN, OR UNDERSTANDINGS OR
14 ASSURANCES, ET CETERA. YOU UNDERSTAND THAT?

15 A. YES.

16 Q. THIS WOULD NOT, HOWEVER, YOU UNDERSTAND, AFFECT
17 AGREEMENTS THAT NORCAL HAS WITH SOMEBODY ELSE, INCLUDING
18 CWS; IS THAT CORRECT?

19 A. I UNDERSTAND THAT TOO.

20 Q. OKAY. THEN THERE'S ANOTHER SECTION IN THE
21 CONTRACT --

22 A. BUT MY UNDERSTANDING --

23 Q. JUST A MINUTE.

24 A. OKAY.

25 Q. LET ME SHOW YOU THIS OTHER SECTION. ON PAGE 65,
26 PARAGRAPH 24, LET ME SHOW THAT, WHICH IS ENTITLED
27 "SUBCONTRACTORS," AND WHICH SAYS THAT ANY COMPENSATION DUE
28 OR PAYABLE TO CONTRACTOR'S SUBCONTRACTOR -- JUST TO FILL IN

1 THE BLANKS -- ANY MONEY THAT NORCAL OWES TO CWS SHALL BE THE
2 SOLE RESPONSIBILITY OF NORCAL, NOT THE CITY.

3 A. CORRECT.

4 Q. RIGHT. SO I GUESS THE POINT OF ALL THIS -- WAS IT
5 YOUR UNDERSTANDING THAT, GIVEN THE WAY THE DEAL WAS
6 STRUCTURED, THAT NORCAL, BASED ON THIS CONTRACT WE'VE SEEN,
7 WOULD BE IN A POSITION OF HAVING TO ABSORB ON ITS OWN
8 WITHOUT REIMBURSEMENT FROM THE CITY THIS ESTIMATED \$2
9 MILLION A YEAR ADDITIONAL LABOR COST THAT IT APPARENTLY
10 OBLIGATED ITSELF TO PAY IN THIS OCTOBER 9 ADDENDUM?

11 A. YES.

12 Q. I TAKE IT YOUR TESTIMONY IS THAT NO ONE GAVE YOU
13 ANY INFORMATION ABOUT THIS OCTOBER 9 ADDENDUM AND NORCAL'S
14 UNDERTAKING THIS OBLIGATION TO REIMBURSE CWS FOR THESE
15 ADDITIONAL LABOR COSTS ABOVE AND BEYOND WHAT THE PROPOSAL
16 HAD ANTICIPATED THEY WOULD BE DURING THE TIME YOU PREPARED
17 YOUR REPORT.

18 A. THAT'S RIGHT.

19 Q. I'M SORRY?

20 A. YES, THAT'S RIGHT.

21 Q. AND YOU CONSIDERED THAT INFORMATION TO BE
22 SIGNIFICANT TO THE ISSUES THAT YOU WERE ADDRESSING?

23 A. YES.

24 Q. HAD YOU KNOWN ABOUT THAT INFORMATION, YOU WOULD
25 HAVE REPORTED ON THAT, CORRECT?

26 A. YES.

27 Q. AND IS THAT SOMETHING THAT MIGHT HAVE AFFECTED YOUR
28 CONCLUSIONS IN YOUR REPORT ABOUT NORCAL'S FINANCIAL ABILITY

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1 TO PERFORM UNDER THE CONTRACT?

2 A. UH -- YES. BECAUSE AS WE INDICATED WITH THE OTHER
3 ITEMS IN THE REPORT, THAT WAS A SIGNIFICANT ELEMENT OF COST.
4 AND IT -- I DON'T RECALL EXACTLY WHAT WE HAD CALCULATED --
5 WE SAW IN THEIR PROPRIETARY INFORMATION ON WHAT THEY WERE
6 ANTICIPATING THEIR PROFITS WERE GOING TO BE. BUT IF IT
7 WOULD HAVE FLIPPED THEM FROM MAKING \$1 MILLION A YEAR TO
8 LOSING \$1 MILLION A YEAR, THAT WOULD HAVE BEEN SIGNIFICANT
9 AND COULD POTENTIALLY HAVE PUT THEM AT RISK FOR BEING ABLE
10 TO PERFORM UNDER THE CONTRACT.

11 Q. COULD IT HAVE POTENTIALLY MEANT THE DECISION MAKERS
12 MIGHT NOT HAVE GONE ALONG WITH NORCAL'S PROPOSAL?

13 A. YES. AND IF I MAY, WHAT'S INTERESTING TO ME ON
14 THAT IS THE SANITATION BUSINESS IS A VERY COMPETITIVE

15 BUSINESS. IT'S ALSO A VERY INCESTUOUS BUSINESS. THE PEOPLE
16 WORK FOR THESE COMPANIES, AND THEY KIND OF JUMP FROM ONE
17 COMPANY -- THEY ALL KNOW EACH OTHER VERY WELL, AND WE GOT A
18 LOT OF INPUT FROM SOME UNSUCCESSFUL BIDDERS ON WHY NORCAL
19 WAS NOT GOING TO WORK. AND WE INCLUDED IN OUR REPORT WHEN
20 WE FOUND IT TO BE RELIABLE OR PERTINENT. IT SORT OF
21 SURPRISES ME -- NOT SORT OF, IT SURPRISES ME THAT ONE OF THE
22 COMPETITORS DIDN'T POINT THIS OUT TO US.

23 Q. POINTED OUT THE SIDE DEAL TO BE REIMBURSED?

24 A. YEAH.

25 Q. OF COURSE, WE DON'T KNOW IF THEY HAD ANY
26 INFORMATION ON IT.

27 A. RIGHT.

28 Q. YOU INDICATED THAT YOU PROVIDED A DRAFT OF THIS

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1 REPORT TO NORCAL, AMONG OTHERS, CORRECT?

2 A. YES.

3 Q. WHAT ABOUT THE MAYOR'S OFFICE? DID THE MAYOR'S
4 OFFICE GET A DRAFT OF THE REPORT?

5 A. I DON'T BELIEVE SO.

6 Q. WHAT ABOUT THE ENVIRONMENTAL SERVICES DEPARTMENT?

7 A. YES.

8 Q. LET ME DIRECT YOUR ATTENTION BACK TO YOUR DECEMBER
9 8 LETTER AT THE BEGINNING OF YOUR REPORT. THERE'S A CC AT
10 THE BOTTOM. IS THAT THE DISTRIBUTION LIST FOR WHO RECEIVED
11 THE DECEMBER 8 REPORT?

12 A. THE FINAL REPORT, YES.

13 Q. AND WOULD THAT HAVE BEEN DISTRIBUTED ON DECEMBER 8,
14 THE DATE OF THE LETTER?

15 A. YES.

16 Q. I SEE THAT JOE GUERRA WAS ON THE DISTRIBUTION LIST.

17 A. YES.

18 Q. THIS WOULD HAVE BEEN FOUR DAYS BEFORE THE DECEMBER
19 12 SECOND CITY COUNCIL VOTE, RIGHT?

20 A. THAT'S RIGHT.

21 Q. DID MR. GUERRA OR ANYONE FROM THE MAYOR'S OFFICE
22 COME BACK PRIOR TO THE COUNCIL VOTE ON DECEMBER 12 AND
23 INDICATE THAT YOU SHOULD BE AWARE OF SOME ADDITIONAL LABOR
24 COSTS THAT NORCAL MIGHT HAVE TO PAY FOR AS A RESULT OF CWS
25 SWITCHING FROM LONGSHOREMEN TO THE TEAMSTERS?

26 A. NO.

27 Q. DID YOU ATTEND THE COUNCIL MEETING ON DECEMBER 12?

28 A. I DID.

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1 Q. IF YOU WOULD HAVE BEEN MADE AWARE OF THAT
2 INFORMATION BY ANYONE, WOULD YOU HAVE BROUGHT THAT TO THE
3 COUNCIL'S ATTENTION?

4 A. YES.

5 MR. FINKELSTEIN: LET ME SEE IF THE JURORS HAVE
6 ANY QUESTIONS FOR YOU.

7 LET ME JUST CHECK MY NOTES FOR A MINUTE. I THINK
8 THAT'S ALL THE QUESTIONS -- OH, WAIT. SORRY. A JUROR HAS A
9 QUESTION.

10 BY MR. FINKELSTEIN:

11 Q. DO YOU KNOW THE NAMES OF ANYONE AT NORCAL THAT YOU
12 SPOKE WITH CONCERNING THIS REPORT, EITHER THE DRAFT REPORT
13 OR THE PREPARATION OF THE FINAL REPORT?

14 A. NOT RIGHT OFF THE TOP OF MY HEAD, IT'S BEEN SIX
15 YEARS.

16 Q. I UNDERSTAND. IF I GAVE YOU A NAME, WOULD THAT
17 HELP?

18 A. IT WOULD.

19 Q. WE UNDERSTAND THAT BILL JONES WAS NORCAL'S POINT
20 PERSON ON THIS REPORT.

21 A. WE DID SPEAK WITH BILL JONES A NUMBER OF TIMES. I
22 DO REMEMBER THAT NAME NOW.

23 Q. AND WAS THAT IN CONNECTION WITH THE PREPARATION OF
24 THIS REPORT?

25 A. YES.

26 Q. AND SINCE -- DID MR. JONES EVER SHARE WITH YOU
27 ANYTHING ABOUT THIS OCTOBER 9, 2000 ADDENDUM?

28 A. I DO NOT RECALL ANY DISCUSSIONS WITH ANYONE ABOUT

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1 THAT.

2 Q. SO WOULD YOU CHARACTERIZE THE SITUATION WITH REGARD
3 TO NORCAL AS NOT HAVING PROVIDED YOU WITH ALL AVAILBLE
4 INFORMATION THAT YOU WOULD HAVE LIKED TO HAVE HAD TO MAKE
5 THIS REPORT?

6 A. YES. I WOULD HAVE LIKED TO HAVE SEEN THAT
7 DOCUMENT.

8 Q. OR AT LEAST KNOWN ABOUT THAT ARRANGEMENT?

9 A. YES.

10 Q. I DON'T RECALL IN THE REPORT IF YOU ACTUALLY MAKE A
11 RECOMMENDATION REGARDING THE SELECTION OF HAULERS OR JUST
12 STATE FINDINGS ABOUT THEIR FINANCIAL OPERATION.

13 A. WE DID NOT MAKE ANY RECOMMENDATIONS ABOUT THE
14 HAULERS. WHAT WE DID DO WAS -- THERE WAS TWO PARTS TO THIS.
15 THE FIRST PART WAS ONE THAT WASN'T EVEN ENVISIONED
16 WHEN WE WERE GIVEN OUR ASSIGNMENT, AND THAT WAS ON THE
17 ASSUMPTION THAT THE ENVIRONMENTAL SERVICES DEPARTMENT HAD
18 MADE REGARDING REVENUES AND EXPENSES OVER THE NEXT 11 YEARS

19 OF THE RECYCLE PLUS TWO CONTRACT.

20 WE HAD SOME SERIOUS ISSUES WITH THEIR ASSUMPTIONS
21 THAT THEY BUILT INTO THEIR MODEL RUNNING INTO TENS OF
22 MILLIONS OF DOLLARS, SO WE INCLUDED THAT AS A FIRST PART.

23 AGAIN, THE REASON WE DID THAT IS BECAUSE WE
24 THOUGHT IT WAS SIGNIFICANT. WE KNEW THAT THE COUNCIL WAS
25 UNDER THE ASSUMPTION THAT THEY WERE GOING TO BE ABLE TO
26 REDUCE THE COST OF THE PROGRAM BY \$60 MILLION, AND THEY WERE
27 CONTEMPLATING REDUCING GARBAGE RATES. BUT WHEN WE LOOKED AT
28 ALL OF THE PROBLEMS WE SAW WITH THE ASSUMPTIONS ON REVENUES

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1 AND EXPENSES, WHEN WE LOOKED AT THE FUND ITSELF, WE
2 RECOMMENDED THAT THEY DID NOT DO THAT, BECAUSE WE COULD SEE
3 THE FUND WAS GOING TO GO UNDERGROUND IN TWO YEARS EVEN WITH
4 THE NEW GARBAGE CONTRACT.

5 THE OTHER PART WAS ON OUR ASSESSMENT OF THE
6 PROPOSED HAULERS, AND WE MADE THREE RECOMMENDATIONS. THE
7 FIRST ONE WAS TO DEVELOP A CONTINGENCY PLAN TO MITIGATE THE
8 CONSEQUENCES OF NORCAL NOT SUCCEEDING IN ITS ATTEMPT TO
9 ACQUIRE A SUITABLE PROPERTY AND THE REQUIRED PERMITS FOR ITS
10 HEADQUARTERS BY JULY 1, 2001. THAT WAS ONE OF OUR CONCERNS;

11 THEY DIDN'T HAVE A HEADQUARTERS IN SAN JOSE THAT WAS GOING
12 TO BE SUFFICIENT SIZE TO ACCOMMODATE THE CONTRACT.

13 AND THEN TO MONITOR NORCAL'S PROGRESS TOWARDS
14 MEETING ITS MATERIAL RECYCLING FACILITY TIMELINE AS PROPOSED
15 IN ITS RESPONSE TO THE RECYCLE PLUS 2002 RFP AND DEVELOP A
16 CONTINGENCY PLAN TO MITIGATE THE CONSEQUENCES OF NORCAL NOT
17 BEING ABLE TO MEET THE MATERIAL RECYCLING FACILITY TIME
18 FRAME.

19 THEN THE LAST ONE WAS TO REQUIRE THE PROPOSED
20 CONTRACTORS TO, ONE, SUBMIT PRELIMINARY WORKDAY, TRAVEL
21 TIME, AND EQUIPMENT ESTIMATES BY JULY 1, 2001 FOR ESD
22 ANALYSIS AND WRITTEN COMMENT.

23 AND TWO, RESPOND IN WRITING TO ANY ESD WRITTEN
24 COMMENTS WITHIN 30 DAYS OF RECEIPT. THIS WAS TO ADDRESS
25 SOME OF THE ISSUES ON THE NUMBER OF HOURS THE DRIVERS WOULD
26 WORK PER WEEK, ESTIMATED TIMES FOR ROUTES. THEY WERE
27 SUPPOSED TO PROVIDE THEM WITH ROUTING AND ALL THAT SO ESD
28 COULD ANALYZE IT AND ASSESS ITS FEASIBILITY.

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1 Q. IF I COULD JUST TRY TO SUM UP HERE, ON OCTOBER 10,
2 2000, THE COUNCIL MADE A PRELIMINARY SELECTION OF HAULERS
3 WHICH INCLUDED NORCAL, CORRECT?

4 A. THAT IS CORRECT.

5 Q. AND THEN YOU WERE ASKED TO DO THIS AUDIT REVIEW TO
6 MAKE SURE THAT THE HAULERS SELECTED BY THE COUNCIL COULD
7 ACTUALLY DO WHAT THEY SAID THEY WERE GOING TO DO FOR THE
8 COSTS THEY THOUGHT THEY WERE GOING TO INCUR. IS THAT A
9 SUMMARY?

10 A. YES. WHETHER THEY HAD THE OPERATIONAL AND
11 FINANCIAL CAPACITY TO PERFORM UNDER THE CONTRACT.

12 Q. IN ASSESSING FINANCIAL CAPACITY, YOU TRY TO ASSESS
13 THE ACCURACY OF THEIR COST ASSUMPTIONS AND WHAT THEIR COSTS
14 WOULD BE?

15 A. THAT IS CORRECT.

16 Q. AND YOU WANTED TO KNOW WHETHER THEY WOULD STILL
17 MAKE A PROFIT OR NOT BECAUSE THAT COULD BEAR ON WHETHER OR
18 NOT THEY COULD CONTINUE OPERATING UNDER THE CONTRACT?

19 A. THAT IS CORRECT, AND WE ALSO LOOKED AT THEIR
20 AUDITED FINANCIAL STATEMENTS TO SEE WHAT THEIR FINANCIAL
21 CAPACITY WAS AS AN ORGANIZATION. AND IN NORCAL'S CASE, THEY
22 HAD SIGNIFICANT FINANCIAL RESERVES. AND IN FACT THEY HAD, I
23 BELIEVE WE QUOTED IN THE REPORT \$69 MILLION IN CASH ON HAND.
24 SO --

25 Q. ACCORDING TO THE FINANCIAL STATEMENT YOU LOOKED AT?

26 A. YES.

27 Q. SO WOULDN'T THAT MEAN THEY COULD HAVE ABSORBED THIS
28 \$1 MILLION LOSS AND STILL STAYED IN BUSINESS, CARRIED OUT

1 THE CONTRACT?

2 A. YES. ONE OF THE OTHER THINGS WE WERE ASKED TO LOOK
3 AT WAS A CONTRACT THAT NORCAL HAD WITH SAN BERNARDINO COUNTY
4 THAT THEY LOST, AND THEY HAD TO PAY SAN BERNARDINO COUNTY
5 \$6.6 MILLION IN PENALTIES OR FINES. AND WE ASSESSED WHETHER
6 THAT WOULD --

7 Q. MATERIALLY AFFECT THE OPERATION?

8 A. YEAH. AND THEIR ABILITY TO PERFORM, AND WE
9 CONCLUDED THAT IT WOULDN' T.

10 MR. FINKELSTEIN: ANY OTHER QUESTIONS?

11 MY MR. FINKELSTEIN:

12 Q. DID YOUR OFFICE GET INVOLVED IN ANY WAY IN THE MAY
13 2003 GARBAGE RATE HIKE HEARINGS?

14 A. NO.

15 MR. FINKELSTEIN: ANY OTHER QUESTIONS FOR
16 MR. SILVA?

17 MR. SILVA, THANK YOU AGAIN. AND THANK YOU FOR
18 BAILING US OUT WITH OUR INCOMPLETE CERTIFIED COPY OF YOUR
19 REPORT.

20 THE FOREPERSON WILL REMIND YOU OF THE
21 ADMONITION.

22 THE FOREPERSON: I READ YOU THE LONG FORM.
23 BASICALLY, ANYTHING THAT YOU HEARD, SAID, OR SAW TODAY IS
24 NOT TO BE COMMUNICATED TO ANYBODY UNTIL SUCH TIME AS THE
25 TRANSCRIPT MAY BE MADE AVAILABLE.

26 THE WITNESS: I UNDERSTAND.

27 MR. FINKELSTEIN: THANK YOU. AND IF THE JURORS
28 WILL JUST REMAIN, I WANT TO TALK TO YOU FOR A MOMENT.

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1 WE SPOKE BRIEFLY YESTERDAY, I THINK, ABOUT WHETHER
2 ADDITIONAL WITNESSES MIGHT BE CALLED, SHOULD BE CALLED. AND
3 I WANT TO MAKE IT CLEAR TO YOU ALL THAT IN CASE THERE WAS
4 ANY LACK OF CLARITY YESTERDAY ON MY PART, IT'S YOUR
5 INVESTIGATION; IF YOU WANT TO HEAR FROM THE MAYOR'S CHIEF
6 AIDE, REBECCA DISHOTSKI, I'M SURE WE CAN GET HER IN WITHIN
7 THE NEXT FEW DAYS, AND MAYBE THAT'S A GOOD THING TO DO.

8 WITH REGARD TO AMY DEAN, OUR INFORMATION IS THAT
9 SHE IS IN THE STATE OF ILLINOIS AND BEYOND OUR REACH. THE
10 GRAND JURY SUBPOENA POWER IS ONLY WITHIN THE STATE. THERE
11 MAY BE AN INTERSTATE MEANS FOR SUBPOENAIING WITNESSES FROM
12 OUT OF STATE; IT'S A VERY LONG, TIME CONSUMING PROCESS, IT'S
13 NOT EASY TO DO. WE TRIED TO GET HER VOLUNTARILY TO COME AND
14 APPEAR BUT HAVE NOT BEEN SUCCESSFUL.

15 SO WHAT I WOULD LIKE YOU TO DO IS TAKE A MOMENT
16 AND DECIDE IF YOU WOULD LIKE TO HEAR FROM REBECCA DI SHOTSKI
17 OR NOT. SHE MAY HAVE INFORMATION. I DON'T KNOW; WE HAVEN'T
18 SPOKEN WITH HER. I DON'T KNOW WHAT SHE HAS TO SAY.

19 IT'S UP TO YOU. WE HAVE THE TIME. SHE WON'T BE A
20 VERY LONG WITNESS IF YOU WANT TO DO THAT.

21 THE SAME HOLDS TRUE OF BARBARA ZEITMAN-OLSEN, WHO
22 I THINK THE EVIDENCE REFLECTS WAS A LOBBYIST OR PR PERSON,
23 GOVERNMENT SPECIALIST THAT DID SOME WORK EITHER FOR NORCAL
24 OR CWS. I'M NOT SURE HOW VALUABLE SHE WOULD BE. BUT AGAIN,
25 IT'S YOUR INVESTIGATION; I DON'T WANT TO DEPRIVE YOU OF
26 HEARING FROM WITNESSES YOU WANT TO HEAR.

27 SO WE'LL STEP OUTSIDE; THE REPORTER AND
28 MR. GIBBONS-SHAPIRO AND I WILL STEP OUTSIDE. WHY DON'T YOU

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1 DISCUSS THIS AMONGST YOURSELVES AND LET US KNOW WHEN YOU'RE
2 READY. LET US KNOW WHETHER YOU WANT TO HEAR FROM SOME, ALL,
3 OR NONE OF THE WITNESSES.

4 (A DISCUSSION WAS HELD OFF THE RECORD.)

5 THE FOREPERSON: ARE WE BACK ON THE RECORD?

6 MR. FINKELSTEIN: YES.

7 THE FOREPERSON: THE JURORS ASKED ME TO RAISE TWO
8 TOPICS WITH YOU.

9 THE FIRST IS TO EMPHASIZE THE IMPORTANCE THAT THE
10 JURORS THINK AMY DEAN MAY PLAY IN THIS WHOLE BUSINESS, AND
11 JUST TO ASK IF THERE MIGHT BE ANY WAY TO VISIT HER OR TO IN
12 SOME OTHER WAY FACILITATE GETTING A STATEMENT FROM HER.

13 MR. FINKELSTEIN: UH -- BECAUSE THIS IS A FORMAL
14 INVESTIGATION, WE COULD ONLY EXAMINE HER UNDER OATH BEFORE
15 YOU. AN OUT-OF-COURT STATEMENT WOULD NOT BE ADMISSIBLE
16 EVIDENCE, WOULD NOT BE PROPER EVIDENCE. SO UNLESS WE CAN
17 GET HER ONTO THE WITNESS STAND AND SWORN AND TESTIFYING,
18 TALKING TO HER WOULD NOT, WE COULD NOT SHARE THAT
19 INFORMATION WITH YOU.

20 SHE IS JUST BEYOND OUR REACH; THAT SOMETIMES
21 HAPPENS. WITNESSES DIE, MOVE OUT OF STATE, OUT OF THE
22 COUNTRY.

23 WE WILL TRY AGAIN TO CONTACT HER AND SEE IF WE CAN
24 GET HER TO VOLUNTARILY RETURN. BUT BARRING THAT, I DON'T
25 THINK, GIVEN THE TIMING WHERE WE ARE NOW, THAT IT'S
26 PRACTICAL TO TRY, IT COULD TAKE WEEKS OR LONGER TO PROCESS
27 THE OUT-OF-STATE SUBPOENA PROCESS.

28 THE FOREPERSON: IS THAT SATISFACTORY?

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1 A JUROR: I'M SORRY. IS THERE ANY WAY TO DO A
2 VIDEO CONFERENCE? IS THAT ACCEPTABLE?

3 MR. FINKELSTEIN: NO, THAT'S NOT. SHE WOULD HAVE
4 TO BE HERE, UNFORTUNATELY.

5 A JUROR: DEPOSITION TESTIMONY?

6 MR. FINKELSTEIN: NO; WE CANNOT USE A DEPOSITION.
7 I'M GOING TO BE GIVING YOU SOME INSTRUCTIONS ON THE LAW WHEN
8 WE CONCLUDE ALL THE WITNESSES, AND ONE OF THE INSTRUCTIONS
9 WILL TELL YOU THAT THE GRAND JURY CAN ONLY RECEIVE EVIDENCE
10 THAT WOULD BE ADMISSIBLE AT A TRIAL. THAT'S WHY WE HAVE TO
11 BRING ALL THESE PEOPLE IN. WE CAN'T RELY ON HEARSAY AND
12 OTHER THINGS THAT A GRAND JURY MIGHT RELY ON IF YOU WERE
13 WRITING A REPORT. THIS HAS TO BE DONE WITH A CERTAIN
14 FORMALITY, AS IF THIS WERE A TRIAL. OKAY?

15 A JUROR: THAT MEANS WE CAN'T TALK ABOUT THIS TILL
16 YOU PRESENT US WITH THE --

17 MR. FINKELSTEIN: YES. YOU SHOULD NOT FORM OR
18 EXPRESS ANY OPINIONS ABOUT ANY MATTERS WHICH YOU'VE HEARD
19 ABOUT. YOU SHOULDN'T BREAK OFF IN GROUPS OF ONES, TWOS, OR
20 THREES, OR ANYTHING LESS THAN THE ENTIRE BODY. AND ONLY
21 THOSE GRAND JURORS THAT HAVE HEARD ALL OF THE EVIDENCE CAN
22 PARTICIPATE IN ANY DELIBERATIONS AT THE END. THAT'S
23 IMPORTANT TO KEEP IN MIND.

24 THE FOREMAN: THE SECOND TOPIC HAD TO DO WITH THE
25 COMPLETENESS OF TESTIMONY FROM A NUMBER OF THE WITNESSES;

26 SOME OF THEM APPEARED TO US TO BORDER ON CLINICALLY
27 SIGNIFICANT MEMORY LOSS. AND THE QUESTION, IN ADDITION TO
28 OTHER FORMS OF OBFUSCATION OR HESITATION IN BEING

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1 FORTHCOMING, THE QUESTION IS, HAS THERE BEEN CONSIDERATION
2 OF SOME FORM OF IMMUNITY OR SOME OTHER ARRANGEMENT TO INDUCE
3 PEOPLE IN POSITIONS TO KNOW EXACTLY WHAT WENT ON IN SOME OF
4 THESE MEETINGS AND SO ON TO COME FORWARD?

5 MR. FINKELSTEIN: RIGHT. WE DON'T THINK -- WE'RE
6 NOT OF A VIEW THAT IT WOULD BE APPROPRIATE TO IMMUNIZE
7 ANYONE, NOR DO WE THINK IT WOULD NECESSARILY BRING FORTH
8 ADDITIONAL EVIDENCE THAT YOU DON'T ALREADY HAVE.

9 TYPICALLY, IMMUNITY WOULD BE GIVEN IF SOMEBODY
10 ASSERTED THEIR PRIVILEGE AGAINST SELF-INCRIMINATION AND DID
11 NOT TESTIFY AND WE WANTED TO HEAR WHAT THEY HAVE TO SAY, AND
12 THE DISTRICT ATTORNEY MADE A JUDGMENT CALL THAT IN THE
13 INTERESTS OF JUSTICE IT WOULD BE BETTER TO LET THAT PERSON
14 ESCAPE LIABILITY IN THE GREATER GOAL OF BRINGING SOMEBODY
15 MORE CULPABLE TO JUSTICE.

16 (PAGE 2193, LINE 16 THROUGH PAGE 2194, LINE 3 HAVE
17 BEEN REDACTED AND ARE UNDER SEAL.)

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4 THE FOREPERSON: I WOULD ADD JUST A COMMENT
5 OUTSIDE OF THOSE TWO POINTS.

6 THE GRAND JURY EXPRESSED SATISFACTION WITH THE
7 PROFESSIONALISM AND COMPLETENESS OF THE INQUIRY THAT YOU'VE
8 MADE, AND IT ISN'T CLEAR THAT THERE WOULD BE OTHER
9 INFORMATION FORTHCOMING FROM MISS DISHOTSKI OR
10 MR. HOLGERSON.

11 MR. FINKELSTEIN: MR. HOLGERSON, BY THE WAY, IS
12 OUT OF STATE AS WELL, ALTHOUGH HE MIGHT BE AVAILABLE TO
13 RETURN VOLUNTARILY IF YOU DID WANT TO HEAR FROM HIM.

14 THE FOREPERSON: WE HEARD FROM MR. BORGS DORF, AND
15 IT'S NOT CLEAR WE CAN GET MORE FROM MR. HOLGERSON. ARE
16 THERE OTHER QUESTIONS OR COMMENTS?

17 MR. FINKELSTEIN: SO, WITH REGARD TO REBECCA
18 DISHOTSKI, SHE DOES WORK AT THE MAYOR'S OFFICE. SHE IS
19 PROBABLY, YOU KNOW, SOMEONE THE MAYOR MIGHT COMMUNICATE WITH
20 FOR VARIOUS MATTERS AND SHE IS LOCAL, SO SHE WOULD BE
21 AVAILABLE IF YOU WANT TO HEAR FROM HER. I'M NOT SUGGESTING
22 YOU SHOULD HEAR FROM HER OR THAT YOU NEED TO HEAR FROM HER.

23 SHE -- OF ALL THE WITNESSES THAT WE'VE DISCUSSED,
24 SHE IS ONE THAT COULD PROBABLY BE CHARACTERIZED AS READILY
25 AVAILABLE.

26 THE FOREPERSON: I THINK THE FEELING, IF I CAN
27 REFLECT THE DISCUSSION, IS THAT WE UNDERSTAND THAT YOU DO
28 NOT HAVE A STRONG PAPER TRAIL TO GUIDE A QUESTIONING OF MISS

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1 DISHOTSKI, AND THAT WITHOUT THAT IT MIGHT NOT BE VERY
2 FRUITFUL.

3 MR. FINKELSTEIN: IT MAY NOT, BUT ON THE OTHER
4 HAND IT WOULD NOT REQUIRE A GREAT DEAL OF EFFORT TO BRING
5 HER FORTH, AND WE HAVE THE TIME.

6 THE FOREPERSON: SO HOW MANY JURORS WOULD LIKE TO
7 SEE MISS DISHOSKI BROUGHT FORWARD?

8 THAT DOES NOT SEEM TO BE THAT OVERWHELMING.

9 MR. FINKELSTEIN: I DON'T SEE ANYBODY'S HAND.

10 THE FOREPERSON: I THINK THAT WE'RE AT THE POINT
11 WHERE WE WOULD TURN THIS OVER TO YOU TO COME BACK WITH A
12 RECOMMENDATION OF ANY FURTHER ACTION THE GRAND JURY SHOULD
13 TAKE.

14 MR. FINKELSTEIN: OKAY. WE NEED TO TALK ABOUT
15 SCHEDULING AGAIN. IT MAY BE NEXT WEEK. IF THERE IS NO
16 OTHER QUESTIONS ABOUT THE CASE OR PROCEDURE, IT'S JUST A
17 MATTER OF WHEN SHALL WE MEET AGAIN. I THINK WE CAN DO THAT
18 OFF THE RECORD.

19 THE FOREPERSON: OKAY.

20

21

22

23

24

25

26

27

28

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1 SAN JOSE, CALIFORNIA

JUNE 20, 2006

2

3

PROCEEDINGS:

4

(ROLL WAS TAKEN BY THE FOREPERSON.)

5

MR. FINKELSTEIN: VERY GOOD. THANK YOU VERY MUCH.

6

IT WAS MY INTENTION TO SUM UP FOR YOU TODAY WHERE

7

I THINK WE ARE IN TERMS OF THE EVIDENCE AND WHAT THE

8

EVIDENCE SHOWS. BUT BEFORE WE DO THAT, I NEED TO MARK JUST

9

FOUR ADDITIONAL EXHIBITS. THESE ARE CERTIFIED COPIES OF

10

DOCUMENTS WE HAVE ALREADY LOOKED AT, BUT THE DOCUMENTS WE'VE

11

USED WERE NOT CERTIFIED, AND I WANTED TO MAKE SURE WE HAD

12

CERTIFIED VERSIONS.

13

FOR THE RECORD, I WILL ASK TO HAVE MARKED AS

14

EXHIBIT 140, THE CERTIFIED COPY OF THE OCTOBER 10, 2000,

15

CITY COUNCIL MINUTES.

16

AS EXHIBIT 141, A CERTIFIED COPY OF THE MAYOR'S

17

DECEMBER 8, 2000 MEMO TO THE COUNCIL.

18

AS EXHIBIT 142, A CERTIFIED COPY OF THE NORCAL

19

ORIGINAL AGREEMENT WITH THE CITY OF SAN JOSE.

20

AND AS EXHIBIT 143, A CERTIFIED COPY OF THE SECOND

21 AMENDMENT TO THE NORCAL AGREEMENT. THAT'S THE ONE DATED
22 DECEMBER 14, 2004.

23 SO I WOULD ASK THOSE BE MARKED AS EXHIBITS AS
24 WELL.

25 (EXHIBITS WERE MARKED FOR IDENTIFICATION AS GRAND
26 JURY EXHIBITS 140, 141, 142, AND 143.)

27 MR. FINKELSTEIN: OF COURSE, WHEN YOU REVIEW THE
28 EXHIBITS, YOU COMPARE THEM WITH THE UNCERTIFIED COPIES TO

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1 SEE IF THERE ARE ANY DIFFERENCES OR CHANGES, BUT WE NEED TO
2 HAVE THE CERTIFIED COPIES.

3 OVER THE LAST SIX MONTHS, WE'VE HEARD FROM 31
4 WITNESSES, WE'VE LOOKED AT MORE THAN 140 EXHIBITS, AND THIS
5 IS WHAT WE THINK THE EVIDENCE SHOWS. BUT, OF COURSE, YOU'RE
6 THE FINAL JUDGES OF WHAT THE EVIDENCE SHOWS, AND I WILL BE
7 GIVING YOU SOME LEGAL INSTRUCTIONS ABOUT THAT.

8 HERE IS WHAT WE THINK THE EVIDENCE SHOWS:

9 THE MAYOR HATCHED A BRIBERY AND FRAUD SCHEME
10 WHEREBY NORCAL WOULD GET MILLIONS MORE THAN THE PRICE QUOTED
11 IN ITS PROPOSAL AND THE PRICE AGREED TO IN ITS CONTRACT IN
12 EXCHANGE FOR GETTING ITS SUBCONTRACTOR, CWS, CALIFORNIA
13 WASTE SOLUTIONS, TO USE TEAMSTERS INSTEAD OF LONGSHOREMEN AT

14 ITS SAN JOSE FACILITY.

15 NORCAL WENT ALONG WITH THIS BRIBERY AND FRAUD
16 SCHEME BY GETTING CWS TO RECOGNIZE THE TEAMSTERS INSTEAD OF
17 LONGSHOREMEN AS REQUESTED BY THE MAYOR AND BY CONCEALING
18 THIS SECRET UNDERSTANDING THAT NORCAL HAD WITH THE MAYOR
19 FROM THE CITY.

20 THE MAYOR'S BUDGET AND POLICY DIRECTOR, JOE
21 GUERRA, AIDED AND ABETTED THIS BRIBERY FRAUD SCHEME BY
22 GETTING A RATE HIKE PASSED TO PAY NORCAL FOR GETTING CWS TO
23 SWITCH FROM LONGSHOREMEN TO TEAMSTERS.

24 SO LET ME TALK A LITTLE BIT ABOUT WHAT WE THINK
25 THE EVIDENCE SHOWS AND WHAT THE FACTS ARE.

26 WE KNOW THAT ON APRIL 28, 2000, THE CITY OF SAN
27 JOSE ISSUED A REQUEST FOR PROPOSAL, AND WE HAVE A COPY OF
28 THAT AS EXHIBIT 3. AND THE PROPOSALS RELATED TO THE

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1 COLLECTION OF GARBAGE, RECYCLABLES, AND YARD TRIMMINGS IN
2 THE CITY OF SAN JOSE. SOMETIMES THE CONTRACT WAS REFERRED
3 TO AS RECYCLE PLUS! SERVICES WITH AN EXCLAMATION POINT.

4 NOW, WE SAW THAT THE SAN JOSE RFP REQUIRED THAT
5 SUCCESSFUL BIDDERS OFFER EMPLOYMENT TO DISPLACED WORKERS AND

6 DEMONSTRATE LABOR PEACE. WE'VE HEARD A LOT ABOUT THAT, BUT
7 WE ALSO SAW THAT THE RFP DID NOT REQUIRE THE RECOGNITION OF
8 EXISTING COLLECTIVE BARGAINING AGREEMENTS, WHICH I'LL
9 ABBREVIATE AS CBA'S IN THE COURSE OF MY SUMMING UP, DID NOT
10 REQUIRE THE PAYMENT OF EXISTING WAGES AND BENEFITS AND DID
11 NOT REQUIRE THE RECOGNITION OF UNIONS REPRESENTING DISPLACED
12 WORKERS.

13 THE REASON THE RFP IS IMPORTANT IN THIS CASE IS
14 BECAUSE UNLIKE THE MAYOR, WHO IS JUST ONE MEMBER OF THE CITY
15 COUNCIL, THE RFP IS THE OFFICIAL LEGAL DOCUMENT THAT
16 REFLECTS OFFICIAL CITY POLICY AS APPROVED BY AT LEAST THE
17 MAJORITY OF THE COUNCIL. AND WE'VE HEARD TESTIMONY THAT
18 THEY SPENT A CONSIDERABLE AMOUNT OF TIME HAMMERING OUT WHAT
19 SHOULD OR SHOULD NOT BE IN THE RFP. AND ONCE THEY CAME TO A
20 DECISION OR VOTE, THE RFP REPRESENTS CITY POLICY, AND THE
21 MAYOR WAS NOT AUTHORIZED TO DEVIATE FROM THAT POLICY OR TO
22 IMPOSE ADDITIONAL CONDITIONS SUCH AS PAYING EXISTING WAGES,
23 RECOGNITION OF COLLECTIVE BARGAINING AGREEMENTS OR
24 RECOGNITION OF EXISTING UNIONS.

25 NOW, IN RESPONSE TO THE RFP ON JULY 14, 2000,
26 NORCAL SUBMITTED A PROPOSAL, WHICH IS EXHIBIT 4, TO THE CITY
27 OF SAN JOSE.

28 IN ITS PROPOSAL, NORCAL MAKES CERTAIN

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1 REPRESENTATIONS TO THE CITY, WHICH INCLUDED THAT NORCAL
2 WOULD PROVIDE THE SERVICES FOR THE PRICE IN ITS PROPOSAL.

3 THAT ANOTHER SEPARATE COMPANY, CWS, WOULD DO THE
4 SORTING AND PROCESSING OF RECYCLABLE MATERIALS AT NO COST TO
5 NORCAL, AND THAT THE PROCESSING OF RECYCLABLES WOULD BE DONE
6 AT A NEW CWS FACILITY IN SAN JOSE THAT WOULD BE STAFFED BY
7 I LWU WORKERS UNDER AN EXISTING CBA, A COLLECTIVE BARGAINING
8 AGREEMENT, THAT CWS HAD IN ITS OAKLAND OPERATION.

9 BECAUSE I LWU WORKERS RECEIVED LOWER WAGES AND
10 BENEFITS THAN TEAMSTERS, NORCAL WAS ABLE TO SUBMIT A VERY
11 LOW COST BID; IN FACT, THE LOWEST BID OF ALL THE CONTRACTORS
12 SUBMITTING PROPOSALS.

13 WE ALSO KNOW THAT ON SEPTEMBER 22, 2000, THE
14 ENVIRONMENTAL SERVICES DEPARTMENT FOR THE CITY OF SAN JOSE,
15 OR ESD, RECOMMENDED NORCAL'S PROPOSAL TO THE CITY COUNCIL.
16 A COPY OF THAT RECOMMENDATION OF THE PROPOSAL RECOMMENDED BY
17 ESD INCLUDED THE USE OF I LWU WORKERS AT THE NEW CWS FACILITY
18 IN SAN JOSE.

19 HERE'S WHERE THE STORY REALLY BEGINS. AFTER THAT
20 RECOMMENDATION, AND ACTUALLY TO SOME EXTENT BEFORE, THE HEAD
21 OF THE TEAMSTERS LOCAL FOR THE BAY AREA, LOCAL 350, BOB
22 MORALES, UNDERTOOK A CAMPAIGN TO IMPOSE A REQUIREMENT THAT
23 WENT BEYOND WHAT THE RFP REQUIRED. WE KNOW THAT BOB
24 MORALES, THE LOCAL TEAMSTER REPRESENTATIVE, DID NOT WANT HIS

25 MEMBERS CHANGING UNIONS WHEN THEY WENT TO WORK FOR CWS, AND
26 WE KNOW THAT MORALES APPROACHED NORCAL ABOUT IT, BUT NORCAL
27 REFUSED TO INTERVENE IN ANOTHER COMPANY'S UNION MATTERS.
28 MORALES FILED AN UNFAIR LABOR PRACTICE WITH THE

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1 NLRB AGAINST CWS. AND THAT, LADIES AND GENTLEMEN, IS WHERE
2 THE STORY SHOULD HAVE ENDED, AND WE WOULD NOT HAVE SPENT THE
3 LAST SIX MONTHS INVESTIGATING THIS MATTER. BUT AS WE ALSO
4 KNOW, HE DIDN'T RELY ON THE LEGAL PROCESS AVAILABLE TO
5 RESOLVE THIS DISPUTE; HE RELIED ON ANOTHER AVENUE THAT WAS
6 OPEN TO HIM, AND THAT'S WHERE THIS CASE REALLY BEGINS.

7 HE APPROACHED COUNCILMEMBER CINDY CHAVEZ FOR HELP,
8 BUT SHE REFUSED. SHE TOLD MORALES THAT THIS WAS A LABOR
9 ISSUE AND NOT SOMETHING THAT THE COUNCIL OR CITY COULD BE
10 INVOLVED IN.

11 MORALES APPROACHED THE MAYOR ABOUT HIS CONCERNS.
12 THE MAYOR TOLD MORALES TO PUT HIS CONCERNS IN WRITING, AND
13 ON OCTOBER 3 OF 2000 MORALES FAXED A LETTER TO THE MAYOR,
14 AND EXHIBIT 6 IS A COPY OF THAT LETTER.

15 SO IT'S CLEAR FROM THE EVIDENCE THAT AS EARLY AS
16 OCTOBER 3, THE MAYOR KNEW ABOUT THIS ISSUE, WHICH OF COURSE

17 IS BEFORE THE FRIDAY, OCTOBER 6 MEETING.

18 AND IN THE LETTER MORALES CLAIMED THAT THE NORCAL
19 PROPOSAL FAILED TO PROTECT THE EMPLOYMENT RIGHTS AND
20 PREVAILING WAGE REQUIREMENTS ADOPTED BY THE CITY OF SAN
21 JOSE. OF COURSE WE ALSO KNOW THAT'S NOT CORRECT, THAT THE
22 PREVAILING WAGE REQUIREMENT AT THAT TIME DID NOT APPLY TO
23 THE SORTERS, AND THERE WAS NO REQUIREMENT FOR EMPLOYMENT
24 RIGHTS.

25 NOTWITHSTANDING MORALES'S EFFORTS, CWS STOOD FIRM
26 ON ITS PRIOR COMMITMENT TO USE ILWU WORKERS IN SAN JOSE.

27 ON OCTOBER 4, 2000, ONLY SIX DAYS BEFORE THE CITY
28 COUNCIL VOTE ON NORCAL'S PROPOSAL -- THIS IS THE FIRST VOTE

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1 ON TUESDAY, OCTOBER 10 -- CWS FAXED A LETTER TO THE MAYOR
2 REITERATING THAT IT INTENDED TO USE ILWU WORKERS UNDER ITS
3 EXISTING OAKLAND COLLECTIVE BARGAINING AGREEMENT. WE HAVE A
4 COPY OF THAT LETTER IN EVIDENCE; THAT IS EXHIBIT 9, IN WHICH
5 DAVID DUONG, THE PRESIDENT OF CWS, REITERATES THAT CWS
6 INTENDED TO STAND BY THE COMMITMENT TO USE THE ILWU
7 WORKERS.

8 WE ALSO KNOW THAT ON OCTOBER 4, THE ILWU FAXED A
9 LETTER TO THE MAYOR INFORMING HIM OF CWS'S OBLIGATION TO USE

10 I LWU WORKERS IN SAN JOSE.

11 THAT'S EXHIBIT A.

12 ALL OF THIS, OF COURSE, PRECEDES THAT IMPORTANT
13 FRIDAY MEETING.

14 SO AT THIS POINT IN TIME, THE MAYOR HAS RECEIVED A
15 LETTER FROM THE TEAMSTERS, HE'S RECEIVED A LETTER FROM THE
16 LONGSHOREMEN, AND HE'S RECEIVED A LETTER FROM CWS, ALL OF
17 WHICH ARE TALKING ABOUT THIS IMPORTANT ISSUE. SO ON OCTOBER
18 6 WE HAVE A MEETING BETWEEN THE MAYOR AND NORCAL. THE
19 FRIDAY BEFORE THE TUESDAY COUNCIL VOTE, THE MAYOR SUMMONED
20 SEVERAL NORCAL PEOPLE TO CITY HALL.

21 THE MAYOR TOLD NORCAL CEO MICHAEL SANGIACOMO THAT
22 HE WOULD REALLY LIKE TO SEE CWS BE A TEAMSTER SHOP AND ASKED
23 WHETHER NORCAL COULD MAKE THAT HAPPEN. WHEN TOLD THAT
24 TEAMSTERS COULD COST \$2 MILLION MORE PER YEAR, THE MAYOR
25 TOLD NORCAL THAT IF THEY MADE THAT HAPPEN, HE WOULD MAKE
26 THEM WHOLE.

27 HERE'S THE ACTUAL TESTIMONY FROM A TRANSCRIPT THAT
28 WE HAVE OF THE MEETING WITH THE MAYOR AS RECOUNTED BY

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1 MICHAEL SANGIACOMO ON THE WITNESS STAND DURING THE COURSE OF

2 THIS INVESTIGATION.

3 FIRST, HE TESTIFIES AS FOLLOWS:

4 I DON'T RECALL SPECIFIC WORDS AND WHO SAID
5 WHAT TO WHOM, BUT THE GIST OF THE MEETING WAS
6 COMMENTS BY THE MAYOR THAT THEY WOULD REALLY LIKE
7 TO SEE THE CWS FACILITY BE A TEAMSTERS FACILITY,
8 AND WE WERE ASKED IF WE COULD MAKE THAT HAPPEN.

9 AND THEN A LITTLE LATER IN HIS TESTIMONY, HE GOES
10 ON TO SAY:

11 WE ESTIMATED IT WOULD BE SOMEWHERE IN THE
12 AREA OF \$2 MILLION PER YEAR ADDITIONAL COST. AND
13 THE MAYOR SAID SOMETHING ALONG THE LINE OF, "YOU
14 DO IT, WE'LL MAKE YOU WHOLE."

15 BUT, ACCORDING TO NORCAL'S POINT PERSON ON THE
16 PROPOSAL, BILL JONES, THE MAYOR ONLY SAID HE WANTED LABOR
17 PEACE AND WAS SUPPORTIVE OF GOING TO THE COUNCIL FOR FUNDS
18 TO COVER THE ADDITIONAL EXPENSE. SO WE HAVE A CONFLICT HERE
19 IN TESTIMONY AND RECOLLECTION OF WHAT HAPPENED.

20 BUT JONES IS CONTRADICTED BY WHAT HE TOLD ANOTHER
21 NORCAL EMPLOYEE, JOHN NICOLETTI. JONES IS ALSO CONTRADICTED
22 BY WHAT HE TOLD NORCAL'S ATTORNEY, TODD THOMPSON, IN EARLY
23 2003. THE INTERVIEW OF BILL JONES IS EXHIBIT 113.

24 AND SANGIACOMO'S VERSION OF WHAT THE MAYOR SAID AT
25 THE OCTOBER 6 MEETING IS VERY WELL CORROBORATED BY HIS
26 SUBSEQUENT ACTIONS, STARTING WITH THE OCTOBER 9, 2000
27 ADDENDUM. SO WE HAVE A MEETING ON FRIDAY, OCTOBER 6. THE

28 VERY NEXT BUSINESS DAY WE HAVE THE OCTOBER 9, 2000,

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1 ADDENDUM. ON OCTOBER 9, 2000 THE MONDAY BEFORE THE TUESDAY
2 COUNCIL VOTE, NORCAL AGREED TO REIMBURSE CWS FOR THIS
3 ESTIMATED \$2 MILLION PER YEAR FOR THE ADDITIONAL COST OF
4 USING TEAMSTERS IN AN EFFORT TO COMPLY WITH THE MAYOR'S
5 REQUEST THAT CWS SWITCH FROM ILWU TO TEAMSTERS.

6 ALTHOUGH THERE IS NO SPECIFIC REFERENCE TO
7 TEAMSTERS IN THE ADDENDUM, THE PARTIES UNDERSTOOD, AND WE
8 KNOW THAT FROM THEIR OWN TESTIMONY, THAT THE HIGHER WAGES
9 AND BENEFITS REFERRED TO TEAMSTER WAGES AND BENEFITS AS
10 OPPOSED TO LONGSHOREMEN WAGES AND BENEFITS.

11 AND IN EXHIBIT 15, WE HAVE A COPY OF THE SIGNED
12 OCTOBER 9, 2000 ADDENDUM. AND THE REASON THIS IS A CRITICAL
13 DOCUMENT IN THE EVIDENCE IS BECAUSE IT'S REASONABLE FOR YOU
14 TO INFER THAT A PROFESSIONAL CORPORATION LIKE NORCAL WOULD
15 NOT UNDERTAKE A \$2 MILLION A YEAR ADDITIONAL LIABILITY THAT
16 WOULD FLIP THAT DEAL IN SAN JOSE FROM A \$1 MILLION A YEAR
17 PROFIT TO A \$1 MILLION A YEAR LOSS UNLESS THEY BELIEVED THEY
18 HAD REASONABLE ASSURANCES FROM THE MAYOR.

19 IN THE INTRODUCTORY PARAGRAPH, THERE'S A RECITAL
20 ON THE OCTOBER 9, 2000 ADDENDUM, WHICH SAYS:

21 THE PARTIES HAVE LEARNED THAT THE CITY OF SAN
22 JOSE MAY REQUIRE CWS AND NORCAL TO PROVIDE WAGE
23 AND BENEFIT PACKAGES THAT ARE DIFFERENT THAN CWS' S
24 CURRENT WAGE AND BENEFIT PACKAGES.

25 WELL, HERE WE SEE A BEGINNING OF THE
26 MISSTATEMENTS, BECAUSE AS WE KNOW, IT WAS NOT THE CITY OF
27 SAN JOSE, IT WAS ONE MEMBER OF THE CITY COUNCIL, THE MAYOR.
28 THAT DISTINCTION BECOMES IMPORTANT AS WE GO THROUGH THE

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1 EVIDENCE.

2 AGAIN, WE CAN SEE IN THE AGREEMENT NORCAL PROPOSED
3 TO REIMBURSE CWS FOR THE DIFFERENTIAL IN LABOR COSTS, WHICH
4 ACCORDING TO MR. SANGIACOMO, WAS ESTIMATED AT THAT TIME TO
5 BE \$2 MILLION A YEAR OVER FIVE YEARS. THAT'S \$10 MILLION,
6 WHICH IS NOT FAR OFF, GIVEN THAT THE FINAL FIGURE WAS \$11.25
7 MILLION. AND THIS ESTIMATE WAS BEFORE CWS HAD NEGOTIATED A
8 NEW COLLECTIVE BARGAINING AGREEMENT WITH THE TEAMSTERS.
9 THIS IS BEING ESTIMATED IN 2000.

10 THIS ADDENDUM, OF COURSE, WAS NOT DISCLOSED TO THE
11 CITY. AND PERHAPS EVEN MORE STARTLING, NORCAL'S OWN LAWYER
12 DID NOT FIND OUT ABOUT THIS ADDENDUM UNTIL TWO YEARS LATER.

13 NOW, THE IMPORT OF THIS, LET ME SUGGEST TO YOU, IS
14 WHEN PARTIES ARE INVOLVED IN LEGITIMATE LAWFUL TRANSACTIONS,
15 THEY USUALLY DON'T ENGAGE IN CONCEALMENT, AND THEY CERTAINLY
16 DON'T PASS UP THE OPPORTUNITY TO HAVE LEGAL ADVICE FROM
17 THEIR LAWYER ON AGREEMENTS SUCH AS THIS AND AMOUNTS SUCH AS
18 THIS. AND THE FACT THAT THERE WAS CONCEALMENT OF THIS
19 AGREEMENT FROM BOTH THE CITY, AND MORE SIGNIFICANT, FROM
20 NORCAL'S OWN LAWYER, SUGGESTS THAT NORCAL BELIEVED AND KNEW
21 IT WAS INVOLVED IN AN ILLEGAL TRANSACTION.

22 NOW, SANGIACOMO'S TESTIMONY IS ALSO CORROBORATED
23 BY THE FOLLOWING:

24 IMMEDIATELY FOLLOWING THAT FRIDAY AFTERNOON
25 MEETING WITH THE MAYOR ON OCTOBER 6, SANGIACOMO TOLD
26 NORCAL'S CHIEF OPERATING OFFICER, ARCHIE HUMPHREY, THAT THEY
27 WERE SWITCHING TO THE TEAMSTERS. SO AGAIN, THAT SUGGESTION
28 IS CONTRARY TO WHAT THE MAYOR TRIED TO SAY LATER ON.

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1 AFTER THE FIRST GRAND JURY REPORT, THERE WAS
2 DISCUSSION ABOUT TEAMSTERS VERSUS LONGSHOREMEN, AND THERE
3 WAS DISCUSSION ABOUT THE PAY DIFFERENTIAL. SANGIACOMO'S
4 VERSION IS ALSO CORROBORATED BY SANGIACOMO'S CONFIDENTIAL
5 STATEMENT TO NORCAL'S ATTORNEY IN 2003. THAT'S THE THOMPSON

6 MEMO, EXHIBIT 72. AND IT IS ALSO CORROBORATED BY NORCAL'S
7 REPORTING OF THE EXPECTED REIMBURSEMENT FROM THE CITY OF SAN
8 JOSE AS REVENUE IN 2003, A YEAR BEFORE THE CITY AUTHORIZED
9 PAYMENT TO NORCAL.

10 SO THEY DIDN'T CONSIDER THIS TO BE A STATEMENT,
11 I'LL TRY, THEY CONSIDERED THIS TO BE A FIRM DEAL, FIRM
12 ENOUGH THAT THEY FELT JUSTIFIED IN THEIR AUDITED FINANCIAL
13 STATEMENTS TREATING IT AS A RECEIVABLE, AS REVENUE. AND
14 THEY TOLD THEIR AUDITORS IN 2003 THE CITY REQUIRED THE
15 SWITCH TO TEAMSTERS, WHICH IS NOT CORRECT -- IT WAS NOT THE
16 CITY, IT WAS THE MAYOR -- AND AGREED TO PAY THE ADDITIONAL
17 COST.

18 LET'S LOOK AT THE MAYOR'S VERSION OF THE OCTOBER
19 6, 2000 MEETING.

20 ON JUNE 28, 2005, THE MAYOR RESPONDED TO A MERCURY
21 STORY ON THE NORCAL GARBAGE DEAL WHICH RAN AFTER THE LAST
22 GRAND JURY RELEASED ITS REPORT.

23 THE MAYOR SENT AN E-MAIL TO 300 COMMUNITY LEADERS
24 AND COUNCILMEMBERS GIVING HIS SIDE OF THE STORY. AND THE
25 E-MAIL WAS WORKED ON BY HIS COMMUNICATIONS DIRECTOR, DAVID
26 VOSSBRINK, AND THEY KNEW IT WAS AN IMPORTANT E-MAIL. THIS
27 IS WHAT THE MAYOR TOLD 300 COMMUNITY LEADERS AND
28 COUNCILMEMBERS:

1 NOW, WHEN YOU LOOK AT EXHIBIT 135, THE TOP
2 PORTION, THE FORMAT OF THIS IS TO REMIND YOU, THE MAYOR
3 STARTS OUT WITH WHAT IS REPORTED IN THE MERCURY, AND THEN
4 AFTER THE INITIALS R. G. FOR RONALD GONZALES, HIS VERSION OF
5 EVENTS.

6 SO IN THE FIRST INSTANCE, HIS VERSION IS ONLY ONE
7 DAY BEFORE THE COUNCIL APPROVED THE CITY STAFF'S RECOMMENDED
8 VENDOR, WHICH WOULD BE MONDAY, OCTOBER 9, NOT FRIDAY,
9 OCTOBER 6:

10 I LEARNED THAT THERE WAS A DISPUTE BETWEEN
11 THE LONGSHOREMEN AND TEAMSTERS ABOUT WHO WOULD
12 REPRESENT THE GARBAGE SORTERS.

13 WE HAD NO IDEA AT THAT TIME WHAT THE COST OF
14 THAT DIFFERENCE WOULD BE. IN FACT, IT WOULD HAVE
15 BEEN IMPOSSIBLE TO CALCULATE THE DIFFERENCE AT
16 THAT POINT, AS THE LABOR NEGOTIATIONS BETWEEN CWS
17 AND THE TEAMSTERS DID NOT EVEN BEGIN FOR SOME
18 TIME.

19 AND HERE'S THE CRUCIAL LINE:

20 WHEN I MET WITH NORCAL ON OCTOBER 6, 2000, I
21 DID NOT KNOW ABOUT THIS ISSUE AND IT WAS NOT
22 DISCUSSED.

23 AS WE'VE SEEN, THAT'S SIMPLY CONTRARY TO ALL THE

24 OTHER EVIDENCE.

25 ANOTHER PORTION FROM EXHIBIT 135 READS AS FOLLOWS:

26 I DID NOT CALL FOR THIS MEETING, IT WAS
27 REQUESTED BY NORCAL AS A COURTESY MEETING. NORCAL
28 WAS DOING THE SAME WITH OTHER COUNCILMEMBERS AT

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1 THAT TIME. THIS 30-MINUTE MEETING WAS ON THE
2 FRIDAY BEFORE THE COUNCIL MEETING, AND IT WAS THE
3 ONE AND ONLY TIME WHICH I MET WITH NORCAL. WE
4 HAVE NO RECORD OF CWS BEING PRESENT AT THIS
5 MEETING, AND NEITHER JOE GUERRA NOR I REMEMBER
6 THEM BEING THERE.

7 AT THIS SESSION I TOLD NORCAL THAT I WANTED
8 THE COMPANY TO PROVIDE EXCELLENT SERVICE TO THE
9 PEOPLE OF SAN JOSE AND TO WORK HARD TO ENSURE
10 LABOR PEACE.

11 THERE WAS NO DISCUSSION OF THE WAGE
12 DIFFERENTIAL AT THIS MEETING.

13 SO IN ORDER TO SWALLOW THIS VERSION OF HISTORY, WE
14 WOULD HAVE TO CONCLUDE THAT NORCAL WASTE SYSTEMS,
15 INCORPORATED, WITH NO DISCUSSIONS FROM THE MAYOR AND NO
16 REQUIREMENT OR NO REASON WHATSOEVER, HAVING PUT TOGETHER A

17 PROPOSAL THAT SAID THAT CWS WAS GOING TO USE LONGSHOREMEN,
18 THAT THE OTHER PARTIES -- THAT CWS, HAVING SENT A LETTER
19 SAYING WE'RE GOING TO USE LONGSHOREMEN, FOR NO REASON
20 WHATSOEVER DECIDED TO ENTER INTO AN ADDENDUM, AN AGREEMENT
21 ON THAT MONDAY OBLIGATING ITSELF TO PAY AN ADDITIONAL \$2
22 MILLION OR MORE PER YEAR TO ITS SUBCONTRACTOR INSTEAD OF THE
23 ORIGINAL PROPOSAL WHICH REQUIRED NO PAYMENT TO NORCAL OR
24 CWS.

25 OUR VIEW IS THAT ASKING NORCAL TO GET CWS TO
26 SWITCH UNIONS WAS CONTRARY TO THE RFP. THE RFP DIDN'T
27 REQUIRE A NEW CONTRACTOR TO PAY DISPLACED SORTERS EXISTING
28 WAGES AND BENEFITS, DIDN'T REQUIRE THE NEW CONTRACTOR TO

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1 RECOGNIZE UNIONS THAT REPRESENTED DISPLACED SORTERS. AND
2 THE OCTOBER 27, 2000 MEMO FROM THE CITY ATTORNEY, WHICH IS
3 EXHIBIT 20, CONCLUDED THAT THE CITY COULD NOT LAWFULLY
4 REQUIRE A CONTRACTOR RECOGNIZE A PARTICULAR UNION.

5 NOW, THAT MEMO, AND WE'LL SEE A COPY OF IT,
6 EXHIBIT 20, LATER ON IN THE PRESENTATION, HAS ANOTHER
7 SIGNIFICANCE, AND THAT IS THIS: IF WE ASSUME FOR A MOMENT
8 THAT THE MAYOR IN HIS MEETING OF OCTOBER 6 WAS SIMPLY

9 MISTAKEN ABOUT THE LAW AND ACTING INNOCENTLY, NOT CORRUPTLY,
10 LET ME SUGGEST TO YOU THAT WHAT AN INNOCENT MAYOR WOULD HAVE
11 DONE, HAVING RECEIVED THAT, IS TO HAVE PICKED UP THE PHONE,
12 CALLED NORCAL AND SAID, LISTEN, I KNOW I TOLD YOU ABOUT
13 WANTING TO SEE CWS BE A TEAMSTER SHOP, BUT I JUST RECEIVED A
14 MEMO FROM THE CITY ATTORNEY, AND I NOW UNDERSTAND THAT
15 THAT'S ILLEGAL AND I CANNOT REQUIRE THAT OF YOU. SO YOU DO
16 WHATEVER YOU WANT, AND I CAN'T REQUIRE YOU TO USE TEAMSTERS
17 OR ANY OTHER UNION. AND THE FACT THAT THE MAYOR CHOSE NOT
18 TO DO THAT MAKES IT EVEN CLEARER THAT HE KNEW WHAT HE WAS
19 DOING WAS WRONG AND CORRUPT.

20 REIMBURSING NORCAL WITH THE CITY'S MONEY FOR
21 CHANGING A COLLECTIVE BARGAINING AGREEMENT WAS ALSO
22 INCONSISTENT WITH WHAT THE MAYOR HIMSELF HAD SAID JUST SIX
23 MONTHS EARLIER.

24 WHAT THE MAYOR TOLD NORCAL AT THE OCTOBER 6, 2000
25 MEETING WAS COMPLETELY CONTRARY TO WHAT THE MAYOR TOLD THE
26 COUNCIL JUST SIX MONTHS EARLIER, WHEN THE CONTENTS OF THE
27 RFP WAS BEING CONSIDERED BY THE COUNCIL AND BEFORE THE
28 TEAMSTERS ASKED FOR HIS HELP.

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2 2000 MEMO TO THE COUNCIL REGARDING WHETHER OR NOT THE RFP
3 SHOULD ALLOW REOPENING OF THE CONTRACT IN THE EVENT OF A
4 CHANGE IN THE COLLECTIVE BARGAINING AGREEMENT, HE HAS A
5 SECTION ENTITLED "COMPENSATION ADJUSTMENT," AND IT READS AS
6 FOLLOWS:

7 SOME COUNCILMEMBERS SUGGEST THAT WE MAY
8 CHOOSE TO REOPEN THE CONTRACT IN THE EVENT OF A
9 CHANGE IN COLLECTIVE BARGAINING AGREEMENTS. WE
10 BELIEVE THIS SUGGESTION WILL CREATE AN OPPORTUNITY
11 TO EASILY OR REGULARLY RAISE RECYCLE PLUS RATES
12 AND CANNOT RECOMMEND ITS ADOPTION.

13 CANNOT RECOMMEND ITS ADOPTION. THAT'S WHAT HE
14 SAID SIX MONTHS EARLIER BEFORE A POLITICAL SUPPORTER, THE
15 TEAMSTERS, CALLED IN A POLITICAL FAVOR AND ASKED FOR HIS
16 HELP.

17 THE MEMO READS:

18 CURRENT CONTRACTS ACCOUNT FOR REASONABLE WAGE
19 INCREASES. EMPLOYERS WHO WISH TO INCREASE WAGE
20 RATES HIGHER THAN ANTICIPATED MAY DO SO. WE
21 BELIEVE THE CURRENT RFP LANGUAGE BEST PROTECTS THE
22 INTERESTS OF THE CITY AND OUR RATEPAYING
23 CUSTOMERS.

24 THE UNDERSTANDING -- I PUT UNDERSTANDING IN QUOTES
25 -- BETWEEN THE MAYOR AND NORCAL WAS A BRIBERY SCHEME, SO LET
26 ME TELL YOU A LITTLE BIT ABOUT THE LAW OF BRIBERY, AND
27 YOU' LL GET SOME INSTRUCTIONS, AND YOU' LL HAVE THE

28 INSTRUCTIONS WITH YOU DURING DELIBERATIONS.

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2210

1 A BRIBE IS SOMETHING OF PRESENT OR FUTURE
2 VALUE OR ADVANTAGE OR A PROMISE TO GIVE SUCH A
3 THING THAT IS REQUESTED OR TAKEN WITH THE CORRUPT
4 INTENT THAT THE OFFICIAL VOTE, OPINION, JUDGMENT
5 OR ACTION OF THE PERSON WHO IS RECEIVING,
6 OFFERING, OR AGREEING TO RECEIVE THE BRIBE, WILL
7 BE UNLAWFULLY INFLUENCED.

8 AND A PERSON ACTS WITH CORRUPT INTENT WHEN HE
9 ACTS TO WRONGFULLY GAIN A FINANCIAL OR OTHER
10 ADVANTAGE FOR HIMSELF OR SOMEONE ELSE.

11 SO, FOR EXAMPLE, IF I WERE TO OFFER \$100,000 IN
12 ALL SMALL BILLS IN AN ENVELOPE TO A PUBLIC OFFICIAL, THAT
13 WOULD BE THE KIND OF BRIBERY WE'RE USED TO SEEING IN THE
14 MOVIES AND ON TV AND SO FORTH. BUT THE LAW WOULD NOT BE
15 VERY ABLE TO ADDRESS THIS KIND OF CORRUPTION WHERE SOMEONE
16 CAN CIRCUMVENT THE LAW EASILY BY INSTEAD OF OFFERING THE
17 THING OF VALUE TO THE OFFICIAL, I CAN OFFER IT TO A THIRD
18 PERSON, I CAN GO TO THE PUBLIC OFFICIAL AND SAY, I KNOW I
19 CAN'T GIVE YOU \$100,000, BUT IF I GIVE YOUR MOTHER \$100,000,

20 CAN I GET A ZONING CHANGE?

21 CLEARLY, THE LAW HAS THAT IN MIND AND RECOGNIZES
22 THE THING OF VALUE DOESN'T HAVE TO GO TO THE OFFICIAL, IT
23 CAN GO TO A THIRD PARTY, AND THAT'S WHAT HAPPENED HERE. THE
24 THING OF VALUE WENT DIRECTLY TO THE TEAMSTERS.

25 THE PROMISE WENT TO THE MAYOR, THE ACTUAL ECONOMIC
26 BENEFIT WENT TO THE TEAMSTERS. AND INDIRECTLY, THE MAYOR
27 BENEFITED, BECAUSE HE MAINTAINED GOOD RELATIONS WITH HIS
28 POLITICAL SUPPORTER, WHO HE COULD EXPECT TO COUNT ON IN 2002

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2211

1 WHEN HE RAN FOR REELECTION.

2 GETTING CWS TO AGREE TO USE TEAMSTERS AND TO PAY
3 THE HIGHER TEAMSTER WAGES AND BENEFITS WAS A THING OF VALUE
4 WRONGFULLY ASKED FOR BY THE MAYOR IN EXCHANGE FOR HIS
5 FAVORABLE ACTION IN SUPPORTING A CHANGE IN TERMS OF THE
6 PRICE. GETTING CWS TO AGREE TO USE TEAMSTERS AND TO PAY
7 HIGHER TEAMSTER WAGES AND BENEFITS WAS WRONGFUL, BECAUSE THE
8 CITY, AS WE KNOW FROM THE MEMO AND FROM THE RFP, COULD NOT
9 LAWFULLY ASK CWS TO RECOGNIZE A PARTICULAR UNION.

10 THE FACT THAT THE NATIONAL LABOR RELATIONS BOARD,
11 THE NLRB, MIGHT HAVE FOUND THAT CWS COULD NOT IMPOSE THE
12 ILWU COLLECTIVE BARGAINING AGREEMENT ON THE SAN JOSE WORKERS

13 DOES NOT NEGATE THE WRONGFULNESS OF WHAT THE MAYOR DID.

14 FIRST, THE NLRB NEVER GOT THE OPPORTUNITY TO RULE
15 ON THIS MATTER, AND THEY NEVER MADE A FINDING BECAUSE
16 MORALES, EVEN THOUGH THERE WERE TWO YEARS OR MORE BEFORE
17 THIS WOULD ACTUALLY BECOME AN IMMEDIATE PROBLEM, DECIDED NOT
18 TO PURSUE THE NLRB ROUTE. HE DECIDED TO PURSUE THE
19 POLITICAL ROUTE.

20 SECOND, ANY FINDING -- AS WE HEARD FROM THE
21 TESTIMONY OF THE NLRB REPRESENTATIVE, DAVID DUONG WOULD HAVE
22 DEPENDED ON WHAT ULTIMATELY THE FACTS WERE, INCLUDING HOW
23 MANY TEAMSTER WORKERS WERE HIRED, HOW MANY NEW WORKERS WERE
24 HIRED, AND WHO THE WORKERS WANTED TO REPRESENT THEM.

25 THE UNDERSTANDING BETWEEN THE MAYOR AND NORCAL IN
26 OUR VIEW WAS A BRIBERY SCHEME. GETTING CWS TO RECOGNIZE THE
27 TEAMSTERS WAS A THING OF VALUE, WRONGFULLY ASKED FOR BY THE
28 MAYOR AS A QUID PRO QUO, WHICH IS LATIN FOR "THIS FOR THAT,"

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2212

1 FOR USING HIS OFFICIAL POSITION TO SWAY THE CITY TO PAY THE
2 ADDITIONAL LABOR COST RESULTING FROM THE PAYMENT OF THE
3 TEAMSTER WAGES AND BENEFITS BY CWS.

4 SO THAT BRINGS US TO THE OCTOBER 10 TUESDAY

5 COUNCIL VOTE. ON OCTOBER 10, 2000, THE CITY COUNCIL
6 CONSIDERED THE PROPOSALS THE CITY RECEIVED IN RESPONSE TO
7 THE RFP.

8 THE CITY AUDITOR WAS ASKED TO PERFORM A REVIEW
9 AUDIT OF ALL THE RECOMMENDED HAULERS, WHICH WOULD INCLUDE
10 NORCAL, TO DETERMINE THE OPERATIONAL ADEQUACY OF THEIR
11 PROPOSALS AND THEIR FINANCIAL CAPABILITY TO PERFORM.

12 THAT WAS IN THE RESOLUTION THAT THE COUNCIL VOTED
13 ON, THAT THE MAYOR VOTED ON, AND EVEN THOUGH THE MAYOR KNEW
14 THE AUDITOR WAS BEING ASKED TO REVIEW IN PART THE FINANCIAL
15 CAPABILITY TO PERFORM, THE MAYOR AND NORCAL SAID NOTHING
16 ABOUT EXTRA LABOR COSTS OR ADDITIONAL COMPENSATION.

17 REMEMBER, WE HEARD FROM THE CITY AUDITOR,
18 MR. SILVA, WHO IDENTIFIED WHAT HE THOUGHT OF THE
19 UNDERSTATEMENT OF THE EXPENSE OF \$1 MILLION A YEAR, WHICH HE
20 CONSIDERED TO BE SIGNIFICANT, AND HERE WE HAVE THE MAYOR AND
21 NORCAL AND GUERRA CONCEALING A \$2 MILLION A YEAR ADDITIONAL
22 EXPENSE.

23 THE MAYOR ALSO SAID NOTHING ABOUT HIS EFFORTS TO
24 GET CWS TO RECOGNIZE THE TEAMSTERS AND PAY TEAMSTER WAGES
25 AND BENEFITS.

26 NOW, IF THE MAYOR TRULY BELIEVED THAT WHAT HE HAD
27 DONE, HIS EFFORTS WERE LAUDABLE AND PRAISEWORTHY AND HE HAD
28 REALLY DONE A SERVICE TO THE COMMUNITY AND THE PUBLIC AND

1 THE VOTERS, WHEN HAVE YOU HEARD AN ELECTED OFFICIAL FAIL TO
2 TAKE CREDIT FOR SOMETHING THAT THEY DID THAT THEY CONSIDER
3 TO BE A VERY GOOD THING? BUT IN THIS CASE WE HAVE THE MAYOR
4 DOING EXACTLY THAT; AND THE REASON, I SUGGEST TO YOU, IS
5 BECAUSE HE KNOWS IT'S ILLEGAL AND IT'S CORRUPT AND HE
6 DOESN'T WANT IT TO GET OUT.

7 SO WE HAVE THE AUDITOR'S REVIEW OF THE NORCAL
8 PROPOSAL, AND WE KNOW THAT THE AUDITOR, DIRECTED BY THE
9 COUNCIL, REVIEWED THE PROPOSALS TO DETERMINE THE OPERATIONAL
10 ADEQUACY OF THE PROPOSALS AND THE CONTRACTOR'S FINANCIAL
11 CAPABILITY TO PERFORM. AND WE KNOW THAT THE AUDITOR
12 PROVIDED BOTH NORCAL AND GUERRA WITH THIS PRELIMINARY RESULT
13 IDENTIFYING THAT ADDITIONAL \$1 MILLION A YEAR EXPENSE, BUT
14 NEITHER SAID ANYTHING ABOUT EXTRA LABOR COSTS NOT REFLECTED
15 IN NORCAL'S PROPOSAL.

16 NORCAL KNEW THAT WITHOUT ADDITIONAL MONEY FROM THE
17 CITY, IT WOULD LOSE AN ESTIMATED \$1 MILLION PER YEAR ON THIS
18 CONTRACT. INFORMATION DIRECTLY RELEVANT TO THE AUDITOR'S
19 INQUIRY ABOUT FINANCIAL CAPABILITY TO PERFORM. INFORMATION
20 WITHHELD BY THE PARTIES.

21 SO THEN ON DECEMBER 8, 2000, THE MAYOR SIGNS AND
22 SUBMITS A MEMO TO THE COUNCIL. WE HAVE A COPY OF IT AS
23 EXHIBIT 21, AND WE JUST MARKED THIS MORNING AS EXHIBIT 141 A

24 CERTIFIED COPY OF THIS SAME MEMO. WE KNOW THAT THIS WAS OR
25 BECAME A PART OF THE OFFICIAL RECORD OF THE PROCEEDINGS OF
26 THE CITY COUNCIL, SO IT WAS A GOVERNMENT RECORD.

27 IN THIS DOCUMENT, ON PAGE TWO, THE MAYOR SAYS IN
28 THIS OFFICIAL RECORD:

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1 AS A RESULT OF THE AUDITOR'S INVOLVEMENT, WE
2 NOW CAN HAVE GREATER CONFIDENCE IN THE INFORMATION
3 ABOUT THE FINANCIAL IMPACTS OF THE CITY COUNCIL'S
4 CHOICES FOR RECYCLE PLUS.

5 THAT STATEMENT WAS FALSE, AND THE MAYOR KNEW IT
6 WAS FALSE BECAUSE HE KNEW THAT THE AUDITOR HAD NOT BEEN
7 PROVIDED WITH RELEVANT INFORMATION ABOUT THIS ESTIMATED \$2
8 MILLION A YEAR ADDITIONAL EXPENSE, AND THIS WAS A FALSE
9 RECORD SUBMITTED AND FALSIFIED BY THE MAYOR.

10 TO REITERATE, THE MAYOR'S DECEMBER 8, 2000 MEMO TO
11 THE COUNCIL WAS FALSE AND MISLEADING, BECAUSE AS GONZALES,
12 GUERRA, AND NORCAL ALL KNEW, THE AUDITOR HAD NOT BEEN
13 PROVIDED WITH INFORMATION ABOUT THE FINANCIAL IMPACTS OF CWS
14 CHANGING FROM LONGSHOREMEN TO TEAMSTERS OR THE OCTOBER 9
15 ADDENDUM WHICH OBLIGATED NORCAL TO PAY CWS AN ADDITIONAL

16 ESTIMATED \$2 MILLION PER YEAR FOR EXTRA LABOR COSTS.

17 AND WE HEARD TESTIMONY FROM THE AUDITOR,
18 MR. SILVA. WE ASKED HIM, WELL, DIDN'T MR. MORALES SPEAK AT
19 THE CITY COUNCIL, AND WEREN'T YOU AWARE THAT HE WAS
20 CONCERNED ABOUT HAVING TO CHANGE UNIONS?

21 HE SAID, YES, I KNEW THAT, BUT WHEN I LOOKED AT
22 NORCAL'S PROPOSAL, I SAW THAT THEY WERE NOT OBLIGATED TO PAY
23 CWS ANY MONEY. SO CWS'S EXTRA COSTS IN SWITCHING TO
24 TEAMSTERS WOULD NOT BE CARRIED OVER TO NORCAL, BASED ON WHAT
25 HE KNEW. HE WAS MISLED, HE WAS DEFRAUDED, AS WAS THE CITY.

26 SO BETWEEN OCTOBER 6, 2000 AND DECEMBER 11, 2000,
27 NORCAL PERSUADED CWS TO SIGN A NEUTRALITY AGREEMENT WITH THE
28 TEAMSTERS. THIS IS ALSO CALLED A CARD CHECK AGREEMENT BY

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2215

1 SOME WITNESSES, AN AGREEMENT THAT WOULD ALLOW THE TEAMSTERS
2 TO BE RECOGNIZED IN PLACE OF THE LONGSHOREMEN. AND ON
3 DECEMBER 11, 2000, ONLY ONE DAY BEFORE THE NEXT COUNCIL VOTE
4 ON NORCAL'S PROPOSAL, CWS SIGNED A NEUTRALITY AGREEMENT, AND
5 THAT'S EXHIBIT 68, WITH THE TEAMSTERS AT THE URGING OF
6 NORCAL.

7 ON DECEMBER 12, 2000, THE CITY COUNCIL SELECTED
8 NORCAL'S PROPOSAL. DESPITE ITS OBLIGATION TO REIMBURSE CWS
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9 \$2,000,000 A YEAR FOR EXTRA LABOR COSTS BASED ON THE MAYOR'S
10 ASSURANCES, NORCAL, WHO STOOD TO LOSE THIS \$2 MILLION A
11 YEAR, SAID NOTHING TO THE OTHER MEMBERS OF THE CITY COUNCIL
12 ABOUT THIS.

13 WHY, IF YOU'RE IN BUSINESS AND YOU'RE A
14 CORPORATION, AND YOU'RE IN THE BUSINESS OF DEALING WITH
15 PUBLIC ENTITIES THROUGHOUT CALIFORNIA AND NEVADA, AND YOU
16 KNOW THAT THE MAYOR CAN'T BIND THE CITY WITHOUT THE MAJORITY
17 VOTE, WHY WOULD YOU PUT YOURSELF AT RISK UNLESS YOU BELIEVED
18 THIS WAS A CORRUPT, ILLEGAL ACT THAT COULD NOT BE DIVULGED?

19 THE MAYOR ALSO SAID NOTHING ABOUT HIS EFFORTS TO
20 GET CWS TO RECOGNIZE TEAMSTERS IN PAYING HIGHER TEAMSTER
21 WAGES AND BENEFITS.

22 SO AGAIN, WE HAVE THE FIRST COUNCIL VOTE ON
23 OCTOBER 6, AND THE PARTIES HAVE AN OPPORTUNITY TO COME
24 CLEAN, AND THEY CHOOSE NOT TO.

25 THEY HAVE A SECOND OPPORTUNITY ON DECEMBER 12, THE
26 SECOND COUNCIL VOTE, TO COME CLEAN, AND THEY CHOOSE NOT
27 TO.

28 THEN ON MARCH 27, 2001, NORCAL, ACTING THROUGH ITS

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1 WHOLLY OWNED SUBSIDIARY, NORCAL WASTE SYSTEMS OF SAN JOSE,
2 INC. , SIGNED AND DELIVERED AN AGREEMENT, EXHIBIT 26, TO THE
3 CITY OF SAN JOSE. THE AGREEMENT CONTAINED NO PROVISION FOR
4 THE PAYMENT OF THE ADDITIONAL TEAMSTER LABOR COSTS.

5 IN THE AGREEMENT, NORCAL REPRESENTED TO THE CITY
6 THAT IT WOULD PROVIDE THE SERVICES FOR THE PRICE IN THE
7 AGREEMENT.

8 IN SOME WAYS, EXCEPT FOR THE SCALE BEING LARGER,
9 THIS IS NO DIFFERENT THAN A FRAUDULENT CONTRACTOR. PEOPLE
10 HAVE EXPERIENCE WITH THAT TYPE OF CONTRACTOR WHO AGREES TO
11 DO WORK FOR ONE PRICE, AND WHEN YOUR HOUSE IS TAKEN APART,
12 THE WALLS KNOCKED OUT, DECIDES HE NEEDS MORE MONEY TO FINISH
13 THE JOB. AND THAT'S EXACTLY WHAT'S GOING ON HERE, EXCEPT ON
14 A LARGER SCALE. AND INSTEAD OF A HOMEOWNER BEING THE
15 VICTIM, WE HAVE THE CITY OF SAN JOSE AND RATEPAYERS
16 THROUGHOUT THE CITY OF SAN JOSE BEING VICTIMIZED BY THIS
17 FRAUDULENT AND ILLEGAL ACTIVITY.

18 AT THE TIME THIS CONTRACT WAS SIGNED AND ENTERED
19 INTO AND REPRESENTATIONS WERE MADE, NORCAL, GONZALES, AND
20 GUERRA KNEW THAT THE PRICE IN THE AGREEMENT WAS NOT
21 ACCURATE. THIS AGREEMENT WAS FALSE AND MISLEADING BECAUSE,
22 AS NORCAL AND ITS CO-CONSPIRATORS KNEW BUT FAILED TO
23 DISCLOSE, NORCAL WOULD BE RECEIVING ADDITIONAL PAYMENTS FOR
24 ITS SERVICES BEYOND WHAT WAS CALLED FOR IN THIS WRITTEN
25 AGREEMENT.

26 NORCAL SIGNED AND DELIVERED THIS WRITTEN AGREEMENT

27 TO THE CITY OF SAN JOSE IN ORDER TO MISLEAD THE CITY INTO
28 BELIEVING THAT NORCAL WOULD ACTUALLY PERFORM THE SERVICES

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2217

1 REQUIRED UNDER THE AGREEMENT FOR THE PRICE IN THE AGREEMENT.

2 AT THAT SAME TIME, NORCAL KNEW THAT IN ORDER TO
3 MAKE A PROFIT, NORCAL WOULD NEED TO RECEIVE AN ADDITIONAL
4 ESTIMATED \$2,000,000 PER YEAR MORE THAN THE PRICE IN THE
5 AGREEMENT. NORCAL WOULD NOT HAVE SIGNED THIS AGREEMENT
6 UNLESS IT BELIEVED IT WOULD BE RECEIVING ADDITIONAL PAYMENTS
7 BEYOND THE PAYMENTS CALLED FOR IN THE AGREEMENT.

8 A FEW MONTHS AFTER NORCAL STARTED PROVIDING
9 SERVICES TO THE CITY, WHICH IS JULY 1 OF 2000, GUERRA BEGINS
10 EFFORTS TO IMPLEMENT THE MAYOR'S 2006 STATEMENT THAT THEY
11 WOULD MAKE NORCAL WHOLE.

12 A SEPTEMBER 13, 2002, E-MAIL FROM ESD DIRECTOR
13 CARL MOSHER, THAT'S EXHIBIT 80, REPORTS A MEETING ON
14 SEPTEMBER 12, THE DAY BEFORE, BETWEEN NORCAL, CWS, AND JOE
15 GUERRA TO DISCUSS LABOR ISSUES.

16 REMEMBER, MOSHER IS LEARNING THIS FOR THE FIRST
17 TIME, AND A NORCAL REPRESENTATIVE IS FILLING HIM IN ON WHAT
18 GUERRA SAID, AND HE'S REPORTING IT TO OTHER OFFICIALS IN THE
19 CITY, AND IN THE E-MAIL, ACCORDING TO MOSHER, CWS CLAIMED IT

20 WOULD COST MORE, BECAUSE THE TEAMSTERS WILL BE REPRESENTING
21 THE WORKERS RATHER THAN LONGSHOREMEN. AND ACCORDING TO
22 NORCAL, THE MAYOR HAD PREVIOUSLY COMMITTED TO MAKE IT GOOD.

23 BASED ON THE 31 WITNESSES WE HEARD TESTIMONY FROM,
24 143 EXHIBITS, AND A SIX-MONTH INVESTIGATION, WE THINK THAT
25 THE EARLIEST, THE EARLIEST THIS MATTER COULD HAVE COME TO
26 LIGHT WOULD HAVE BEEN AROUND SEPTEMBER 12 OR SEPTEMBER 13,
27 ASSUMING SOMEONE HAD THE FORESIGHT TO INVESTIGATE FURTHER AT
28 THAT TIME. BUT WE DON'T BELIEVE THERE WAS ANY LEAKAGE OF

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2218

1 THIS ILLEGAL SECRET DEAL PRIOR TO SEPTEMBER 12, 2002 TO
2 PEOPLE OTHER THAN PEOPLE INVOLVED IN THE CONSPIRACY. SO WE
3 THINK THE DATE WHEN THIS SHOULD HAVE BEEN DISCOVERED IS NO
4 EARLIER THAN SEPTEMBER 12 OR 13.

5 THE E-MAIL GOES ON TO SAY:

6 JOE ASKED NORCAL/CWS TO PROVIDE HIM WITH HOW
7 MUCH MORE NORCAL/CWS NEEDS TO BE COMPENSATED.

8 THERE'S A SECOND E-MAIL ON SEPTEMBER 13, 2002.
9 THAT'S EXHIBIT 103, THAT'S FROM TONY ARREOLA, A CWS
10 CONSULTANT, WHICH ALSO REFERS TO A MEETING WITH GUERRA.
11 HE'S REPORTING BACK TO HIS CLIENT ABOUT WHAT HAPPENED.

12 AND IN MR. ARREOLA'S E-MAIL, HE SAYS:

13 IN ADDITION, CONFIDENTIALLY, JOE GUERRA, THE
14 MAYOR'S BUDGET DIRECTOR, HAS COMMITTED TO ME TO
15 SUPPORT A GARBAGE RATE INCREASE TO PAY FOR THE
16 COST OF EMPLOYING TEAMSTERS. I'M HAVING DINNER
17 WITH THE MAYOR TONIGHT AND WILL DISCUSS THE MATTER
18 WITH HIM ALSO TO ENSURE SUCCESS.

19 NOW, HE TESTIFIED THAT DIDN'T HAPPEN. HE
20 PREVIOUSLY SAID IT DID HAPPEN. WHETHER IT DID OR DIDN'T IS
21 NOT REALLY CRUCIAL, BUT THAT'S A MATTER FOR YOUR
22 CONSIDERATION.

23 AFTER THAT SEPTEMBER '02 MEETING, ON FEBRUARY 10,
24 CWS SENDS A LETTER, EXHIBIT 28, AN E-MAIL TO GUERRA ADVISING
25 HIM THAT THEY HAVE REACHED A VERBAL AGREEMENT WITH THE
26 TEAMSTERS OVER A NEW COLLECTIVE BARGAINING AGREEMENT, BUT
27 THEY CANNOT SIGN THE AGREEMENT UNTIL THERE'S A RESOLUTION
28 OF, QUOTE, THE SUBSIDY ISSUE, AND THE CITY MAKES A

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2219

1 COMMITMENT IN WRITING.

2 GUERRA SENDS BACK AN E-MAIL TO CWS IN RESPONSE TO
3 THE LETTER FROM CWS, THAT'S EXHIBIT 31, INDICATING THAT THE
4 MAYOR'S OFFICE WILL BRING FORWARD A RATE INCREASE TO OFFSET

5 UNANTICIPATED LABOR COSTS.

6 AS WE CLEARLY KNOW, THERE WAS NOTHING
7 UNANTICIPATED ABOUT THESE LABOR COSTS; THIS IS WINDOW
8 DRESSING.

9 GUERRA ALSO SENDS AN E-MAIL TO THE CITY MANAGER,
10 THE CITY ATTORNEY, AND THE DIRECTOR OF THE ENVIRONMENTAL
11 SERVICES DEPARTMENT. THAT'S EXHIBIT 29, INQUIRING ABOUT THE
12 TIMELINE TO IMPLEMENT AN INCREASE IN THE RATES CHARGED BY
13 THE CITY FOR GARBAGE COLLECTION.

14 NOW, THIS E-MAIL WAS PART OF AN EFFORT BY GUERRA
15 TO BRING FORWARD TO THE SAN JOSE CITY COUNCIL THE RATE
16 INCREASE TO GENERATE FUNDS THAT WOULD BE USED TO PAY NORCAL
17 FOR THE ADDITIONAL COST OF CWS USING TEAMSTERS INSTEAD OF
18 ILWU WORKERS.

19 ON MAY 27, 2003, THE CITY COUNCIL APPROVED A NINE
20 PERCENT RATE INCREASE IN THE GARBAGE RATES. THE PUBLIC AND
21 COUNCIL WERE TOLD THAT THE PURPOSE OF THIS RATE INCREASE WAS
22 TO BRING THE PROGRAM CLOSER TO FULL COST RECOVERY.

23 NOTHING WAS SAID ABOUT PAYING FOR THE ADDITIONAL
24 TEAMSTER LABOR COST OR CREATING A RESERVE TO PAY FOR THAT IN
25 THE EVENT THAT COUNCIL APPROVED IT. BUT AN INTERNAL E-MAIL
26 FROM THE MAYOR'S BUDGET DIRECTOR, JOE GUERRA, SAID
27 OTHERWISE.

28 HERE'S EXHIBIT 40. THIS IS GUERRA'S E-MAIL ON MAY

1 26, I THINK, 2004, GOING TO THE CITY ATTORNEY, RICHARD
2 DOYLE. IT'S GOING TO JIM HOLGERSON, THE DEPUTY CITY
3 MANAGER; TO DEL BORGSDORF, THE CITY MANAGER; AND IT'S GOING
4 TO CARL MOSHER, THE DIRECTOR OF ENVIRONMENTAL SERVICES.

5 THE SUBJECT LINE READS "RE: NORCAL CONTRACT."
6 IMPORTANCE SAYS "HIGH." THE E-MAIL BEGINS:

7 GENTLEMEN: AS I HAVE POINTED OUT TO RICK AND
8 DEL BY PHONE TODAY, WE HAVE RAISED OUR CUSTOMERS'
9 RATES ALREADY TO SPECIFICALLY COVER THIS
10 ADDITIONAL COST. I BELIEVE I EVEN STILL HAVE THE
11 SPREADSHEET CARL MADE UP WHICH SHOWED THE
12 JUSTIFICATION FOR THE RATE AMOUNT THAT WAS SETTLED
13 ON.

14 THAT SPREADSHEET IS EXHIBIT 43. AND IT USES THAT
15 \$1.9 MILLION FIGURE WHICH WE'VE SEEN BEFORE AS THE ESTIMATE
16 AT THAT TIME FOR THE PAY DIFFERENTIAL AND BENEFIT
17 DIFFERENTIAL. IT USES THAT DIFFERENCE IN COST BETWEEN THE
18 TEAMSTERS AND THE LONGSHOREMEN.

19 SO THE EVIDENCE, IT SEEMS TO US IT'S ABUNDANTLY
20 CLEAR THAT THE REAL PURPOSE OF THE RATE HIKE IN 2003 IS NOT
21 WHAT THE PUBLIC AND THE RATEPAYERS WERE TOLD. IT WAS TO
22 START GENERATING A PILE OF MONEY FROM THE RATEPAYERS TO

23 CARRY OUT THIS BRIBERY FRAUD SCHEME THAT THE MAYOR HATCHED
24 AT THE URGING OF THE TEAMSTERS BACK ON FRIDAY, OCTOBER 6,
25 2000.

26 WE HAVE BEEN GOING ABOUT 50 MINUTES, IT'S A LITTLE
27 WARM. WOULD THIS BE AN OKAY TIME TO TAKE A BRIEF RECESS?

28 THE FOREPERSON: ABSOLUTELY. TEN MINUTES?

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2221

1 MR. FINKELSTEIN: SURE.

2 THE FOREPERSON: LET'S RECESS FOR 10 MINUTES AND
3 RECONVENE AT 11:00.

4 MR. FINKELSTEIN: ONE CAUTION I WANT TO GIVE YOU.
5 THANK YOU VERY MUCH. MY COLLEAGUE JUST REMINDED ME OF
6 SOMETHING. BECAUSE WE THINK THE EVIDENCE HAS DISCLOSED
7 CRIMINAL WRONGDOING AND WE INTEND TO SUBMIT AN INDICTMENT
8 FOR YOUR CONSIDERATION, IT'S VERY IMPORTANT, AS I INDICATED
9 BEFORE, THAT YOU DO NOT DISCUSS OR DELIBERATE IN WHOLE OR IN
10 PART, OR GROUPS OF TWO OR THREE OR FOUR OR WHATEVER, ABOUT
11 ANY ASPECT OF THIS CASE UNTIL WE GIVE YOU THE FINAL
12 INSTRUCTIONS AND GIVE YOU THE PROPOSED DOCUMENT TO
13 DELIBERATE ON.

14 NUMBER TWO, ONLY THOSE JURORS WHO HAVE HEARD ALL
15 OF THE TESTIMONY CAN PARTICIPATE IN THE DELIBERATIONS, SO

16 PLEASE BEAR THIS IN MIND.

17 (A BRIEF RECESS WAS TAKEN.)

18 THE FOREPERSON: ALL JURORS ARE PRESENT.

19 MR. FINKELSTEIN: THANK YOU VERY MUCH.

20 WE WERE LOOKING AT EXHIBIT 40, WHICH IS GUERRA'S
21 E-MAIL OF MAY 26, 2004, REMINDING OTHER CITY OFFICIALS OF
22 WHAT THE TRUE PURPOSE OF THE RATE HIKE WAS, AND THERE WAS A
23 REASON THAT GUERRA SENT THIS E-MAIL.

24 THE PURPOSE OF THIS E-MAIL MESSAGE WAS TO PERSUADE
25 CITY OFFICIALS TO GO ALONG WITH EFFORTS TO AMEND THE NORCAL
26 CONTRACT WITH THE CITY SO THAT THE CITY WOULD PAY NORCAL THE
27 ADDITIONAL COST OF CWS USING TEAMSTERS INSTEAD OF ILWU
28 WORKERS IN SAN JOSE.

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2222

1 IN ESSENCE, GUERRA'S POINT WAS ONCE YOU SIGNED ON
2 TO THE RATE HIKE, THE DIE WAS CAST. NOW YOU HAVE TO HAVE
3 FOLLOW THROUGH, AND THAT'S EXACTLY WHAT THEY DID.

4 ON MAY 26, 2004, GUERRA SENDS A LETTER TO NORCAL'S
5 CEO, EXHIBIT 21, CONFIRMING THAT THE MAYOR'S OFFICE IS
6 WORKING ON A CONTRACT AMENDMENT FOR WHAT HE CHARACTERIZES AS
7 UNFORESEEN LABOR COSTS.

8 AGAIN, THAT'S NOT AN ACCURATE AND TRUE STATEMENT.
9 THERE WAS NOTHING UNFORESEEN ABOUT THIS. THE EXACT DOLLAR
10 AMOUNT MAY HAVE BEEN UNFORESEEN, BUT THEY HAD AN ESTIMATE
11 THAT WAS WITHIN 10 PERCENT OF THE FINAL AMOUNT.

12 IN THE LETTER, GUERRA TELLS NORCAL:

13 I WANTED TO CONFIRM FOR YOU THAT OUR OFFICE
14 IS WORKING WITH THE CITY MANAGER AND THE CITY
15 ATTORNEY TO PROCESS THE CONTRACT AMENDMENT
16 PURSUANT TO OUR PREVIOUS DISCUSSIONS RELATED TO
17 UNFORESEEN LABOR COSTS.

18 SO HERE WE HAVE A QUID PRO QUO, NORCAL DELIVERING
19 ON ITS END TO GET CWS TO RECOGNIZE THE TEAMSTERS, AND NOW WE
20 HAVE THE MAYOR AND GUERRA DELIVERING ON THEIR END TO GET THE
21 ADDITIONAL MONEY TO NORCAL.

22 SO ON JUNE 16, NORCAL WRITES TO ESD, THAT'S
23 EXHIBIT 64, SEEKING AN AMENDMENT FOR ADDITIONAL LABOR COSTS.
24 BUT ON JUNE 25, ESD REJECTS THE REQUEST, THAT'S EXHIBIT 45,
25 AND REPLIES THAT ANY COMMITMENT MADE BY UNNAMED CITY
26 OFFICIALS IS NOT BINDING ON THE CITY.

27 HERE'S EXHIBIT 45.

28 AS YOU KNOW, NEITHER MY STAFF NOR I WERE

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1 INVOLVED IN THE DISCUSSIONS YOU HAVE DESCRIBED.
2 THE CITY CANNOT -- THE CITY COUNCIL DID NOT
3 AUTHORIZE THESE DISCUSSIONS, AND ANY, QUOTE,
4 COMMITMENTS MADE BY UNNAMED CITY OFFICIALS ARE NOT
5 BINDING ON THE CITY.

6 SO EVEN AS LATE AS 2004, NORCAL IS STILL HOLDING
7 BACK SOME OF THE FACTS; NAMELY, THAT THE COMMITMENT CAME
8 FROM THE MAYOR, AND IT WAS THE MAYOR WHO ASKED THEM TO
9 SWITCH.

10 AFTER ESD REJECTS NORCAL'S REQUEST FOR AMENDMENT
11 ON JULY 22, 2004, NORCAL TURNS TO THE CITY MANAGER. HE
12 SENDS A LETTER, EXHIBIT 39.

13 IN THIS LETTER, THEY GIVE A VERSION OF EVENTS THAT
14 DOESN'T REALLY TRACK REALITY. HERE'S WHAT THEIR VERSION
15 READS:

16 LET ME FIRST RECOUNT SOME BACKGROUND RELATING
17 TO THE ADDITIONAL LABOR COSTS CWS IS INCURRING.
18 WHEN NORCAL PRESENTED ITS RECYCLE PLUS PROPOSAL IN
19 RESPONSE TO THE CITY'S RFP IN 2000, IT BECAME
20 KNOWN THAT NORCAL'S PROPOSED RECYCLING
21 SUBCONTRACTOR, CWS, INTENDED TO HIRE WORKERS UNDER
22 A LABOR CONTRACT CWS THEN HAD IN OAKLAND WITH THE
23 LONGSHOREMEN'S UNION. UNDER THAT CONTRACT, CWS
24 WAS PAYING ITS WORKERS CONSIDERABLY LESS THAN
25 WORKERS ORGANIZED BY THE TEAMSTERS WERE RECEIVING
26 AT THE RECYCLING FACILITY THEN IN OPERATION IN

27 SAN JOSE.

28 THIS SIGNIFICANT WAGE DISCREPANCY, ALONG WITH

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1 THE POSSIBILITY THAT SAN JOSE WORKERS MIGHT LOSE
2 THEIR JOBS, PROMPTED THE MAYOR'S OFFICE TO URGE
3 NORCAL TO EXPLORE AN ARRANGEMENT WITH CWS THAT
4 WOULD ALLOW CWS TO RETAIN EXISTING WORKERS AT THE
5 HIGHER TEAMSTERS WAGE SCALE. NORCAL WAS ADVISED
6 THAT THE CITY DID NOT WANT A ROCK-BOTTOM PRICE FOR
7 ITS NEW COLLECTION CONTRACT IF DOING SO REQUIRED
8 DISPLACING EXISTING RECYCLING FACILITY WORKERS OR
9 FORCING THOSE WORKERS TO ACCEPT LOWER PAY.

10 THAT LAST STATEMENT IS NOT TRUE, BECAUSE WHAT THE
11 CITY WANTED, AS DISTINGUISHED FROM THE MAYOR, IS REFLECTED
12 IN THE CITY'S VOTED ON AND APPROVED RFP. THAT'S NOT WHAT
13 THE CITY SAID IN ITS RFP; NOTHING IN THE RFP REQUIRED LOWER
14 PAY.

15 AS A MATTER OF FACT, REMEMBER THAT STAFF WAS AWARE
16 OF THE USE OF ILWU WORKERS IN THE PROPOSAL AND NONETHELESS
17 APPROVED IT ANYWAY.

18 SO ON SEPTEMBER 16, 2004, THE MAYOR SENT A FALSE

19 AND MISLEADING MEMO TO COUNCIL RECOMMENDING AN AMENDMENT TO
20 PAY NORCAL \$11.25 MILLION FOR ADDITIONAL LABOR COSTS. AND
21 EXHIBIT 42 IS A COPY OF THAT SEPTEMBER 16 MEMO, ANOTHER
22 RECORD CREATED AND SUBMITTED BY THE MAYOR TO THE CITY
23 COUNCIL, SIGNED AND SUBMITTED BY HIM, WHICH CONTAINS FALSE
24 INFORMATION.

25 HERE'S THE FALSE AND MISLEADING MEMO TO THE
26 COUNCIL FROM THE MAYOR RECOMMENDING THE \$11.25 MILLION
27 PAYMENT TO NORCAL. HERE'S WHAT THE MAYOR SAID IN THIS MEMO:
28 SHORTLY BEFORE THE CITY COUNCIL VOTED ON

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2225

1 POTENTIAL HAULERS IN 2000, IT WAS BROUGHT TO THE
2 MAYOR'S OFFICE'S ATTENTION THAT THERE WAS A
3 POTENTIAL UNION JURISDICTIONAL PROBLEM WITH THE
4 NORCAL PROPOSAL. THE WORKERS WHO NEEDED TO BE
5 RETAINED WERE WORKING FOR WASTE MANAGEMENT AND
6 WERE GOVERNED BY A TEAMSTERS COLLECTIVE BARGAINING
7 AGREEMENT.

8 IT WAS THOUGHT AT THE TIME THAT THIS
9 JURISDICTIONAL ISSUE COULD BE EASILY RESOLVED
10 DURING THE PERIOD THAT THE CONTRACT WAS BEING
11 NEGOTIATED; HOWEVER, IT SOON BECAME CLEAR THAT THE

12 SITUATION WAS MORE COMPLEX. AFTER COUNCIL
13 APPROVAL, THE MAYOR'S OFFICE LEARNED THAT THE
14 WORKERS TO BE RETAINED FROM WASTE MANAGEMENT WOULD
15 BE EXPECTED TO CHANGE UNIONS. IT WAS THEN LEARNED
16 THAT THIS WOULD MEAN THE RETAINED WORKERS WOULD BE
17 TAKING A PAY CUT. THIS WOULD BE UNTENABLE FOR THE
18 VENDOR, WORKERS, UNIONS, AND THE CITY, BECAUSE THE
19 RESULT COULD NOT MEET THE COUNCIL'S DESIRE TO HAVE
20 BOTH WORKER RETENTION AND LABOR PEACE.

21 TO CONFORM TO COUNCIL DIRECTION, THE MAYOR'S
22 OFFICE CONVENE A MEETING BETWEEN NORCAL AND THE
23 LEADERSHIP OF THE TEAMSTERS LOCAL AND A
24 REPRESENTATIVE OF THE CENTRAL LABOR COUNCIL TO
25 IDENTIFY SOLUTIONS OF THE JURISDICTIONAL ISSUE.

26 AS A RESULT, NORCAL AGREED TO WORK WITH CWS
27 AND WITH THE TEAMSTERS FOR THE WORKERS TO BE
28 RETAINED. EVENTUALLY, THE JURISDICTIONAL ISSUE

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2226

1 WAS RESOLVED WITH A NEUTRALITY AGREEMENT THAT CWS
2 SIGNED WITH THE TEAMSTERS, AND THE TEAMSTERS WERE
3 SELECTED BY THE WORKERS TO MAINTAIN JURISDICTION.

4 WHEN THE MAYOR SAID, "AFTER COUNCIL APPROVAL THE
5 MAYOR'S OFFICE LEARNED THAT THE WORKERS TO BE RETAINED FROM
6 WASTE MANAGEMENT WOULD BE EXPECTED TO CHANGE UNIONS," THAT'S
7 NOT TRUE. THE MAYOR KNEW ABOUT THAT ISSUE BEFORE COUNCIL
8 APPROVAL. IN THE WEEK LEADING UP TO THAT FRIDAY, OCTOBER 6
9 MEETING, HE RECEIVED A LETTER FROM THE TEAMSTERS, HE TALKED
10 TO MORALES, HE GOT A LETTER FROM THE ILWU, AND HE GOT A
11 LETTER FROM DAVID DUONG OF CWS DISCUSSING THIS ISSUE.

12 WHEN THE MAYOR SAID, "TO CONFORM TO COUNCIL
13 DIRECTION, THE MAYOR'S OFFICE CONVENED A MEETING," THAT'S
14 NOT TRUE. THE COUNCIL NEVER DIRECTED THE MAYOR TO CONVENE
15 ANY SUCH MEETING, AND THE SWITCH TO TEAMSTERS CAME ABOUT,
16 NOT AS THE RESULT OF COUNCIL INTERVENTION, BECAUSE REMEMBER,
17 WE KNOW THAT BACK IN 2000 THE CITY ATTORNEY HAD SAID THAT
18 THE CITY COULD NOT LEGALLY GET INVOLVED IN LABOR MATTERS.

19 THE SWITCH CAME ABOUT AS A RESULT OF THE MAYOR'S
20 PRIVATE MEETING WITH NORCAL ON OCTOBER 6, 2000.

21 SO THAT BRINGS US UP TO SEPTEMBER 21, 2004, THE
22 COUNCIL VOTE ON THE AMENDMENT TO THE NORCAL AGREEMENT. SO
23 IN CONNECTION WITH THAT VOTE, THE MAYOR RECOMMENDS THAT THE
24 CITY COUNCIL AUTHORIZE THE CITY MANAGER AND CITY ATTORNEY TO
25 NEGOTIATE AN AMENDMENT TO THE NORCAL AGREEMENT AND
26 AUTHORIZING THE CITY MANAGER TO EXECUTE THE AMENDMENT.

27 THAT'S AN UNUSUAL WAY TO APPROVE AN \$11 MILLION
28 AMENDMENT. AS YOU SAW IN THE OTHER TRANSACTIONS, THEY

1 NEGOTIATED, BUT THE FINAL APPROVAL RESTS WITH THE CITY
2 COUNCIL. HERE, THE MAYOR IS TRYING TO CIRCUMVENT THAT
3 PROCESS, SHORT CIRCUIT IT, AND HAVE THE FINAL APPROVAL REST
4 IN THE HANDS OF THE CITY MANAGER TO EXECUTE THE AGREEMENT.
5 BUT THE COUNCIL MODIFIES THAT AMENDMENT. AS ORIGINALLY
6 PROPOSED BY THE MAYOR, THE RESOLUTION WOULD HAVE AUTHORIZED
7 THE CITY MANAGER TO EXECUTE THE AMENDMENT WITHOUT FURTHER
8 REVIEW BY THE CITY COUNCIL.

9 INSTEAD, ON SEPTEMBER 21, THE COUNCIL AUTHORIZED
10 THE CITY MANAGER AND CITY ATTORNEY TO NEGOTIATE THE
11 AMENDMENT TO PAY FOR ADDITIONAL TEAMSTER LABOR COSTS AND
12 RETURN TO THE COUNCIL FOR APPROVAL OF THE FINAL AGREEMENT.

13 SO BETWEEN DECEMBER 10, 2004 AND DECEMBER 14,
14 2004, NORCAL SIGNED AND DELIVERED TO THE CITY A SECOND
15 WRITTEN AMENDMENT TO ITS AGREEMENT THAT PROVIDED FOR
16 ADDITIONAL PAYMENTS TO NORCAL TOTALING \$11.25 MILLION. THE
17 TRUE PURPOSE OF THE SECOND WRITTEN AMENDMENT WAS TO PAY
18 NORCAL'S COSTS OF CWS USING THE TEAMSTERS INSTEAD OF
19 LONGSHOREMEN IN SAN JOSE.

20 WE ALL KNOW THAT'S WHERE THE NUMBERS CAME FROM,
21 BUT NORCAL REPRESENTED IN THE SECOND WRITTEN AMENDMENT THAT
22 THE ADDITIONAL \$11.25 MILLION WAS IN EXCHANGE FOR ROLL-OFF

23 CONTAINERS FOR NEIGHBORHOOD CLEAN-UP BINS, CONTRIBUTING UP
24 TO \$100,000 TO THE COST OF A MATERIAL COMPOSITION STUDY, AND
25 ACCEPTING SCRAP ELECTRONIC EQUIPMENT FROM CITY RESIDENTS
26 FOUR TIMES PER YEAR.

27 I'LL GO BACK TO SOMETHING. THAT REPRESENTATION IN
28 THE CONTRACT IS AGAIN FALSE AND MISLEADING. THAT'S NOT THE

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2228

1 REAL CONSIDERATION, THAT'S NOT WHAT'S GOING ON IN THIS
2 CONTRACT. BUT PUBLICLY, IN THE CONTRACT THAT'S WHAT NORCAL
3 IS SAYING.

4 ON DECEMBER 14 OF 2004, THE COUNCIL VOTED TO PAY
5 NORCAL AN ADDITIONAL \$11.25 MILLION FOR ADDITIONAL LABOR
6 COSTS. THAT'S REFLECTED IN THE MINUTES AND THE VIDEO
7 EXHIBITS 95, 100, AND 108. THERE WAS NO REAL NEGOTIATION;
8 STAFF BRINGS BACK TO COUNCIL THE SAME AMOUNT NORCAL
9 ORIGINALLY ASKED FOR.

10 NORCAL ATTEMPTED TO JUSTIFY THIS ADDITIONAL
11 PAYMENT BY REPRESENTING THAT THE CITY HAD REQUESTED NORCAL'S
12 SUBCONTRACTOR, CWS, TO USE TEAMSTERS IN SAN JOSE.

13 LET ME PLAY A CLIP FROM THAT MEETING.

14 (PLAYING VIDEO OF AN EXCHANGE BETWEEN

15 COUNCILMEMBER CORTESE AND JOHN NICOLETTI OF NORCAL.)

16 MR. FINKELSTEIN: THEY WERE STILL MISREPRESENTING
17 AT THE TIME OF THIS SECOND VOTE CLAIMING THE CITY HAD
18 REQUESTED WHEN THEY KNEW IT WAS NOT THE CITY, IT WAS THE
19 MAYOR. THE STATEMENT WAS FALSE AND MISLEADING BECAUSE AS
20 NORCAL, GONZALES AND GUERRA ALL KNEW AT THE TIME, THE CITY
21 COULD NOT AND DID NOT MAKE SUCH A REQUEST. IT WAS THE MAYOR
22 WHO MADE THIS REQUEST.

23 WHEN LATER IN THE HEARING NORCAL WAS ASKED -- AND
24 THAT GENTLEMAN WE'VE SEEN IN THE CLIP IS JOHN NICOLETTI, THE
25 NORCAL MANAGER FOR THIS REGION. WHEN ASKED WHO IN THE CITY
26 HAD REQUESTED NORCAL'S SUBCONTRACTOR TO NEGOTIATE WITH THE
27 TEAMSTERS, NORCAL REPRESENTED THAT IT DID NOT KNOW, AND THE
28 MAYOR REMAINED SILENT.

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1 LET'S SEE IF I CAN PLAY THIS NEXT CLIP
2 (PLAYING VIDEO.)

3 MR. FINKELSTEIN: IT WAS SOMEONE IN THAT ROOM THAT
4 KNEW; IT WAS THE MAYOR SITTING ON THE DAIS UP NEXT TO
5 COUNCILMEMBER DANDO. AND THIS STATEMENT WAS FALSE AND
6 MISLEADING BECAUSE AT THE TIME NORCAL AND THE MAYOR KNEW
7 THAT IT WAS THE MAYOR WHO HAD MADE THIS REQUEST. AND

8 NORCAL' S AUTHORIZED REPRESENTATIVE TO SPEAK AT THE COUNCIL
9 MEETING, JOHN NICOLETTI , HE KNEW. BECAUSE REMEMBER, I ASKED
10 HIM WHEN I PLAYED THIS CLIP FOR YOU. "AT THE TIME DID YOU
11 KNOW IT WAS THE MAYOR," BECAUSE HE HAD BEEN BRIEFED BY BILL
12 JONES.

13 HE SAID "YES." AND I SAID, "WHY DID YOU SAY WHAT
14 YOU SAID?"

15 HE SAID, "BECAUSE NORCAL' S ATTORNEY TOLD ME TO
16 ANSWER IT THAT WAY. "

17 NOW, WE KNOW THAT SOME COUNCILMEMBERS KNEW SOME OF
18 THE FACTS PRIOR TO THIS SECOND VOTE BECAUSE OF THE
19 INFORMATION THAT HAD BEEN PROVIDED, SOME OF THE INFORMATION
20 PROVIDED BY NORCAL, BECAUSE OF SOME MERCURY NEWS EDITORIAL
21 AND SOME OF THE COUNCILMEMBERS AND STAFF HAVE ADMITTED THEY
22 WERE TOLD BY NORCAL BEFORE THE FIRST VOTE EVEN THAT NORCAL
23 WAS ASKING TO BE REIMBURSED BECAUSE THE CITY HAD REQUIRED
24 THEM TO SWITCH UNIONS.

25 OF COURSE, IT WAS NOT THE CITY, IT WAS THE MAYOR.

26 COUNCILMEMBER LEZOTTE HAD SOME DISCUSSIONS WITH
27 MR. NICOLETTI ; COUNCILMEMBER DANDO WE SAW HAD A BRIEF
28 DISCUSSION.

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1 THERE WAS A MERCURY NEWS EDITORIAL BETWEEN THE
2 FIRST AND SECOND VOTE THAT DISCLOSED SOME OF BUT ALL THE
3 FACTS. THAT'S EXHIBIT 3.

4 BY THE WAY, AS I THINK I TOLD YOU, THESE NEWSPAPER
5 EXHIBITS ARE WHAT WE CALL HEARSAY; THEY ARE NOT BEING
6 OFFERED TO PROVE THAT WHAT THE NEWSPAPER THINKS HAPPENED IS
7 WHAT HAPPENED. THAT'S NOT EVIDENCE AND I'LL INSTRUCT YOU
8 ABOUT THAT LATER ON. BUT IT'S BEING OFFERED TO SHOW WHAT
9 WAS SAID TO SHOW WHAT PEOPLE KNEW OR SHOULD HAVE KNOWN AT
10 DIFFERENT TIMES.

11 THIS IS WHAT THE EDITORIAL DISCLOSED. THIS IS
12 ACCORDING TO THE EDITORIAL:

13 IN ORDER TO KEEP THE CONTRACT, THE EVENTUAL
14 WINNER, NORCAL, ON TRACK, THE MAYOR'S OFFICE
15 OFFERED NORCAL ASSURANCES OF HIS SUPPORT FOR
16 HIGHER COMPENSATION THAN THE CONTRACT WOULD CALL
17 FOR. THIS PROMISE WAS MADE NOT YEARS LATER AS THE
18 MAYOR HAS SAID, BUT BEFORE THE COUNCIL EVEN VOTED
19 TO ACCEPT NORCAL'S BID ON OCTOBER 10, 2000.

20 AT THE TIME OF THE THAT VOTE, GONZALES KNEW
21 FULL WELL THE CITY WOULD HAVE TO COME UP WITH MORE
22 MONEY. HE DIDN'T TELL COUNCIL MEMBERS THEN AND HE
23 DIDN'T TELL THEM IN SEPTEMBER WHEN THEY SPRANG THE
24 11.7 MILLION SURPRISE THAT THEY APPROVED THE
25 ORIGINAL CONTRACT ON THE BASIS OF INCOMPLETE OR

Vol 13G-1
26 MISLEADING INFORMATION.

27 THE SEPTEMBER 16TH MEMO FROM THE MAYOR
28 ACKNOWLEDGED SHORTLY BEFORE THE CITY COUNCIL VOTE

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2231

1 ON POTENTIAL HAULERS IN 2000 IT WAS BROUGHT TO THE
2 MAYOR'S OFFICE'S ATTENTION THAT THERE WAS A
3 POTENTIAL UNION PROBLEM. IT ALSO SAID AFTER
4 COUNCIL APPROVAL, THE MAYOR'S OFFICE LEARNED THAT
5 THE WORKERS WOULD BE EXPECTED TO CHANGE UNIONS.

6 BUT CURRENT AND FORMER NORCAL EXECUTIVES SAID
7 THEY HAD THE PLEDGE OF SUPPORT FROM THE MAYOR
8 BEFORE THE COUNCIL VOTE TO AWARD THEM THE CONTRACT
9 IN 2000. REMINDED OF THAT WEDNESDAY, THE MAYOR'S
10 TOP ASSISTANT, JOE GUERRA, CALLED A SENTENCE IN
11 THE SEPTEMBER 16 MEMO AN INCONSISTENCY ON HIS
12 PART. IT SHOULD HAVE SAID BEFORE COUNCIL
13 APPROVAL, HE SAID.

14 HERE'S WHAT THE OCTOBER 14TH EDITORIAL DID NOT
15 DISCLOSE, BECAUSE EVEN AS LATE AS 2004, THE PARTIES WERE
16 STILL KEEPING SOME OF THE FACTS CONCEALED. IT WAS THE MAYOR
17 OR CREATED NORCAL'S NEED FOR MORE MONEY BY ASKING NORCAL TO
18 GET CWS TO RECOGNIZE THE TEAMSTERS.

19 THE WAY IT WAS PLAYING IN THE PRESS AT THAT TIME
20 WAS THAT THIS PROBLEM AROSE FROM THE UNIONS HAVING NOTHING
21 TO DO WITH THE MAYOR, AND THAT HE WAS JUST TRYING TO BAIL
22 OUT THE CONTRACTOR, WHO HAD A PROBLEM WITH THE UNIONS.
23 THAT'S NOT HOW IT WENT DOWN. THE MAYOR CREATED THE PROBLEM
24 BY INSISTING OR REQUESTING THAT THEY SWITCH, SOMETHING THAT
25 THE CITY COULD NOT LAWFULLY DO.

26 THIS WAS AN IMPORTANT FACT THAT WAS STILL NOT
27 DISCLOSED, BECAUSE WHAT THIS IN FACT MEANS IS THAT THE
28 COUNCIL WAS ACTUALLY BEING ASKED TO PAY NORCAL FOR DOING

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2232

1 SOMETHING THAT THE CITY COULD NOT HAVE LAWFULLY ASKED FOR.

2 REMEMBER THAT OCTOBER 27, 2000 MEMO WAY BACK AT
3 THE TIME THIS ALL STARTED FROM THE CITY ATTORNEY? IN THAT
4 MEMO, THE CITY ATTORNEY HAD PREVIOUSLY CONCLUDED THAT THE
5 CITY COULD NOT LAWFULLY REQUIRE A CONTRACTOR TO RECOGNIZE A
6 PARTICULAR UNION.

7 HERE'S THE MEMO; IT'S EXHIBIT 20.

8 LET ME READ YOU A FEW EXCERPTS:

9 A CITY REQUIREMENT THAT WORKERS ENTER INTO
10 NEUTRALITY AGREEMENTS OR AGREE TO NEUTRALITY

11 PROVISIONS RAISES VERY SERIOUS LEGAL CONCERNS ON
12 TWO LEVELS. FIRST, FEDERAL LABOR LAW PROHIBITS A
13 CITY FROM INTERFERING WITH THE COLLECTIVE
14 BARGAINING PROCESS REGULATED BY FEDERAL LAW.

15 NORCAL HAS SIGNED A MEMORANDUM OF
16 UNDERSTANDING WITH TEAMSTERS' LOCAL 350 UNDER
17 WHICH THE TEAMSTERS WOULD BE RECOGNIZED AS THE
18 BARGAINING REPRESENTATIVE IF NORCAL IS AWARDED A
19 RECYCLE PLUS CONTRACT.

20 ADDITIONALLY, EMPLOYEES OF NORCAL'S
21 SUBCONTRACTOR, CALIFORNIA WASTE SOLUTIONS, INC.,
22 ARE CURRENTLY REPRESENTED BY A LABOR ORGANIZATION.
23 AS SUCH, THERE IS LITTLE CITY BUSINESS INTEREST OR
24 JUSTIFICATION IN REQUIRING NEUTRALITY AGREEMENTS
25 IN THIS CASE

26 MOREOVER, A NEUTRALITY PROVISION WAS NEVER A
27 SPECIFICATION OF THE ORIGINAL RFP. INSERTION OF
28 NEW PROVISION AFTER ALL PROPOSALS HAVE BEEN

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2233

1 RECEIVED RAISES A SERIOUS LEGAL CONCERN REGARDING
2 THE INTEGRITY OF THE RFP PROCESS.

3 LET ME STOP READING FOR A MOMENT. YOU KNOW, IN
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4 THIS COUNTRY WHEN WE START A BASEBALL GAME, WE DON'T CHANGE
5 THE RULES OF HOW MANY STRIKES AND YOU'RE OUT AFTER THE SIXTH
6 INNING BECAUSE IT'S THE ADVANTAGE OF ONE SIDE OR ANOTHER.
7 THAT'S WHAT WE'RE TALKING ABOUT HERE, THE INTEGRITY OF THE
8 PROCESS. OTHER COMPANIES BID AND WE ARE SUPPOSED TO HAVE A
9 LEVEL PLAYING FIELD. THE MAYOR TILTED THE FIELD BY A
10 BRIBERY SCHEME HE HATCHED, A FRAUD SCHEME HE HATCHED.

11 FOR THESE REASONS, THE CITY SHOULD NOT
12 REQUIRE SUBCONTRACTORS TO ENTER INTO NEUTRALITY
13 AGREEMENTS AS A CONDITION OF THE AWARD OF
14 CONTRACT.

15 I SAID BEFORE, ANY HONEST OFFICIAL WHO WAS NOT
16 CORRUPT READING THAT WOULD HAVE IMMEDIATELY GOTTEN ON THE
17 PHONE TO NORCAL AND RECTIFIED THE SITUATION. IN THE FACT
18 THE MAYOR DIDN'T SPEAKS VOLUMES ABOUT HIS MENTAL STATE AND
19 THE CORRUPTNESS OF HIS ACTIONS.

20 FINALLY, I WANT TO SUGGEST TO YOU THAT IN OUR VIEW
21 THE 11 AND A QUARTER MILLION DOLLAR PAYMENT TO NORCAL WAS A
22 GIFT OF PUBLIC FUNDS.

23 AN EXPENDITURE OF MUNICIPAL FUNDS IS
24 PERMITTED ONLY WHERE IT APPEARS THE WELFARE OF THE
25 COMMUNITY AND INHABITANTS IS INVOLVED AND THE
26 BENEFIT RESULTS TO THE PUBLIC.

27 HERE, THE BENEFIT WENT TO NORCAL AND NOT TO THE
28 PUBLIC

1 THE PROHIBITION ON GIFTS OF PUBLIC FUNDS IS
2 APPLICABLE TO ACTS OF THE CITY COUNCIL. SO THE FACT THE
3 CITY COUNCIL APPROVED OF IT DOES NOT MAKE IT NOT A GIFT OF
4 PUBLIC FUNDS. THE CITY COUNCIL CANNOT APPROVE THE GIFT OF
5 PUBLIC FUNDS; IT'S THE PUBLIC'S MONEY, IN THIS CASE THE
6 RATEPAYERS' MONEY.

7 THE CONTRACT, WHICH IS WHAT WE'RE TALKING ABOUT
8 HERE, IS NOT A GIFT OF PUBLIC FUNDS IF THE CONTRACT HAS
9 ADEQUATE CONSIDERATION OR THE CONTRACT HAS A PUBLIC PURPOSE.

10 THE COUNCIL RECORD AT THAT HEARING IS QUITE CLEAR,
11 THE COUNCIL VOTED ON THESE FUNDS TO PAY FOR NORCAL'S
12 ADDITIONAL LABOR COSTS THAT HAD -- ACTUALLY, CWS'S
13 ADDITIONAL LABOR COSTS THAT NORCAL HAD AGREED TO REIMBURSE.

14 NO ON -- WE'VE HEARD THE COUNCIL MEETING AND IT'S
15 AN EXHIBIT, IF YOU WANT YOU CAN HEAR IT AGAIN. THERE WAS
16 NOT ONE WORD UTTERED AT THE COUNCIL HEARING ABOUT
17 NEIGHBORHOOD CLEANUP BINS, ABOUT AN E-WASTE SCRAP PROGRAM OR
18 MATERIALS COMPOSITION STUDY. ALL OF THE DISCUSSION WAS
19 ABOUT THE TRUE PURPOSE OF THIS PAYMENT WAS TO BAIL OUT
20 NORCAL FROM ITS OBLIGATION TO REIMBURSE CWS FOR ADDITIONAL
21 LABOR COSTS CREATED BY THE MAYOR IN REQUIRING OR REQUESTING

22 THAT NORCAL GET CWS TO SWITCH.

23 THE 11 AND A QUARTER MILLION DOLLARS COMES FROM
24 THE ADDITIONAL LABOR COSTS

25 THE CITY ATTORNEY EVEN CONCLUDED THAT A PAYMENT
26 FOR ADDITIONAL LABOR COSTS WOULD BE A GIFT OF PUBLIC FUNDS
27 BECAUSE NORCAL WAS ALREADY OBLIGATED TO PROVIDE THE CITY
28 WITH COLLECTION SERVICES.

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2235

1 THERE'S ALSO LANGUAGE IN THE AGREEMENT, THE
2 IMPORTANT AGREEMENT, EXHIBIT 26, THAT SPECIFICALLY BARS THE
3 PAYMENT OF THIS 11 AND A QUARTER MILLION DOLLARS FOR
4 ADDITIONAL LABOR COSTS. IF YOU LOOK AT THE ORIGINAL
5 CONTRACT AND YOU LOOK AT PARAGRAPH 24.11, WHICH DEALS WITH
6 SUBCONTRACTORS, THIS IS WHAT WE'RE TALKING ABOUT HERE. IT
7 SAYS AT LINE 9, COMPENSATION DUE OR PAYABLE TO CONTRACTOR OR
8 SUBCONTRACTOR SHALL BE THE SOLE RESPONSIBILITY OF THE
9 CONTRACTOR.

10 THERE'S ADDITIONAL LANGUAGE THAT BARS THE 11 AND A
11 QUARTER MILLION DOLLAR PAYMENT FOR ADDITIONAL LABOR COSTS.
12 PARAGRAPH 24.24 LABELED ENTIRE AGREEMENT:

13 THIS AGREEMENT INCORPORATES AND INCLUDES ALL
14 NEGOTIATIONS, CORRESPONDENCE, CONVERSATIONS,

15 AGREEMENTS AND UNDERSTANDINGS APPLICABLE TO THE
16 MATTERS CONTAINED IN THIS AGREEMENT, AND THE
17 PARTIES AGREE THAT THERE ARE NO COMMITMENTS,
18 AGREEMENTS OR UNDERSTANDINGS CONCERNING THE MATTER
19 OF THIS AGREEMENT THAT ARE NOT CONTAINED IN THIS
20 DOCUMENT. ACCORDINGLY, IT IS AGREED THAT NO
21 DEVIATION FROM THE TERMS OF THIS AGREEMENT SHALL
22 BE PREDICATED ON ANY PRIOR REPRESENTATIONS OR
23 AGREEMENTS, WHETHER ORAL OR WRITTEN.

24 ONCE THIS DEAL WAS INKED, IT WAS A GIFT OF PUBLIC
25 FUNDS FOR THE CITY TO PAY FOR SOMETHING THAT WAS BARRED BY
26 THE ORIGINAL AGREEMENT. PLUS THERE WAS NO ADEQUATE
27 CONSIDERATION FOR THE 11 AND A QUARTER MILLION DOLLAR
28 PAYMENT. THE CITY ATTORNEY MADE IT CLEAR AT THE HEARING

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2236

1 THERE HAD TO BE NEW CONSIDERATION FOR THIS PAYMENT NOT TO BE
2 A GIFT OF PUBLIC FUNDS, BECAUSE NORCAL WAS ALREADY OBLIGATED
3 DO PROVIDE THE CITY WITH COLLECTION SERVICES.

4 CONSIDERATION MUST BE ADEQUATE SO AS TO EVIDENCE A
5 BONAFIDE CONTRACT AND CANNOT BE MERELY NOMINAL.

6 WHAT WE HAVE HERE, LADIES AND GENTLEMEN, IS

7 NOMINAL CONSIDERATION.

8 NORCAL SAN JOSE MANAGER, MR. NICOLETTI, ESTIMATED
9 THE COST OF THE NEW CONSIDERATION, 10 NEIGHBORHOOD CLEANUP
10 BINS, E-WASTE PROGRAM AND GARBAGE STUDY AT AROUND A
11 \$100,000. \$100,000 FOR AN 11 AND A QUARTER MILLION DOLLAR
12 PAYMENT IS NOMINAL CONSIDERATION.

13 COUNCILMEMBER LEZOTTE TESTIFIED THAT THE NEW
14 CONSIDERATION WAS A JOKE, AND SHE WAS RIGHT. COUNCILMEMBERS
15 LEZOTTE AND REED SENT A MEMO TO THE COUNCIL AT THE TIME OF
16 THE VOTE CALLING THE PAYMENT OF 11 AND A QUARTER MILLION
17 DOLLARS TO NORCAL A GIFT OF PUBLIC FUNDS. COUNCILMEMBER
18 CORTESE AGREED WITH THE MEMO.

19 HERE'S EXHIBIT 93, THE SEPTEMBER 20, 2004 MEMO
20 FROM COUNCILMEMBERS LEZOTTE AND REED.

21 ITEM 1. THE PROPOSE AMENDMENT APPEARS TO BE
22 A GIFT OF PUBLIC FUNDS, WHICH IS PROHIBITED BY THE
23 CALIFORNIA CONSTITUTION SINCE THERE IS NOTHING IN
24 THE RECYCLE PLUS AGREEMENT THAT PROVIDES FOR
25 INCREASED PAYMENT OTHER THAN COST OF LIVING
26 INCREASES

27 YOU KNOW WHAT? SHE WAS RIGHT. PLUS THIS PAYMENT
28 SERVED NO PUBLIC PURPOSE. MAYOR GONZALES SUGGESTED IT WAS A

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1 PUBLIC PURPOSE SERVED BY AVERTING A GARBAGE STRIKE. WELL,
2 AVERTING A GARBAGE STRIKE MIGHT BE A PUBLIC PURPOSE BUT NOT
3 IN THIS CASE, BECAUSE THE ONE-DAY STRIKE IN 2003 HAD ALREADY
4 BEEN SETTLED WITH A NEW COLLECTIVE BARGAINING AGREEMENT WITH
5 CWS MORE THAN A YEAR EARLIER.

6 MAYOR GONZALES SUGGESTED THAT THERE WAS A PUBLIC
7 PURPOSE BY INSURING THAT RECYCLING WORKERS RECEIVE A FAIR
8 WAGE. BUT THE WORKERS HAD BEEN RECEIVING THE HIGHER WAGES
9 AND BENEFITS SINCE JULY 1, 2002.

10 AND THE CITY'S PREVALING WAGE POLICY WOULD NOT
11 APPLY TO THE RECYCLING WORKERS.

12 BAILING OUT NORCAL FROM A BID THAT WAS TOO LOW
13 DOES NOT SERVE A PUBLIC PURPOSE. THE CITY WAS UNDER NO
14 OBLIGATION TO PAY NORCAL FOR THE ADDITIONAL COST OF USING
15 TEAMSTERS, BUT THE MAYOR RECOMMENDED THAT THE CITY PAY
16 NORCAL ANYWAY FOR DOING SOMETHING THAT THE CITY COULD NOT
17 HAVE LAWFULLY REQUIRED NORCAL TO DO, USING A FALSE AND
18 MISLEADING MEMO TO THE COUNCIL AND A SECRET NINE PERCENT
19 RATE INCREASE.

20 SO THAT'S WHAT WE'RE PROPOSING TO YOU THAT YOU
21 DELIBERATE ON IN WHETHER OR NOT TO RETURN AN INDICTMENT.
22 HERE'S WHO WE THINK THE DEFENDANTS SHOULD BE.

23 RONALD GONZALES, THE MAYOR OF SAN JOSE; JOSEPH
24 GUERRA III, THE MAYOR'S BUDGET AND POLICY DIRECTOR; AND
25 NORCAL WASTE SYSTEMS, INCORPORATED, THE CORPORATION THAT

26 DIRECTLY BENEFITED FROM THIS ILLEGAL BRIBERY SCHEME.

27 THESE ARE THE SUGGESTED CHARGES:

28 I HAVE PREPARED AN INDICTMENT WHICH I'LL PRESENT

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1 TO YOU PROBABLY AFTER LUNCH AT THIS POINT. LET ME DISCUSS
2 THE CHARGES WITH YOU.

3 COUNT ONE CHARGES ALL THREE DEFENDANTS WITH
4 CONSPIRACY TO CHEAT AND DEFRAUD.

5 COUNT TWO CHARGES DEFENDANT GONZALES WITH ASKING
6 FOR AND RECEIVING A BRIBE.

7 COUNT THREE CHARGES NORCAL WITH GIVING A BRIBE.

8 COUNT FOUR CHARGES GONZALES WITH FALSIFYING A
9 PUBLIC RECORD. THAT'S THE DECEMBER 8, 2000 MEMO WHICH
10 ASSERTS THAT AS A RESULT OF THE AUDITOR'S INVOLVEMENT, WE
11 CAN NOW HAVE GREATER CONFIDENCE IN THE FINANCIAL IMPACT.

12 COUNT FIVE, CONSPIRACY TO MISAPPROPRIATE PUBLIC
13 MONIES.

14 COUNT SIX, MISAPPROPRIATING PUBLIC MONIES.

15 AND COUNT SEVEN CHARGES MAYOR GONZALES WITH
16 FALSIFYING A PUBLIC RECORD. THAT'S BASED ON THE SEPTEMBER
17 16, 2004 MEMO THAT ASSERTS FALSELY THAT AFTER COUNCIL

18 APPROVAL IT WAS LEARNED.

19 SO LET ME STOP HERE FOR A MOMENT AND SEE IF YOU
20 HAVE ANY QUESTIONS BEFORE WE TAKE OUR BREAK.

21 WHAT I INTEND TO DO FOR THE REST OF THE DAY IS GO
22 OVER THE INDICTMENT. AND WE CAN HAND OUT, WE HAVE A COPY
23 FOR EACH OF YOU. PLEASE REMEMBER, IT'S ONLY A PROPOSED
24 INDICTMENT. THANK GOD FOR WORD PROCESSORS; IT CAN BE
25 MODIFIED. IN ORDER TO RETURN AN INDICTMENT, AT LEAST 12
26 GRAND JURORS WHO HEARD ALL OF THE EVIDENCE HAVE TO AGREE TO
27 THE DOCUMENT IT WOULD BE MODIFIED OR CHANGED IF YOU'RE NOT
28 ABLE TO COME TO AGREEMENT ON SOME OR ALL OF THE PROPOSED

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1 COUNTS.

2 THE OTHER THING I HAVE TO DO IS READ TO YOU AND
3 HAND OUT COPIES OF THE JURY INSTRUCTIONS, BECAUSE OBVIOUSLY,
4 WHETHER OR NOT ANYONE SHOULD BE INDICTED DEPENDS ON WHAT THE
5 FACTS ARE AS YOU FIND THEM TO BE, AND THEN WHAT THE LAW IS
6 THAT YOU MUST APPLY TO THOSE FACTS. SO YOU MUST BE GOVERNED
7 BY THE LAW IN THE WRITTEN JURY INSTRUCTIONS I WILL READ TO
8 YOU.

9 SO BEFORE WE TAKE OUR NOON RECESS, ANY QUESTIONS
10 ABOUT THE FACTS THAT I CAN ADDRESS?

11 A JUROR: OUT OF FIVE OR SIX, THOSE TWO ARE FOR
12 GONZALES?

13 MR. FINKELSTEIN: NO. THE CONSPIRACY TO
14 MISAPPROPRIATE PUBLIC MONIES AND THE MISAPPROPRIATION OF
15 PUBLIC MONIES, WE'RE PROPOSING THAT CHARGE BE RETURNED
16 AGAINST ALL DEFENDANTS. WE HAVE THREE PARTICIPANTS IN THE
17 CONSPIRACY, AND YOU'LL LEARN ABOUT THIS WHEN I GO OVER THE
18 INSTRUCTION, BUT I CAN GIVE YOU AN AD HOC PREVIEW.

19 IF MR. GIBBONS-SHAPIRO AND I CONSPIRED TO COMMIT A
20 CRIME, NOT ONLY ARE WE GUILTY OF THE CRIME OF CONSPIRING TO
21 COMMIT A CRIME, BUT WE'RE ALSO GUILTY OF THE TARGET CRIME
22 THAT'S COMMITTED. SO IF MR. GIBBONS-SHAPIRO AND I CONSPIRED
23 TO COMMIT A BANK ROBBERY, THAT'S ONE CHARGE. IF THEN ONE OR
24 MORE OF US ACTUALLY PULLS OFF THE ROBBERY, WE'RE BOTH GUILTY
25 OF THE BANK ROBBERY AS WELL. THAT'S THE WAY THE LAW WORKS
26 ON THAT.

27 A JUROR: NUMBER TWO AND THREE, SPECIFICALLY WHAT
28 WAS THE BRIBE? I KNOW YOU MENTIONED SOMETHING ABOUT

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1 SUPPORTING --

2 MR. FINKELSTEIN: I WILL BE GOING OVER THAT AGAIN.

3 WE' RE NOT TALKING ABOUT A CASH BRIBE. THE BRIBE WAS, IN
4 ORDER TO DO THE ANALYSIS, YOU HAVE TO DECIDE WAS IT -- DID
5 MAYOR GONZALES ASK FOR AND RECEIVE A THING OF VALUE IN ORDER
6 TO CORRUPTLY INFLUENCE HIS OFFICIAL ACT.

7 THE THING OF VALUE HERE WAS THE GETTING NORCAL' S
8 AGREEMENT TO GET CWS TO SWITCH FROM THE TEAMSTERS. THAT' S
9 THE THING OF VALUE THAT WE' RE SUGGESTING TO YOU.

10 FOR EXAMPLE, LET ME GIVE YOU JUST A SLIGHTLY
11 DIFFERENT FACT SCENARIO.

12 I' M THE MAYOR OF CITY X, AND I' M LOOKING AT
13 PROPOSALS FROM CONTRACTORS AND I SEE A PROPOSAL FROM A
14 CONTRACTOR THAT' S PROPOSING TO USE ANOTHER COMPANY AS ITS
15 SUBCONTRACTOR, AND THEY' RE GOING TO USE ACME RECYCLING TO DO
16 THE RECYCLING. SO I HAVE A MEETING WITH THE CONTRACTOR
17 BEFORE THE PROPOSAL AND I SAY, "I HAVE LOOKED AT YOUR
18 PROPOSAL, AND IT LOOKS GOOD TO ME, BUT ACME RECYCLING -- IS
19 THAT A SAN JOSE COMPANY?"

20 AND THE CONTRACTOR SAYS, "WELL, NO, MAYOR, IT' S
21 NOT. "

22 "WELL, YOU KNOW, WE HAVE A VERY FINE COMPANY RIGHT
23 HERE IN TOWN, SAN JOSE RECYCLING. IT' S BEEN A LONG-TIME
24 POLITICAL SUPPORTER OF MINE. IS THERE A REASON YOU HAVEN' T
25 CONSIDERED USING SAN JOSE RECYCLING?"

26 "YES, MAYOR, THEY WERE EXPENSIVE. "

27 "WELL, IF YOU USE SAN JOSE RECYCLING, I' LL MAKE
28 YOU WHOLE TO GET YOU EXTRA MONEY. "

1 NOW, HERE, INSTEAD OF THE MAYOR REQUESTING THE USE
2 OF THE PARTICULAR SUBCONTRACTOR, WHICH PROBABLY FITS A MORE
3 TYPICAL SCENARIO, THE MAYOR IS REQUESTING THE USE OF A
4 PARTICULAR UNION. BUT LEGALLY, IT DOESN'T MATTER.

5 CLEARLY, PAYING TEAMSTERS' WAGE AND BENEFITS,
6 AGREEING TO DO THAT AND HAVING THAT DONE WAS A THING OF
7 VALUE, SO THAT'S THE BRIBE.

8 DOES THAT ANSWER YOUR QUESTION?

9 A JUROR: YES.

10 MR. FINKELSTEIN: DID YOU HAVE A QUESTION?

11 A JUROR: HOW DO YOU CONCLUDE POSSIBLY THAT THE
12 CONSPIRACY TO MISAPPROPRIATE PUBLIC FUNDS DOES NOT EXTEND
13 BEYOND THESE INDIVIDUALS AND MIGHT INCLUDE ALL
14 COUNCILMEMBERS AND POSSIBLY THE CITY ATTORNEY, BECAUSE
15 THEY -- THAT WAS VOTED TO ON AT THE SAME TIME WHEN THEY
16 SHOULD NOT HAVE -- OR THE CITY ATTORNEY SHOULD HAVE ADVISED
17 THEM NOT TO VOTE ON IT.

18 MR. FINKELSTEIN: RIGHT. I CERTAINLY DON'T
19 DISPUTE YOUR VIEW OF THE FACTS HERE, BUT I THINK THERE IS A
20 DISTINCTION TO BE DRAWN.

21 THE CITY ATTORNEY AND THE OTHER COUNCILMEMBERS

22 DIDN' T KNOW ABOUT THE OCTOBER 6TH MEETING AND THAT
23 ARRANGEMENT; THAT' S WHAT I THINK MAKES THE DISTINCTION. I
24 THINK I ASKED THE CITY ATTORNEY WHEN HE WAS ON THE STAND ON
25 ONE OF THE SEVERAL OCCASIONS WHEN HE TESTIFIED IN CONNECTION
26 WITH THE OPINION HE RENDERED IT WAS NOT A GIFT OF PUBLIC
27 FUNDS.

28 I SAID, "DID YOU KNOW ABOUT THIS AND THIS," AND

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1 YOU WILL RECALL HE SAID HE DIDN' T.

2 I SAID, "HAD YOU KNOWN ABOUT THAT, WOULD YOUR
3 OPINION HAVE BEEN OTHERWISE.

4 HE SAID, "YES, POSSIBLY. "

5 SO I THINK THE DIFFERENCE IS WHAT DISTINGUISES
6 THIS THREE DEFENDANTS IS THEY KNEW ALL THE FACTS. AND
7 ANYONE KNOWING ALL OF FACTS KNOWS THAT WHAT THEY ARE DOING
8 IS ILLEGAL. AND, YOU KNOW, IT' S NOT A CRIME TO DO SOMETHING
9 THAT FURTHERS A CONSPIRACY UNLESS YOU HAVE A CONSPIRATORIAL
10 INTENT.

11 LET ME GIVE YOU ANOTHER EXAMPLE.

12 SCENARIO ONE. I ASKED ONE OF THE CO-CONSPIRATORS,
13 WE' RE GOING TO DO THIS ROBBERY, WE NEED YOU TO DRIVE US TO

14 THE BANK ON SUCH AND SUCH A DATE AND TIME SO WE CAN PULL OFF
15 THE ROBBERY.

16 WELL, THE DRIVER OF THE CAR, EVEN THOUGH THEY
17 REMAIN IN THE CAR ARE IN ON THE CONSPIRACY BECAUSE THEY KNOW
18 WHAT'S GOING ON. THEY SHARE THE COMMON CRIMINAL PURPOSE.

19 SCENARIO NUMBER TWO. OUR CAR BREAKS DOWN SO WE
20 HAIL A TAXI TO TAKE US TO THE BANK. NOW, THE TAXI DRIVER
21 HAS AIDED THE PURPOSE OF THE CONSPIRACY BECAUSE HE HAS
22 ASSISTED US BY DELIVERING US TO THE PLACE WHERE WE PULL THE
23 ROBBERY. BUT BECAUSE HE DOESN'T KNOW WHAT WE'RE UP TO OR
24 ALL THE FACTS, HE DOESN'T SHARE A COMMON CRIMINAL PURPOSE,
25 EVEN THOUGH HIS ACTIONS AIDED THE CONSPIRACY, HE'S NOT A
26 MEMBER OF THE CONSPIRACY UNDER THE LAW.

27 DOES THAT HELP?

28 A JUROR: IT DOES, EXCEPT THAT DOYLE INDICATED

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1 THAT IT DIDN'T NEED TO BE A ONE FOR ONE BENEFIT.

2 MR. FINKELSTEIN: RIGHT.

3 A JUROR: THE RATIO DIDN'T NEED TO BE ONE FOR ONE,
4 IT WAS PROBABLY 20 TO ONE. AND YOU'RE SAYING LAW SUGGESTING
5 IT'S MINIMAL HE SHOULD HAVE KNOWN THAT AT SOME JUNCTURE AND
6 SEEMED TO GO ALONG WITH IT.

7 MR. FINKELSTEIN: HOW ABOUT 100 TO ONE? THAT'S
8 WHAT WE HAVE HERE.

9 A JUROR: OR 200 TO ONE.

10 MR. FINKELSTEIN: DOYLE SAID HIS OPINION MIGHT
11 HAVE BEEN OTHERWISE IF HE HAD KNOWN ALL THE FACTS. THERE IS
12 ANOTHER WAY TO ANALYZE THIS, AND THAT IS WHAT THE MAYOR IS
13 REALLY DOING IS PAYING NORCAL FOR SOMETHING ILLEGAL. AND
14 DOYLE DIDN'T KNOW THAT; HE DIDN'T KNOW THE MAYOR WAS THE ONE
15 WHO HAD REQUESTED THE SWITCH AND -- EVERYONE ELSE THOUGHT
16 FROM WHAT WE KNOW HERE IS THAT THE SWITCH OCCURRED ON ITS
17 OWN, AND THEY WERE JUST VOTING ON WHETHER OR NOT TO
18 REIMBURSE NORCAL FOR THE SWITCH.

19 THE DIFFERENCE IS IF THE MAYOR SAID TO NORCAL,
20 LOOK, YOUR PROPOSAL LOOKS GOOD TO ME, BUT I HAVE A HEAVY
21 COCAINE HABIT -- I'M NOT SUGGESTING HE DOES -- CAN YOU THROW
22 IN A POUND OF COCAINE?

23 "WELL, THAT WILL COST \$100,000."

24 "YOU THROW IN A POUND OF COCAINE AND WE'LL MAKE
25 YOU WHOLE."

26 SO HE KNOWS THE PAYMENT IS FOR SOMETHING ILLEGAL.
27 IT'S THE FRUIT OF AN ILLEGAL BRIBERY SCHEME. THE OTHERS
28 DON'T KNOW THAT. THAT IS ANOTHER DISTINGUISHING FACTOR.

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1 DID THAT HELP?

2 A JUROR: YEAH.

3 A JUROR: YOU'RE MAKING A CHARGE AGAINST A
4 CORPORATION. WHAT DOES THAT MEAN? DOES IT INVOLVE PEOPLE?

5 MR. FINKELSTEIN: NO. WHAT HAPPENS, AND I WILL
6 GIVE YOU INSTRUCTIONS ABOUT THAT. THAT'S A VERY GOOD
7 QUESTION, AND I PROBABLY SHOULD HAVE POINTED THAT OUT; I
8 THINK I HAVE BEEN A LAWYER TOO LONG.

9 UNDER THE LAW, A CORPORATION IS TRULY JUST LIKE
10 PERSON. BUT OF COURSE A CORPORATION IS JUST A LEGAL ENTITY
11 SO IT CAN ONLY ACT THROUGH ITS AGENTS AND IS ONLY HELD
12 ACCOUNTABLE FOR THE AUTHORIZED ACTS OF THE AGENT. SO IF
13 AGENTS ARE ACTING FOR THE BENEFIT OF THE CORPORATION, IT'S
14 TYPICALLY ATTRIBUTED TO THE CORPORATION.

15 I WILL BE GIVING YOU FURTHER INSTRUCTIONS ABOUT
16 THAT. THIS IS JUST A PREVIEW. AND AS I SAY, YOU HAVE TO BE
17 GOVERNED BY THIS FORM OF WRITTEN INSTRUCTIONS, WHICH IS
18 SOMETHING WE TOOK A LONG TIME TO DEVELOP; THAT'S PART OF THE
19 REASON WE HAD THE HIATUS. BUT HERE IT APPEARS TO US FROM
20 THE EVIDENCE THAT THE EMPLOYEES WHO WERE INVOLVED IN THIS
21 WRONGDOING WERE NOT GAINING PERSONALLY FROM THE WRONGDOING;
22 IT WAS ALL DONE FOR THE BENEFIT OF THE CORPORATION. THAT'S
23 WHY WE'RE RECOMMENDING THAT THE CORPORATION BE CHARGED.

24 NOW, BECAUSE IT'S A CORPORATION WE CAN'T THROW THE

25 ARTICLES OF THE CORPORATION IN JAIL, THAT MAKES NO SENSE,
26 BUT WE CAN FINE THEM, IN THIS CASE NOT VERY LARGE. BUT
27 REALLY WHAT'S AT PLAY, IF CONVICTED THEY CAN BE ORDERED TO
28 MAKE RESTITUTION AND REPAY THE 11 AND A QUARTER MILLION

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1 DOLLARS. THAT'S WHY WE'RE RECOMMENDING A CHARGE AGAINST THE
2 CORPORATION.

3 A JUROR: I WOULD LIKE TO BETTER UNDERSTAND COUNT
4 TWO. AS PART OF THE BRIBE THE MAYOR WAS PART OF THAT
5 ALLEGED INTERACTION, BUT ALSO WASN'T MR. MORALES THE OTHER
6 PART OF THAT INTERACTION AND SHOULDN'T HE BE CHARGED ALSO?

7 MR. FINKELSTEIN: THAT'S A GOOD QUESTION. MORALES
8 CERTAINLY PRECIPITATED THAT AND ASKED FOR THE MAYOR'S HELP,
9 BUT THERE IS NO EVIDENCE THAT HE ASKED FOR THE MAYOR TO HELP
10 HIM IN SOME ILLEGAL WAY.

11 IN OTHER WORDS, WHAT'S MISSING TO CHARGE MORALES,
12 I THINK, THERE'S NO EVIDENCE THAT MORALES SAID TO THE MAYOR,
13 IF YOU HAVE TO OFFER HIM MORE MONEY, TELL HIM WE'LL GO FOR
14 MORE MONEY IF THEY SWITCH TO TEAMSTERS. THAT'S WHERE THE
15 LINE WAS CROSSED. THERE IS NO EVIDENCE MORALES KNEW OR
16 ASKED THE MAYOR TO DO THAT.

17 PEOPLE ASK HELP FROM ELECTED OFFICIALS ALL THE
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18 TIME. THEY DON'T NECESSARILY EXPECT THE HELP WILL BE A
19 BRIBERY FRAUD SCHEME, WHICH WAS WHAT ENSUED, AND THAT'S THE
20 LINK THAT'S MISSING HERE.

21 A JUROR: WITH RESPECT TO THE -- WHAT VALUE DID
22 GONZALES RECEIVE AS PART OF THE BRIBE?

23 MR. FINKELSTEIN: NUMBER ONE, THE THING OF VALUE
24 DOESN'T HAVE TO BE PERSONAL, IT CAN GO TO A THIRD PARTY.
25 HERE THE THING OF VALUE WENT DIRECTLY TO THE TEAMSTERS AND
26 THEIR EMPLOYEES, BUT HE RECEIVED AN INDIRECT VALUE BECAUSE
27 WHAT HE RECEIVED WAS THE ASSURANCE THAT HE WOULD ENJOY
28 CONTINUED POLITICAL SUPPORT FROM THE TEAMSTERS IN TERMS OF

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1 CONTRIBUTIONS, PRECINCT WALKING AND SO FORTH, WHICH WE HAD
2 TESTIMONY ABOUT, AND HE DID RECEIVE TWO YEARS LATER IN THE
3 2004 REELECTION.

4 SO HE'S MAINTAINING GOOD RELATIONS WITH THE
5 TEAMSTERS WHO HAVE SUPPORTED HIM IN THE PAST AND WHO COULD
6 BE EXPECTED AS A RESULT OF THIS FAVOR TO CONTINUE SUPPORTING
7 HIM IN THE FUTURE. SO IT WENT DIRECTLY TO THE TEAMSTERS AND
8 INDIRECTLY TO THE MAYOR.

9 A JUROR: IMPLICIT IN MORALES GOING TO THE MAYOR

10 IS, IF YOU DON'T HELP US, THERE WILL BE SOME LABOR PROBLEMS.

11 MR. FINKELSTEIN: THAT'S CERTAINLY A REASONABLE
12 INFERENCE. AND MORALES TESTIFIED IN HIS EXPERIENCE ELECTED
13 OFFICIALS ALWAYS WANT TO SUPPORT TEAMSTERS BECAUSE THEY ARE
14 A LARGE POWERFUL UNION AND CAN HELP POLITICALLY.

15 LET ME POINT SOMETHING ELSE OUT ABOUT REALITY.
16 WAITING CITY OF SAN JOSE HAS AN ORDINANCE THAT CAPS SINGLE
17 SOURCE CONTRIBUTIONS TO \$500. A LABOR UNION LIKE TEAMSTERS
18 CAN PUT HUNDREDS IF NOT THOUSANDS OF PRECINCT WALKERS OUT
19 INTO THE STREETS WHOSE VALUE FAR EXCEEDS A \$500
20 CONTRIBUTION. SO I THINK FROM COMMON EXPERIENCE WE KNOW
21 THAT'S A VALUABLE SUPPORT TO HAVE THE SUPPORT OF A LABOR
22 UNION.

23 ANY OTHER QUESTIONS?

24 A JUROR: DID NOT THEY VIOLATE THE LABOR LAWS WHEN
25 THEY GOT INVOLVED IN GETTING THE UNIONS TO SWITCH UNIONS?

26 MR. FINKELSTEIN: I DON'T KNOW. AND IF THEY DID,
27 THAT WOULD BE A FEDERAL VIOLATION, AND WE ONLY ENFORCE STATE
28 LAWS, NOT FEDERAL. AT LEAST IN THE OPINION OF THE CITY

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1 ATTORNEY, IT COULD HAVE BEEN, IT MIGHT HAVE BEEN A VIOLATION
2 OF THE FEDERAL LABOR LAW FOR A CITY TO INTERFERE IN

3 COLLECTIVE BARGAINING AGREEMENTS.

4 I HAVE SOME KNOWLEDGE OF LABOR LAW, AND I CAN TELL
5 YOU THAT IN MOST CASES THE ANSWER TO MOST LABOR LAW
6 QUESTIONS IS THE WORKERS DECIDE. AND HERE THAT PROCESS
7 NEVER GOT TO BE CARRIED OUT, BECAUSE THE MAYOR INTERVENED ON
8 THE EVE OF THE VOTE ON NORCAL'S PROPOSAL.

9 ANYTHING ELSE? MAYBE WE SHOULD TAKE OUR NOON
10 RECESS.

11 THE FOREPERSON: DO YOU WANT TO RECESS TO 1:30?

12 MR. FINKELSTEIN: I THINK THE STAFF DOES. I THINK
13 WE HAD BETTER FOLLOW NORMAL HOURS. WE'LL HAND OUT THE
14 PROPOSED INDICTMENT AND PLEASE REMEMBER, IT'S A PROPOSED
15 INDICTMENT, AND IT CAN BE CHANGED. IT'S YOUR INDICTMENT.
16 WE'LL GO OVER THE JURY INSTRUCTIONS, AND AFTER THAT YOU CAN
17 START YOUR DELIBERATION.

18 THE FOREPERSON: I'LL REMIND THE JURORS, NO
19 DISCUSSION OF THESE ISSUES OVER LUNCH TILL WE RECONVENE OR
20 GO INTO FORMAL CONSIDERATION.

21 MR. FINKELSTEIN: THANK YOU VERY MUCH.

22 THE FOREPERSON: LET US RECESS UNTIL 1:30.

23 (THE LUNCHEON RECESS WAS TAKEN.)

24

25

26

27

28

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1 SAN JOSE, CALIFORNIA

JUNE 20, 2006

2

3

AFTERNOON SESSION:

4

THE FOREPERSON: COULD I CALL THE GRAND JURY TO
5 ORDER. LET THE RECORD SHOW THAT ALL 19 GRAND JURORS ARE
6 PRESENT.

7

MR. FINKELSTEIN: VERY GOOD. WE'RE GOING TO PASS
8 OUT -- WE HAVE A SET OF DUPLICATE COPIES OF THE PROPOSED
9 INDICTMENT. I WILL GO THROUGH THE PROPOSED INDICTMENT
10 DOCUMENT WITH YOU VERY BRIEFLY, THEN WE'LL GO OVER THE JURY
11 INSTRUCTIONS AND THE LAW THAT WILL GOVERN YOU IN MAKING YOUR
12 DECISION.

13

THE FOREPERSON: COULD I ASK ABOUT A PROCEDURAL
14 MATTER?

15

THE TWO JURORS WHO WERE NOT ABLE TO HEAR ALL OF
16 THE EVIDENCE WILL NOT PARTICIPATE IN THE DELIBERATION. CAN
17 THEY PARTICIPATE -- IF THERE WERE AN ACTION TO HAND DOWN IN
18 SOME OF THESE DOCUMENTS, CAN THEY PARTICIPATE IN THE HEARING
19 WITH THE JUDGE?

20

MR. FINKELSTEIN: YES. IN THE HEARING WITH THE

21 JUDGE, YES.

22 DOES EVERYONE HAVE A COPY? AS WE DISCUSSED PRIOR
23 TO THE NOON RECESS, THERE ARE SEVEN COUNTS, AND LET ME GO
24 THROUGH THEM WITH YOU.

25 THE FIRST THING, OF COURSE, IN THE INDICTMENT, ANY
26 CRIMINAL CASE IS PROSECUTED IN THE NAME OF THE PEOPLE OF THE
27 STATE OF CALIFORNIA, SO THAT IS THE PLAINTIFF IN THIS
28 ACTION.

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1 AND THEN WE HAVE THE NAMES OF THE THREE PROPOSED
2 DEFENDANTS: RONALD R. GONZALES; JOSEPH AUGUST GUERRA, III;
3 AND THE CORPORATION'S NAME, NORCAL WASTE SYSTEMS, INC.

4 THOSE ARE THE DEFENDANTS.

5 COUNT ONE CHARGES THAT THESE DEFENDANTS CONSPIRED
6 TO CHEAT AND DEFRAUD, WHICH IS A VIOLATION OF SECTION
7 182(A)4 OF THE PENAL CODE OF THE STATE OF CALIFORNIA,
8 ALLEGES THAT THEY DID THIS COMMENCING ON OR ABOUT OCTOBER 6,
9 2000, WHICH WAS THE FRIDAY MEETING WITH THE MAYOR, AND
10 THROUGH DECEMBER 14, 2004, WHICH IS THE SECOND AND FINAL
11 VOTE ON THE \$11.25 MILLION AMENDMENT.

12 NOW, THE ALLEGATION IS THAT THEY CONSPIRED WITH

13 EACH OTHER TO OBTAIN MONEY AND PROPERTY; IN THIS CASE WE'RE
14 TALKING ABOUT MONEY BY FALSE PRETENSES AND BY FALSE PROMISES
15 WITH THE FRAUDULENT INTENT NOT TO PERFORM THOSE PROMISES.
16 THEY WERE MADE IN CONNECTION WITH THE PROPOSAL BY NORCAL IN
17 2000, THE RESULTING AGREEMENT AND THE LATER AMENDMENTS TO
18 THAT AGREEMENT.

19 WE HAVE ALLEGED, GOING ON TO PAGE TWO, WHAT SOME
20 OF THESE FALSE PRETENSES AND PROMISES WERE, AND THEY WERE AS
21 FOLLOWS:

22 REPRESENTING IN THE PROPOSAL AND RESULTING
23 AGREEMENT THAT NORCAL WOULD PROVIDE INTEGRATED WASTE
24 SERVICES FOR THE PRICES SET FORTH IN THESE DOCUMENTS.

25 THE NEXT FALSE AND FRAUDULENT REPRESENTATION IS
26 REPRESENTING IN THE PROPOSAL THAT ANOTHER SEPARATE COMPANY,
27 CALIFORNIA WASTE SOLUTIONS, OR CWS, WOULD DO THE SORTING AND
28 PROCESSING OF RECYCLABLE MATERIALS AT NO COST TO NORCAL AND

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1 THAT CWS'S NEW FACILITY IN SAN JOSE WOULD BE STAFFED BY
2 EMPLOYEES REPRESENTED BY THE LONGSHOREMEN UNDER AN EXISTING
3 COLLECTIVE BARGAINING AGREEMENT.

4 THE NEXT FALSE, FRAUDULENT REPRESENTATION OR
5 PROMISE IS REPRESENTING THAT THE CITY HAD REQUESTED NORCAL'S

6 SUBCONTRACTOR, CWS, TO USE TEAMSTERS IN SAN JOSE, WHEN IN
7 FACT IT WAS THE MAYOR.

8 AND THE LAST ONE IS REPRESENTING IN THE AMENDMENT
9 TO THE AGREEMENT THAT THE ADDITIONAL \$11.25 MILLION IN
10 PAYMENTS TO NORCAL WAS FOR THE CONSIDERATION RECITED IN THE
11 AGREEMENT; NAMELY, THE NEIGHBORHOOD CLEANUP BINS OR ROLL-OUT
12 CONTAINERS, THE MATERIALS COMPOSITION STUDY AND E-WASTE
13 PROGRAM, AND THAT WAS NOT TO BE A CONSIDERATION.

14 IN THE CRIME OF CONSPIRACY, AS I WILL INSTRUCT YOU
15 IN A FEW MINUTES, BECAUSE THE LAW DOES NOT MAKE CRIMINAL BAD
16 THOUGHTS ALONE. IN EVERY CONSPIRACY, TO BE GUILTY OF THE
17 CRIME, THE CONSPIRATORS HAVE TO GO BEYOND MERE IDEAS INTO
18 SOME FORM OF ACTION.

19 SO MY COLLEAGUE AND I CAN CONSPIRE ALL DAY LONG
20 AND TALK ABOUT ROBBING THE BANK; WE'RE NOT GUILTY OF
21 CONSPIRACY UNLESS WE WILL COMMIT SOME, WHAT'S CALLED AN
22 OVERT ACT IN FURTHERANCE OF A CONSPIRACY.

23 SO IF I WERE TO GO GET A GUN TO USE IN THE BANK
24 ROBBERY, THAT WOULD CROSS THE LINE. IF I WERE TO GET A CAR
25 TO TAKE US TO THE BANK, THAT WOULD CROSS THE LINE, SO WE
26 HAVE TO GO BEYOND MERE THOUGHTS TO ACTIONS.

27 SO IN EVERY CONSPIRACY, WE HAVE TO FIND AT LEAST
28 ONE OVERT ACT COMMITTED WITHIN THE STATUTE OF LIMITATIONS.

1 AND FOR JURISDICTIONAL PURPOSES, IT IS WITHIN THE COUNTY OF
2 SANTA CLARA, AND I'LL GIVE YOU MORE INSTRUCTIONS ON THIS,
3 BUT I WANT TO SORT OF WALK YOU THROUGH THE INDICTMENT.

4 IN THIS CASE WE HAVE ALLEGED, IN THE FIRST CASE OF
5 THE FIRST CONSPIRACY, TWELVE OVERT ACTS, AND IT STARTS ON
6 PAGE THREE: THE FIRST OVERT ACT IS THE OCTOBER 6 MEETING
7 BETWEEN GONZALES, GUERRA, AND NORCAL, AND I'M NOT GOING TO
8 GO THROUGH LINE BY LINE, WORD FOR WORD, YOU CAN REVIEW THAT.
9 BASICALLY, THAT'S THE FIRST OVERT ACT.

10 THE SECOND OVERT ACT IS THE OCTOBER 9, 2000,
11 ENTERING INTO THAT ADDENDUM, BECAUSE THAT WAS DONE IN
12 RESPONSE TO THE MAYOR'S REQUEST, TO CARRY OUT THE PURPOSE OF
13 THAT REQUEST IN FURTHERANCE OF THE CONSPIRACY.

14 THE THIRD OVERT ACT ALLEGES THAT BETWEEN OCTOBER 6
15 AND DECEMBER 11, 2000, NORCAL PERSUADED CWS TO SIGN THIS
16 NEUTRALITY AGREEMENT.

17 THE FOURTH OVERT ACT ALLEGES THAT ON DECEMBER 8TH,
18 2000, DEFENDANT GONZALES SIGNED AND SUBMITTED THIS FALSE AND
19 MISLEADING MEMORANDUM TO THE CITY COUNCIL ABOUT HAVING
20 GREATER CONFIDENCE IN THE INFORMATION ABOUT THE FINANCIAL
21 IMPACT OF THE CITY COUNCIL'S CHOICES FOR RECYCLE PLUS AS A
22 RESULT OF THE AUDITOR'S INVOLVEMENT; WHEN HE KNEW FULL WELL,
23 IF ANYTHING, THERE WAS LESS REASON TO HAVE CONFIDENCE,

24 BECAUSE INFORMATION THAT WAS CRITICAL TO THE AUDITOR'S
25 REVIEW WAS INTENTIONALLY WITHHELD AND CONCEALED FROM THE
26 AUDITOR.

27 THE FIFTH OVERT ACT IS THE ENTERING INTO THE
28 AGREEMENT ON MARCH 27, 2001, THE WRITTEN AGREEMENT WITH THE

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1 CITY, WHICH NORCAL KNEW HAD A PRICE IN THE AGREEMENT THAT
2 WAS NOT ACCURATE, AND THAT THEY WERE ACTUALLY GETTING MORE
3 MONEY. WE HAVE ALLEGED THAT WAS DONE TO MISLEAD THE CITY TO
4 FURTHER THE CONSPIRACY TO CHEAT AND DEFRAUD THE CITY,
5 BECAUSE THEY WANTED TO INDUCE THE CITY INTO THINKING THAT
6 WAS THE PRICE WHEN IT WASN' T.

7 THE SIXTH OVERT ACT IS THE E-MAIL THAT DEFENDANT
8 GUERRA SENT ON FEBRUARY 10, 2003 INQUIRING ABOUT THE TIME
9 LINE, AND THE REASON THAT FURTHERED THE CONSPIRACY AS WE' VE
10 ALLEGED IS IT' S PART OF THE EFFORTS TO RAISE THE RATES TO
11 GENERATE THE MONEY TO PAY THE MONEY THAT THE MAYOR PROMISED
12 WOULD BE FORTHCOMING ON OCTOBER 6.

13 THE SEVENTH OVERT ACT IS THE MAY 26TH E-MAIL FROM
14 GUERRA REMINDING THE OTHER CITY OFFICIALS THAT THEY NEEDED
15 TO AMEND THE AGREEMENT BECAUSE THAT' S WHY THEY RAISED THE
16 RATES THE YEAR BEFORE.

17 THE EIGHTH OVERT ACT ALLEGES THAT ON JULY 22,
18 NORCAL SENT A LETTER TO THE CITY REQUESTING THE AMENDMENT
19 AND ALSO CHARACTERIZING THE ADDITIONAL COST AS UNFORESEEN
20 AND UNANTICIPATED WHEN IN FACT IT WAS BOTH FORESEEN AND
21 ANTICIPATED.

22 THE NINTH OVERT ACT IS THE SEPTEMBER 16, 2004 MEMO
23 THAT THE MAYOR SUBMITTED TO THE CITY COUNCIL IN SUPPORT OF
24 THE AMENDMENT TO THE NORCAL AGREEMENT, WHICH HAS THE FALSE
25 AND MISLEADING STATEMENT ABOUT LEARNING OF THE ISSUE AFTER
26 COUNCIL APPROVAL, WHEN THE MAYOR KNEW FULL WELL, AS DID
27 OTHER CONSPIRATORS, THIS ALL WAS KNOWN BEFORE THE FIRST
28 COUNCIL VOTE IN 2000.

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1 THE 10TH OVERT ACT IS THE MAYOR'S SPEAKING BEFORE
2 THE COUNCIL IN FAVOR OF THE RESOLUTION AUTHORIZING THE CITY
3 MANAGER AND CITY ATTORNEY TO NEGOTIATE THIS AMENDMENT
4 AGREEMENT WITH NORCAL.

5 THE 11TH OVERT ACT IS NORCAL'S STATEMENTS TO THE
6 CITY COUNCIL ON THE SECOND CITY COUNCIL VOTE ON SEPTEMBER
7 14, 2004, WHICH WERE BOTH FALSE AND MISLEADING. THE
8 STATEMENT WAS, THE FIRST FALSE AND MISLEADING STATEMENT WAS

9 THAT IT WAS THE CITY THAT REQUESTED THEM TO CHANGE, AND THE
10 SECOND IS THAT NORCAL DIDN' T KNOW IT WAS THE MAYOR WHO MADE
11 THAT REQUEST.

12 THE 12TH OVERT ACT IS THE SIGNING AND DELIVERING
13 OF THE SECOND WRITTEN, SEPARATE SECOND WRITTEN AMENDMENT TO
14 THE AGREEMENT TO PROVIDE FOR ADDITIONAL PAYMENTS OF \$11.25
15 MILLION TO NORCAL IN EXCHANGE FOR ITEMS THAT WERE JUST
16 NOMINAL OR TOKEN CONSIDERATIONS WHEN THEY KNEW THAT WAS NOT
17 THE CORRECT OR THE REAL REASON. SO THAT' S COUNT ONE, THE
18 CONSPIRACY.

19 NOW, AS YOU WILL LEARN WHEN I GO OVER THE
20 INSTRUCTIONS, IN ORDER TO RETURN AN INDICTMENT, AT LEAST
21 TWELVE JURORS WHO HEARD ALL OF THE EVIDENCE AND TESTIMONY
22 HAVE TO VOTE IN FAVOR OF THE INDICTMENT.

23 AND YOU HAVE TO FIND AT LEAST ONE OVERT ACT. BUT
24 YOU DON' T HAVE TO FIND ALL THE OVERT ACTS, YOU HAVE TO FIND
25 JUST ONE WITHIN THE STATUTE OF LIMITATIONS AND THAT IT
26 OCCURRED WITHIN COUNTY OF SANTA CLARA.

27 LET ME RUN THROUGH THE CHARGES.

28 THAT' S COUNT ONE.

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1

COUNT TWO IS THE BRIBERY COUNT IN VIOLATION OF
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2 SECTION 165 OF THE PENAL CODE OF THE STATE OF CALIFORNIA
3 THAT ALLEGES THAT RONALD GONZALES OFFERED TO RECEIVE AND DID
4 RECEIVE A BRIBE ON THE UNDERSTANDING THAT HIS OFFICIAL VOTE,
5 OPINION, JUDGMENT, AND SO FORTH WOULD BE INFLUENCED THEREBY
6 IN CONNECTION WITH A MATTER THAT MIGHT COME BEFORE HIM,
7 NAMELY THE AWARDING OF THE CONTRACT AND HOW MUCH MONEY TO
8 PAY NORCAL.

9 COUNT THREE IS THE SAME PENAL CODE SECTION, BUT IT
10 JUST CHARGES THE BRIBERY FROM THE GIVER'S POINT OF VIEW AS
11 OPPOSED TO THE RECEIVER. HERE WE HAVE CHARGED NORCAL WITH
12 GIVING THE BRIBE BY DOING WHAT THE MAYOR ASKED FOR, NAMELY
13 GETTING CWS TO SWITCH TO THE TEAMSTERS.

14 COUNT FOUR ACCUSES RONALD GONZALES OF FALSIFYING A
15 PUBLIC RECORD, AND THAT'S A VIOLATION OF SECTION 6201 OF THE
16 GOVERNMENT CODE OF THE STATE OF CALIFORNIA. THAT RELATES TO
17 THE DECEMBER 8, 2000 MEMO IN WHICH HE REPORTED OUT TO THE
18 COUNCIL THAT, "BECAUSE OF THE AUDITORS'S INVOLVEMENT, WE CAN
19 NOW HAVE GREATER CONFIDENCE IN THE FINANCIAL IMPACT OF OUR
20 CHOICES," WHEN IN FACT THE OPPOSITE WAS TRUE.

21 COUNT FIVE CHARGES A SECOND CONSPIRACY. AND THE
22 DIFFERENCE BETWEEN COUNT FOUR AND COUNT FIVE HAS TO DO WITH
23 THE OBJECT OF THE CONSPIRACY. IN COUNT ONE, THE OBJECT OF
24 THE CONSPIRACY IS TO CHEAT AND DEFRAUD THE CITY BY MEANS OF
25 FALSE PROMISES AND FALSE REPRESENTATIONS.

26 IN COUNT FIVE, WE HAVE A DIFFERENT SECTION OF THE
27 PENAL CODE, 182(A)(1), WHICH IS A CONSPIRACY TO COMMIT A

28 CRIME, AND THE TARGET CRIME HERE, THE OBJECT OF THE

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1 CONSPIRACY, IS THE CRIME OF MISAPPROPRIATING PUBLIC MONIES,
2 WHICH IS A VIOLATION OF SECTION 424(A)(1) OF THE PENAL
3 CODE.

4 AS YOU WILL SEE, THE FIRST TWELVE OVERT ACTS ARE
5 ESSENTIALLY THE SAME OVERT ACTS AS BEFORE. THERE IS ONE
6 ADDITIONAL OVERT ACT IN THIS CONSPIRACY THAT'S NOT PRESENTED
7 IN THE FIRST CONSPIRACY, AND THAT IS OVERT ACT 13, AND LET
8 ME GET THAT. THAT'S ON PAGE 16.

9 WE HAVE ALLEGED AS AN ADDITIONAL OVERT ACT IN THIS
10 CONSPIRACY, AND ONE OF THE REASONS WE HAVE AN EXTRA OVERT
11 ACT HERE IS WE HAVE ALLEGED A DIFFERENT ENDING DATE IN THE
12 SECOND CONSPIRACY, WHEREAS THE CONSPIRACY TO CHEAT AND
13 DEFRAUD WE HAVE ALLEGED AS GOING THROUGH DECEMBER 14, AT
14 LEAST DECEMBER 14, 2004.

15 THIS ONE WE HAVE ALLEGED AS GOING THROUGH AT LEAST
16 MARCH OF 2006, BECAUSE WE KNOW FROM THE TESTIMONY OF
17 NORCAL'S WITNESS THAT THEY WERE STILL GETTING PAYMENTS AT
18 LEAST AS LATE AS MARCH 2006. SO THE MISAPPROPRIATION IS
19 ONGOING, AND WE HAVE A NEWER OVERT ACT, 13, WHICH RELATES TO

20 THE MAYOR'S E-MAIL MESSAGE OF JUNE 28, 2005 TO THE 300
21 COMMUNITY LEADERS AND COUNCILMEMBERS IN WHICH HE GIVES THE
22 FALSE AND MISLEADING STATEMENT ABOUT MEETING WITH NORCAL ON
23 OCTOBER 6 AND NOT KNOWING ABOUT THIS ISSUE AND IT NOT BEING
24 DISCUSSED.

25 WE'VE ALLEGED THAT THE SENDING OF THIS E-MAIL
26 MESSAGE WAS IN FURTHERANCE OF THE CONSPIRACY TO
27 MISAPPROPRIATE PUBLIC MONIES, BECAUSE ITS PURPOSE WAS TO
28 PREVENT THE CITY OF SAN JOSE FROM LEARNING THAT THE CITY WAS

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1 PAYING NORCAL \$11.25 MILLION DOLLARS AS PART OF THE SECRET
2 AND ILLEGAL AGREEMENT BETWEEN GONZALES AND NORCAL THAT WAS
3 ENTERED INTO ON OCTOBER 6, 2000.

4 THE POINT BEING, IN ORDER TO PREVENT THE FLOW OF
5 MONEY FROM STOPPING, HE DIDN'T WANT THE FULL FACTS AND TRUTH
6 TO COME OUT, BECAUSE PEOPLE LIKE THE GRAND JURY AND OTHERS
7 MIGHT PUT A STOP TO IT SOONER.

8 THEN WE HAVE COUNT SIX, WHICH SAYS THAT NOT ONLY
9 DID THEY CONSPIRE TO COMMIT THE CRIME OF MISAPPROPRIATING
10 PUBLIC MONIES, BUT THE DEFENDANTS ALSO COMMITTED THE CRIME
11 BECAUSE THE MONEY WAS ACTUALLY PAID AND APPROPRIATED WITHOUT
12 AUTHORITY OF LAW, AND THEY KNEW THAT WHAT THEY WERE DOING

13 WAS I LLEGAL.

14 AND THE LAST COUNT, COUNT SEVEN, IS FALSIFYING THE
15 SECOND PUBLIC RECORD, AND THAT HAS TO DO WITH THE MAYOR' S
16 SEPTEMBER 16, 2004 MEMO IN WHICH HE SAID, "AFTER COUNCIL
17 APPROVAL, THE MAYOR' S OFFICE LEARNED," ET CETERA, WHEN IN
18 FACT HE KNEW THAT WELL BEFORE COUNCIL APPROVAL, EVEN BEFORE
19 THE VERY FIRST VOTE ON OCTOBER 15.

20 THERE IS ONE OTHER MATTER WE' RE GOING TO ASK YOU
21 TO DELIBERATE ON IN THE INDICTMENT. WE ARE GOING TO ASK YOU
22 TO MAKE A FINDING -- AGAIN, AT LEAST TWELVE JURORS WHO HEARD
23 ALL THE EVIDENCE -- REGARDING THE STATUTE OF LIMITATIONS. I
24 AM GOING TO ASK YOU TO FIND THE OFFENSES CHARGED ABOVE COULD
25 NOT HAVE BEEN DISCOVERED UNTIL ON OR AFTER SEPTEMBER 12,
26 2002, THAT' S WHEN CARL MOSHER, WHEN THERE WAS THIS MEETING
27 WITH GUERRA AND CWS AND NORCAL. AND EITHER ON THAT DAY OR
28 THE FOLLOWING DAY, MOSHER LEARNED ABOUT THE MEETING, SENT

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1 HIMSELF AN E-MAIL REPORTING WHAT HE LEARNED, AND THE
2 STATEMENT ABOUT THE MAYOR HAVING COMMITTED TO MAKE GOOD,
3 WHATEVER THAT MEANS.

4 SO WE' RE ALLEGING, WE DON' T KNOW IT WAS DISCOVERED

5 ON THAT DAY, WE DON'T THINK IT WAS, BUT WE'RE ALLEGING FOR
6 THE PURPOSES OF THE STATUTE OF LIMITATIONS, THAT IS THE
7 EARLIEST CONCEIVABLE DATE THAT COULD HAVE BEEN DISCOVERED.
8 WE THINK THAT'S RIGHT ON THE EVIDENCE HERE.

9 THAT'S WHAT THE INDICTMENT LOOKS LIKE, AND THEN
10 YOU'LL DELIBERATE ON THAT. I HAVE THE ORIGINAL, WHICH I
11 HAVE SIGNED AND WHICH I'LL GIVE TO YOUR FOREPERSON FOR
12 SAFEKEEPING. IN THE EVENT YOU FIND THAT SOME OR ALL OF
13 THESE ARE TRUE, THEN OF COURSE HE WILL SIGN THE INDICTMENT,
14 A TRUE BILL, LET US KNOW, AND WE'LL GET THE JUDGE.

15 NOW, AS YOU WILL HEAR, THESE ARE SEPARATE COUNTS,
16 SEPARATE POTENTIAL DEFENDANTS. YOU HAVE TO BASICALLY RENDER
17 SEPARATE DECISIONS. YOU CAN INDICT SOME, ALL, OR NONE,
18 SOME, ALL, OR NONE OF THE COUNTS. IT DOESN'T HAVE TO BE
19 THESE COUNTS, WE CAN CHANGE AND MODIFY IT. LET US KNOW WHAT
20 YOUR DECISION IS.

21 THE LAST THING IN THE INDICTMENT, FOR HISTORICAL
22 REASONS, THE INDICTMENT LISTS THE NAMES OF ALL THE WITNESSES
23 WHO TESTIFIED, AND THEY ARE LISTED IN ALPHABETICAL ORDER BY
24 LAST NAME, NOT BY ORDER OF APPEARANCE. IF YOU FIND A
25 MISTAKE THERE, LET US KNOW. WE THINK THAT'S ACCURATE, BUT
26 THIS IS A SORT OF WORK IN PROGRESS, A WORKING DOCUMENT, A
27 STARTING POINT.

28 IF YOU'RE ABLE TO COME TO AGREEMENT ON THIS

1 INDICTMENT, FINE. IF YOU HAVE QUESTIONS, COMMENTS,
2 THOUGHTS, LET US KNOW. WE'RE HERE TO ASSIST YOU.

3 ANY QUESTIONS ABOUT THE INDICTMENT?

4 A JUROR: WHAT IS THE STATUTE OF LIMITATIONS ON
5 THESE CHARGES?

6 MR. FINKELSTEIN: THE STATUTE OF LIMITATIONS, I
7 WILL BE GIVING YOU INSTRUCTIONS ABOUT THAT, BUT BASICALLY
8 THE STATUTE OF LIMITATIONS ON CONSPIRACY IS THREE YEARS FROM
9 THE LAST OVERT ACT IN FURTHERANCE OF THE CONSPIRACY.

10 SO IF YOU FIND AN OVERT ACT THAT'S LESS THAN THREE
11 YEARS OLD FROM TODAY, THAT WOULD MAKE IT.

12 THE STATUTE OF LIMITATIONS FOR BRIBERY IS FOUR
13 YEARS FROM THE DATE OF DISCOVERY. AND WE'VE ALLEGED
14 SEPTEMBER 12, 2002 AS THE DATE OF DISCOVERY, AND DATE OF
15 DISCOVERY MEANS EITHER WHEN IT ACTUALLY WAS DISCOVERED OR
16 WHEN IT SHOULD HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF
17 DUE DILIGENCE.

18 SO WE HAVE THAT ISSUE.

19 ON THE FALSIFICATION OF PUBLIC RECORDS, I DON'T
20 THINK THERE IS A STATUTE OF LIMITATIONS ON THAT. OR IF
21 THERE IS, IT WOULD BE FOUR YEARS -- WE'LL GO INTO THAT IN
22 THE INSTRUCTIONS.

23 ANY OTHER QUESTIONS?

24 THE FOREPERSON: IS IT IMPORTANT TO SPELL MY NAME
25 RIGHT?

26 MR. FINKELSTEIN: I APOLOGIZE.

27 THE FOREPERSON: THERE'S A C BETWEEN THE S AND H.

28 MR. FINKELSTEIN: THAT'S WHY WE BROUGHT A PRINTER.

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1 THE FOREMAN: I'LL TELL YOU, YOU ARE NOT THE
2 FIRST.

3 MR. FINKELSTEIN: THANK YOU FOR BRINGING THAT TO
4 OUR ATTENTION.

5 MR. FINKELSTEIN: LET ME START, AND IF ANYONE
6 NEEDS TO TAKE A BREAK, LET ME KNOW.

7 I WILL READ THEM SLOWLY SO THE COURT REPORTER GETS
8 A GOOD RECORD.

9 CAN WE ALL JUST FOLLOW ALONG ON THE WRITTEN PART,
10 AND WE WON'T HAVE TO BOTHER WITH THE SCREEN. IS THAT OKAY?

11 MEMBERS OF THE GRAND JURY, I WILL NOW
12 INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE.
13 I WILL GIVE YOU A COPY OF THE INSTRUCTIONS TO USE
14 IN THE JURY ROOM.

15 YOU MUST DECIDE WHAT THE FACTS ARE. IT IS UP

16 TO YOU EXCLUSIVELY TO DECIDE WHAT HAPPENED, BASED
17 ONLY ON THE EVIDENCE THAT HAS BEEN PRESENTED TO
18 YOU IN THIS GRAND JURY PROCEEDING.

19 DO NOT LET BIAS, SYMPATHY, PREJUDICE, OR
20 PUBLIC OPINION INFLUENCE YOUR DECISION. YOU MUST
21 REACH YOUR DECISION WITHOUT ANY CONSIDERATION OF
22 PUNISHMENT.

23 AND IN THAT REGARD, THERE WAS A QUESTION ASKED
24 ABOUT THE CORPORATION AND THE FACT THAT IF CONVICTED, THEY
25 COULD BE ASKED TO MAKE RESTITUTION. THAT SHOULD NOT BE A
26 FACTOR, FOR EXAMPLE, THAT IN ANY WAY, SHAPE, OR FORM
27 INFLUENCES YOUR DECISION WHETHER OR NOT TO INDICT THE
28 CORPORATION.

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1 YOU MUST FOLLOW THE LAW AS I EXPLAIN IT TO
2 YOU, EVEN IF YOU DISAGREE WITH IT. PAY CAREFUL
3 ATTENTION TO ALL THESE INSTRUCTIONS AND CONSIDER
4 THEM TOGETHER. IF I REPEAT ANY INSTRUCTION OR
5 IDEA, DO NOT CONCLUDE THAT IT IS MORE IMPORTANT
6 THAN ANY OTHER INSTRUCTION OR IDEA BECAUSE I
7 REPEATED IT.

8 SOME WORDS OR PHRASES USED DURING THIS
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9 PROCEEDING HAVE LEGAL MEANINGS THAT ARE DIFFERENT
10 FROM THEIR MEANINGS IN EVERYDAY USE. THESE WORDS
11 AND PHRASES WILL BE SPECIFICALLY DEFINED IN THESE
12 INSTRUCTIONS. PLEASE BE SURE TO LISTEN CAREFULLY
13 AND FOLLOW THE DEFINITIONS THAT I GIVE YOU. WORDS
14 AND PHRASES NOT SPECIFICALLY DEFINED IN THESE
15 INSTRUCTIONS ARE TO BE APPLIED USING THEIR
16 ORDINARY EVERYDAY MEANINGS. SOME OF THESE
17 INSTRUCTIONS MAY NOT APPLY DEPENDING UPON YOUR
18 FINDINGS ABOUT THE FACTS OF THE CASE. DO NOT
19 ASSUME JUST BECAUSE I GIVE A PARTICULAR
20 INSTRUCTION THAT I'M SUGGESTING ANYTHING ABOUT THE
21 FACTS.

22 AFTER YOU HAVE DECIDED WHAT THE FACTS ARE,
23 FOLLOW THE INSTRUCTIONS THAT DO APPLY TO THE FACTS
24 AS YOU FIND THEM.

25 MY COLLEAGUE WANTS TO POINT OUT THAT I MISSPOKE ON
26 THE STATUTE OF LIMITATIONS ON THE FALSIFYING OF PUBLIC
27 RECORDS. IT'S FOUR YEARS FROM THE DATE OF DISCOVERY.

28 LET ME CONTINUE WITH THE INSTRUCTIONS:

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1 DO NOT DO ANY RESEARCH ON YOUR OWN OR AS A
2 GROUP. DO NOT USE A DICTIONARY OR OTHER REFERENCE
3 MATERIALS, INVESTIGATE THE FACTS OR THE LAW,
4 CONDUCT EXPERIMENTS, OR VISIT THE SCENE OF ANY
5 EVENT INVOLVED IN THIS CASE.

6 IF YOU HAPPEN TO PASS BY THE SCENE, DO NOT
7 STOP OR INVESTIGATE.

8 YOU HAVE BEEN GIVEN NOTEBOOKS AND MAY HAVE
9 TAKEN NOTES DURING THE GRAND JURY PROCEEDING.
10 PLEASE DO NOT REMOVE YOUR NOTES FROM THE GRAND
11 JURY ROOM. YOU MAY USE YOUR NOTES DURING
12 DELIBERATIONS ONLY TO REMIND YOURSELF OF WHAT
13 HAPPENED DURING THE GRAND JURY PROCEEDING. BUT
14 REMEMBER, YOUR NOTES MAY BE INACCURATE OR
15 INCOMPLETE. IF THERE IS A DISAGREEMENT ABOUT WHAT
16 ACTUALLY HAPPENED DURING THE GRAND JURY
17 PROCEEDING, YOU MAY ASK THE COURT REPORTER TO READ
18 BACK THE RELEVANT PARTS OF THE TESTIMONY TO ASSIST
19 YOU.

20 IT IS THE TESTIMONY THAT MUST GUIDE YOUR
21 DELIBERATIONS, NOT YOUR NOTES.

22 THE GRAND JURY SHALL FIND AN INDICTMENT WHEN
23 ALL THE EVIDENCE BEFORE IT TAKEN TOGETHER, IF
24 UNEXPLAINED OR UNCONTRADICTED, WOULD IN ITS
25 JUDGMENT WARRANT A CONVICTION BY A TRIAL JURY.

26 THIS MEANS THE GRAND JURY MUST FIND PROBABLE

20 MATERIAL OBJECTS, OR OTHER THINGS PRESENTED TO THE
21 SENSES.

22 THE GRAND JURY IS NOT REQUIRED TO HEAR
23 EVIDENCE FOR THE DEFENDANT, BUT IT SHALL WEIGH ALL
24 THE EVIDENCE SUBMITTED TO IT, AND WHEN IT HAS
25 REASON TO BELIEVE THAT OTHER EVIDENCE WITHIN ITS
26 REACH WILL EXPLAIN AWAY THE CHARGE, IT SHALL ORDER
27 THE EVIDENCE TO BE PRODUCED, AND FOR THAT PURPOSE
28 MAY REQUIRE THE DISTRICT ATTORNEY TO ISSUE PROCESS

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1 FOR THE WITNESS.

2 YOU MUST SEPARATELY CONSIDER THE EVIDENCE AS
3 IT APPLIES TO EACH PERSON, AND PERSON INCLUDES
4 CORPORATION. YOU MUST DECIDE EACH CHARGE FOR EACH
5 PERSON SEPARATELY. IF YOU CANNOT REACH A DECISION
6 ON ALL OF THE PERSONS OR ON ANY OF THE CHARGES
7 AGAINST ANY PERSON, YOU MUST REPORT YOUR
8 DISAGREEMENT TO THE COURT --

9 ACTUALLY, THAT SHOULD SAY TO THE DISTRICT
10 ATTORNEY.

11 AND YOU MUST RETURN YOUR DECISION ON ANY

12 PERSON CHARGED ON WHICH 12 OR MORE HAVE AGREED.
13 UNLESS I TELL YOU OTHERWISE, ALL INSTRUCTIONS
14 APPLY TO EACH PERSON.

15 UNDER THE LAW, A CORPORATION MUST BE TREATED
16 IN THE SAME WAY AS A NATURAL PERSON. WHEN I USE
17 WORDS LIKE PERSON OR HE OR SHE IN THESE
18 INSTRUCTIONS, THOSE INSTRUCTIONS ALSO APPLY TO
19 CORPORATIONS.

20 ONE OF THE PERSONS IN THIS CASE IS A
21 CORPORATION. A CORPORATION IS A LEGAL ENTITY AND
22 MAY BE INDICTED FOR A CRIMINAL OFFENSE AND MAY
23 COMMIT OVERT ACTS. OF COURSE, A CORPORATION CAN
24 ONLY ACT THROUGH ITS AGENTS. THAT IS, ITS
25 DIRECTORS, OFFICERS, AND EMPLOYEES OR OTHER
26 PERSONS AUTHORIZED TO ACT FOR IT.

27 A CORPORATION IS LEGALLY RESPONSIBLE FOR
28 THOSE ACTS OR ADMISSIONS OF ITS AGENTS MADE OR

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1 PERFORMED IN THE COURSE OF THEIR EMPLOYMENT.
2 THUS, BEFORE YOU MAY FIND PROBABLE CAUSE TO INDICT
3 A CORPORATE PERSON, YOU MUST FIND THAT THERE IS
4 PROBABLE CAUSE TO BELIEVE THAT ALL OF THE ELEMENTS

5 OF THE OFFENSE AS I HAVE EXPLAINED THEM TO YOU
6 HAVE BEEN COMMITTED AS TO THE CORPORATION IN THE
7 FORM OF ACTS OR OMISSIONS OF ITS AGENTS WHICH WERE
8 PERFORMED IN THE SCOPE OF THEIR EMPLOYMENT.

9 TO BE ACTING WITHIN THE SCOPE OF ONE'S
10 EMPLOYMENT MAY BE SHOWN IN SEVERAL WAYS:

11 FIRST, IF THE ACT OR OMISSION WAS
12 SPECIFICALLY AUTHORIZED BY THE CORPORATION, IT
13 WOULD BE THE WITHIN THE SCOPE OF THE AGENT'S
14 EMPLOYMENT.

15 SECOND, EVEN IF THE ACT OR OMISSION WAS NOT
16 SPECIFICALLY AUTHORIZED, IT MAY STILL BE WITHIN
17 THE SCOPE OF AN AGENT'S EMPLOYMENT IF BOTH OF THE
18 FOLLOWING HAVE BEEN PROVEN:

19 THAT THE AGENT INTENDED THAT HIS ACT WOULD
20 PRODUCE SOME BENEFIT TO THE CORPORATION;

21 AND THAT THE AGENT WAS ACTING WITHIN HIS
22 AUTHORITY.

23 AN ACT IS WITHIN AN AGENT'S AUTHORITY IF IT
24 WAS DIRECTLY RELATED TO THE PERFORMANCE OF THE
25 KIND OF DUTIES THAT THE AGENT HAD THE GENERAL
26 AUTHORITY TO PERFORM.

27 IF YOU FIND THAT THE AGENT WAS ACTING WITHIN
28 THE SCOPE OF HIS EMPLOYMENT, THE FACT THAT THE

1 AGENT'S ACT WAS ILLEGAL, CONTRARY TO HIS
2 EMPLOYER'S INSTRUCTIONS OR AGAINST THE
3 CORPORATION'S POLICIES, WILL NOT RELIEVE THE
4 CORPORATION OF RESPONSIBILITY FOR IT; HOWEVER, YOU
5 MAY CONSIDER THE FACT THAT THE AGENT DISOBEYED
6 INSTRUCTIONS OR VIOLATED PUBLIC POLICY IN
7 DETERMINING WHETHER THE AGENT INTENDED TO BENEFIT
8 THE CORPORATION OR WAS ACTING WITHIN THIS
9 AUTHORITY.

10 FINALLY, IF YOU FIND AN AGENT WAS NOT ACTING
11 WITHIN THE SCOPE OF HIS AUTHORITY AT THE TIME, YOU
12 SHOULD THEN CONSIDER WHETHER THE CORPORATION LATER
13 APPROVED THE ACT. AN ACT IS APPROVED AFTER IT IS
14 PERFORMED WHEN ANOTHER AGENT OF THE CORPORATION,
15 HAVING FULL KNOWLEDGE OF THE ACT AND ACTING WITHIN
16 THE SCOPE OF HIS EMPLOYMENT, AS I JUST EXPLAINED
17 IT TO YOU, APPROVES THE ACT BY HIS WORDS OR
18 CONDUCT.

19 THE CORPORATION IS RESPONSIBLE FOR ANY ACT OR
20 OMISSION APPROVED BY ITS AGENT IN THIS MATTER.

21 YOU MUST DECIDE WHAT THE FACTS ARE IN THIS
22 CASE. YOU MUST USE ONLY THE EVIDENCE THAT WAS

23 PRESENTED IN THIS COURTROOM. EVIDENCE IS THE
24 SWORN TESTIMONY OF WITNESSES, THE EXHIBITS
25 ADMITTED INTO EVIDENCE, AND ANYTHING ELSE I TOLD
26 YOU TO CONSIDER AS EVIDENCE.

27 NOTHING THAT AN ATTORNEY SAYS IS EVIDENCE,
28 EXCEPT WHILE THE ATTORNEY IS TESTIFYING UNDER

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1 OATH.

2 SO, FOR EXAMPLE, MY REMARKS AND MY SUMMING UP OF
3 THE CASE, THAT'S NOT EVIDENCE. BUT WHEN TODD THOMPSON
4 TESTIFIED ON THE WITNESS STAND, WHO HAPPENS TO BE AN
5 ATTORNEY, THAT IS EVIDENCE.

6 IN THEIR OPENING STATEMENTS AND CLOSING
7 ARGUMENTS THE ATTORNEYS DISCUSS THE CASE, BUT
8 THEIR REMARKS ARE NOT EVIDENCE. THEIR QUESTIONS
9 ARE NOT EVIDENCE. ONLY THE WITNESSES' ANSWERS ARE
10 EVIDENCE. THE ATTORNEY'S QUESTIONS ARE
11 SIGNIFICANT ONLY IF THEY HELPED YOU TO UNDERSTAND
12 THE WITNESS'S ANSWERS. DO NOT ASSUME THAT
13 SOMETHING IS TRUE JUST BECAUSE ONE OF THE
14 ATTORNEYS ASKED A QUESTION THAT SUGGESTED IT WAS
15 TRUE.

16 YOU MUST DISREGARD ANYTHING YOU SAW OR HEARD
17 WHEN THE GRAND JURY WAS NOT IN SESSION, EVEN IF IT
18 WAS DONE OR SAID BY ONE OF THE PARTIES OR
19 WITNESSES.

20 THE COURT REPORTER HAS MADE A RECORD OF
21 EVERYTHING THAT WAS SAID DURING THE GRAND JURY
22 PROCEEDING. IF YOU DECIDE THAT IT IS NECESSARY,
23 YOU MAY ASK THAT THE COURT REPORTER'S NOTES BE
24 READ TO YOU. YOU MUST ACCEPT THE COURT REPORTER'S
25 NOTES AS ACCURATE.

26 FACTS MAY BE PROVED BY DIRECT OR
27 CIRCUMSTANTIAL EVIDENCE, OR BY A COMBINATION OF
28 BOTH. DIRECT EVIDENCE CAN PROVE A FACT BY ITSELF.

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1 FOR EXAMPLE, IF A WITNESS TESTIFIES HE SAW IT
2 RAINING OUTSIDE BEFORE HE CAME INTO THE
3 COURTHOUSE, THAT TESTIMONY IS IT DIRECT EVIDENCE
4 THAT IT WAS RAINING.

5 CIRCUMSTANTIAL EVIDENCE ALSO MAY BE CALLED
6 INDIRECT EVIDENCE. CIRCUMSTANTIAL EVIDENCE DOES
7 NOT DIRECTLY PROVE THE FACT TO BE DECIDED, BUT IS

8 EVIDENCE OF ANOTHER FACT OR GROUP OF FACTS FROM
9 WHICH YOU MAY CONCLUDE THE TRUTH OF THE FACT IN
10 QUESTION.

11 FOR EXAMPLE, IF A WITNESS TESTIFIES THAT HE
12 SAW SOMEONE COME INSIDE WEARING A RAINCOAT COVERED
13 WITH DROPS OF WATER, THAT TESTIMONY IS
14 CIRCUMSTANTIAL EVIDENCE, BECAUSE IT MAY SUPPORT
15 THAT CONCLUSION THAT IT WAS RAINING OUTSIDE.

16 BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE ARE
17 ACCEPTABLE TYPES OF EVIDENCE TO PROVE OR DISPROVE
18 THE ELEMENTS OF THE CHARGE, INCLUDING INTENT AND
19 MENTAL STATE AND ACTS NECESSARY TO A CONVICTION,
20 AND NEITHER IS NECESSARILY MORE RELIABLE THAN THE
21 OTHER. NEITHER IS ENTITLED TO ANY GREATER WEIGHT
22 THAN THE OTHER.

23 YOU MUST DECIDE WHETHER A FACT IN ISSUE HAS
24 BEEN PROVED BASED ON ALL THE EVIDENCE.

25 YOU ALSO MUST JUDGE THE CREDIBILITY OR
26 BELIEVABILITY OF THE WITNESSES. IN DECIDING
27 WHETHER TESTIMONY IS TRUE AND ACCURATE, USE YOUR
28 COMMON SENSE AND EXPERIENCE.

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1 THE TESTIMONY OF EACH WITNESS MUST BE JUDGED
2 BY THE SAME STANDARD. YOU MUST SET ASIDE ANY BIAS
3 OR PREJUDICE YOU MAY HAVE, INCLUDING ANY BASED ON
4 THE WITNESS' S GENDER, RACE, RELIGION, OR NATIONAL
5 ORIGIN. YOU MAY BELIEVE ALL, PART, OR NONE OF ANY
6 WITNESS' S TESTIMONY. CONSIDER THE TESTIMONY OF
7 EACH WITNESS AND DECIDE HOW MUCH OF IT YOU
8 BELIEVE.

9 IN EVALUATING A WITNESS' S TESTIMONY, YOU MAY
10 CONSIDER ANYTHING THAT REASONABLY TENDS TO PROVE OR DISPROVE
11 THE TRUTH OR ACCURACY OF THAT TESTIMONY.

12 AMONG THE FACTORS THAT YOU MAY CONSIDER ARE:

13 HOW WELL COULD THE WITNESS SEE, HEAR, OR OTHERWISE
14 PERCEIVE THE THINGS ABOUT WHICH THE WITNESS TESTIFIED?

15 HOW WELL WAS THE WITNESS ABLE TO REMEMBER AND
16 DESCRIBE WHAT HAPPENED?

17 WHAT WAS THE WITNESS' S BEHAVIOR WHILE TESTIFYING?

18 DID THE WITNESS UNDERSTAND THE QUESTIONS AND
19 ANSWER THEM DIRECTLY?

20 WAS THE WITNESS' S TESTIMONY INFLUENCED BY A FACTOR
21 SUCH AS BIAS OR PREJUDICE?

22 THE PERSONAL RELATIONSHIP OF SOMEONE INVOLVED IN
23 THE CASE OR A PERSONAL INTEREST IN HOW THE CASE IS DECIDED.

24 WHAT WAS THE WITNESS' S ATTITUDE ABOUT THE CASE OR
25 ABOUT TESTIFYING?

26 DID THE WITNESS MAKE A STATEMENT IN THE PAST THAT

27 IS CONSISTENT OR INCONSISTENT WITH HIS OR HER TESTIMONY?
28 HOW REASONABLE IS THE TESTIMONY WHEN YOU CONSIDER

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1 ALL THE OTHER EVIDENCE IN THE CASE?

2 DID OTHER EVIDENCE PROVE OR DISPROVE ANY
3 FACT ABOUT WHICH THE WITNESS TESTIFIED?

4 DID THE WITNESS ADMIT TO BEING UNTRUTHFUL?

5 WAS IT THE WITNESS'S -- WHAT IS THE WITNESS'S
6 CHARACTER FOR TRUTHFULNESS?

7 HAS THE WITNESS BEEN CONVICTED OF A FELONY?

8 I DON'T THINK WE HAD THAT IN THIS CASE.

9 HAS THE WITNESS ENGAGED IN OTHER CONDUCT THAT
10 REFLECTS ON HIS OR HER BELIEVABILITY?

11 WAS THE WITNESS PROMISED IMMUNITY OR LENIENCY IN
12 EXCHANGE FOR HIS OR HER TESTIMONY?

13 DO NOT AUTOMATICALLY REJECT TESTIMONY JUST BECAUSE
14 OF INCONSISTENCIES OR CONFLICTS. CONSIDER WHETHER THE
15 DIFFERENCES ARE IMPORTANT OR NOT.

16 PEOPLE SOMETIMES HONESTLY FORGET THINGS OR MAKE
17 MISTAKES ABOUT WHAT THEY REMEMBER.

18 ALSO, TWO PEOPLE MAY WITNESS THE SAME EVENT,

19 YET SEE OR HEAR IT DIFFERENTLY.

20 IF THE EVIDENCE ESTABLISHES THAT A WITNESS' S
21 CHARACTER FOR TRUTHFULNESS HAS NOT BEEN DISCUSSED
22 AMONG THE PEOPLE WHO KNOW HIM OR HER, YOU MAY
23 CONCLUDE FROM THE LACK OF DISCUSSION THAT THE
24 WITNESS' S CHARACTER FOR TRUTHFULNESS IS GOOD.

25 IF YOU DO NOT BELIEVE A WITNESS' S TESTIMONY
26 THAT HE OR SHE NO LONGER REMEMBERS SOMETHING, THAT
27 TESTIMONY IS INCONSISTENT WITH THE WITNESS' S
28 EARLIER STATEMENT ON THAT SUBJECT.

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2270

1 IF YOU DECIDE THAT A WITNESS DELIBERATELY
2 LIED ABOUT SOMETHING SIGNIFICANT IN THIS CASE, YOU
3 SHOULD CONSIDER NOT BELIEVING ANYTHING THAT
4 WITNESS SAID.

5 OR, IF YOU THINK THAT THE WITNESS LIED ABOUT
6 SOME THINGS BUT TOLD THE TRUTH ABOUT OTHERS, YOU
7 MAY SIMPLY ACCEPT THE PART THAT YOU THINK IS TRUE
8 AND IGNORE THE REST.

9 EVERY CRIME OR ALLEGATION CHARGED IN THIS
10 CASE REQUIRES PROOF OF THE UNION OR JOINT
11 OPERATION OF ACT AND WRONGFUL INTENT.

12 THE FOLLOWING CRIMES AND ALLEGATIONS REQUIRE
13 GENERAL CRIMINAL INTENT:

14 FALSIFYING A PUBLIC RECORD. COUNTS FOUR AND
15 SEVEN.

16 TO BE INDICTED FOR THESE OFFENSES, A PERSON
17 NOT ONLY, THE PERSON MUST NOT ONLY COMMIT THE
18 PROHIBITED ACT OR FAIL TO DO THE REQUIRED ACT, BUT
19 MUST DO SO INTENTIONALLY OR ON PURPOSE.

20 IT IS NOT REQUIRED, HOWEVER, THAT THE PERSON
21 INTENDED TO BREAK THE LAW. THE ACT REQUIRED IS
22 EXPLAINED IN THE INSTRUCTION FOR EACH CRIME OR
23 ALLEGATION.

24 THE FOLLOWING CRIMES AND ALLEGATIONS REQUIRE
25 A SPECIFIC INTENT OR MENTAL STATE.

26 CONSPIRACY, COUNTS ONE AND FIVE.

27 BRIBERY, COUNTS TWO AND THREE, AND
28 MISAPPROPRIATION OF PUBLIC MONIES, COUNT SIX.

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2271

1 TO BE INDICTED FOR THESE OFFENSES, A PERSON
2 MUST NOT ONLY INTENTIONALLY COMMIT THE PROHIBITED
3 ACT OR INTENTIONALLY FAIL TO DO THE REQUIRED ACT,

4 BUT MUST DO SO WITH A SPECIFIC INTENT OR MENTAL
5 STATE. THE ACT OR INTENT AND MENTAL STATE
6 REQUIRED ARE EXPLAINED IN THE INSTRUCTIONS FOR
7 EACH CRIME OR ALLEGATION.

8 IF YOU DETERMINE THERE IS A CONFLICT IN THE
9 EVIDENCE, YOU MUST DECIDE WHAT EVIDENCE, IF ANY,
10 TO BELIEVE. DO NOT SIMPLY COUNT THE NUMBER OF
11 WITNESSES TO AGREE OR DISAGREE ON A POINT AND
12 ACCEPT THE TESTIMONY OF THE GREATER NUMBER OF
13 WITNESSES.

14 ON THE OTHER HAND, DO NOT DISREGARD THE
15 TESTIMONY OF THE GREATER NUMBER OF WITNESSES OR
16 ANY WITNESS WITHOUT A REASON OR BECAUSE OF
17 PREJUDICE OR DESIRE TO FAVOR ONE SIDE OR THE
18 OTHER. WHAT IS IMPORTANT IS WHETHER THE TESTIMONY
19 OR ANY OTHER EVIDENCE CONVINCES YOU, NOT JUST THE
20 NUMBER OF WITNESSES WHO TESTIFIED ABOUT A CERTAIN
21 POINT.

22 DURING THE GRAND JURY PROCEEDINGS, CERTAIN
23 EVIDENCE WAS ADMITTED FOR A LIMITED PURPOSE. YOU
24 MAY CONSIDER THIS EVIDENCE ONLY FOR THAT PURPOSE
25 AND FOR NO OTHER.

26 SO SOME OF THE COMMUNICATIONS, SOME OF THE
27 NEWSPAPER ARTICLES THAT WE SAW, THEY WERE ADMITTED FOR A
28 LIMITED PURPOSE, NOT TO PROVE WHAT THEY SAID WAS TRUE, JUST

1 TO SHOW THAT THE STATEMENTS WERE MADE AS THAT MIGHT HAVE
2 BEARING ON THE REST OF THE CASE. SO PLEASE REMEMBER THOSE
3 WERE ADMITTED FOR A LIMITED PURPOSE.

4 WE HAVE TO MAKE A CHANGE IN THE INSTRUCTIONS.
5 WHAT I'M GOING TO DO, IF YOU GO TO PAGE 18, I WAS GOING TO
6 GIVE YOU AN INSTRUCTION ABOUT EXHIBIT 135, THE JUNE 28, 2000
7 E-MAIL, THAT YOU COULD ONLY USE THAT AGAINST RON GONZALES.
8 THAT'S NOT CORRECT, SO I'M JUST GOING TO CROSS THAT OUT ON
9 THE ORIGINAL AND SAY NOT GIVEN, AND INITIAL THAT. AND THE
10 REASON THAT'S NOT CORRECT IS BECAUSE THAT E-MAIL IS NOT
11 BEING OFFERED FOR THE TRUTH, TO PROVE THE VERSION OF EVENTS
12 THAT THE MAYOR CLAIMED HAPPENED, IT'S BEING GIVEN SIMPLY TO
13 SHOW THAT WHAT THE MAYOR SAID HAPPENED -- IT WOULD SORT OF
14 BE LIKE, IF THIS WERE A ROBBERY CASE, AND WHEN THE SUSPECT
15 WAS ARRESTED BY THE POLICE THE SUSPECT TOLD THE POLICE
16 OFFICER THAT HE WAS OUT OF TOWN AT THE TIME OF THE ROBBERY,
17 AND THEN OTHER EVIDENCE PROVED THAT THAT WAS NOT TRUE, HE
18 WAS IN TOWN, THAT WOULD BE OFFERED TO SHOW THAT HE LIED AND
19 HAD A CONSCIOUSNESS OF GUILT, NOT OFFERED AS EVIDENCE THAT
20 HE REALLY WAS OUT OF TOWN, SIMPLY THAT HE SAID HE WAS OUT OF
21 TOWN, SO THE SAME WOULD BE TRUE OF THE JUNE 28, 2005 E-MAIL
22 FROM MAYOR GONZALES.

23 AND THERE IS AN ADDITIONAL REASON; THAT IS,
24 STATEMENTS IN FURTHERANCE OF THE CONSPIRACY CAN ALSO BE USED
25 NOT ONLY AGAINST THE CONSPIRATOR WHO MAKES THE STATEMENT,
26 BUT AGAINST OTHER MEMBERS OF THE CONSPIRACY IF CERTAIN
27 CONDITIONS ARE SATISFIED.

28 SO, AS YOU RECALL, THAT EXHIBIT REFLECTS THE 13TH

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2273

1 OVERT ACT. SO FOR BOTH THOSE REASONS, DISREGARD, AND I'M
2 INSTRUCTING YOU NOW TO DISREGARD THE MULTIPLE TARGETS,
3 LIMITED ADMISSIBILITY OF EVIDENCE INSTRUCTION, CALCRIM 304
4 ON PAGE 18.

5 THE NEXT INSTRUCTION WILL BE PAGE 19.

6 YOU HAVE HEARD EVIDENCE OF STATEMENTS THAT A
7 WITNESS MADE BEFORE THIS GRAND JURY PROCEEDING.

8 IF YOU DECIDE THAT THE WITNESS MADE THOSE
9 STATEMENTS, YOU MAY USE THOSE STATEMENTS IN TWO
10 WAYS:

11 ONE, TO EVALUATE WHETHER THE WITNESS'S
12 TESTIMONY IN THIS GRAND JURY PROCEEDING IS
13 BELIEVABLE; AND

14 TWO, AS EVIDENCE THAT THE INFORMATION IN

15 THOSE EARLIER STATEMENTS IS TRUE.

16 SO, FOR EXAMPLE, IN THE CASE OF BILL JONES, HE
17 TESTIFIED TO ONE THING ON THE STAND, AND THEN WE CONFRONTED
18 HIM WITH HIS INTERVIEW WITH TODD THOMPSON IN 2003, WHICH HAD
19 SOME DIFFERENT STATEMENTS. AND WE HAD TESTIMONY FROM TODD
20 THOMPSON ABOUT THAT, SO THAT'S WHAT WE CALL A PRIOR
21 INCONSISTENT STATEMENT, SO YOU CAN USE IT IN TWO WAYS TO
22 ASSESS THE CREDIBILITY OF BILL JONES. AND I DON'T MEAN TO
23 SINGLE HIM OUT, I'M JUST GIVING AN EXAMPLE FROM THE FACTS OF
24 THE CASE.

25 AND ALSO, YOU COULD DECIDE THAT THE VERSION HE
26 SAID IN 2003 WAS CORRECT AND THE VERSION HE SAID IN 2006 WAS
27 NOT. SO YOU CAN USE IT IN TWO WAYS. WHETHER OR NOT TO DO
28 SO IS, OF COURSE, YOUR DECISION.

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2274

1 WITNESSES WHO WERE NOT TESTIFYING AS EXPERTS
2 GAVE THEIR OPINIONS DURING THE GRAND JURY
3 PROCEEDING. YOU MAY, BUT ARE NOT REQUIRED TO,
4 ACCEPT THOSE OPINIONS AS TRUE OR CORRECT. YOU MAY
5 GIVE THE OPINIONS WHATEVER WEIGHT YOU THINK
6 APPROPRIATE.

7 THE EXTENT OF THE WITNESS'S OPPORTUNITY TO
Page 146

8 PERCEIVE MATTERS ON WHICH HIS OR HER OPINION IS
9 BASED, THE REASONS THE WITNESS GIVES FOR HIS
10 OPINION, AND FACTS OR INFORMATION ON WHICH THE
11 WITNESS RELIED IN FORMING THAT OPINION.

12 YOU MUST DECIDE WHETHER INFORMATION ON WHICH
13 THE WITNESS RELIED WAS TRUE AND ACCURATE. YOU MAY
14 DISREGARD ALL OR ANY PART OF AN OPINION THAT YOU
15 FIND UNBELIEVABLE, UNREASONABLE, OR UNSUPPORTED BY
16 THE EVIDENCE.

17 SO WHEN WE TALK ABOUT OPINION TESTIMONY OF LAY
18 WITNESSES, FOR EXAMPLE, A NUMBER OF WITNESSES EXPRESSED
19 OPINIONS ABOUT WHOSE SIGNATURE WAS ON CERTAIN DOCUMENTS.
20 THEY WERE NOT HANDWRITING EXPERTS, THEY ARE WHAT WE CALL LAY
21 WITNESSES, WHO CAN STATE AN OPINION IF THEY ARE FAMILIAR
22 WITH THE HANDWRITING AS TO WHOSE HANDWRITING IT WAS.

23 THAT BRINGS US TO PAGE 21, ACCOMPLICE TESTIMONY.

24 IF THERE IS PROBABLE CAUSE TO BELIEVE THAT
25 THE CRIME OF BRIBERY, CONSPIRACY, OR
26 MISAPPROPRIATION OF PUBLIC MONEY WERE COMMITTED,
27 THEN MICHAEL SANGIACOMO WAS AN ACCOMPLICE TO THOSE
28 CRIMES.

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1 YOU MAY NOT INDICT SOMEONE FOR THESE CRIMES
2 BASED ON THE STATEMENT OR TESTIMONY OF AN
3 ACCOMPLICE ALONE. YOU MAY USE THE STATEMENT FOR
4 TESTIMONY OF AN ACCOMPLICE TO INDICT SOMEBODY ONLY
5 IF THE ACCOMPLICE'S STATEMENT OR TESTIMONY IS
6 SUPPORTED BY OTHER EVIDENCE THAT YOU BELIEVE.
7 THAT SUPPORTING EVIDENCE IS INDEPENDENT OF THE
8 ACCOMPLICE'S TESTIMONY, AND THAT SUPPORTING
9 EVIDENCE TENDS TO CONNECT THE OTHER PERSON WITH
10 THE COMMISSION OF THE CRIME. THE SUPPORTING
11 EVIDENCE, HOWEVER, MAY BE SLIGHT.

12 IT DOES NOT NEED TO BE ENOUGH BY ITSELF TO
13 PROVE THAT A PERSON IS GUILTY OF A CRIME, AND IT
14 DOES NOT NEED TO SUPPORT EVERY FACT ABOUT WHICH
15 THE WITNESS TESTIFIED. ON THE OTHER HAND, IT IS
16 NOT ENOUGH IF THE SUPPORTING EVIDENCE MERELY SHOWS
17 THAT A CRIME WAS COMMITTED OR THE CIRCUMSTANCES OF
18 ITS COMMISSION. THE SUPPORTING EVIDENCE MUST TEND
19 TO CONNECT THE OTHER PERSON WITH THE COMMISSION OF
20 THE CRIME. THE EVIDENCE NEEDED TO SUPPORT THE
21 TESTIMONY OF ONE ACCOMPLICE CANNOT BE PROVIDED BY
22 THE TESTIMONY OF ANOTHER ACCOMPLICE.

23 ANY TESTIMONY OF AN ACCOMPLICE THAT TENDS TO
24 INCRIMINATE ANOTHER PERSON SHOULD BE VIEWED WITH
25 CAUTION. YOU MAY NOT, HOWEVER, ARBITRARILY

26 DISREGARD IT. YOU SHOULD GIVE THAT TESTIMONY THE
27 WEIGHT YOU THINK IT DESERVES AFTER EXAMINING IT
28 WITH CARE AND CAUTION AND IN LIGHT OF ALL THE

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2276

1 OTHER EVIDENCE.

2 A WITNESS MAY REFUSE TO ANSWER QUESTIONS THAT
3 CALL FOR PRIVILEGED INFORMATION. DO NOT CONSIDER
4 A WITNESS'S REFUSAL TO ANSWER FOR ANY REASON AT
5 ALL, AND DO NOT GUESS WHAT THE WITNESS'S ANSWERS
6 WOULD HAVE BEEN.

7 // (LINES 7 THROUGH 11
8 // HAVE BEEN REDACTED
9 // AND ARE UNDER SEAL.)

10 //
11 //

12 DO NOT DISCUSS THAT FACT WHEN YOU DELIBERATE
13 OR LET IT INFLUENCE YOUR DECISION IN ANY WAY.

14 YOU HAVE HEARD EVIDENCE THAT A PERSON MADE
15 ORAL OR WRITTEN STATEMENTS BEFORE THIS GRAND JURY
16 PROCEEDING. YOU MUST DECIDE WHETHER OR NOT THE
17 PERSON MADE ANY OF THE STATEMENTS IN WHOLE OR IN
18 PART. IF YOU DECIDE THAT A PERSON MADE SUCH

19 STATEMENTS, CONSIDER THE STATEMENTS ALONG WITH ALL
20 THE OTHER EVIDENCE IN REACHING YOUR DECISION. IT
21 IS UP TO YOU TO DECIDE HOW MUCH IMPORTANCE TO GIVE
22 TO SUCH STATEMENTS.

23 YOU MUST CONSIDER WITH CAUTION EVIDENCE OF A
24 PERSON'S ORAL STATEMENT UNLESS IT WAS WRITTEN OR
25 OTHERWISE RECORDED.

26 NO ONE MAY BE INDICTED FOR ANY CRIME BASED
27 UPON HIS OR HER OUT-OF-COURT STATEMENTS ALONE,
28 UNLESS YOU CONCLUDE THAT OTHER EVIDENCE SHOWS

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1 SOMEONE COMMITTED A CRIME. YOU MAY NOT RELY ON
2 ANY OUT-OF-COURT STATEMENTS BY THE PERSON TO
3 CONVICT HIM OR HER OF THE CRIME. THE OTHER
4 EVIDENCE MAY BE SLIGHT AND NEED ONLY BE ENOUGH TO
5 SUPPORT A REASONABLE INFERENCE THAT SOMEONE'S
6 CRIMINAL CONDUCT CAUSED AN INJURY, LOSS, OR HARM.
7 THE OTHER EVIDENCE DOES NOT HAVE TO ESTABLISH
8 PROBABLE CAUSE TO BELIEVE THAT THE CRIME ACTUALLY
9 WAS COMMITTED.

10 THE IDENTITY OF THE PERSON WHO COMMITTED THE

11 CRIME MAY BE PROVED BY A PERSON'S STATEMENT ALONE.
12 YOU MAY NOT INDICT SOMEONE UNLESS THE EVIDENCE
13 ESTABLISHES THAT A CRIME WAS COMMITTED AND THAT
14 PERSON COMMITTED THE CRIME.

15 IF A PERSON MADE A FALSE OR MISLEADING
16 STATEMENT RELATING TO THE CHARGED CRIME, KNOWING
17 THE STATEMENT WAS FALSE OR TENDING TO MISLEAD,
18 THAT CONDUCT MAY SHOW THAT HE WAS AWARE OF HIS
19 GUILT OF THE CRIME, AND YOU MAY CONSIDER IT IN
20 DETERMINING HIS GUILT. IF YOU CONCLUDE THAT A
21 PERSON MADE THE STATEMENT, IT IS UP TO YOU TO
22 DECIDE ITS MEANING AND IMPORTANCE; HOWEVER,
23 EVIDENCE THAT A PERSON MADE SUCH A STATEMENT
24 CANNOT PROVE GUILT BY ITSELF.

25 THE PEOPLE ARE NOT REQUIRED TO PROVE THAT A
26 PERSON HAD A MOTIVE TO COMMIT ANY OF THE CRIMES IN
27 THE INDICTMENT. IN REACHING YOUR DECISION YOU
28 MAY, HOWEVER, CONSIDER WHETHER A PERSON HAD A

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1 MOTIVE. HAVING A MOTIVE MAY BE A FACTOR TENDING
2 TO SHOW THAT A PERSON SHOULD BE INDICTED. NOT
3 HAVING A MOTIVE MAY BE A FACTOR TENDING TO SHOW

4 THAT A PERSON SHOULD NOT BE INDICTED.

5 WE' RE NOW GOING TO START GOING OVER THE
6 INSTRUCTIONS THAT DEAL WITH WHAT HAS TO BE ESTABLISHED FOR
7 EACH OF THE CRIMES IN THE INDICTMENT, STARTING WITH THE
8 CONSPIRACY TO CHEAT AND DEFRAUD.

9 TO INDICT A PERSON FOR THE CRIME OF
10 CONSPIRACY TO CHEAT AND DEFRAUD, YOU MUST FIND
11 PROBABLE CAUSE TO BELIEVE THAT, ONE, THE PERSON
12 INTENDED TO AGREE AND DID AGREE WITH ONE OR MORE
13 OF THE OTHER ALLEGED MEMBERS OF THE CONSPIRACY TO
14 OBTAIN MONEY OR PROPERTY BY FALSE PRETENSES, OR BY
15 FALSE PROMISES WITH FRAUDULENT INTENT, NOT TO
16 PERFORM THOSE PROMISES.

17 A FALSE PRETENSE IS ANY ACT, WORD, SYMBOL, OR
18 TOKEN, THE PURPOSE OF WHICH IS TO DECEIVE. A
19 PERSON ACTS WITH FRAUDULENT INTENT WHEN HE OR SHE
20 INTENDS TO DECEIVE ANOTHER PERSON, EITHER TO CAUSE
21 A LOSS OF MONEY OR GOODS OR SERVICES OR SOMETHING
22 ELSE OF VALUE, OR TO CAUSE DAMAGE TO A LEGAL,
23 FINANCIAL, OR PROPERTY RIGHT;

24 TWO, AT THE TIME OF AGREEMENT, THE PERSON AND
25 ONE OR MORE OF THE OTHER ALLEGED MEMBERS OF THE
26 CONSPIRACY INTENDED THAT ONE OR MORE OF THEM WOULD
27 OBTAIN MONEY OR PROPERTY BY FALSE PRETENSES OR BY
28 FALSE PROMISES WITH FRAUDULENT INTENT NOT TO

1 PERFORM THOSE PROMISES;

2 THREE, ONE OF THE MEMBERS OF THE ALLEGED
3 CONSPIRACY COMMITTED AT LEAST ONE OF THE ALLEGED
4 OVERT ACTS WITHIN THE STATUTE OF LIMITATIONS TO
5 ACCOMPLISH THE PURPOSE OF OBTAINING MONEY OR
6 PROPERTY BY FALSE PRETENSES OR BY FALSE PROMISES
7 WITH FRAUDULENT INTENT NOT TO PERFORM THOSE
8 PROMISES;

9 AND, FOUR, AT LEAST ONE OF THESE OVERT ACTS
10 WAS COMMITTED IN THE COUNTY OF SANTA CLARA.

11 YOU MUST FIND THAT THE MEMBERS OF THE ALLEGED
12 CONSPIRACY HAD AN AGREEMENT AND AN INTENT TO
13 OBTAIN MONEY OR PROPERTY BY FALSE PRETENSES OR BY
14 FALSE PROMISES WITH FRAUDULENT INTENT NOT TO
15 PERFORM THOSE PROMISES.

16 IT IS NOT NECESSARY TO PROVE THAT ANY OF THE
17 MEMBERS OF THE ALLEGED CONSPIRACY ACTUALLY MET OR
18 CAME TO A DETAILED OR FORMAL AGREEMENT TO OBTAIN
19 MONEY OR PROPERTY BY FALSE PRETENSES OR BY FALSE
20 PROMISES WITH FRAUDULENT INTENT NOT TO PERFORM
21 THOSE PROMISES.

22 AN AGREEMENT MAY BE INFERRED FROM CONDUCT IF
23 YOU CONCLUDE THAT THE MEMBERS OF THE ALLEGED
24 CONSPIRACY ACTED WITH A COMMON PURPOSE TO OBTAIN
25 MONEY OR PROPERTY BY FALSE PRETENSES OR BY FALSE
26 PROMISES OF FRAUDULENT INTENT NOT TO PERFORM THOSE
27 PROMISES.

28 AN OVERT ACT IS AN ACT BY ONE OR MORE OF THE

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1 MEMBERS OF A CONSPIRACY THAT IS DONE TO HELP
2 ACCOMPLISH THE AGREED-UPON PURPOSE OF THE
3 CONSPIRACY. THE OVERT ACT MUST HAPPEN AFTER THE
4 PERSON HAS AGREED TO OBTAIN MONEY OR PROPERTY BY
5 FALSE PRETENSES OR BY FALSE PROMISES WITH
6 FRAUDULENT INTENT NOT TO PERFORM THOSE PROMISES.

7 THE OVERT ACT MUST BE MORE THAN THE ACT OF
8 AGREEING OR PLANNING TO OBTAIN MONEY OR PROPERTY
9 BY FALSE PRETENSES OR FALSE PROMISES WITH
10 FRAUDULENT INTENT NOT TO PERFORM THOSE PROMISES,
11 BUT IT DOES NOT HAVE TO BE A CRIMINAL ACT ITSELF.

12 AT LEAST TWELVE OF YOU MUST AGREE THAT AT
13 LEAST ONE ALLEGED OVERT ACT WAS COMMITTED IN THE
14 COUNTY OF SANTA CLARA WITHIN THE STATUTE OF

15 LIMITATIONS BY AT LEAST ONE ALLEGED MEMBER OF THE
16 CONSPIRACY. BUT YOU DO NOT HAVE TO ALL AGREE ON
17 WHICH SPECIFIC OVERT ACT OR ACTS WERE COMMITTED,
18 OR WHO COMMITTED THE OVERT ACT OR ACTS.

19 YOU MUST MAKE A SEPARATE DECISION AS TO
20 WHETHER EACH PERSON NAMED IN THAT CHARGE WAS A
21 MEMBER OF THE ALLEGED CONSPIRACY. A MEMBER OF THE
22 CONSPIRACY DOES NOT HAVE TO KNOW THE IDENTITY OR
23 ROLES OF ALL OF THE OTHER MEMBERS.

24 SOMEONE WHO MERELY ACCOMPANIES OR ASSOCIATES
25 WITH MEMBERS OF A CONSPIRACY, BUT WHO DOES NOT
26 INTEND TO OBTAIN MONEY OR PROPERTY BY FALSE
27 PRETENSES OR BY FALSE PROMISES WITH FRAUDULENT
28 INTENT NOT TO PERFORM THOSE PROMISES, IS NOT A

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1 MEMBER OF THE CONSPIRACY.

2 EVIDENCE THAT A PERSON DID AN ACT OR MADE A
3 STATEMENT THAT HELPED ACCOMPLISH THE GOAL OF THE
4 CONSPIRACY IS NOT ENOUGH BY ITSELF TO PROVE THE
5 PERSON WAS A MEMBER OF THE CONSPIRACY.

6 THE NEXT INSTRUCTION DEALS WITH THE COUNT ALLEGING

7 THE CONSPIRACY TO COMMIT A CRIME.

8 TO INDICT A PERSON FOR THE CRIME OF
9 CONSPIRACY TO COMMIT THE CRIME OF MISAPPROPRIATION
10 OF PUBLIC MONEY, YOU MUST FIND PROBABLE CAUSE TO
11 BELIEVE THAT:

12 ONE, THE PERSON INTENDED TO AGREE AND DID
13 AGREE WITH ONE OR MORE OF THE OTHER MEMBERS OF THE
14 CONSPIRACY TO COMMIT THE CRIME OF MISAPPROPRIATION
15 OF PUBLIC MONEY;

16 TWO, AT THE TIME OF THE AGREEMENT, THE PERSON
17 AND ONE OR MORE OF THE MEMBERS OF THE CONSPIRACY
18 INTENDED THAT ONE OR MORE OF THEM WOULD COMMIT THE
19 CRIME OF MISAPPROPRIATION OF PUBLIC MONEY;

20 THREE, ONE OF THE MEMBERS OF THE ALLEGED
21 CONSPIRACY COMMITTED AT LEAST ONE OF THE ALLEGED
22 OVERT ACTS WITHIN THE STATUTE OF LIMITATIONS TO
23 ACCOMPLISH THE CRIME OF MISAPPROPRIATION OF PUBLIC
24 MONEY; AND

25 FOUR, AT LEAST ONE OF THE OVERT ACTS WAS
26 COMMITTED IN THE COUNTY OF SANTA CLARA.

27 TO DECIDE WHETHER A PERSON INTENDED TO COMMIT
28 THE CRIME OF MISAPPROPRIATION OF PUBLIC MONEY,

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1 PLEASE REFER TO THE SEPARATE INSTRUCTIONS THAT ARE
2 BEING GIVEN ON THAT CRIME, AND I'LL GET THAT IN A
3 MINUTE.

4 YOU MUST FIND THAT THE MEMBERS OF THE ALLEGED
5 CONSPIRACY HAD AN AGREEMENT AND INTENT TO COMMIT
6 THE CRIME OF MISAPPROPRIATION OF PUBLIC MONEY. IT
7 IS NOT NECESSARY TO PROVE THAT ANY OF THE MEMBERS
8 OF THE ALLEGED CONSPIRACY ACTUALLY MET OR CAME TO
9 A DETAILED OR FORMAL AGREEMENT TO COMMIT THAT
10 CRIME. AN AGREEMENT MAY BE INFERRED FROM CONDUCT
11 IF YOU CONCLUDE THAT MEMBERS OF THE ALLEGED
12 CONSPIRACY ACTED WITH A COMMON PURPOSE TO COMMIT
13 THE CRIME.

14 AN OVERT ACT IS AN ACT BY ONE OR MORE OF THE
15 MEMBERS OF THE CONSPIRACY THAT IS DONE TO HELP
16 ACCOMPLISH THE AGREED-UPON CRIME.

17 THE OVERT ACT MUST HAPPEN AFTER THE PERSON
18 HAS AGREED TO COMMIT THE CRIME. THE OVERT ACT
19 MUST BE MORE THAN THE ACT OF PLANNING TO COMMIT
20 THE CRIME, BUT IT DOESN'T HAVE TO BE A CRIMINAL
21 ACT ITSELF.

22 AT LEAST TWELVE OF YOU MUST AGREE THAT AT
23 LEAST ONE ALLEGED OVERT ACT WAS COMMITTED IN THE
24 COUNTY OF SANTA CLARA WITHIN THE STATUTE OF
25 LIMITATIONS BY AT LEAST ONE ALLEGED MEMBER OF THE

26 CONSPIRACY, BUT YOU DO NOT HAVE TO ALL AGREE ON
27 WHICH SPECIFIC OVERT ACT OR ACTS WERE COMMITTED OR
28 WHO COMMITTED THE OVERT ACT OR ACTS. YOU MUST

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1 MAKE A SEPARATE DECISION AS TO WHETHER ANY PERSON
2 NAMED IN THIS CHARGE WAS A MEMBER OF THE ALLEGED
3 CONSPIRACY. A MEMBER OF THE CONSPIRACY DOES NOT
4 HAVE TO KNOW THE IDENTITY OR ROLES OF ALL THE
5 OTHER MEMBERS.

6 SOMEONE WHO MERELY ACCOMPANIES OR ASSOCIATES
7 WITH MEMBERS OF THE CONSPIRACY, BUT DOES NOT
8 INTEND TO COMMIT THE CRIME, IS NOT A MEMBER OF THE
9 CONSPIRACY.

10 EVIDENCE THAT A PERSON DID AN ACT OR MADE A
11 STATEMENT TO HELP ACCOMPLISH THE GOAL OF THE
12 CONSPIRACY IS NOT ENOUGH BY ITSELF TO PROVE THAT A
13 PERSON WAS A MEMBER OF THE CONSPIRACY.

14 WHY DON'T WE TAKE A 10-MINUTE BREAK. THE REPORTER
15 HAS INDICATED THAT SHE WOULD LIKE A BREAK.

16 THE FOREPERSON: DOES ANYBODY HAVE ANY QUESTIONS
17 BEFORE THE BREAK? 10 MINUTES.

(A BRIEF RECESS WAS TAKEN.)

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THE FOREPERSON: CAN I CALL THE GRAND JURY BACK TO ORDER, PLEASE? LET THE RECORD SHOW ALL OF THE JURORS ARE PRESENT.

MR. FINKELSTEIN: THANK YOU. I THINK WE WERE DEALING WITH THE CONSPIRACY INSTRUCTION, SO WE SHOULD BE ON PAGE 31 NOW, WHICH DEALS WITH LIABILITY FOR A CO-CONSPIRATORS' ACTS. AND I ALLUDED TO DO THIS EARLIER, BUT THIS IS THE ACTUAL INSTRUCTION THAT I SHOULD GIVE YOU.

A MEMBER OF A CONSPIRACY IS CRIMINALLY RESPONSIBLE FOR THE CRIMES THAT HE OR SHE

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CONSPIRES TO COMMIT, NO MATTER WHICH MEMBER OF THE CONSPIRACY COMMITS THE CRIME. A MEMBER OF A CONSPIRACY IS ALSO CRIMINALLY RESPONSIBLE FOR ANY ACT OF ANY MEMBER OF THE CONSPIRACY IF THAT ACT IS DONE FOR FURTHERING THE CONSPIRACY, THAT ACT IS A NATURAL AND PROBABLE CONSEQUENCE OF THE COMMON PLAN OR DESIGN OF THE CONSPIRACY. THIS RULE APPLIES EVEN IF THE ACT IS NOT INTENDED AS PART OF THE ORIGINAL PLAN.

UNDER THIS RULE, A PERSON IS A MEMBER OF THE

11 CONSPIRACY AND DOES NOT NEED TO BE PRESENT AT THE
12 TIME OF THE ACT.

13 A NATURAL AND PROBABLE CONSEQUENCE IS ONE
14 THAT A REASONABLE PERSON WOULD KNOW IS LIKELY TO
15 HAPPEN IF NOTHING UNUSUAL INTERVENES. IN DECIDING
16 WHETHER A CONSEQUENCE IS NATURAL OR PROBABLE,
17 CONSIDER ALL OF THE CIRCUMSTANCES ESTABLISHED BY
18 THE EVIDENCE.

19 A MEMBER OF A CONSPIRACY IS NOT CRIMINALLY
20 RESPONSIBLE FOR THE ACT OF ANOTHER MEMBER IF THAT
21 ACT DOES NOT FURTHER THE COMMON PLAN OR IS NOT A
22 NATURAL AND PROBABLE CONSEQUENCE OF THE COMMON
23 PLAN.

24 TO INDICT A PERSON OTHER THAN
25 RONALD R. GONZALES FOR THE CRIME CHARGED IN COUNT
26 SIX, THAT'S THE MISAPPROPRIATING PUBLIC MONIES
27 COUNT, YOU MUST FIND PROBABLE CAUSE TO BELIEVE
28 THAT THE PERSON CONSPIRED TO COMMIT A CRIME AND

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1 THAT A MEMBER OF THAT CONSPIRACY COMMITTED THAT
2 CRIME OR THAT, ONE, THE PERSON CONSPIRED TO OBTAIN

3 MONEY AND PROPERTY BY FALSE PRETENSES OR BY FALSE
4 PROMISES WITH FRAUDULENT INTENT NOT TO PERFORM
5 THOSE PROMISES;

6 TWO, A MEMBER OF THAT CONSPIRACY COMMITTED
7 THE CRIME OF MISAPPROPRIATION OF PUBLIC MONEY TO
8 FURTHER THAT CONSPIRACY; AND

9 THREE, THE CRIME OF MISAPPROPRIATION OF
10 PUBLIC MONEY WAS A NATURAL AND PROBABLE
11 CONSEQUENCE OF THE COMMON PLAN OR DESIGN TO OBTAIN
12 MONEY AND PROPERTY WITH FALSE PRETENSES OR BY
13 FALSE PROMISES WITH FRAUDULENT INTENT NOT TO
14 PERFORM THOSE PROMISES.

15 A PERSON IS NOT RESPONSIBLE FOR THE ACTS OF
16 ANOTHER PERSON WHO WAS NOT A MEMBER OF THE
17 CONSPIRACY, EVEN IF THE ACTS OF THE OTHER PERSON
18 HELPED ACCOMPLISH THE GOAL OF THE CONSPIRACY.

19 A CONSPIRACY MEMBER IS NOT RESPONSIBLE FOR
20 THE ACTS OF OTHER CONSPIRACY MEMBERS THAT ARE DONE
21 AFTER THE GOAL OF THE CONSPIRACY HAS BEEN
22 ACCOMPLISHED.

23 LET ME SEE IF I CAN SIMPLIFY THAT FOR YOU. IF MY
24 COLLEAGUE AND I CONSPIRE TO ROB A BANK NEXT SATURDAY AND WE
25 DECIDE TO MEET IN THE PARKING LOT AT 11:00 A.M. ON SATURDAY
26 AND WE HAVE NO FURTHER COMMUNICATION, BUT ON WEDNESDAY NIGHT
27 I BURGLARIZE A GUN SHOP TO GET A GUN TO USE IN THE ROBBERY,
28 NOT ONLY AM I GUILTY OF THE BURGLARY AT THE GUN SHOP, BUT SO

1 IS MY CLIENT HERE, BECAUSE I COMMITTED THAT BURGLARY TO
2 FURTHER THE GOAL OF OUR CONSPIRACY. AND THAT WAS A, TO USE
3 THE LANGUAGE OF THE INSTRUCTION, NATURAL AND PROBABLE
4 CONSEQUENCE, THAT SOMEONE IN THE CONSPIRACY MIGHT NEED A GUN
5 AND MIGHT COMMIT A CRIME TO GET THAT GUN.

6 SO NOW WE SHOULD BE ON PAGE 33, CO-CONSPIRATOR' S
7 STATEMENT.

8 IN DECIDING WHETHER TO INDICT A PERSON FOR
9 ANY OF THE CRIMES IN THE PROPOSED DOCUMENT, YOU
10 MUST NOT CONSIDER ANY STATEMENT MADE OUT OF COURT
11 BY ANY OTHER PERSONS UNLESS YOU FIND BY A
12 PREPONDERANCE OF THE EVIDENCE THAT, ONE, SOME
13 EVIDENCE OTHER THAN THE STATEMENT ITSELF
14 ESTABLISHES A CONSPIRACY TO COMMIT A CRIME EXISTED
15 WHEN THE STATEMENT WAS MADE;

16 TWO, THE OTHER PERSON WAS A MEMBER OF AND
17 PARTICIPATING IN THE CONSPIRACY WHEN HE OR SHE
18 MADE THE STATEMENT;

19 THREE, THE OTHER PERSON MADE THE STATEMENT IN
20 ORDER TO FURTHER THE GOAL OF THE CONSPIRACY;

21 AND FOUR, THE STATEMENT WAS MADE BEFORE OR
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22 DURING THE TIME THAT THE PERSON AGAINST WHOM THE
23 STATEMENT IS BEING USED WAS PARTICIPATING IN THE
24 CONSPIRACY;

25 A STATEMENT MEANS AN ORAL OR WRITTEN
26 EXPRESSION OR NON-VERBAL CONDUCT INTENDED TO BE A
27 SUBSTITUTE FOR AN ORAL OR WRITTEN EXPRESSION.

28 PROOF BY A PREPONDERANCE OF THE EVIDENCE IS A

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1 DIFFERENT STANDARD OF PROOF THAN PROBABLE CAUSE.
2 A FACT IS PROVED BY A PREPONDERANCE OF THE
3 EVIDENCE IF YOU CONCLUDE THAT IT'S MORE LIKELY
4 THAN NOT THAT THE FACT IS TRUE.

5 YOU MAY NOT CONSIDER STATEMENTS MADE BY A
6 PERSON WHO WAS NOT A MEMBER OF THE CONSPIRACY,
7 EVEN IF THE STATEMENTS HELPED ACCOMPLISH THE GOAL
8 OF THE CONSPIRACY. YOU MAY NOT CONSIDER
9 STATEMENTS MADE AFTER THE GOALS OF THE CONSPIRACY
10 HAVE BEEN ACCOMPLISHED.

11 A PERSON IS NOT RESPONSIBLE FOR ANY ACTS THAT
12 WERE DONE BEFORE HE OR SHE JOINED THE CONSPIRACY.
13 YOU MAY CONSIDER EVIDENCE OF ACTS OR STATEMENTS

14 MADE BEFORE THE PERSON JOINED THE CONSPIRACY ONLY
15 TO SHOW THE NATURE AND GOALS OF THE CONSPIRACY.
16 YOU MAY NOT CONSIDER ANY SUCH EVIDENCE TO PROVE
17 THAT THE PERSON WAS GUILTY OF ANY CRIMES COMMITTED
18 BEFORE HE OR SHE JOINED THE CONSPIRACY.

19 A PERSON IS NOT GUILTY OF A CONSPIRACY IF HE
20 OR SHE WITHDREW FROM THE A CONSPIRACY BEFORE ANY
21 OVERT ACT WAS COMMITTED. TO WITHDRAW FROM THE
22 CONSPIRACY, THE PERSON MUST TRULY AND
23 AFFIRMATIVELY REJECT THE CONSPIRACY AND
24 COMMUNICATE THAT REJECTION BY WORD OR BY DEED TO
25 THE OTHER MEMBERS OF THE CONSPIRACY KNOWN TO THE
26 PERSON.

27 A FAILURE TO ACT IS NOT SUFFICIENT ALONE TO
28 WITHDRAW FROM A CONSPIRACY. IF YOU DECIDE THAT A

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1 PERSON WITHDREW FROM A CONSPIRACY AFTER AN OVERT
2 ACT WAS COMMITTED, THEN THAT PERSON IS NOT GUILTY
3 OF ANY ACTS COMMITTED BY THE REMAINING MEMBERS OF
4 THE CONSPIRACY AFTER HE OR SHE WITHDREW.

5 IN ORDER TO INDICT A PERSON FOR CONSPIRACY,
6 YOU MUST FIND PROBABLE CAUSE TO BELIEVE THAT THE

7 PERSON DID NOT WITHDRAW FROM THE CONSPIRACY BEFORE
8 AN OVERT ACT WAS COMMITTED.

9 IF YOU DO NOT FIND PROBABLE CAUSE TO BELIEVE
10 THAT THE PERSON DID NOT WITHDRAW FROM THE
11 CONSPIRACY, THEN YOU MAY NOT INDICT THAT PERSON
12 FOR CONSPIRACY, AND YOU MAY NOT INDICT THAT PERSON
13 FOR ANY OF THE ADDITIONAL ACTS COMMITTED BY THE
14 REMAINING MEMBERS OF THE CONSPIRACY AFTER HE OR
15 SHE WITHDREW.

16 NOW, THE INSTRUCTIONS ON RECEIVING, OFFERING, OR
17 AGREEING TO RECEIVE A BRIBE.

18 IN ORDER TO INDICT A PERSON FOR THE CRIME OF
19 RECEIVING, OFFERING, OR AGREEING TO RECEIVE A
20 BRIBE, PENAL CODE SECTION 165, YOU MUST FIND
21 PROBABLE CAUSE TO BELIEVE THAT:

22 ONE, THE PERSON WAS A MEMBER OF THE CITY
23 COUNCIL FOR THE CITY OF SAN JOSE, STATE OF
24 CALIFORNIA;

25 TWO, THE PERSON RECEIVED, OFFERED, OR AGREED
26 TO RECEIVE A BRIBE;

27 THREE, WHEN THE PERSON RECEIVED, OFFERED, OR
28 AGREED TO RECEIVE A BRIBE, THE PERSON REPRESENTED

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1 THE BRIBE WOULD UNLAWFULLY INFLUENCE HIS OFFICIAL
2 VOTE, OPINION, JUDGMENT OR ACTION IN ANY
3 PARTICULAR MANNER OR UPON ANY PARTICULAR SIDE OF
4 ANY QUESTION OR MATTER UPON WHICH HE MAY BE
5 REQUIRED TO ACT IN HIS OFFICIAL CAPACITY;

6 THE REPRESENTATION MAY HAVE BEEN EXPRESS OR
7 IMPLIED;

8 AND, FOUR, THE PERSON ACTED WITH CORRUPT
9 INTENT THAT HIS PUBLIC OR OFFICIAL DUTY WOULD BE
10 UNLAWFULLY INFLUENCED.

11 AS USED HERE, BRIBE MEANS SOMETHING OF
12 PRESENT OR FUTURE VALUE OR ADVANTAGE, OR A PROMISE
13 TO GIVE SUCH A THING THAT IS REQUESTED OR TAKEN
14 WITH A CORRUPT INTENT THAT THE OFFICIAL VOTE,
15 OPINION, JUDGMENT, OR ACTION OF THE PERSON WHO WAS
16 RECEIVING, OFFERING, OR AGREEING TO RECEIVE THE
17 BRIBE WILL BE UNLAWFULLY INFLUENCED.

18 A PERSON ACTS WITH CORRUPT INTENT WHEN HE OR
19 SHE ACTS TO WRONGFULLY GAIN A FINANCIAL OR OTHER
20 ADVANTAGE FOR HIMSELF, HERSELF, OR SOMEONE ELSE.

21 RECEIVING, OFFERING, OR AGREEING TO RECEIVE A
22 BRIBE DOES NOT REQUIRE SPECIFIC WORDS OR BEHAVIOR,
23 AS LONG AS THE LANGUAGE USED AND THE CIRCUMSTANCES
24 CLEARLY SHOW THE PERSON IS SEEKING A BRIBE FROM

25 SOMEONE ELSE.

26 YOU DO NOT HAVE TO FIND THAT THE OTHER PERSON
27 ACTUALLY CONSENTED TO GIVE A BRIBE. YOU DO NOT
28 HAVE TO FIND THAT THE PERSON WHO OFFERED OR AGREED

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1 TO RECEIVE A BRIBE MADE ANY EFFORT TO FOLLOW
2 THROUGH ON THE PURPOSE FOR WHICH THE BRIBE WAS
3 SOUGHT.

4 THE NEXT INSTRUCTION RELATES TO GIVING OR OFFERING
5 A BRIBE.

6 IN ORDER TO INDICT A PERSON FOR THE CRIME OF
7 GIVING OR OFFERING A BRIBE, PENAL CODE SECTION
8 165, YOU MUST FIND PROBABLE CAUSE TO BELIEVE THAT:
9 ONE, THE PERSON GAVE OR OFFERED A BRIBE TO A
10 MEMBER OF THE CITY COUNCIL FOR THE CITY OF SAN
11 JOSE, STATE OF CALIFORNIA;

12 AND, TWO, THE PERSON ACTED WITH THE CORRUPT
13 INTENT TO UNLAWFULLY INFLUENCE THAT MEMBER'S
14 OFFICIAL VOTE, OPINION, JUDGMENT, OR ACTION IN ANY
15 PARTICULAR MANNER OR UPON ANY PARTICULAR SIDE OF
16 ANY QUESTION OR MATTER UPON WHICH HE MAY BE
17 REQUIRED TO ACT IN HIS OFFICIAL CAPACITY.

18 AS USED HERE, BRIBE MEANS SOMETHING OF
19 PRESENT OR FUTURE VALUE OR ADVANTAGE OR A PROMISE
20 TO GIVE SUCH A THING THAT IS REQUESTED OR TAKEN
21 WITH THE CORRUPT INTENT THAT THE OFFICIAL VOTE,
22 OPINION, JUDGMENT, OR ACTION OF A PERSON WHO IS
23 RECEIVING, OFFERING, OR AGREEING TO RECEIVE A
24 BRIBE WILL BE UNLAWFULLY INFLUENCED.

25 A PERSON ACTS WITH CORRUPT INTENT WHEN HE OR
26 SHE ACTS TO WRONGFULLY GAIN A FINANCIAL OR OTHER
27 ADVANTAGE FOR HIMSELF OR HERSELF OR SOMEONE ELSE.

28 THE OFFICIAL VOTE, OPINION, JUDGMENT, OR

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1 ACTION OF THE COUNCILMEMBER THE PERSON SOUGHT TO
2 INFLUENCE MUST HAVE RELATED TO AN EXISTING SUBJECT
3 THAT COULD HAVE BEEN BROUGHT BEFORE THE
4 COUNCILMEMBER IN HIS OR HER OFFICIAL CAPACITY.

5 A BRIBE DOES NOT REQUIRE SPECIFIC WORDS OR
6 BEHAVIOR, AS LONG AS THE LANGUAGE USED AND
7 CIRCUMSTANCES CLEARLY SHOW INTENT TO BRIBE.

8 THE THING OFFERED DOES NOT NEED TO ACTUALLY
9 BE GIVEN, EXIST AT THE TIME IT'S OFFERED, OR HAVE

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A SPECIFIC VALUE.

THE NEXT INSTRUCTION RELATES TO FALSIFYING PUBLIC RECORDS:

EVERY PERSON WHO WILLFULLY ALTERS OR FALSIFIES ANY RECORD, MAP, OR BOOK FILED OR DEPOSITED IN ANY PUBLIC OFFICE IS GUILTY OF THE CRIME OF FALSIFYING PUBLIC RECORDS.

IN ORDER TO INDICT A PERSON FOR THIS CRIME, YOU MUST FIND PROBABLE CAUSE TO BELIEVE THAT:

ONE, THE PERSON WILLFULLY ALTERED OR FALSIFIED ANY RECORD, MAP, OR BOOK; AND TWO, THAT THE RECORD, MAP, OR BOOK WAS FILED OR DEPOSITED IN A PUBLIC OFFICE.

THE NEXT INSTRUCTION RELATES TO MISAPPROPRIATION OF PUBLIC MONEY.

EVERY PERSON CHARGED WITH THE RECEIPT, SAFEKEEPING, TRANSFER OR DISBURSEMENT OF PUBLIC MONIES WHO, WITHOUT AUTHORITY OF THE LAW, APPROPRIATES THE SAME OR ANY PORTION THEREOF TO

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HIS OR HER OWN USE OR TO THE USE OF ANOTHER, IS GUILTY OF THE CRIME OF MISAPPROPRIATION OF PUBLIC
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3 MONEY.

4 PENAL CODE SECTION 428.1 DOES NOT APPLY TO
5 THE INCIDENTAL AND MINIMAL USE OF PUBLIC
6 RESOURCES.

7 IN ORDER TO INDICT A PERSON FOR THIS CRIME,
8 YOU MUST FIND PROBABLE CAUSE TO BELIEVE THAT:

9 ONE, THE PERSON WAS A PERSON CHARGED WITH THE
10 RECEIPT, SAFEKEEPING, TRANSFER, OR DISBURSEMENT OF
11 PUBLIC MONIES;

12 AND TWO, THAT THE PERSON, WITHOUT AUTHORITY
13 OF LAW, INTENTIONALLY APPROPRIATED PUBLIC MONIES
14 TO HIS OR HER OWN USE OR TO THE USE OF ANOTHER.

15 TO VIOLATE SECTION 424(A)(1), IT MUST BE
16 SHOWN THAT THE DEFENDANT INTENDED TO APPROPRIATE
17 PUBLIC MONEY TO HIS OWN USE OR THE USE OF ANOTHER
18 WITH KNOWLEDGE THAT HE WAS ACTING WITHOUT
19 AUTHORITY OF LAW.

20 TO PROVE THIS MENTAL STATE, IT MUST BE SHOWN
21 THAT THE DEFENDANT ACTUALLY KNEW THAT THE LAW DID
22 NOT AUTHORIZE HIS APPROPRIATION OF THE MONEY. IF
23 A PUBLIC OFFICIAL KNOWS HE DOES NOT HAVE AUTHORITY
24 TO APPROPRIATE PUBLIC MONEY IN A PARTICULAR WAY
25 BUT DOES SO ANYWAY, THEN AND ONLY THEN CAN IT BE
26 SAID THE OFFICIAL HAS ACTED WITH THE INTENT TO
27 COMMIT THE ACT THAT SECTION 424(A)(1) PROHIBITS.

28 IF, ON THE OTHER HAND, THE PUBLIC OFFICIAL
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1 BELIEVED IN GOOD FAITH THAT HIS ACTIONS WERE
2 AUTHORIZED, THEN THE OFFICIAL CANNOT BE SAID TO
3 HAVE ACTED WITH THE REQUISITE MENTAL STATE.

4 FOR A PUBLIC OFFICIAL TO VIOLATE PENAL CODE
5 SECTION 424(A)(1), IT IS NOT NECESSARY THAT HE OR
6 SHE HAVE ACTUAL CUSTODY OF PUBLIC MONIES. THE
7 FACT THAT THE OFFICIAL WAS NOT DIRECTLY IN HIS JOB
8 DESCRIPTION OR COMMON RESPONSIBILITIES OF HIS
9 POSITION CHARGED WITH RECEIPT, SAFEKEEPING,
10 TRANSFER OR DISBURSEMENT OF PUBLIC FUNDS, DOES NOT
11 NECESSARILY PRECLUDE A PROSECUTION UNDER SECTION
12 424.

13 IT IS SUFFICIENT IF THE PUBLIC OFFICIAL
14 CONTROLS PUBLIC FUNDS SO AS TO CAUSE THEIR
15 EXPENDITURE FOR NON-PUBLIC PURPOSES.

16 THE PAYMENT PURSUANT TO A CONTRACT IS NOT A
17 GIFT OF PUBLIC FUNDS, IF THE CONTRACT HAS ADEQUATE
18 CONSIDERATION OR THE CONTRACT HAS A PUBLIC
19 PURPOSE.

20 IF YOU FIND A PAYMENT UNDER A CONTRACT WAS A

21 GIFT OF PUBLIC FUNDS, THAT PAYMENT IS NOT
22 AUTHORIZED BY LAW.

23 THE NEXT INSTRUCTION SHOULD NOT BE GIVEN FOR THIS
24 CASE. IT'S ON PAGE 41, MISTAKE OF LAW, AND SO I'M GOING TO
25 CROSS IT OUT ON MY COPY WITH A LINE THROUGH IT, AND THIS
26 WILL BE THE OFFICIAL COPY.

27 I WILL WRITE THE WORDS "NOT GIVEN," AND I WILL
28 INITIAL IT.

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1 THIS INSTRUCTION IS NOT CORRECT. MISTAKE OF LAW
2 WOULD BE AN OFFENSE TO FALSIFYING A PUBLIC RECORD.

3 I WAS CONFUSED -- WAIT A MINUTE. I JUST READ THE
4 INSTRUCTION ON MISAPPROPRIATION ON PUBLIC MONEY, AND THE
5 MISTAKE OF LAW IS A DEFENSE TO THAT CRIME, BUT IT IS NOT A
6 DEFENSE TO THE CRIME OF FALSIFYING A PUBLIC RECORD. SO LET
7 ME READ THAT INSTRUCTION --

8 I'LL PRINT OUT ANOTHER CLEAN COPY IN THE ORIGINAL
9 PACKET.

10 NOW, JUST TO BE CLEAR, WE'RE TALKING ABOUT THE
11 MISTAKE OF LAW DEFENSE AS TO THE CRIME OF FALSIFYING PUBLIC
12 RECORD AND ONLY THAT CRIME:

13 IT IS NOT A DEFENSE TO THE CRIME OF
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14 FALSIFYING A PUBLIC RECORD, GOVERNMENT CODE
15 SECTION 6201, THAT THE PERSON DID NOT KNOW THAT HE
16 WAS BREAKING THE LAW OR THAT HE BELIEVED HIS ACT
17 WAS LAWFUL.

18 THE REASON FOR THAT IS FALSIFYING A PUBLIC RECORD
19 IS A GENERAL INTENT CRIME; YOU JUST HAVE TO HAVE INTENT TO
20 DO THE ACT WHICH IS ILLEGAL.

21 THE OTHER CRIMES ARE CALLED SPECIFIC INTENT CRIMES
22 REQUIRING MENTAL STATE, AND I'VE TOLD YOU WHAT THOSE ARE, SO
23 I'LL REPLACE THAT.

24 WE DO NEED TO REPLACE THE NEXT INSTRUCTION ON
25 STATUTE OF LIMITATION, AND THAT IS ON PAGE 42. SO MY
26 COLLEAGUE IS GOING TO HAND OUT A NEW PAGE 42 FOR YOU.

27 I PUT BACK IN THE CORRECT PAGE 41, SO THAT WILL BE
28 IN THE ORIGINAL PACKET.

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1 NOW YOU SHOULD HAVE THE NEW PAGE 42, WHICH RELATES
2 TO THE STATUTE OF LIMITATIONS.

3 LET ME READ THAT INSTRUCTION TO YOU. WE ONLY HAVE
4 TWO MORE INSTRUCTIONS, THIS ONE AND THE NEXT, AND WE'RE
5 DONE.

6 A PERSON MAY NOT BE INDICTED FOR THE CRIME OF
7 CONSPIRACY, PENAL CODE SECTION 182, UNLESS YOU
8 FIND AN OVERT ACT IN FURTHERANCE OF A CONSPIRACY
9 WAS COMMITTED BY A MEMBER OF THE CONSPIRACY WITHIN
10 THREE YEARS FROM THE DATE THAT THE INDICTMENT IS
11 RETURNED.

12 A PERSON MAY NOT BE INDICTED FOR THE CRIME OF
13 BRIBERY, PENAL CODE SECTION 165, OR FALSIFYING A
14 PUBLIC RECORD, GOVERNMENT CODE SECTION 6201,
15 UNLESS THE INDICTMENT IS RETURNED WITHIN FOUR
16 YEARS OF THE DATE WHEN THE CRIME SHOULD HAVE BEEN
17 DISCOVERED.

18 THE CRIME SHOULD HAVE BEEN DISCOVERED WHEN
19 THE VICTIM OR A LAW ENFORCEMENT OFFICER WAS AWARE
20 OF FACTS THAT WOULD HAVE ALERTED A REASONABLY
21 DILIGENT PERSON OR LAW ENFORCEMENT OFFICER IN THE
22 SAME CIRCUMSTANCES TO THE FACT THAT A CRIME MAY
23 HAVE BEEN COMMITTED.

24 SO IN THIS CASE, AS WE SAID THIS MORNING, OUR
25 SUGGESTION TO YOU IS THAT THE MEETING ON SEPTEMBER 12, 2002,
26 REPORTED TO MOSHER, WAS NOT PART OF THESE ALLEGED CRIMES AND
27 REPRESENTS THE CITY, THE VICTIM. AND ON EITHER SEPTEMBER 12
28 OR SEPTEMBER 13, WHEN THAT WAS, THE MEETING WAS REPORTED AND

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1 THE STATEMENT WAS MADE, THE MAYOR HAD COMMITTED TO MAKE IT
2 GOOD, THAT SEEMS TO US AS THE EARLIEST TIME THAT A
3 REASONABLY DILIGENT PERSON WOULD HAVE BEEN ALERTED TO THE
4 POSSIBILITY OF THIS CRIME.

5 NOW, THE LAST INSTRUCTION:

6 EACH OF THE COUNTS IN THE INDICTMENT IS A
7 SEPARATE CRIME. YOU MUST CONSIDER EACH COUNT
8 SEPARATELY AND RETURN A SEPARATE DECISION ON EACH
9 ONE.

10 SO YOU HAVE TO MAKE A SEPARATE DECISION ON EACH OF
11 THE COUNTS, AND AS TO EACH COUNT A SEPARATE DECISION AS TO
12 EACH OF THE PERSONS, INCLUDING THE CORPORATION.

13 SO THAT CONCLUDES THE INSTRUCTIONS. AND WHAT
14 WE' LL DO, SO THE RECORD IS CLEAR, IS MY ORIGINAL COPY OF THE
15 INSTRUCTIONS, EVEN THOUGH IT'S NOT EVIDENCE, I THINK WE' LL
16 MARK THAT AS THE LAST EXHIBIT, WHICH WILL BE EXHIBIT 144.
17 WE' LL KEEP IT WITH THE EVIDENCE SO IT WILL BE PART OF THE
18 RECORD. SO IF THERE IS ANY QUESTION IN ANY FUTURE LEGAL
19 PROCEEDINGS WHAT INSTRUCTIONS WERE GIVEN, WE' LL HAVE THE
20 TRANSCRIPT AND WE' LL HAVE MY ORIGINAL SET ON WHICH I NOTATED
21 THE CHANGES.

22 THAT FINISHES THE INSTRUCTIONS. SO NOW THAT
23 YOU' VE HEARD WHAT WE THINK THE EVIDENCE SHOWS, YOU' VE SEEN
24 WHAT OUR PROPOSED INDICTMENT IS, I' VE JUST GIVEN YOU THE

25 INSTRUCTIONS, IT'S NOW YOUR DUTY TO DELIBERATE AMONGST
26 YOURSELVES, THOSE MEMBERS OF THE JURY THAT HEARD ALL OF THE
27 EVIDENCE.

28 ANY QUESTIONS?

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1 A JUROR: ONE QUESTION ON THE INSTRUCTION ON PAGE
2 31 IN THE MIDDLE OF THE PAGE. IT'S IN REFERENCE TO COUNT
3 SIX, WHERE YOU INDICATE THAT TO INDICT A PERSON OTHER THAN
4 RONALD GONZALES FOR THE CRIME CHARGED, YET COUNT SIX CHARGES
5 THREE PERSONS -- WHY HAVE YOU MADE THAT DISTINCTION?

6 MR. FINKELSTEIN: THE REASON IS THE OFFICIAL WHO
7 ACTUALLY VOTED FOR THE DISBURSEMENT OF THE MONEY WAS RON
8 GONZALES. GUERRA DIDN'T VOTE FOR IT, NORCAL DIDN'T VOTE FOR
9 IT, SO THEY DID NOT DIRECTLY COMMIT THE ACT. THEY CAN ONLY
10 BE INDICTED IF YOU FIND THAT ACT WAS COMMITTED AS PART OF A
11 CONSPIRACY AND THAT THE OTHER INDIVIDUALS NAMED IN THAT
12 COUNT WERE MEMBERS OF THAT CONSPIRACY.

13 AS I SAID TO YOU IN THE INSTRUCTION, THAT'S WHY
14 THIS INSTRUCTION IS GIVEN. IT'S SORT OF LIKE IF I DO THE
15 BURGLARY OF A GUN SHOP IN CONSPIRACY WITH MY COLLEAGUE TO
16 COMMIT THE ROBBERY, HE WAS NOT WITH ME AT THE TIME I

17 COMMITTED THE BURGLARY, HE DIDN' T PHYSICALLY DO IT, BUT
18 BECAUSE I DID IT IN FURTHERANCE OF THE CONSPIRACY, IT WAS A
19 NATURAL AND PROBABLE CONSEQUENCE, HE' S GUILTY, POOR
20 MR. GIBBONS-SHAPIRO IS GUILTY OF IT TOO. THAT' S HOW IT
21 WORKS.

22 A JUROR: I HAVE TWO QUESTIONS.

23 IN SOME OF THE INSTRUCTIONS, ONE OF THE OVERT ACTS
24 HAD TO TAKE PLACE IN SANTA CLARA COUNTY AND WITH CERTAIN
25 CIRCUMSTANCES. FOR EXAMPLE, THE EDITING OF THE DOCUMENT OR
26 TRANSMISSION OF AN E-MAIL. THERE ARE OBVIOUSLY ONE OR MORE
27 END POINTS OF SUCH A TRANSACTION.

28 WHAT IS CONSIDERED IN SANTA CLARA COUNTY FOR SUCH

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1 A TRANSACTION TO BE AN IMPORTANT PART OF --

2 MR. FINKELSTEIN: IF ANY PORTION OF IT TOOK PLACE
3 IN SANTA CLARA COUNTY, BUT THIS IS A LITTLE CONFUSING. LET
4 ME SEE HOW I CAN BEST EXPLAIN THIS.

5 THE JURISDICTION OF THIS GRAND JURY IS FOR CRIMES
6 COMMITTED IN SANTA CLARA COUNTY. SO YOU HAVE TO FIND THAT
7 AT LEAST ONE OVERT ACT WAS COMMITTED IN THE COUNTY OF SANTA
8 CLARA, BUT YOU ALSO HAVE TO FIND THAT AT LEAST ONE OVERT ACT
9 WAS COMMITTED WITHIN THE THREE YEARS PRIOR TO THE

10 INDICTMENT, BUT THEY DON'T HAVE TO BE THE SAME OVERT ACT.

11 SO IF YOU FIND AN OVERT ACT THAT WAS COMMITTED IN
12 SANTA CLARA COUNTY, THAT GIVES US JURISDICTION. AND IF YOU
13 ALSO FIND ANOTHER OVERT ACT, COULD BE THE SAME BUT DOESN'T
14 HAVE TO BE, THAT WAS COMMITTED WITHIN THREE YEARS, THEN WE
15 KNOW WE'RE WITHIN THE STATUTE OF LIMITATIONS.

16 SO DOES THAT ANSWER YOUR QUESTION?

17 A JUROR: YES, IT DOES.

18 THE SECOND QUESTION HAD TO DO WITH AN ACT OR
19 AGREEMENT WHICH IS A PROMISE TO PERFORM WHICH YOU DON'T
20 CARRY THROUGH ON. CLEARLY, A CONTRACT REPRESENTS SUCH A
21 PROMISE. HOW GENERAL IS THE TERM PROMISE, IS THAT A WORD OF
22 ART --

23 MR. FINKELSTEIN: NO. THAT'S JUST THE ORDINARY
24 ENGLISH MEANING. WE HAVE TRIED TO SUGGEST IN THE
25 INDICTMENT, IN THE BEGINNING OF COUNT ONE WE'VE LISTED OUT A
26 NUMBER OF POSSIBLE PROMISES OR REPRESENTATIONS.

27 REMEMBER, IT HAS TO BE EITHER A FALSE
28 REPRESENTATION OR A PROMISE WITH FRAUDULENT INTENT NOT TO

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1 PERFORM IT. AND WE SUGGESTED A NUMBER OF THEM AND ACTUALLY

2 LISTED THEM FOR YOUR BENEFIT, IF YOU WILL, THAT YOU CAN RELY
3 ON. BUT WE'VE ALSO SAID IT'S NOT LIMITED TO THOSE, YOU CAN
4 FIND OTHERS, AND WE'VE SEEN A NUMBER OF THEM WHEN I WENT
5 OVER THE EVIDENCE THIS MORNING, STARTING WITH PROMISING TO
6 PERFORM THE SERVICES FOR THE PRICE STATED IN THE AGREEMENT,
7 AGREEING OR PROMISING THAT THE PAYMENTS FROM THE CONTRACTOR
8 TO SUBCONTRACTOR WOULD BE THE SOLE RESPONSIBILITY OF THE
9 CONTRACTOR, KNOWING THAT THEY WERE GOING TO ASK FOR
10 ADDITIONAL MONEY FROM THE CITY FOR THAT, AND SO ON.
11 REPRESENTATIONS IN THE PROPOSAL THAT CWS WOULD DO THE
12 RECYCLING AT NO CHARGE TO NORCAL, REPRESENTATIONS THAT THEY
13 WOULD USE ILWU WORKERS, EXISTING COLLECTIVE BARGAINING
14 AGREEMENT, AND THERE IS A LONG LIST. YOU DON'T HAVE TO FIND
15 THEM ALL, JUST HAVE TO FIND ONE.

16 THE FOREPERSON: THEN THE THIRD QUESTION, YOU GAVE
17 THE EXAMPLES OF ROBBING A BANK IN THE CONTEXT OF A
18 CONSPIRACY. AND THAT THE ACT OF ROBBING THE BANK
19 EFFECTIVELY WAS THE END OF THE CONSPIRACY. IF THE
20 PARTICIPANTS DID SOMETHING SUBSEQUENTLY TO COVER UP THAT THE
21 BANK WAS ROBBED OR THAT THEY TOOK PART, DOES THAT CONSTITUTE
22 PART OF THE CONSPIRACY?

23 MR. FINKELSTEIN: NO. ONCE THE GOAL OF THE
24 CONSPIRACY IS ACHIEVED, IT'S OVER. BUT THAT'S WHY IN THE
25 FIRST CONSPIRACY, THE CHEAT AND DEFRAUD, WE ALLEGE THAT IT
26 ENDS AT LEAST ON DECEMBER 14 OF 2004 WHEN THE AMENDMENT CAME
27 THROUGH BECAUSE THEY ACCOMPLISHED WHAT THEY SET OUT TO DO,

28 GET THE MONEY. ALTHOUGH THERE IS AN ARGUMENT THEY ARE STILL

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1 GETTING THE MONEY, AT LEAST THROUGH MARCH.

2 IN THE MISAPPROPRIATION CONSPIRACY, WE ALLEGE THAT
3 THE CONSPIRACY WENT THROUGH AT LEAST MARCH OF 2006, BECAUSE
4 THE NORCAL WITNESS TESTIFIED THAT THEY HAD GOTTEN THE END OF
5 MARCH 2006 PAYMENT. AND, YOU KNOW, AN INFERENCE CAN BE
6 DRAWN THAT THEY ARE STILL GETTING IT. BUT WE KNOW FOR SURE
7 THEY GOT IT AT LEAST THROUGH MARCH OF 2006, AND IF THE GOAL
8 IS TO MISAPPROPRIATE PUBLIC MONEY, THEY WERE AT LEAST
9 MISAPPROPRIATING IT THROUGH MARCH OF 2006, WHEN WE KNOW THE
10 LAST PAYMENT WAS MADE. BECAUSE OF THE TIME LIMIT WHEN THE
11 WITNESS TESTIFIED, WE DON'T KNOW FOR SURE WHETHER THEY ARE
12 STILL GETTING IT.

13 A JUROR: THANK YOU.

14 A JUROR: SOMETHING HAS BEEN BOTHERING ME A LITTLE
15 BIT, BUT I HESITATE TO BRING IT UP. I HAVE DISCLOSED WHEN I
16 KNEW PEOPLE, BUT I DIDN'T UNTIL (NAME REDACTED) BROUGHT UP
17 THAT SHE KNEW PAT DANDO. BUT I NEVER DISCLOSED THAT I KNEW
18 RON GONZALES OR GUERRA.

19 MR. FINKELSTEIN: WHEN YOU SAY YOU KNOW THESE
20 INDIVIDUALS, IN WHAT WAY DO YOU KNOW THEM?

21 A JUROR: FOR GONZALES, I WAS ON THE OTHER SIDE OF
22 HIS MAYORAL CAMPAIGN WITH PAT. AND WITH GUERRA, I KNOW HIM
23 BECAUSE HE WAS THE AID OF FRANK FISCALINI, SO I KNEW HIM
24 THAT WAY.

25 MR. FINKELSTEIN: I THANK YOU FOR BRINGING THAT
26 UP. DOES THAT MAKE YOU FEEL IN ANY WAY UNCOMFORTABLE, AND
27 IF IT DOES, YOU CAN EXCUSE YOURSELF. IT'S UP TO YOU.

28 A JUROR: NO, I REALLY DON'T FEEL UNCOMFORTABLE.

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2301

1 I FEEL THE EVIDENCE HAS BEEN PRESENTED HERE, I FEEL I CAN BE
2 OBJECTIVE. I WAS WORRIED MORE ABOUT THE PERCEPTION WE
3 TALKED ABOUT IN THE PAST.

4 MR. FINKELSTEIN: AS LONG AS YOU FEEL ABSOLUTELY
5 CERTAIN THAT YOU WON'T APPROACH THIS CASE OR JUDGE THIS CASE
6 IN ANY WAY DIFFERENT FROM SOME OTHER CASE WHERE YOU DIDN'T
7 KNOW THE PEOPLE, THEN I WILL THINK THAT'S FINE.

8 IF YOU THINK YOU'RE GOING TO LOOK AT THE CASE IN ANY WAY
9 DIFFERENTLY BECAUSE YOU KNOW SOME OF THE PEOPLE WHO HAVE
10 TESTIFIED AS WITNESSES, YOU KNOW SOME OF THE POTENTIAL
11 DEFENDANTS, THEN I THINK YOU SHOULD DISQUALIFY YOURSELF.
12 BUT IF YOU CAN ASSURE US THAT'S NOT GOING TO ENTER INTO YOUR

13 DELIBERATIONS IN ANY WAY, SHAPE, OR FORM, THEN THAT'S OKAY.
14 ONLY YOU KNOW THE ANSWER.

15 A JUROR: I REALLY BELIEVE THAT I CAN BE
16 OBJECTIVE. I DON'T THINK THERE IS A PROBLEM FOR ME.

17 MR. FINKELSTEIN: I THANK YOU FOR MAKING THAT
18 DISCLOSURE.

19 ANYTHING ELSE?

20 THE FOREPERSON: I HAVE A COUPLE OF PROCEDURAL
21 QUESTIONS.

22 IT'S NOW 20 AFTER 3:00. OUR PLAN IS TO RELOCATE
23 TO OUR NORMAL GRAND JURY SUITE TO DELIBERATE. AND GIVEN THE
24 COMPLEXITY OF THE ADMONITION, I DOUBT THAT WE ARE GOING TO
25 COMPLETE EVERYTHING BY 4:00 O'CLOCK THIS AFTERNOON.

26 MR. FINKELSTEIN: THAT'S FINE. SO IT'S UP TO YOU.
27 IF YOU WANT TO START DELIBERATIONS FRESH IN THE MORNING,
28 THAT'S FINE. WE WILL TRANSPORT THE EVIDENCE TO THE JURY

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2302

1 ROOM ACROSS THE STREET AND YOU CAN START DELIBERATING THERE,
2 AND WE'LL PICK UP THE EVIDENCE AT 4:00 O'CLOCK IF THAT'S
3 YOUR QUITTING TIME.

4 THE FOREPERSON: THAT IS PART OF THE PROCEDURE,
5 THAT YOU WOULD TAKE POSSESSION OF THE EVIDENCE AT 4:00

6 O' CLOCK?

7 MR. FINKELSTEIN: YES.

8 THE FOREPERSON: HOW SHALL WE COMMUNICATE WHEN
9 WE'RE TO THE POINT OF COMPLETION?

10 MR. FINKELSTEIN: YOU CAN JUST CALL ME. I'LL
11 LEAVE YOU A CELL NUMBER.

12 THE FOREPERSON: AND THEN JUST BASED ON WHAT I
13 THINK CAN HAPPEN THIS AFTERNOON WITH THE TIME TO RELOCATE
14 AND GET SETTLED AND TALK, WE'RE TENTATIVELY PLANNING TO
15 START TOMORROW MORNING, AND WE WOULD USE THE SAME METHOD, TO
16 GIVE YOU A CALL.

17 MR. FINKELSTEIN: WE WILL HAVE THE INVESTIGATOR
18 DELIVER THE EVIDENCE TOMORROW AT 9:00 O' CLOCK IN THE GRAND
19 JURY MEETING ROOM ACROSS THE STREET.

20 THE FOREPERSON: OKAY. GOOD.

21 A JUROR: BY THE TIME WE GET OURSELVES ORGANIZED
22 HERE, GET OVER THERE, IS IT WORTHWHILE TO HAVE THEM BRING
23 THAT STUFF OVER, SIT DOWN, AND DO IT TODAY?

24 MR. FINKELSTEIN: IT'S JUST THREE TUBS, BUT IT'S
25 UP TO YOU.

26 THE FOREPERSON: LET ME KNOW YOUR PREFERENCES.
27 HOW MANY PEOPLE WOULD LIKE TO AT LEAST SIT AND TALK ABOUT
28 PROCEDURE AND GET ORGANIZED IN TERMS OF THE NUMBER OF

1 DECISIONS --

2 MR. FINKELSTEIN: CAN I MAKE A SUGGESTION? WE
3 HAVE THE COURTROOM FOR THE REST OF THE DAY. GIVEN THE HOUR,
4 IT MAY MAKE MORE SENSE TO HAVE A DISCUSSION, WE'LL STEP
5 OUTSIDE AND YOU CAN HAVE THE WHOLE COURTROOM TO DELIBERATE,
6 MOVE AROUND IN, AND THEN AT 4:00 O'CLOCK WHEN YOU RECESS,
7 WE'LL TAKE POSSESSION OF THE EVIDENCE AGAIN, BRING IT TO YOU
8 ACROSS THE STREET AT 9:00 O'CLOCK.

9 THE FOREPERSON: I THINK THAT'S THE MOST SENSIBLE
10 WAY TO USE THE TIME REMAINING THIS AFTERNOON; THAT'S A FINE
11 IDEA.

12 MR. FINKELSTEIN: OKAY. AND AGAIN, JURORS WHO DID
13 NOT HEAR ALL THE EVIDENCE SHOULD EXCUSE THEMSELVES FROM THE
14 DELIBERATION.

15 A JUROR: WHAT DO WE DO WITH THE PAPERS?

16 MR. FINKELSTEIN: YOU CAN HOLD ON TO THEM FOR THE
17 TIME BEING, LIKE YOUR NOTES. IT MAKES IT EASIER IF EVERYONE
18 HAS THE DOCUMENT, PROPOSED DOCUMENT, AND DURING THE RECESS
19 WE PRINTED OUT THE LAST PAGE OF THE INDICTMENT WITH THE
20 CORRECT SPELLING OF YOUR FOREPERSON'S NAME, AND I'LL LEAVE
21 HIM THE ORIGINAL, WHICH IS RIGHT HERE.

22 THE FOREPERSON: THESE NOTEBOOKS WE SHOULD LEAVE
23 HERE AND YOU'LL COLLECT THEM?

24 MR. FINKELSTEIN: RIGHT, AT 4:00 O'CLOCK.

25 A JUROR: WE LEAVE THE NOTEBOOKS HERE. SHALL WE
26 ALSO LEAVE THE INDICTMENT?

27 MR. FINKELSTEIN: YES, PLEASE, AND PLEASE REMEMBER
28 IT'S VERY IMPORTANT THAT THE MAIN THING IS TO MAINTAIN THE

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1 CONFIDENTIALITY OF THE PROCEEDINGS. DO NOT TALK TO ANYONE
2 ABOUT THIS. THIS IS STRICTLY CONFIDENTIAL.

3 JUROR: YOU WILL DELIVER THESE OVER TO THE OTHER
4 BUILDING?

5 MR. FINKELSTEIN: YES. TOMORROW AT 9:00.

6 THE FOREPERSON: ANY OTHER QUESTIONS THIS
7 AFTERNOON?

8 MR. FINKELSTEIN: WHY DON'T WE EXCUSE OURSELVES.

9 (A BRIEF RECESS WAS TAKEN.)

10 THE FOREPERSON: LET THE RECORD SHOW THAT 17 OF 19
11 JURORS ARE PRESENT. MISS (NAME REDACTED) AND MR. (NAME
12 REDACTED), WHO WERE NOT ABLE TO BE PRESENT FOR ALL OF THE
13 EVIDENCE, ARE NOT IN THE ROOM.

14 MR. FINKELSTEIN: MR. FOREMAN, I UNDERSTAND THE
15 JURORS MAY HAVE SOME QUESTIONS.

16 THE FOREPERSON: YES. THERE ARE FOUR TOPICS, AND
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17 LET ME READ THOSE TO YOU, AND THEN PERHAPS MEMBERS OF THE
18 JURY CAN AUGMENT IF I MISS SOME PARTS OF IT.

19 THERE WAS A DESIRE TO HAVE YOU GO BACK OVER THE
20 DEFINITION OF BRIBERY AS IT'S USED IN THIS CASE, AND THE WAY
21 YOU THOUGHT BOTH SOLICITATION AND THE GIVING OF A BRIBE WAS
22 CARRIED OUT BY MAYOR GONZALES AND NORCAL.

23 MR. FINKELSTEIN: OKAY.

24 THE FOREPERSON: THE SECOND WAS, COULD WE HAVE A
25 COPY OF THE POWERPOINT PRESENTATION THAT YOU MADE THIS
26 MORNING THAT LINKED EXHIBITS TO THE VARIOUS COUNTS THAT WERE
27 PART OF THE INDICTMENT.

28 SECOND IS, SINCE WE'RE GOING TO HAVE A CRATE OF

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2305

1 WHAT IS NOW I THINK 146 DOCUMENTS AND YOU AND
2 MR. GIBBONS-SHAPIRO HAVE AN INDEX --

3 MR. FINKELSTEIN: WE HAVE A LIST FOR YOU.

4 THE FOREPERSON: SO THE QUESTION WAS THE INDEX.
5 IF WE WANT TO FIND THE MAYOR'S E-MAIL ON SUCH AND SUCH A
6 TOPIC, HOW DO WE FIGURE OUT WHICH PIECE OF EVIDENCE IT IS?

7 MR. FINKELSTEIN: OKAY.

8 THE FOREPERSON: THE LAST QUESTION HAD TO DO WITH

9 THE DEFINITION OF FALSIFYING PUBLIC RECORDS, BOTH COMPLETELY
10 AND IN PART, AND HOW THAT MAPS INTO THE EVIDENCE THAT WAS
11 PRESENTED IN A WAY YOU THINK THAT SHOWS THIS UNDER THOSE
12 COUNTS OF THE INDICTMENT.

13 MR. FINKELSTEIN: OKAY. DOES THAT QUESTION HAVE
14 TO DO WITH WHETHER THE WORD FALSIFY MEANS TO CHANGE AN
15 EXISTING RECORD OR TO MAKE A FALSE ENTRY IN THE FIRST
16 INSTANCE?

17 A JUROR: I THINK AS I UNDERSTAND THE DISTINCTION
18 IT COULD BE EITHER/OR, BUT IN THIS CASE IT'S FALSIFYING AS
19 INITIALLY WRITTEN.

20 MR. FINKELSTEIN: RIGHT.

21 A JUROR: THE QUESTION WOULD ALSO BE RELATED TO
22 TELLING THE WHOLE TRUTH, ALL OF THE TRUTH VERSUS PART OF THE
23 TRUTH; ALTHOUGH PERHAPS NO FALSE STATEMENTS WERE MADE, WHAT
24 WAS SAID IS NOT ALL THAT SHOULD HAVE BEEN SAID.

25 MR. FINKELSTEIN: OKAY. WE'RE GOING TO TAKE NOTES
26 OF YOUR QUESTIONS AND, GIVEN THE HOUR, WE'LL PROBABLY
27 RESPOND IN THE MORNING. DO YOU STILL WANT TO START AT 9:00
28 O'CLOCK?

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2306

1 THE FOREPERSON: IF IT WOULD BE AT ALL POSSIBLE.
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2 I THINK WE WOULD LIKE TO PUSH THIS THROUGH AS QUICKLY AS WE
3 CAN.

4 MR. FINKELSTEIN: CAN WE MAKE IT 9:30?

5 THE FOREPERSON: SURE.

6 A JUROR: WE COULD MAKE IT 10:00 IF WE HAVE TO.

7 A JUROR: UNLESS EVERYBODY IS OPPOSED, WE CAN
8 STILL START AT 9:00 AND HAVE HIM SHOW UP AT 9:30.

9 THE FOREPERSON: WE'LL START AT 9:00.

10 MR. FINKELSTEIN: THAT WILL BE ACROSS THE STREET.
11 LET ME ASK THE REPORTER IF SHE IS AVAILABLE.

12 COURT REPORTER: I'LL BE THERE.

13 A JUROR: COULD YOU GO OVER THE CONCEPT, NOT WHAT
14 THE DATES ARE, BUT WHAT ARE THE STATUTE OF LIMITATIONS AS TO
15 EACH OF THE COUNTS WHERE THERE IS ONE AND WHAT THE
16 DEFINITIONS OR BOUNDS REALLY ARE?

17 MR. FINKELSTEIN: SURE. WE CAN DO THAT.

18 ANYTHING ELSE? ALL RIGHT.

19 THE FOREPERSON: I THINK THAT'S IT.

20 MR. FINKELSTEIN: WE HAVE A PRINTOUT OF A LIST OF
21 THE EXHIBITS WHICH I NEGLECTED TO GET TO YOU, AND NOW WE
22 HAVE PREPARED IT FOR YOU. IT HAS THREE COLUMNS; THE GRAND
23 JURY NUMBER, THE DATE COLUMN, WHICH REFERS TO THE DATE OF
24 THE ITEM, AND THE DESCRIPTION COLUMN, AS TO WHAT THE ITEM
25 IS. SO YOU CAN SCAN THIS VERY QUICKLY AND FIND EXHIBITS,
26 AND WE'LL LEAVE THEM WITH THE EXHIBITS.

27 THE FOREPERSON: GOOD.

28

MR. FINKELSTEIN: AS FOR THE OTHER ITEMS, WE' LL

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2307

1 CONSIDER OUR ANSWERS AND SHARE THEM TOMORROW WITH YOU AT
2 10:00 O' CLOCK.

3 THE FOREPERSON: WE' LL MEET AT 9:00, HAVE OUR
4 DISCUSSION, AND YOU WILL BE THERE AT 10:00 O' CLOCK?

5 MR. FINKELSTEIN: YES. ANY OTHER QUESTIONS?

6 THE FOREPERSON: NO. I THINK THAT WILL DO IT.

7 MR. FINKELSTEIN: IF YOU THINK OF ANYTHING
8 OVERNIGHT, WE' LL DEAL WITH THAT TOMORROW.

9 JUROR: OUR NOTES AND BOOKS WILL BE THERE
10 TOMORROW?

11 MR. FINKELSTEIN: WITH THE EVIDENCE. WE TAKE
12 CUSTODY OF THEM, GUARD THEM, AND TRANSMIT THEM TO YOU.

13 THE FOREPERSON: WE NEED TO LEAVE OUR COPY OF THE
14 INSTRUCTIONS AND COPY OF THE DRAFT INDICTMENT?

15 MR. FINKELSTEIN: I THINK IT'S SAFE TO LEAVE ALL
16 THE MATERIALS. IF YOU MADE NOTES ON YOUR COPIES, PLEASE PUT
17 YOUR NAMES ON THE COPIES. IF THEY ARE JUST BLANK COPIES,
18 THEY ARE BLANK COPIES.

19 THE FOREPERSON: THE PEOPLE IN THE JURY HAVE BEEN,

20 I THINK, VERY DILIGENT ABOUT BEING CAREFUL ABOUT DOCUMENTS,
21 NOT ONLY IN THIS CASE, BUT ALL OTHER CASES. I KNOW THAT
22 SOME PEOPLE WOULD LIKE TO READ THIS, TO HAVE IT ABSORBED.
23 WOULD IT BE POSSIBLE TO TAKE THIS MATERIAL HOME, SUBJECT TO
24 THE --

25 MR. FINKELSTEIN: I THINK THAT THE SAFER COURSE,
26 BECAUSE OF THE NATURE OF THE PROCEEDING WE'RE EMBARKING ON,
27 THE SAFER COURSE WOULD BE TO DO THAT IN THE JURY ROOM.

28 THE FOREPERSON: OKAY. ANY OTHER QUESTIONS?

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2308

1 IT LOOKS LIKE WE'RE ADJOURNING.
2 (COURT WAS ADJOURNED FOR THE DAY.)

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2309

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SAN JOSE, CALI FORNIA

JUNE

21, 2006

5 THE FOREPERSON: LET ME CALL THE MEETING OFF OF
6 BASEBALL BACK TO THE BUSINESS AT HAND. LET THE RECORD NOTE
7 THAT 17 OF THE 19 JURORS ARE PRESENT. THE TWO GRAND JURORS,
8 (NAMES REDACTED), WHO WERE NOT PRESENT TO RECEIVE ALL OF THE
9 TESTIMONY, HAVE RECUSED THEMSELVES FROM THESE DELIBERATIONS.

10 LET ME SUMMARIZE WHERE WE LEFT OFF AS FAR AS
11 QUESTIONS, AND AS OF THIS MORNING WE HAVE SEVERAL OTHERS
12 THAT I WOULD LIKE TO ADD TO THE LIST. SO IF IT'S OKAY WITH
13 YOU, I'LL GIVE YOU THE ENTIRE LIST AND WE CAN SORT OF DECIDE
14 HOW TO GO THROUGH THIS.

15 MR. FINKELSTEIN: I WAS GOING TO SUGGEST THAT SOME
16 OF THE ITEMS FROM LAST NIGHT WE ARE PREPARED TO TALK ABOUT.

17 ONE OF THE ITEMS IS SIMPLY COULD YOU HAVE A COPY
18 OF THE POWERPOINT. I HAVE COPIES OF THE POWERPOINT IF YOU
19 WOULD LIKE TO DO THAT.

20 SO THAT IT'S PART OF THE RECORD, I'M GOING TO ASK
21 TO HAVE MARKED AS EXHIBIT 145 A PRINTOUT OF THE POWERPOINT
22 PRESENTATION THAT I PRESENTED YESTERDAY. BUT I WANT -- I'LL
23 PASS THAT DOWN AND I HAVE COPIES I'LL PASS DOWN -- BUT I
24 WANT TO MAKE IT VERY, VERY CLEAR THAT THIS POWERPOINT IS
25 NEITHER EVIDENCE NOR A SUBSTITUTE NOR A SUPPLEMENT TO THE
26 JURY INSTRUCTIONS; THIS IS BASICALLY THE DISTRICT ATTORNEY'S
27 VIEW OF THE CASE AND WHAT WE THINK THE EVIDENCE SHOWS, WHAT
28 WE THINK THE CORRECT LEGAL ARGUMENTS ARE.

1 IN YOUR DELIBERATIONS, YOU MAY NOT USE THE
2 POWERPOINT AS ANY KIND OF EVIDENCE. IT'S SIMPLY OUR VIEW OF
3 THE CASE. YOU CAN USE IT AS A ROAD MAP, IF YOU WILL, OR A
4 GUIDE TO THE EVIDENCE, BUT YOUR DECISION HAS TO BE DECIDED
5 SOLELY BY THE EVIDENCE. AND WITH REGARD TO ANY OF THE LEGAL
6 ARGUMENTS MADE IN THE POWERPOINT, ONCE AGAIN IT'S THE JURY
7 INSTRUCTIONS WHICH WE MARKED YESTERDAY AS EXHIBIT 144 THAT
8 MUST GOVERN YOUR DELIBERATIONS IN THIS MATTER.

9 ARE THERE ANY QUESTIONS ABOUT THAT?

10 THE FOREPERSON: I BELIEVE THAT IS CLEARLY
11 UNDERSTOOD BY THE GRAND JURY.

12 MR. FINKELSTEIN: OKAY. AND WE'RE ABLE TO -- THE
13 OTHER THING WHICH I THINK IS PROBABLY THE SIMPLE THING IS WE
14 HAVE A CHART, AND I DON'T THINK WE NEED TO MARK THIS, BUT
15 THIS SUMMARIZES THE STATUTE OF LIMITATIONS AND I CAN GO OVER
16 THAT EASILY.

17 THE FOREPERSON: THAT ACTUALLY JIVES WITH ONE OF
18 THE OTHER QUESTIONS THAT CAME UP THIS MORNING DURING OUR
19 DELIBERATIONS.

20 MR. FINKELSTEIN: WHY DON'T WE PASS THESE AROUND.
21 AND IT'S JUST A SIMPLE CHART. AS YOU SEE, THERE ARE THREE
22 COLUMNS. THE FIRST COLUMN LISTS THE COUNTS, THE NEXT COLUMN

23 THE CRIME, AND THE LAST COLUMN THE STATUTE OF LIMITATIONS.
24 I CAN GO OVER THAT VERY SIMPLY.

25 THE FOREPERSON: DO YOU WANT US TO DESTROY THE
26 EXTRAS?

27 MR. FINKELSTEIN: NO. YOU CAN PASS THEM BACK.
28 PLEASE REMEMBER THAT THE POWERPOINT IS NEITHER

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2311

1 EVIDENCE NOR THE LAW. THE LAW IS IN THE JURY INSTRUCTION
2 PACKET WHICH WE MARKED YESTERDAY AS 144.

3 WITH REGARD TO THE STATUTE OF LIMITATION, IF YOU
4 LOOK AT YOUR CHART, YOU'LL SEE COUNTS ONE AND FIVE ARE THE
5 COUNTS THAT ALLEGE CONSPIRACY, AND THE STATUTE OF
6 LIMITATIONS FOR CONSPIRACY IS THREE YEARS FROM THE LAST
7 OVERT ACT.

8 SO AS TO EACH CONSPIRACY, LET'S SAY COUNT ONE, AT
9 LEAST TWELVE JURORS HAVE TO FIND THAT AN OVERT ACT WAS
10 COMMITTED WITHIN THREE YEARS OF TODAY. TODAY IS 2006, SO WE
11 WOULD BE TALKING ABOUT 2003.

12 THE FOREPERSON: RIGHT.

13 MR. FINKELSTEIN: IT'S JUNE 21ST, SO JUNE 21ST OF
14 2003 OR LATER. AND THAT WOULD BE TRUE OF BOTH COUNTS ONE
15 AND COUNT FIVE.

16 AS TO THE REMAINING COUNTS, WHICH WOULD BE COUNTS
17 TWO AND THREE, THE BRIBERY; COUNTS FOUR AND SEVEN, THE
18 FALSIFYING OF A PUBLIC RECORD; AND COUNT SIX, THE
19 MISAPPROPRIATING OF PUBLIC MONEY; THE STATUTE OF LIMITATION
20 FOR THOSE OFFENSES IN OUR VIEW IS FOUR YEARS FROM THE DATE
21 OF THE DISCOVERY.

22 THE DATE OF DISCOVERY IS DEFINED FOR YOU IN THE
23 JURY INSTRUCTIONS. AND TO SORT OF SUMMARIZE IT FOR A
24 SHORTHAND READER'S DIGEST VIEW, IT'S ACTUALLY THE DATE IT
25 WAS DISCOVERED OR THE DATE WHEN IT SHOULD HAVE BEEN
26 DISCOVERED, WHICHEVER IS EARLIER. SO IF SOMEBODY WAS
27 PARTICULARLY DENSE AND DIDN'T FIND OUT ABOUT AND CONNECT THE
28 DOTS UNTIL A YEAR AGO WHAT THEY SHOULD HAVE DISCOVERED FOUR

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2312

1 YEARS AGO, THE DATE OF DISCOVERY WOULD BE FOUR YEARS AGO.

2 ON THAT POINT, OUR VIEW IS AND WE THINK THE
3 EVIDENCE SUPPORTS THIS, THE EARLIEST POSSIBLE DATE THAT
4 ANYONE EXERCISING REASONABLE DILIGENCE COULD HAVE OR SHOULD
5 HAVE DISCOVERED THIS WAS IN SEPTEMBER OF 2002 WHEN IT WAS
6 MADE KNOWN TO MOSHER THAT THE MAYOR HAD PROMISED TO MAKE IT
7 GOOD, WHATEVER THAT MEANS.

8 SO THAT MEANS FOUR YEARS FROM SEPTEMBER '02 WOULD
9 BE SEPTEMBER '06. THIS IS JUNE OF '06, SO IF YOU ACCEPT
10 THAT VIEW OF THE EVIDENCE THEN THE STATUTE OF LIMITATIONS
11 WOULD NOT HAVE RUN.

12 ANY QUESTIONS ABOUT THAT?

13 A JUROR: IF THIS GOES TO TRIAL, THE STATUTE OF
14 LIMITATIONS IS STILL -- WHAT WE'VE DONE TODAY, NOT THE DATE
15 OF THE TRIAL OR ANYTHING, IT GOES AFTER THIS?

16 MR. FINKELSTEIN: THAT'S A GOOD POINT. REMEMBER
17 THAT YOU'RE NOT CONVICTING ANYONE OF CRIMES IN THIS
18 PROCEEDING; YOU'RE BASICALLY DECIDING WHETHER IT SHOULD GO
19 TO TRIAL. AND THAT'S WHY IT'S A LOWER STANDARD; THAT'S WHY
20 IT'S A PROBABLE CAUSE STANDARD.

21 ONCE THE INDICTMENT IS RETURNED, IT TOLLS OR STOPS
22 THE STATUTE OF LIMITATIONS. SO BASICALLY, THE STATUTE OF
23 LIMITATION COMMENCES WHEN THE PROCEEDING COMMENCES. AND IF
24 YOU RETURN AN INDICTMENT AGAINST ONE OR MORE PEOPLE FOR ONE
25 OR MORE CRIMES, THAT WOULD COMMENCE THE PROCEEDING.

26 IT'S LIKE FILING A COMPLAINT IN A CIVIL LAWSUIT;
27 ONCE YOU FILE THE COMPLAINT, THAT STOPS THE STATUTE. YOU
28 DON'T HAVE TO BRING IT TO TRIAL WITHIN THE LIMITATION

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1 PERIOD; YOU HAVE TO SIMPLY START THE PROCEEDING, AND THE
2 INDICTMENT STARTS THE PROCEEDING.

3 THE FOREPERSON: WHILE WE'RE ON THE TOPIC OF
4 STATUTE OF LIMITATIONS, ONE OF THE CONCERNS THAT CAME UP IN
5 DELIBERATIONS THIS MORNING IS THAT THE FINDING REGARDING THE
6 STATUTE OF LIMITATIONS ON PAGE 17 OF THE INDICTMENT STARTING
7 AT 916 MAY BE INCOMPLETE IN THAT IT DOES NOT ADDRESS THE
8 STATUTE AS IT APPLIES TO THE CONSPIRACY CHARGES. IT ONLY
9 BASICALLY ADDRESSES THE FOUR-YEAR STATUTE DATING FROM
10 DECEMBER 12, 2002.

11 MR. FINKELSTEIN: RIGHT. THE REASON FOR THAT IS
12 THE JURY INSTRUCTION, SINCE WE HAVE ALLEGED AN OVERT ACT
13 WITHIN THREE YEARS OF THE PRESENT TIME AND YOU HAVE BEEN
14 INSTRUCTED YOU HAVE TO FIND AT LEAST ONE OVERT ACT TO BE
15 TRUE, THAT TAKES CARE OF THAT MATTER.

16 THE REASON THERE IS THE FINDING LANGUAGE IS
17 BECAUSE WITH THE OTHER KIND OF STATUTE OF LIMITATION, WHICH
18 IS NOT A FIXED PERIOD OF TIME LIKE THREE OR FOUR YEARS BUT
19 RUNS FROM DATE OF DISCOVERY, YOUR FINDING IS REALLY DIRECTED
20 TO WHEN IT WAS OR SHOULD HAVE BEEN DISCOVERED, THAT'S THE
21 FINDING YOU'RE MAKING. SO THANK YOU FOR BRING THAT TO OUR
22 ATTENTION.

23 THE FOREPERSON: WE WERE CONCERNED THAT NEEDED TO
24 BE AUGMENTED WITH THE OTHER CONSPIRACY ISSUE.

25 MR. FINKELSTEIN: NO.

26 A JUROR: IF WE FIND SOME OF THE OVERT ACTS ARE
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27 WITHIN THE TIME BUT OTHERS AREN' T, DOES THAT HAVE ANY IMPACT
28 ON WHETHER THEY CAN BE USED AT TRIAL?

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2314

1 MR. FINKELSTEIN: NO. YOU JUST HAVE TO FIND AT
2 LEAST ONE.

3 A JUROR: THE OTHER COMPLAINTS WOULD STILL BE
4 RELEVANT OR OTHER EVIDENCE?

5 MR. FINKELSTEIN: THEY WOULD BE RELEVANT. THE
6 OVERT ACTS SERVE TWO PURPOSES -- ACTUALLY, THREE.

7 ONE, THEY DEMONSTRATE THAT THE CONSPIRACY HAS
8 MOVED FROM MERE THOUGHT TO ACTION. THAT'S ONE PURPOSE.
9 THAT PURPOSE IS SEPARATE AND APART FROM THE STATUTE OF
10 LIMITATION PURPOSE.

11 TWO, TO THE EXTENT THE OVERT ACTS ARE COMMITTED IN
12 SANTA CLARA COUNTY, THEY SERVE A SECOND PURPOSE TO SHOW THAT
13 THIS CONSPIRACY IS WITHIN THE JURISDICTION OF THIS GRAND
14 JURY AND THIS DISTRICT ATTORNEY'S OFFICE AND THIS COURT
15 WITHIN SANTA CLARA COUNTY.

16 AND THE THIRD PURPOSE IS TO SHOW THAT THE STATUTE
17 HAS NOT BEEN EXCEEDED. SO THEY HAVE DIFFERENT PURPOSES, AND
18 YOU CAN FIND ONE OR ALL OR NONE -- YOU CAN'T FIND NONE, YOU

19 HAVE TO FIND AT LEAST ONE.

20 ANYTHING ELSE?

21 THE FOREPERSON: NO. I THINK THAT'S ALL OF THE
22 QUESTIONS ON STATUTE OF LIMITATIONS. DOES ANYBODY HAVE
23 ANYTHING? NO.

24 MR. FINKELSTEIN: I HAVE A REVISION TO THE
25 INDICTMENT. IT'S NOT CHANGING ANY OF THE CHARGES, IT'S
26 SIMPLY ADDING AN ADDITIONAL EXPLICIT MISREPRESENTATION THAT
27 I THINK PROBABLY OUGHT TO BE THERE, BECAUSE I THINK IT MAKES
28 IT HELPFUL TO UNDERSTAND THE THEORY OF THE CHARGES, GIVE

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2315

1 NOTICE ABOUT THE CHARGES. SO WHY DON'T I PASS THIS OUT NOW,
2 AND I'LL GO OVER THAT CHANGE.

3 I'LL DIRECT YOUR ATTENTION TO THE CHANGE. IT'S
4 ONE LINE. PLEASE MAKE SOME MARK ON YOUR OWN SCRATCH COPY
5 THAT INDICATES --

6 THE FOREPERSON: HAVING OUR NAME ON IT?

7 DID EVERYBODY HEAR MR. FINKELSTEIN? ON THE
8 INDICTMENT THAT YOU GOT YESTERDAY, DRAW A LINE THAT
9 INDICATES THAT IT'S NO LONGER VALID.

10 MR. FINKELSTEIN: LET ME DIRECT YOU TO THE CHANGE.
11 IT'S REALLY AN ADDITION. IF YOU GO TO PAGE TWO OF THE

12 INDICTMENT, THERE'S A SENTENCE THAT BEGINS ON LINE 1 THAT
13 READS:

14 THESE FALSE PRETENSES AND FALSE PROMISES WERE
15 MADE TO THE CITY OF SAN JOSE INCLUDING BUT ARE NOT
16 LIMITED TO THE FOLLOWING:

17 AND THERE'S A LIST OF BULLETED ITEMS THAT SET
18 FORTH SOME OF THE REPRESENTATIONS TO DRAW THE READER'S
19 ATTENTION TO THE THEORY OF THE CASE. AND WHAT WE HAVE ADDED
20 AT LINE 14 IS A NEW BULLETED ITEM WHICH READS AS FOLLOWS:

21 REPRESENTING IN THE RESULTING AGREEMENT THAT
22 ANY COMPENSATION DUE OR PAYABLE TO NORCAL'S
23 SUBCONTRACTORS WOULD BE THE SOLE RESPONSIBILITY OF
24 NORCAL.

25 AND I WANTED TO HIGHLIGHT THAT, IF YOU WILL, FOR
26 THIS REASON. IT SEEMS TO US, AT LEAST IN THE DISTRICT
27 ATTORNEY'S VIEW, THAT AFTER OCTOBER 9 WHEN THE PARTIES,
28 NORCAL AND CWS, SIGNED THAT ADDENDUM AND NORCAL OBLIGATED

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2316

1 ITSELF TO PAY CWS ADDITIONAL COMPENSATION ESTIMATED AT TWO
2 MILLION A YEAR WITH THE EXPECTATION THAT THE CITY WOULD
3 REIMBURSE IT FOR THAT PAYMENT.

4 WHEN THEY THEREAFTER IN MARCH OF 2001 SIGNED THE
5 AGREEMENT -- I BELIEVE IT'S PARAGRAPH 24.11 OF THE
6 CONTRACT -- IN WHICH THEY REPRESENTED AND PROMISED THAT
7 THESE PAYMENTS TO THE SUBCONTRACTOR WOULD BE THE SOLE
8 RESPONSIBILITY OF NORCAL, THEY KNEW THAT WASN'T TRUE; THEY
9 KNEW THAT WAS NOT GOING TO BE THE SITUATION, AND THEY
10 TREATED THAT EXTRA PAYMENT AS A RECEIVABLE. SO IT SEEMS TO
11 US THAT IS AN EXCEEDINGLY CLEAR MISREPRESENTATION TO THE
12 CITY. IT'S A FALSE PROMISE. THEY KNEW FROM THE GET-GO THAT
13 THEY WERE NOT GOING TO BE SOLELY RESPONSIBLE FOR THOSE
14 PAYMENTS, NO RATIONAL CORPORATION WOULD, BUT THEY WENT AHEAD
15 AND ENGAGED IN THIS FALSE PRETENSE TO REPRESENT THAT THEY
16 WOULD.

17 SO I WANTED TO DRAW YOUR ATTENTION TO THAT. I
18 THINK IT'S A GOOD IDEA TO HAVE THAT HIGHLIGHTED, ALTHOUGH
19 THIS IS NOT MEANT TO BE AN EXHAUSTIVELY --

20 THE FOREPERSON: THAT WAS STATED VERBALLY, BASED
21 ON THE EVIDENCE WE HAD SEEN; AND HAVING IT IN THE
22 INDICTMENT, I THINK, IS COMPLETELY APPROPRIATE.

23 MR. FINKELSTEIN: I HAVE AN ORIGINAL I'LL HAND TO
24 YOU.

25 LET ME CHECK MY LIST. I CAN RESPOND TO SOME OF
26 THE QUESTIONS, OR IF YOU WANT TO ADD TO THE LIST, THAT'S
27 OKAY, TOO.

28 THE FOREPERSON: I THINK ONE OF THE ISSUES IS TO

1 HAVE YOU DISCUSS IN SOME MORE DETAIL, OR PERHAPS TO REPEAT
2 FOR THOSE OF US THAT ARE NOT FAMILIAR WITH THE LAW, SOME OF
3 THE SUBTLETIES OF THE TERM BRIBERY AS IT'S USED IN THIS.

4 I THINK THE ISSUE IS, MANY OF US ARE FAMILIAR WITH
5 THE CASE OF THE CONGRESSMAN FROM L. A. WHO HAD \$100,000 IN
6 THE DEEP FREEZE TO HAVE COLD HARD CASH AVAILABLE. THIS IS A
7 LITTLE MORE SUBTLE OR INDIRECT.

8 MR. FINKELSTEIN: DO YOU WANT ME TO DO THAT ONE AT
9 A TIME?

10 THE FOREPERSON: IF YOU LIKE.

11 MR. FINKELSTEIN: WHY DON'T WE DO IT ONE AT A TIME
12 SO WE HAVE THE QUESTION FRESH IN YOUR MIND.

13 THE FIRST RESPONSE IS IN DECIDING THAT ISSUE YOU
14 HAVE TO BE GOVERNED BY THE JURY INSTRUCTIONS AND IN
15 PARTICULAR THE INSTRUCTIONS STARTING AT PAGE 36 AND
16 CONTINUING ON TO PAGE 37.

17 THE FIRST INSTRUCTION IS FOR THE REQUESTING OF THE
18 BRIBE AND RECEIVING OF THE BRIBE.

19 THE SECOND ONE, WHICH IS VERY SIMILAR, IS FOR THE
20 GIVING OR OFFERING OF THE BRIBE.

21 WHY DON'T WE JUST GO DOWN THE LIST AND I CAN
22 ATTEMPT TO GIVE YOU OUR VIEW OF HOW THE FACTS ESTABLISH THE

23 EXISTENCE OF THE ELEMENTS.

24 THE FIRST ELEMENT IS THAT THE PERSON WAS A MEMBER
25 OF THE CITY COUNCIL. THAT I DON'T THINK IS SUBJECT TO ANY
26 DISPUTE.

27 THE SECOND ELEMENT IS THAT THE PERSON IN THIS
28 CASE, WE'RE TALKING ABOUT THE MAYOR, RECEIVED, OFFERED OR

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1 AGREED TO RECEIVE A BRIBE. SO THEREFORE, IN ORDER TO DECIDE
2 WHETHER THAT ELEMENT HAS BEEN MET, WE HAVE TO LOOK AT THE
3 DEFINITION OF WHAT IS A BRIBE. SO LET'S LOOK AT HOW A BRIBE
4 IS DEFINED. THAT APPEARS FURTHER DOWN IN THE INSTRUCTION
5 AND READS AS FOLLOWS:

6 AS USED HERE, BRIBE MEANS SOMETHING OF
7 PRESENT OR FUTURE VALUE OR ADVANTAGE OR A PROMISE
8 TO GIVE SUCH A THING THAT IS REQUESTED OR TAKEN
9 WITH A CORRUPT INTENT THAT THE OFFICIAL VOTE,
10 OPINION, JUDGMENT OR ACTION OF THE PERSON WILL BE
11 UNLAWFULLY INFLUENCED.

12 I WILL SKIP OVER THE REST.

13 THE FIRST THING I THINK THAT ONE HAS TO NOTICE AND
14 OBSERVE, IT'S NOT LIMITED TO CASH. EVEN THOUGH THAT'S THE

15 MORE TYPICAL SCENARIO, AN ENVELOPE OF CASH.

16 WAS THERE SOMETHING OF VALUE, SOMETHING OF PRESENT
17 OR FUTURE VALUE OR ADVANTAGE THAT THE MAYOR ASKED FOR ON
18 OCTOBER 6, 2000? OUR VIEW IS THAT THE ANSWER IS YES. HE
19 ASKED THAT NORCAL GET CWS, ITS SUBCONTRACTOR, TO RECOGNIZE
20 THE TEAMSTERS' UNION, NOTWITHSTANDING THAT IN THEIR PROPOSAL
21 THEY HAD SAID THEY WOULD USE LONGSHOREMEN. SO THAT WAS
22 SOMETHING OF VALUE.

23 NOTICE IT DOESN'T STAY IT HAS TO BE SOMETHING OF
24 VALUE TO THE OFFICIAL, AND LATER ON YOU'LL SEE IT CAN GO TO
25 SOMEONE ELSE.

26 NUMBER ONE, IT DOESN'T HAVE TO BE CASH.

27 NUMBER TWO, IT DOESN'T HAVE TO GO TO THE OFFICIAL.
28 SO IF MAYOR GONZALES HAD SAID -- INSTEAD OF, I WANT YOU TO

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1 GET CWS TO BE A TEAMSTER SHOP, MAYOR GONZALES HAD SAID, I
2 WANT YOU TO GIVE MY MOTHER-IN-LAW A CONDO TO LIVE IN. IT'S
3 NOT CASH, IT'S NOT GOING TO THE MAYOR, BUT IT'S SOMETHING OF
4 VALUE OR ADVANTAGE THAT WAS ASKED FOR. SO THAT PIECE OF
5 IT -- DOES THAT HELP SO FAR?

6 THE FOREPERSON: YEAH, IT DOES. LET ME ANTICIPATE
7 QUESTIONS THAT MAY COME UP AS WE DISCUSS THIS FURTHER. THE

8 DIFFERENCE BETWEEN VALUE AND ADVANTAGE IN THAT CONTEXT,
9 VALUE SUGGESTS I THINK A FINANCIAL MEASURE OF WORTH, WHEREAS
10 ADVANTAGE MAY BE A MORE INDIRECT THING THAT AFFECTS
11 SOMEBODY'S ABILITY TO CARRY OUT THEIR JOB OR ENHANCE THEIR
12 POSITION. WHAT IS THE DEFINITION OF ADVANTAGE IN THIS
13 SETTING?

14 MR. FINKELSTEIN: AS THE INSTRUCTIONS SAY, IF
15 THERE'S NO SPECIAL DEFINITION GIVEN, IT'S THE ORDINARY
16 ENGLISH USAGE, BUT DON'T LOOK IT UP IN THE DICTIONARY.

17 LET ME TELL YOU OUR VIEW OF WHAT THAT MEANS.

18 THE FOREPERSON: OKAY.

19 MR. FINKELSTEIN: GETTING CWS TO RECOGNIZE THE
20 TEAMSTERS WAS NOT -- WAS SHORTHAND FOR SOMETHING MUCH
21 GREATER. IT WASN'T JUST SIMPLY RECOGNIZING THE TEAMSTERS,
22 BECAUSE THE PRACTICAL AND IMMEDIATE CONSEQUENCE OF DOING
23 THAT WOULD BE THAT CWS WOULD BE PAYING TEAMSTER WAGES, WHICH
24 THE EVIDENCE TELLS US WAS HIGHER SUBSTANTIALLY THAN THE
25 LONGSHOREMEN WAGES.

26 SO TO ALL THE MEMBERS OF THE UNION WHO ARE GOING
27 TO BE DISPLACED FROM THE EXISTING CONTRACT AND REHIRED BY
28 CWS, WE'RE TALKING ACTUAL DOLLAR MONEY VALUE HERE. THEY

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1 WOULD BE GETTING WAGES HIGHER THAN YOU WOULD EXPECT THEM TO
2 RECEIVE AS LONGSHOREMEN BY REMAINING TEAMSTERS AND GETTING
3 TEAMSTERS' WAGES. SO THERE'S BOTH; THAT'S AN ADVANTAGE TO
4 THEM, AND IT HAS VALUE. AND WE CAN PLACE A VALUE ON IT.

5 IN THIS CASE IT WAS ESTIMATED TO BE TWO MILLION
6 DOLLARS A YEAR AND TURNED OUT TO BE 11 AND A QUARTER MILLION
7 DOLLARS FOR THE WAGE AND BENEFIT DIFFERENTIAL. SO THAT WAS
8 THE FUTURE VALUE OR ADVANTAGE.

9 REMEMBER, IT'S A PRESENT OR FUTURE VALUE. IT WAS
10 A FUTURE VALUE AND ADVANTAGE TO THE MEMBERS OF THE
11 TEAMSTERS' UNION WHO WERE BEING REHIRED BY CWS AND HIRED AT
12 THE HIGHER WAGES AGAIN INSTEAD OF THE LOWER LONGSHOREMEN
13 WAGES AND BENEFITS.

14 DOES THAT HELP?

15 THE FOREPERSON: YES. CAN I HYPOTHESIZE ANOTHER
16 THING I MENTIONED YESTERDAY THAT MAY COME UP? THAT WAS BY
17 DOING THIS IT SECURED THE FAVOR OF MR. MORALES AND THE
18 TEAMSTERS, WHICH THEN HAD A BENEFIT TO THE MAYOR AND PERHAPS
19 OTHERS WITH LABOR AFFINITY ON THE CITY COUNCIL IN TERMS OF
20 CO-WORKER SUPPORT FOR ELECTORAL EFFORTS.

21 MR. FINKELSTEIN: MY POINT I THINK YESTERDAY WAS
22 THAT THE DIRECT VALUE OR ADVANTAGE WAS TO THE TEAMSTER
23 MEMBERS WHO WERE GOING TO BE CHANGING EMPLOYERS FROM THE
24 EXISTING CONTRACTOR TO CWS. BUT THERE WAS AN INDIRECT
25 ADVANTAGE TO THE MAYOR, BECAUSE HE HAD GOTTEN THE SUPPORT OF

26 THE TEAMSTERS AND BY DOING A FAVOR FOR HIS POLITICAL
27 SUPPORTERS COULD EXPECT THEIR CONTINUED SUPPORT, MAYBE
28 PERHAPS EVEN GREATER SUPPORT.

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1 SO THERE WAS A DIRECT VALUE AND ADVANTAGE IN THE
2 FUTURE TO THE TEAMSTER WORKERS WHO WERE GOING TO BE
3 DISPLACED AND HIRED BY CWS. IT WAS AN INDIRECT FUTURE
4 ADVANTAGE TO THE MAYOR BY MAINTAINING A GOOD RELATIONSHIP
5 WITH THE TEAMSTERS.

6 THE FOREPERSON: ARE THERE OTHER QUESTIONS FROM
7 THE JURORS ABOUT THIS TECHNICAL POINT OF VALUE, ADVANTAGE,
8 WHAT IT WAS THAT WAS CHANGING HANDS, AS IT WERE?

9 MR. FINKELSTEIN: ANOTHER WAY TO LOOK AT IT, I
10 THINK I MAY HAVE GIVEN THIS EXAMPLE YESTERDAY. IF THE MAYOR
11 TOLD NORCAL, INSTEAD OF DEALING WITH THE UNION ISSUE, HE
12 SAID, LISTEN, INSTEAD OF USING CWS AS YOUR SUBCONTRACTOR,
13 USE SAN JOSE RECYCLING AS YOUR SUBCONTRACTOR -- I HOPE THERE
14 IS NO SAN JOSE RECYCLING.

15 USE SAN JOSE RECYCLING AS YOUR SUBCONTRACTOR
16 BECAUSE THEY ARE POLITICAL SUPPORT SUPPORTERS OF MINE. SO
17 THAT WOULD BE A VALUE AND ADVANTAGE IN THE FUTURE. WHEN THE
18 WORK STARTED, SAN JOSE RECYCLING, BECAUSE THEY WERE GETTING

19 A CONTRACT TO DO THE WORK THAT BUT FOR THE MAYOR'S REQUEST
20 THEY WOULD NOT HAVE GOTTEN. SO THAT'S ANOTHER WAY OF
21 LOOKING AT IT. IT'S NOT LIMITED TO A CASH PAYMENT.

22 THE FOREPERSON: OTHER QUESTIONS?

23 MR. FINKELSTEIN: NOW, OF COURSE YOU HAVE TO FIND
24 THE CORRUPT INTENT, YOU UNDERSTAND, BUT I'M JUST TRYING TO
25 EXPLAIN WHAT KIND OF VALUE OR ADVANTAGE IN OUR VIEW
26 CAN -- THERE'S A POINT HERE I THINK THAT SHOULD NOT BE LOST.
27 IF THE BRIBERY STATUTE WERE LIMITED SOLELY TO THE PAYMENT OF
28 THE CASH BRIBE, IT COULD BE TOO EASY TO CIRCUMVENT IT. AND

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1 WHAT IF I WENT TO THE MAYOR AND SAID, I NEED HELP ON MY
2 REZONING. I KNOW I CAN'T GIVE YOU A CASH BRIBE, BUT I HAVE
3 THIS NICE NEW ROLLS ROYCE SITTING OUT FRONT WITH THE KEYS
4 HERE RIGHT FOR YOU, MAYOR, AND I WOULD LIKE TO MAKE A GIFT
5 OF THIS CAR TO YOU OR YOUR WIFE OR MOTHER-IN-LAW. THE LAW
6 CANNOT BE READ SO NARROWLY THAT ITS PURPOSE IS NOT CLEAR.

7 THE FOREPERSON: IT COULD ALSO BE GIVING
8 EMPLOYMENT; IF YOU DO THIS, I WILL FIND A JOB FOR YOUR
9 BROTHER-IN-LAW.

10 MR. FINKELSTEIN: THAT'S ANOTHER WAY TO LOOK AT

11 THIS CASE. I GUESS ONE COULD PRESUME THE DISPLACED WORKERS
12 HAD THE OPTION TO WORK FOR CWS, BUT IF THEY HAD TO WORK AT
13 LOWER WAGES, THEY MIGHT FIND EMPLOYMENT ELSEWHERE. SO
14 ANOTHER WAY OF LOOKING AT IT, HE WAS GUARANTEEING A JOB FOR
15 DISPLACED WORKERS AT THE CURRENT WAGE AND BENEFIT LEVELS.

16 THE FOREPERSON: OKAY. ARE THERE OTHER ISSUES
17 ABOUT THE BRIBERY COUNTS OR ANY OTHER PIVOTAL ISSUE? DO YOU
18 WANT MR. FINKELSTEIN TO GO THROUGH THE INSTRUCTIONS IN MORE
19 DETAIL?

20 MAYBE WHILE WE'RE HERE, THE WORD CORRUPT INTENT OR
21 WORDS CORRUPT INTENT, THOSE ARE THOSE TO BE TAKEN IN TERMS
22 OF THE COMMONLY UNDERSTOOD MEANING?

23 MR. FINKELSTEIN: NO; THAT'S DEFINED IN THIS JURY
24 INSTRUCTION.

25 A PERSON ACTS WITH CORRUPT INTENT WHEN HE OR
26 SHE ACTS TO WRONGFULLY GAIN A FINANCIAL OR OTHER
27 ADVANTAGE FOR HIMSELF OR HERSELF OR SOMEONE ELSE.

28 SO THE FINANCIAL OR OTHER ADVANTAGE FOR SOMEONE

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1 ELSE IN THIS CASE WOULD BE THE TEAMSTER WORKERS AT THE
2 CURRENT CONTRACT THAT WERE GOING TO BE DISPLACED.

3 THE FOREPERSON: WRONGFULLY IMPLIES THAT THERE IS
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4 A VIOLATION OF LAW OR VIOLATION OF ONE'S FIDUCIARY
5 RESPONSIBILITIES. WHAT IS THE DEFINITION OF WRONGFUL?

6 MR. FINKELSTEIN: WRONGFULLY DOESN'T HAVE A
7 SPECIAL DEFINITION; IT'S THE ORDINARY MEANING. THE REASON
8 IN OUR VIEW THIS WAS WRONGFUL IS BECAUSE AS THE CITY
9 ATTORNEY OBSERVED IN HIS OCTOBER 27, 2000 MEMO. TO PUT IT
10 VERY SIMPLY AND IN VERY SIMPLISTIC TERMS, IT WASN'T THE
11 MAYOR'S JOB TO RESOLVE LABOR DISPUTES.

12 WE HAVE AN ENTIRE AGENCY OF THE FEDERAL GOVERNMENT
13 CALLED THE NATIONAL LABOR RELATIONS BOARD THAT IS CHARGED
14 WITH RESOLVING LABOR DISPUTES. THEY HAVE THE EXPERTISE,
15 THEY HAVE THE KNOWLEDGE, AND IF THERE IS A LABOR DISPUTE,
16 THAT IS THE AGENCY THAT IS CHARGED WITH THAT RESPONSIBILITY.
17 THAT'S NOT THE MAYOR'S JOB.

18 AND I WAS TRYING TO THINK OF AN EXAMPLE. OKAY.
19 WHAT IF INSTEAD OF THIS UNION DISPUTE NORCAL, WHILE IT
20 PROPOSAL WAS PENDING GOT INTO A LAWSUIT WITH A FRIEND OF THE
21 MAYOR'S. MAYBE ONE OF THEIR TRUCKS BANGED INTO THE MAYOR'S
22 FRIEND'S CAR AND THERE WAS A LAWSUIT PENDING SO THEY FILED A
23 COMPLAINT AND IT'S PENDING IN COURT -- JUST LIKE THE UNION
24 HERE FILED AN UNFAIR LABOR PRACTICE CHARGE -- AND IT'S
25 PENDING BEFORE THE NATIONAL LABOR RELATIONS BOARD. AND THE
26 MAYOR SAID TO NORCAL, LISTEN, IF YOU WANT ME TO VOTE FOR
27 THIS CONTRACT, YOU HAVE TO SETTLE THAT LAWSUIT.

28 THAT'S WRONGFUL, BECAUSE THAT'S NOT THE MAYOR'S

1 JOB. THAT'S WHY WE HAVE JUDGES AND COURTS TO RESOLVE
2 LAWSUITS. AND IF DOESN'T MATTER IF WHAT HE WAS ASKING FOR
3 WAS A FAIR OR REASONABLE SETTLEMENT, IT'S NOT WITHIN HIS JOB
4 AND HE CANNOT LEGALLY USE HIS OFFICE AND OFFICIAL POSITION
5 TO COERCE A SETTLEMENT, RIGHT OR WRONG, REGARDLESS OF WHAT
6 YOU THINK ABOUT THE TERMS OF THE SETTLEMENT. THAT'S NOT
7 WITHIN HIS JOB DESCRIPTION, HE CAN'T DO IT.

8 THE FOREPERSON: I THINK THAT'S VERY HELPFUL.
9 ANY OTHER QUESTIONS? OKAY.

10 MR. FINKELSTEIN: NOW, THERE WAS A QUESTION ABOUT
11 FALSIFYING, I KNOW THAT.

12 THE FOREPERSON: I BELIEVE THAT ISSUE HAS BEEN
13 RESOLVED, HAVING GONE THROUGH THE JURY INSTRUCTIONS. AND
14 LET ME OPEN IT UP, DOES ANYBODY HAVE ADDITIONAL QUESTIONS
15 ABOUT THAT ISSUE?

16 MR. FINKELSTEIN: I DO WANT TO JUST EMPHASIZE A
17 POINT ABOUT OUR VIEW ON THAT. IF YOU GO BACK AND LOOK, I'M
18 ASSUMING THIS RELATES, THIS QUESTION -- DOES THAT RELATE TO
19 THE DECEMBER 8TH MEMO OR THE 16TH?

20 THE FOREPERSON: I THINK IT HAD TO DO WITH ISSUING
21 A PUBLIC WRITING THAT BECAME A PART OF A RECORD WHERE THE

22 CONTENT IS KNOWINGLY FALSE AT THE TIME THAT THE AUTHOR
23 WRITES IT AS OPPOSED TO TAKING THAT DOCUMENT AND CHANGING
24 SOME STUFF IN IT TO MAKE A FALSE OR TO MAKE IT CONFORM TO
25 WHAT THE CHANGER WANTED TO SEE.

26 MR. FINKELSTEIN: SO THIS IS THE FALSE FROM THE
27 START VERSUS ALTERING TO MAKE A FALSE --

28 THE FOREPERSON: CORRECT. THESE HAD TO DO WITH

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1 THE MAYOR'S MEMO TO COUNCIL.

2 MR. FINKELSTEIN: LET ME ADDRESS THAT SO EVERYONE
3 IS CLEAR ON OUR VIEW. IT'S A BASIC PRINCIPLE OF STATUTORY
4 INTERPRETATION THAT EVERY WORD IN THE STATUTE IS SUPPOSED TO
5 HAVE MEANING; THE STATUTE DOESN'T HAVE EXTRA WORDS OR
6 SUPERFLUOUS WORDS. SO IF YOU WERE TO TAKE A VERY NARROW
7 VIEW OF THE WORD FALSIFY AND LIMIT IT TO ALTERING, YOU
8 WOULDN'T NEED THE WORD FALSIFY BECAUSE ALTERING IS ALREADY
9 IN THERE, SO FALSIFY HAS TO MEAN SOMETHING MORE, AND OUR
10 VIEW IS IT MEANS TO GIVE AN UNTRUE OR MISLEADING ACCOUNT OF
11 SOMETHING.

12 IN THE CASE OF THE FIRST MEMO, WHAT THE MAYOR IS
13 DOING IS GIVING UNTRUE OR MISLEADING ACCOUNTS OF THE RESULTS
14 OF THE AUDITOR'S REVIEW. HE KNOWS THAT THE RESULTS OF THE

15 AUDITOR'S REVIEW ARE INCOMPLETE IN A VERY IMPORTANT MATERIAL
16 WAY, BECAUSE THE AUDITOR ONLY IDENTIFIED THE ONE MILLION
17 DOLLARS A YEAR ADDITIONAL TRUCK EXPENSE AND DOES NOT KNOW
18 ABOUT THE MORE SIGNIFICANT TWO MILLION DOLLAR A YEAR
19 ADDITIONAL LABOR COST.

20 SO WHEN HE SAYS, NOW THAT WE'VE HAD THE AUDITOR'S
21 REVIEW WE CAN HAVE GREATER CONFIDENCE IN THE FINANCIAL
22 IMPACT OF OUR CHOICE, OUR VIEW IS WHEN HE USES THOSE WORDS
23 WHAT HE MEANS BY THAT IS, FINANCIAL IMPACT OF OUR CHOICE
24 MEANS WHAT IT'S GOING TO COST US IF WE GO WITH NORCAL; AND
25 HE KNOWS FULL WELL THE AUDITOR'S REVIEW HAS NOT UNCOVERED
26 WHAT IT'S REALLY GOING TO COST, IT'S GOING TO COST AN
27 ESTIMATED TWO MILLION DOLLARS A YEAR MORE.

28 SO HE'S GIVING A FALSE ACCOUNT, UNTRUE AND

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1 MISLEADING ACCOUNT OF THE RESULTS OF THE AUDITOR'S REVIEW.
2 SO THAT'S ON THAT PIECE --

3 THE FOREPERSON: GOOD. ANOTHER QUESTION CAME UP
4 THAT WAS PRECISELY ON THAT TOPIC.

5 AS YOU READ THE TEXT OF COUNT FOUR ON PAGE NINE OF
6 THE INDICTMENT, THERE'S A QUOTE AT THE VERY END OF THAT

7 COUNT.

8 MR. FINKELSTEIN: YES.

9 THE FOREPERSON: SOME OF THE JURORS WERE CONCERNED
10 THAT THAT STATEMENT ON ITS OWN DOES NOT PROVIDE THE SORT OF
11 CONTEXT THAT YOU JUST PROVIDED. SO THE ISSUE IS SOMEWHERE
12 BETWEEN THE THREE BOXES OF MATERIALS OVER HERE THAT HAVE
13 BEEN COLLECTED IN EVIDENCE AND THIS SIMPLE TWO-LINE
14 SENTENCE. IS THAT ADEQUATE TO CONVEY WHAT THE
15 INTERPRETATION OF THIS IS OR IS THAT SUBJECT TO A CRAFTY --
16 OR CRAFTY IS THE WRONG WORD -- AN ABLE DEFENSE ATTORNEY
17 COMING UP WITH -- SAYING, WHAT ARE YOU TALKING ABOUT?

18 MR. FINKELSTEIN: IN THIS COUNT WE HAVE IN
19 CALIFORNIA WHAT'S CALLED A NOTICED PLEADING. AND IF AN
20 INDICTMENT IS RETURNED, WE WILL PROVIDE TO THE DEFENSE A
21 TRANSCRIPT OF THE PROCEEDINGS, ALL THE TESTIMONY AS WELL AS
22 COPIES OF ALL THE EXHIBITS AS WELL AS OTHER MATERIALS THAT
23 ARE GATHERED IN THE COURSE OF OUR INVESTIGATION.

24 SO WHAT'S IMPORTANT HERE IS TO GIVE NOTICE AS TO
25 WHAT'S FALSE ABOUT THAT DOCUMENT. WHY IT'S FALSE IS
26 SOMETHING THAT CAN BE ASCERTAINED BY LOOKING AT THE
27 TRANSCRIPT, THE TESTIMONY OF THE WITNESSES AND THE EVIDENCE
28 THAT'S BEEN PRESENTED.

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1 THE FOREPERSON: I THINK THE CONCERN THAT WAS
2 EXPRESSED IS THAT SENTENCE, THAT QUOTE OF ITS OWN REQUIRES A
3 LOT OF BACKGROUND TO UNDERSTAND WHY IT'S FALSE AND HOW IT'S
4 FALSE.

5 MR. FINKELSTEIN: IT'S NOT NECESSARY TO ALLEGE
6 THAT IN THE INDICTMENT.

7 THE FOREPERSON: OKAY. DOES ANY JUROR HAVE
8 FURTHER QUESTION ABOUT THAT?

9 MR. FINKELSTEIN: BECAUSE THE INDICTMENT WILL BE
10 READ IN LIGHT OF THE EVIDENCE IN THE TRANSCRIPT. AND IN
11 LIGHT OF THE EVIDENCE IN THE TRANSCRIPT, THE REASON WHY IT'S
12 FALSE BECOMES APPARENT.

13 THE FOREPERSON: GOOD. THEN THE OTHER QUESTION
14 MAY OR MAY NOT BE APPROPRIATE AT THIS POINT. IT HAD TO DO
15 GENERALLY WITH WHAT OTHER POSSIBLE INDICTMENTS DID YOU
16 CONSIDER IN BOILING YOUR PREPARED INDICTMENT OR PROPOSED
17 INDICTMENT FOR THE GRAND JURY DOWN TO THE ONE YOU HAVE
18 PRESENTED.

19 MR. FINKELSTEIN: I DON'T THINK WE CAN COMMENT ON
20 THAT. BUT WHAT I CAN SAY IS THE INDICTMENT REPRESENTS THE
21 BEST VIEW OF THE DISTRICT ATTORNEY'S OFFICE AS TO WHAT
22 CHARGES SHOULD BE BROUGHT IN THIS CASE AND WHO SHOULD BE
23 CHARGED.

24 THE FOREPERSON: I THINK --

25 MR. FINKELSTEIN: IF THERE IS OTHER CHARGES THE

26 JURY WOULD LIKE TO DELIBERATE ON, YOU CAN MAKE A REQUEST OF
27 US AND WE CAN TALK ABOUT THAT, OR OTHER DEFENDANTS.

28 THE FOREPERSON: I THINK THERE ARE PEOPLE WHOSE

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1 TESTIMONY WE HEARD THAT THE JURY FOUND FRUSTRATING OR
2 PROBLEMATIC IN VARIOUS WAYS. SOME OF THE NAMES I THINK HAVE
3 ALREADY BEEN MENTIONED.

4 MR. MORALES, WHO IN ESSENCE -- BLACKMAIL MAY BE
5 TOO STRONG A WORD, BUT IT WAS BASICALLY DO THIS OR I WILL
6 MAKE YOUR LIFE HELL AND YOU' LL NOT GET THIS CONTRACT.

7 MR. FINKELSTEIN: RIGHT. BUT NOT EVERY WRONG IS A
8 CRIME, NECESSARILY, AND THAT'S -- WE HAVE TO BE GOVERNED BY
9 THE LAW. AND EVEN THOUGH THE JURORS MAY OR MAY NOT FIND A
10 PARTICULAR WITNESS'S CONDUCT REPREHENSIBLE DOESN'T MEAN THAT
11 THERE'S A CRIME THAT CAN BE BROUGHT TO ADDRESS THAT.

12 THE FOREPERSON: ARE THERE OTHER CANDIDATES THE
13 JURORS WOULD LIKE TO PUT FORTH?

14 A JUROR: IN THE AREA OF EXPENDITURE OF PUBLIC
15 FUNDS, SINCE THE SAN JOSE CITY COUNCIL VOTED FOR THAT
16 AMENDMENT IN THE CONTRACT, AND IN FACT FROM WHAT YOU SAID
17 YESTERDAY, THAT WAS -- THE AGREEMENT FOR THAT WAS A GIFT OF

18 PUBLIC FUNDS, WHY WOULD THEY NOT BE CULPABLE OR COMPLICIT IN
19 THE EXPENDITURE OF PUBLIC FUNDS BY VOTING FOR THAT
20 AMENDMENT?

21 MR. FINKELSTEIN: BECAUSE IF YOU LOOK AT THE JURY
22 INSTRUCTION ON THAT CHARGE, THAT'S THE 424 CHARGE, THERE WAS
23 A KNOWLEDGE REQUIREMENT. THEY HAVE TO KNOW THAT THE
24 EXPENDITURE IS NOT AUTHORIZED BY LAW. AND THE DISTRICT
25 ATTORNEY'S VIEW, AND WE THINK IT'S SUPPORTED BY THE
26 EVIDENCE, IS THAT DIFFERENT MEMBERS OF THE COUNCIL KNEW
27 DIFFERENT THINGS WHEN THEY VOTED.

28 LET ME SEE IF I CAN FRAME THAT FOR YOU ANOTHER

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1 WAY:

2 NORCAL AND THE CITY ENTERED INTO AN AGREEMENT, AND
3 AS PART OF THAT AGREEMENT THEY AGREED UPON A PRICE AND THERE
4 WAS A DEAL THAT WAS PUT IN PLACE.

5 NORCAL AND ITS CO-CONSPIRATORS REPRESENTED TO THE
6 COUNCIL IN 2004 THAT AFTER THAT DEAL WAS PUT IN PLACE, THERE
7 WAS A CHANGE IN CIRCUMSTANCES THAT'S JUSTIFIED THE
8 EXPENDITURE OF ADDITIONAL MONEY. AND THAT WAS IN OUR VIEW A
9 FALSE REPRESENTATION TO CONVINCING THE OTHER COUNCILMEMBERS TO
10 GO ALONG WITH THIS.

11 UNLIKE THE OTHER COUNCILMEMBERS, GONZALES, GUERRA
12 AND NORCAL KNEW THAT IT WAS NOT AFTER THE DEAL WAS PUT IN
13 PLACE AND PRICE AGREED UPON BUT BEFORE THE DEAL WAS PUT IN
14 PLACE. AND IF THAT INFORMATION HAD COME TO LIGHT AND OTHERS
15 HAD NONETHELESS VOTED, THEY MIGHT BE CHARGED WITH
16 MISAPPROPRIATING PUBLIC FUNDS BECAUSE THEY WOULD HAVE THE
17 KNOWLEDGE THAT THERE WAS NO LEGAL BASIS FOR EXPENDING THE
18 FUNDS.

19 THAT'S PART OF THE FRAUD ADDRESSED IN THIS COUNT
20 ONE, AND WE THINK WHAT DISTINGUISES THE DEFENDANTS THAT WE
21 HAVE SELECTED HERE FROM ALL THE OTHER PEOPLE ON THE COUNCIL
22 WHO VOTED THINKING THE CIRCUMSTANCES WERE OTHER THAN WHAT
23 THEY WERE. DOES THAT HELP?

24 A JUROR: (NODDING HEAD AFFIRMATIVELY.)

25 MR. FINKELSTEIN: IN OTHER WORDS, MERELY DOING THE
26 ACT IS NOT SUFFICIENT; YOU HAVE TO HAVE A CERTAIN MENTAL
27 STATE. YOU HAVE TO UNDERSTAND YOU'RE DISBURSING MONEY,
28 VOTING TO DISBURSE THE MONEY WITHOUT AUTHORITY OF LAW. AND

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1 SO IF YOU KNOW --

2 A JUROR: YOU HAVE TO KNOWINGLY DO IT.

3 MR. FINKELSTEIN: YES.

4 THE FOREPERSON: I THINK THAT RAISES A QUESTION
5 ABOUT SOME OTHER INDIVIDUALS THAT IT MIGHT BE HELPFUL TO
6 HAVE YOUR COMMENTS ABOUT. THESE ARE PEOPLE WHO ARE NOT
7 MEMBERS OF THE COUNCIL BUT ARE CITY EMPLOYEES, WHO AFTER
8 ABOUT SEPTEMBER 12TH OR 13TH, 2002, THE MEMO, MR. MOSHER
9 KNEW THAT SOMETHING WAS GOING ON THAT WAS PROBABLY ILLEGAL
10 THAT WAS NOT CONTEMPLATED IN THE CONTRACT AND YET MARCHED
11 DOWN THE PATH TO PRESENT TO THE COUNCIL EVIDENCE THAT RATE
12 INCREASES WERE IN ORDER TO MAKE THE OPERATING FUND LESS OF A
13 CONTRIBUTOR TO THE GARBAGE ACTIVITIES, AND SO ON.

14 EVEN IN THE CITY ATTORNEY'S OFFICE, SOME OF THE
15 INVOLVEMENT THAT WAS IMPLIED FOR MISS DEVENCENZI SUGGESTS A
16 DUBIOUSNESS ON HER PART AS TO HER DUTIES AS AN ATTORNEY IN
17 REPRESENTING PRESUMABLY THE PEOPLE OF THE CITY.

18 AND IS THERE ANY BASIS THAT MEMBERS OF THE CITY
19 STAFF WHO WERE KNOWLEDGEABLE AND PARTICIPATED IN THIS WHOLE
20 PROCESS MIGHT BE APPROPRIATE SUBJECTS?

21 MR. FINKELSTEIN: WELL, I THINK IT'S IMPORTANT TO
22 REMEMBER THAT IN THIS INDICTMENT WE'RE TALKING ABOUT
23 CHARGING PEOPLE WITH CRIME AS OPPOSED TO OTHER THE FUNCTION
24 WHERE YOU ISSUE A REPORT AND CRITICIZE MISFEASANCE IN
25 OFFICE.

26 WHILE IT IS TRUE THAT YOU MAY WELL CONCLUDE THAT A
27 NUMBER OF PEOPLE DID NOT ACT NECESSARILY IN THE BEST
28 INTERESTS OF THE CITY OR IN THE MOST EFFICIENT WAY OR THE

1 BEST WAY, THAT DOES NOT MEAN THAT THEY SHOULD BE CHARGED
2 WITH A CRIME.

3 IT'S SORT OF A MALFEASANCE VERSUS MISFEASANCE
4 DISTINCTION. YOU HAVE TO HAVE CRIMINAL INTENT TO BE GUILTY
5 OF A CRIME. THE FACT THAT YOU GO ALONG WITH OTHER PEOPLE'S
6 REQUESTS WHO ARE ABOVE YOU IN THE CHAIN OF COMMAND DOESN'T
7 NECESSARILY MEAN THAT YOU'RE SHARING CRIMINAL INTENT.

8 WE HAVE TO ALSO REMEMBER THAT WE ASKED WITNESSES
9 ABOUT THIS, AND EVEN THOUGH GUERRA KNEW AND SO STATED IN HIS
10 E-MAIL WHAT THE PURPOSE WAS OF THE RATE HIKE, THEIR VIEW WAS
11 THAT MIGHT BE HIS PURPOSE, BUT THEIR VIEW WAS IT'S A RESERVE
12 UNLESS AND UNTIL THE COUNCIL SAYS OTHERWISE. SO DID THEY IN
13 ESSENCE FACILITATE THIS CRIME? SURE. DOES THAT MEAN THEY
14 SHARE THE CRIMINAL INTENT AND CRIMINAL PURPOSE? NOT
15 NECESSARILY.

16 THE FOREPERSON: OKAY.

17 MR. FINKELSTEIN: IT'S -- THINK ABOUT THE EXAMPLE
18 I GAVE YESTERDAY ABOUT THE GETAWAY CAR FOR THE BANK ROBBERY
19 WHERE THE GETAWAY CAR BREAKS DOWN AND THEY HAIL A TAXI CAB
20 AND ASK THE TAXI DRIVER TO TAKE THEM TO THE BANK TO ENABLE
21 THEM TO DO THE ROBBERY. DOES THE TAXI CAB DRIVER FACILITATE

22 THE COMMISSION OF THE CRIME? SURE. HE BROUGHT THEM TO THE
23 SCENE OF THE CRIME, BUT HE DIDN'T SHARE THEIR COMMON PURPOSE
24 AND CRIMINAL INTENT. SO EVEN THOUGH HIS ACTS HELPED THEM,
25 HE'S NOT CHARGED WITH A CRIME.

26 THE FOREPERSON: SUPPOSE HE NOTICED THAT THEY WERE
27 CARRYING FIREARMS OR OTHER PARAPHERNALIA THAT HAD TO DO WITH
28 ROBBING A BANK?

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1 MR. FINKELSTEIN: THAT'S A GOOD EXAMPLE, AND MAYBE
2 HE SHOULD HAVE BEEN MORE DILIGENT, CALLED THE POLICE AS SOON
3 AS THEY LEFT. BUT THE FACT HE DIDN'T STILL DOESN'T MAKE HIM
4 CRIMINALLY RESPONSIBLE UNLESS HE HAS THE MENTAL STATE TO
5 ASSIST THEM IN THE COMMISSION OF THE CRIME.

6 THE FOREPERSON: I SEE.

7 A JUROR: IF HE SAYS, DO YOU WANT ME TO WAIT FOR
8 YOU --

9 MR. FINKELSTEIN: RIGHT. AND EVEN THOUGH HE DOES
10 THESE STUPID THINGS, UNLESS HE SHARES THE CRIMINAL PURPOSE
11 AND INTENT, HE'S NOT GUILTY.

12 THE FOREPERSON: IF HE WERE TO ADJUST HIS METER OR
13 FARE INAPPROPRIATE TO THE MARKETPLACE --

14 MR. FINKELSTEIN: NO. THE FACT HE'S DOING OTHER
15 ILLEGAL ACTS -- HE HAS TO BE PART OF THAT CONSPIRACY, WHICH
16 MEANS HE HAS TO INTEND TO COMMIT THAT CRIME.

17 A JUROR: YOU RAISED A VERY INTERESTING COMMENT
18 THAT I PICKED UP UPON YESTERDAY. YOU SAID THAT IF A COUPLE
19 OF GUYS WERE INTENT ON ROBBING A BANK AND TALK ABOUT IT
20 AHEAD OF TIME AND HAVE A CONSPIRACY TO DO SO, AND ONE GUY ON
21 HIS OWN WENT OUT AND BOUGHT A GUN, THE OTHER GUY WOULD BE
22 GUILTY.

23 MR. FINKELSTEIN: TO BURGLARIZE THE STORE TO GET
24 THE GUN?

25 A JUROR: YES.

26 MR. FINKELSTEIN: IF THAT BURGLARY WAS A NATURAL
27 AND PROBABLE CONSEQUENCE OF THAT CONSPIRACY; IN OTHER WORDS,
28 YOU WOULD EXPECT IF WE'RE GOING TO DO A ROBBERY THAT WE NEED

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1 A WEAPON. SO IT'S NOT UNREASONABLE TO ASSUME THAT SOMEBODY
2 MIGHT GO OBTAIN A WEAPON BY ILLEGAL MEANS.

3 A JUROR: THIS GOES BACK TO THE MINDSET YOU HAD
4 BEFORE, THOUGH.

5 MR. FINKELSTEIN: RIGHT. BUT YOU HAVE TO BE PART
6 OF THE CONSPIRACY WHEN THE ADDITIONAL CRIME WAS COMMITTED.

7 OR IF THEY STOLE A CAR TO USE IN THE GETAWAY, THOSE ARE ALL
8 WITHIN THE AMBIT OF THAT CONSPIRACY.

9 A JUROR: I WOULD LIKE YOU TO COMMENT ABOUT WHY
10 THE CORPORATION IS AT FAULT RATHER THAN THE INDIVIDUALS IN
11 THIS, PARTICULARLY IF YOU LOOK AT SOMETHING LIKE ENRON,
12 WHERE PEOPLE ARE PROSECUTED.

13 MR. FINKELSTEIN: THE ENRON PEOPLE PERSONALLY
14 PROFITED. HERE IT WAS DONE FOR THE BENEFIT OF THE
15 CORPORATION. THERE IS NO EVIDENCE THAT ANY OF THE EMPLOYEES
16 OF NORCAL PERSONALLY PROFITED; THEY DIDN'T GET SOME LARGE
17 BONUS BECAUSE THEY DID ANY OF THE ACTS FOR THE CORPORATION.
18 THEY DIDN'T SELL STOCK AND MAKE A BIG PROFIT. THAT'S THE
19 DIFFERENCE. IT WAS DONE FOR THE BENEFIT OF THE CORPORATION.

20 THE ENTITY -- LET'S CALL THE NORCAL ENTITIES THE
21 CORPORATION AND ITS EMPLOYEES. IT WAS THE CORPORATION THAT
22 WAS THE ENTITY WHO STOOD TO BENEFIT, NOT THE INDIVIDUAL
23 EMPLOYEES. THAT'S WHY WE THINK THAT IT'S APPROPRIATE TO
24 CHARGE THE CORPORATION HERE AND NOT THE INDIVIDUAL
25 EMPLOYEES.

26 A JUROR: PART OF THE TESTIMONY INCLUDED A VERY
27 BRIEF DESCRIPTION OF THE ORGANIZATION STRUCTURE OF NORCAL.
28 NORCAL IS OWNED BY A GROUP OF INDIVIDUALS, MANY OF WHICH ARE

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1 EMPLOYEES.

2 MR. FINKELSTEIN: IT'S OWNED BY AN EMPLOYEE'S
3 STOCK OPTION PLAN. THERE IS A TRUSTEE THAT OWNS THE STOCK
4 OF THE COMPANY FOR THE BENEFIT OF THE EMPLOYEES. SO THAT'S
5 TRUE.

6 A JUROR: SO THOSE EMPLOYEES --

7 MR. FINKELSTEIN: THAT'S SORT OF AN INDIRECT
8 BENEFIT. YOU COULD ALSO ARGUE THE COMPANY STAYED SOLVENT
9 AND THEY GOT TO KEEP THEIR JOBS, BUT IT WAS REALLY DONE FOR
10 THE BENEFIT OF THE CORPORATION. THEY WERE THE IMMEDIATE
11 BENEFICIARIES.

12 AND PLEASE REMEMBER THAT YOU CANNOT CONSIDER
13 PENALTY OR PUNISHMENT IN MAKING YOUR DECISIONS.

14 THE FOREPERSON: OKAY. THIS HAS BEEN VERY
15 HELPFUL. ANY OTHER QUESTIONS OR --

16 MR. FINKELSTEIN: AND THEN ONE MORE POINT ABOUT
17 THE CORPORATION. OUR VIEW IS THAT THE CORPORATION IS
18 GUILTY; THEY SHOULD BE INDICTED IRRESPECTIVE OF WHETHER
19 OTHERS ARE GUILTY AS WELL. AND I THINK WE EXPRESSED OUR
20 VIEWS AS TO WHY WE'RE NOT RECOMMENDING AN INDICTMENT AGAINST
21 THE EMPLOYEES, BUT EVEN IF YOU WERE TO INDICT THE EMPLOYEES,
22 THAT WOULD NOT ABSOLVE OF THE CORPORATION OF ITS
23 RESPONSIBILITY.

24 THE FOREPERSON: OKAY. THANK YOU VERY MUCH.

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25 I HAVE NO OTHER ADDITIONAL QUESTIONS AT THIS
26 POINT, SO LET US TAKE A 5-MINUTE RECESS WHILE WE RECONFIGURE
27 THE ROOM. AND I WOULD LIKE A CONTACT PHONE NUMBER FOR YOU
28 FOR WHEN -- WE'RE GOING TO BE OPTIMISTIC -- WE ARRIVE AT A

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1 CONCLUSION.

2 MR. FINKELSTEIN: TAKE AS MUCH TIME AS YOU NEED.
3 WE'RE HERE.

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1 SAN JOSE, CALIFORNIA

JUNE 21, 2006

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AFTERNOON SESSION:

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THE COURT: GOOD AFTERNOON, MR. FINKELSTEIN.

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MR. FINKELSTEIN: GOOD AFTERNOON, YOUR HONOR.

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THE COURT: GOOD AFTERNOON, LADIES AND

7

GENTLEMEN.

8

I UNDERSTAND THAT THE GRAND JURY WISHES TO PRESENT

9

AN INDICTMENT; IS THAT CORRECT?

10 THE FOREPERSON: YES, YOUR HONOR.

11 THE COURT: THE FIRST THING WE NEED TO DO IS TO
12 CALL THE ROLL.

13 (ROLL WAS CALLED BY THE CLERK.)

14 THE COURT: THANK YOU.

15 MR. FOREMAN, DID ALL OF THE GRAND JURORS VOTE --
16 I'M SORRY, DID ALL OF THE GRAND JURORS THAT WERE VOTING ON
17 THE INDICTMENT HEAR ALL OF THE TESTIMONY THAT WAS PRESENTED?

18 THE FOREPERSON: YES, YOUR HONOR.

19 THE COURT: DID AT LEAST TWELVE OF THE GRAND
20 JURORS WHO HEARD ALL OF THE EVIDENCE VOTE TO FIND THE
21 INDICTMENT?

22 THE FOREPERSON: YES, YOUR HONOR.

23 THE COURT: I WILL THEN FIND THAT AT LEAST TWELVE
24 OF THE GRAND JURORS WHO HEARD ALL OF THE TESTIMONY TAKEN
25 VOTED TO FIND THIS INDICTMENT. I WILL RECEIVE THE
26 INDICTMENT AND ORDER THAT IT BE FILED WITH THE CLERK.

27 DO YOU HAVE THE INDICTMENT -- I HAVE IT. I WILL
28 ORDER THAT IT BE FILED WITH THE CLERK AT THIS TIME.

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1 MR. FINKELSTEIN, WHAT CAN YOU TELL ME CONCERNING

2 THE DEFENDANTS IN THIS CASE?

3 MR. FINKELSTEIN: WELL, RONALD GONZALES IS THE
4 MAYOR OF THE CITY OF SAN JOSE. DEFENDANT JOSEPH AUGUST
5 GUERRA III IS HIS BUDGET AND POLICY DIRECTOR. AND, OF
6 COURSE, NORCAL WASTE SYSTEMS IS A LARGE CORPORATION HERE IN
7 CALIFORNIA.

8 IN LOOKING AT THE BAIL SCHEDULE, I WOULD NOTE THAT
9 THE CURRENT BAIL SCHEDULE PROVIDES THAT ON THE PENAL CODE
10 SECTION 165, BRIBERY CHARGE, THE SCHEDULED AMOUNT IS
11 \$25,000. AND ON THE PENAL CODE SECTION 424,
12 MISAPPROPRIATING PUBLIC MONIES CHARGE, THE SCHEDULE ALSO
13 PROVIDES FOR \$25,000.

14 AS TO THE OTHER COUNTS, THESE ARE MISCELLANEOUS
15 COUNTS WITH \$10,000 EACH. WE WOULD BE SATISFIED WITH JUST
16 \$50,000 ON THIS MATTER.

17 THE COURT: HAVE YOU HAD CONTACT WITH COUNSEL FOR
18 THE PARTIES?

19 MR. FINKELSTEIN: I HAVE, AND I EXPECT THEY WILL
20 SELF-SURRENDER. WE INTEND TO AFFORD THEM THAT
21 OPPORTUNITY.

22 THE COURT: I'LL SET BAIL IN EACH MATTER IN THE
23 SUM OF \$50,000 AS TO EACH DEFENDANT. I WILL ISSUE A BENCH
24 WARRANT FOR THEIR ARREST.

25 DO YOU WISH TO HAVE THAT STAYED?

26 MR. FINKELSTEIN: NO, YOUR HONOR. WE INTEND TO
27 MAKE ARRANGEMENTS AND, HOPEFULLY, THEY WILL BE ABLE TO BE

21 BOTH DURING THE PROCEEDING AND DURING THE DELIBERATION THAT
22 YOU HAD PAID VERY CLOSE ATTENTION TO THE CASE. THEY WERE
23 VERY INTELLIGENT QUESTIONS; WE DON'T ALWAYS GET THAT.

24 ON BEHALF OF THE D. A. ' S OFFICE, I WANT TO
25 SINCERELY EXPRESS OUR GRATITUDE FOR WHAT IS CLEARLY VERY,
26 VERY IMPORTANT WORK. IT'S NOT OFTEN THE GRAND JURY IS
27 CALLED UPON TO CONSIDER THE FATE OF THE MAYOR OF THE LARGEST
28 CITY IN THE COUNTY, AND I UNDERSTAND IT'S THE 10TH OR 11TH

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1 LARGEST CITY IN THE UNITED STATES.

2 FOR WHAT YOU HAVE DONE, I CAN'T EXPRESS TO YOU TOO
3 MUCH THE GRATITUDE OF THE D. A. ' S OFFICE, AND HOPEFULLY THE
4 REST OF THE PEOPLE IN THIS COMMUNITY, FOR DOING SUCH
5 OUTSTANDING SERVICE.

6 SO THANK YOU VERY MUCH, ALL OF YOU.

7 THE FOREPERSON: THANK YOU.

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STATE OF CALIFORNIA)
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COUNTY OF CALIFORNIA) SS.

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I HEREBY CERTIFY:

THAT THE FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT OF THE TESTIMONY GIVEN BEFORE THE GRAND JURY AND THE PROCEEDINGS ON THE PRESENTMENT ON THE INDICTMENT BEFORE THE HONORABLE JACK KOMAR; THAT I REPORTED THE SAME IN STENOTYPE TO THE BEST OF MY ABILITY, BEING THE DULY APPOINTED AND ACTING OFFICIAL STENOGRAPHIC REPORTER OF SAID COURT, AND THEREAFTER HAD THE SAME TRANSCRIBED INTO TYPEWRITING AS HEREIN APPEARS.

I HAVE ADHERED TO CODE OF CIVIL PROCEDURE SECTION 237(A)(2) BY SEALING, THROUGH REDACTION AND SUBSTITUTION, ALL REFERENCES TO JUROR IDENTIFYING INFORMATION, INCLUDING BUT NOT LIMITED TO NAMES, ADDRESSES AND TELEPHONE NUMBERS.

DATED: JUNE 21, 2006.

SUE HERFURTH, C. S. R.
CERTIFICATE NO. 9645

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