

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF:)
)
TODD A. WELKER,) OTA Case No. 18011891
)
)
) APPELLANT,)
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_____)

TRANSCRIPT OF PROCEEDINGS

VAN NUYS, CALIFORNIA

TUESDAY, DECEMBER 11, 2018

Reported by:
Ernaly M. Alonzo
Hearing Reporter

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APPEARANCES:

Panel Lead: HON. MICHAL GEARY

Panel Members: HON. SARA HOSEY
HON. JEFF ANGEJA

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DIRECT CROSS REDIRECT RECROSS

(None offered)

APPELLANT'S WITNESSES:

DIRECT CROSS REDIRECT RECROSS

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Van Nuys, California; Tuesday December 11, 2018

10:00 a.m.

ADMINISTRATIVE LAW JUDGE GEARY: Good morning, everybody. Welcome to the Office of Tax Appeals. We are here this morning in Van Nuys, California to have the appeals conference in the Matter of the Appeal of Todd A. Welker, OTA Case No. 18011891.

My name is Michael Geary. I'm joined on the panel by Judge Angeja and --

ADMINISTRATIVE LAW JUDGE HOSEY: Hosey.

ADMINISTRATIVE LAW JUDGE GEARY: Judge Hosey. Excuse me. And for the benefit primarily of Mr. Welker, who has probably never participated in a process like this before, I wanted to let you know that the Office of Tax Appeals is not a tax assessing agency. We're not connected with the Office of the California Department of Tax and Fee Administration.

We are here solely to resolve tax disputes between taxpayers and taxing agencies, including CDTFA and Franchise Tax Board. We're completely separate. In the tax disputes that arise between the agencies and taxpayers and they're unable to resolve the dispute, we provide an opportunity for the parties to present their arguments and evidence to a panel of three neutral and unbiased judges.

1 So that's what we're here for today is to hear
2 the parties's arguments, to consider their evidence, and
3 eventually to issue a decision in this case where we will
4 make findings of fact and draw conclusions of law and
5 ultimately decide on some issues that are presented.

6 The process is being recorded both by video
7 camera from the back and by a court stenographer who is to
8 my left. Because it is being reported by the
9 stenographer, we have to be careful to speak clearly
10 having one person talking at a time. So don't talk over
11 somebody who is asking you a question, and don't ask a
12 question if a witness is still completing their answer.

13 As long as you speak loudly and clearly and not
14 too quickly, the court reporter will be able to accurately
15 report what is said in the room.

16 We discussed the order of proof during a
17 prehearing conference we held in this case. My
18 understanding is that Mr. Welker is going to be
19 testifying; is that correct?

20 MR. KAHN: Yes.

21 ADMINISTRATIVE LAW JUDGE GEARY: Okay. Let's
22 have the parties identify their representatives first and
23 indicate who is present for the taxpayer first.

24 MR. KAHN: Lucian Kahn. Do you need a spelling
25 on that?

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THE COURT REPORTER: No, sir.

MR. MCCLELLAN: Jesse McClellan on behalf of Todd Welker.

ADMINISTRATIVE LAW JUDGE GEARY: Okay. And Mr. Welker is here; correct?

MR. WELKER: Yes, sir. I am here.

ADMINISTRATIVE LAW JUDGE GEARY: All right. And for CDTFA?

MR. BONIWELL: Hi. Good morning. I am Joseph Boniwell.

MS. SILVA: Monica Silva.

MR. BONIWELL: And we also have Mr. Kevin Hanks with us.

MR. KAHN: One more witness. We have Bridget Hile.

ADMINISTRATIVE LAW JUDGE GEARY: That's right. Okay. Is Ms. Hile here already?

MR. KAHN: Yes, she is.

ADMINISTRATIVE LAW JUDGE GEARY: Okay. I think we discussed that we would -- because you have live witnesses, the parties are free to give opening statements specifically for the purpose of outlining the evidence. No argument in your opening statements.

If you want to tell us what the witness is going to testify to, what the documents say, you can do that.

1 But I don't want arguments in the opening statements, and
2 I think I indicated that each party, if they choose to
3 give one, can have up to ten minutes to give an opening
4 statement.

5 Will you be giving an opening statement,
6 Mr. Kahn?

7 MR. KAHN: Yes.

8 ADMINISTRATIVE LAW JUDGE GEARY: All right. Will
9 the Department give an opening statement?

10 MR. BONIWELL: We're requesting to waive our
11 statement and reserve the time at closing.

12 ADMINISTRATIVE LAW JUDGE GEARY: Okay. All
13 right. That's fine.

14 MR. BONIWELL: Thank you.

15 ADMINISTRATIVE LAW JUDGE GEARY: After opening
16 statements you can call your witness. We have a witness
17 stand. Typically, the witness will take the stand to
18 testify.

19 However, if Mr. Welker feels more comfortable
20 testifying there from the table, as long as the court
21 reporter and counsel for the Department can hear
22 everything that's being said, I'm fine with -- we are fine
23 with him staying in his seat if that's what he prefers.

24 The same for your next witness, if you want her
25 to testify from the table as opposed to taking the stand,

1 I'll leave that up to you. Okay?

2 MR. MCCLELLAN: Okay.

3 MR. KAHN: Mr. Geary, I just have one question
4 about the opening statement.

5 ADMINISTRATIVE LAW JUDGE GEARY: Yes.

6 MR. KAHN: We were going to use this time
7 primarily just to quickly go over the exhibits. Some are
8 self-explanatory and we're not going to cover all the
9 exhibits, but we want them all into evidence.

10 ADMINISTRATIVE LAW JUDGE GEARY: That's fine.
11 We'll talk about the evidence in a minute. After the
12 witnesses -- when the witnesses testify, of course, after
13 you complete your direct examination, Mr. Kahn. I assume
14 you're going to be doing it. The Department will have an
15 opportunity to ask questions.

16 The judges may want to ask questions of the
17 witnesses, and eventually we'll complete the first
18 witness, whoever that might be. And then we'll move on to
19 your next witness and do the same thing and ask questions.
20 The Department can ask questions, and the judges may have
21 questions of the witnesses.

22 And when we're done with that witness -- I don't
23 believe the Department has any live witnesses; is that
24 right?

25 MR. BONIWELL: That's correct.

1 ADMINISTRATIVE LAW JUDGE GEARY: We'll move into
2 closing arguments. And the party with the burden is going
3 to have -- I think ten minutes is what I allowed. Let's
4 see. Ten minutes for opening argument, and that party
5 will be the Taxpayer, the Appellant. Then the Department
6 will have ten minutes. Then the Appellant will have five
7 minutes for a final closing argument, generally, to
8 address new matters that are brought up by the Department.

9 That will conclude the proceeding, assuming
10 there's nothing unexpected like a reference to evidence
11 that we might need to collect that we might not yet have,
12 we'll close the record today.

13 And within 100 days, my co-panelist and I will
14 sit down and review the evidence, reach our decision, and
15 write the decision and issue it. And a copy will be sent
16 to all the parties and their representatives.

17 Any questions about the process?

18 MR. KAHN: Yeah, I do have one question. We've
19 reviewed the evidence that CDTFA has submitted, and we do
20 have comments about that. And I was just wondering if it
21 would be appropriate to wait until our final closing to do
22 that. Because we would like to hear the arguments first,
23 but we realize a lot of that is going to be dependent on
24 the evidence that's being submitted.

25 So I'd just like to be able to address that. I

1 don't know if what I address might go beyond what they
2 argue or not. Or do you want me to do that in my opening?

3 ADMINISTRATIVE LAW JUDGE GEARY: In your opening
4 you can talk about any of the evidence that you expect to
5 come in. By the time you give the opening, all of the
6 documentary evidence will be admitted. So if you want to
7 talk about what's in the documents, you can.

8 MR. KAHN: Well, I was going to discuss our
9 exhibits in evidence and then just make comments on their
10 exhibits in evidence in my second -- in the final closing.

11 ADMINISTRATIVE LAW JUDGE GEARY: That's fine.
12 You can do that. Yeah. Absolutely.

13 MR. KAHN: Okay. I understand. Ready to go
14 then.

15 ADMINISTRATIVE LAW JUDGE GEARY: All right.
16 Let's talk about the exhibits. The appellant has 27
17 exhibits; is that right?

18 MR. KAHN: That's correct.

19 ADMINISTRATIVE LAW JUDGE GEARY: We've reviewed
20 the exhibits. Department you've reviewed the exhibits. I
21 believe we discussed them at the prehearing conversation.
22 There's no objections to the admission of those 27
23 exhibits?

24 MR. BONIWELL: Correct.

25 ADMINISTRATIVE LAW JUDGE GEARY: All right.

1 Those 27 exhibits admitted.

2 (Appellant's Exhibit 1-27 were received
3 in evidence by the Administrative Law Judge.)

4 MR. KAHN: And we'll have that new Exhibit 1,
5 which CDTFA is --

6 ADMINISTRATIVE LAW JUDGE GEARY: Correct.

7 Correct.

8 MR. KAHN: Okay.

9 ADMINISTRATIVE LAW JUDGE GEARY: The Exhibit 1
10 was a decision and recommendation issued in the
11 Administrative Protest that is Smoochie Management LLC,
12 and that was apparently the wrong one. And Exhibit 1 for
13 the Appellant is now the Administrative Protest for
14 Mr. Welker; the decision and recommendation issued in that
15 matter.

16 MR. KAHN: Jesse, go ahead.

17 MR. MCCLELLAN: Can we maintain the Exhibit 1 and
18 then perhaps add the exhibit that the Department has
19 brought as the decision, just to make certain everything
20 is in the record and that it's clear that there were two
21 parties that were pursued by the Department?

22 ADMINISTRATIVE LAW JUDGE GEARY: You want them
23 both to be exhibits?

24 MR. MCCLELLAN: Yes, please.

25 ADMINISTRATIVE LAW JUDGE GEARY: Okay.

1 Department?

2 MR. BONIWELL: I think we would object on the
3 basis that DNR is concerning a Taxpayer. It does not
4 have -- that is not part of this appeal before the board.

5 ADMINISTRATIVE LAW JUDGE GEARY: Okay. So are
6 you objecting on the grounds of relevance?

7 MR. BONIWELL: I would say yes, relevance.

8 ADMINISTRATIVE LAW JUDGE GEARY: And Mr. Kahn,
9 are you --

10 MR. KAHN: Decisions are tied together. There
11 were two appeals that were filed. They were heard
12 together and two decisions were issued now inadvertently.
13 I would have -- I should have included both to begin with
14 because they were issued as duels. Initially, the
15 question was who is the purchaser.

16 MR. MCCLELLAN: And if I may add to that, the
17 Department has already stipulated to the exhibits that
18 we've submitted as being admissible. Those are what we're
19 asking to be admissible.

20 We would -- we would stipulate to the addition of
21 the decision that they're submitting today, but we would
22 like to maintain the exhibits that we have.

23 ADMINISTRATIVE LAW JUDGE GEARY: Okay. I think
24 I'm going to admit the both of the -- are they decisions
25 and recommendations or just decisions? I'm going to admit

1 both of them. I'll keep your relevance objection in mind.

2 We all will when we're considering the evidence.

3 But until we review it we can't really make the
4 determination of whether it may have some relevant
5 information in it, so we're going to admit. We'll admit
6 it as -- both of them as Exhibit 1. If we need to make
7 reference to page numbers, we'll just number them
8 consecutively through the second exhibit.

9 MR. MCCLELLAN: Thank you.

10 ADMINISTRATIVE LAW JUDGE GEARY: Any objections
11 to the Department's Exhibits, and they have submitted
12 Exhibits A through Q?

13 MR. KAHN: No.

14 ADMINISTRATIVE LAW JUDGE GEARY: All right. Then
15 those exhibits are also admitted into evidence.

16 (Respondent's Exhibit A-Q were received
17 in evidence by the Administrative Law Judge.)

18 ADMINISTRATIVE LAW JUDGE GEARY: Let me ask you
19 in advance. Are you going to have Mr. Welker testify from
20 the witness stand?

21 THE WITNESS: I'll testify at the stand, sir.

22 ADMINISTRATIVE LAW JUDGE GEARY: You'll take the
23 stand. Okay, Mr. Welker.

24 Are you ready?

25 THE COURT REPORTER: Yes, sir.

1 ADMINISTRATIVE LAW JUDGE GEARY: All right.

2 Let's -- have you been on the record at all?

3 THE COURT REPORTER: Yes, I have, sir.

4 ADMINISTRATIVE LAW JUDGE GEARY: Okay. Good. I
5 don't see you moving your hands, but you must have your
6 keyboard down there.

7 Mr. Kahn, are you ready to give an opening?

8 MR. KAHN: Yes.

9 ADMINISTRATIVE LAW JUDGE GEARY: All right.
10 Proceed.

11

12 OPENING STATEMENT

13 MR. KAHN: We have two witnesses today, Todd
14 Welker, Appellant. Basically, what we expect him to
15 testify to is that when he discussed purchasing the
16 business with the seller, the agreement was that he would
17 be forming an LLC to become the purchaser.

18 Initially, he hadn't done that when they decided
19 to enter into the purchase agreement. So he will just be
20 testifying to the events which took place, and I'll be
21 asking him questions as things transpired and the LLC was
22 formed and ultimately purchased the business.

23 The next witness is Bridget Hile. She is the
24 escrow officer. She will testify to her discussions with
25 the parties initially when she created the escrow

1 documents on July 1st, when she was told that she knew
2 that they were -- that Mr. Welker intended to form the
3 LLC; that she was informed that the LLC had been -- that
4 when it had been formed; and that she was still with the
5 LLC, and was going to complete the purchasing business and
6 she prepared the documents accordingly.

7 As far as our exhibits, I would like to just
8 quickly go over some of them. Exhibits 1 through 4 are
9 self-explanatory. So I would like to start with
10 Exhibit 5. That's the purchase offer.

11 We just want to point out that the purchaser --
12 the main purchaser in the purchase offer is Todd Welker or
13 is wholly owned affiliate. There were certain
14 requirements there for the buyer to assume a seller's debt
15 to a third party, and the seller was going to issue a
16 covenant not to compete with the buyer. Those are a
17 couple of crucial elements of the purchase agreement that
18 had to be added in order for the sale to occur.

19 Next, we have Exhibit 6, which is opening escrow
20 documents. These were basically prepared on a discussion
21 with the parties and based on what was in the purchase
22 agreement, also dated July 1st.

23 Our Exhibit 7 is a July 5th, 2011, security
24 agreement between the seller and the newly created LLC for
25 the LLC to assume the seller's debt to a third party. It

1 was part of the requirements in the purchase agreement
2 that the purchaser must assume some debt that the seller
3 owed to the third party.

4 We also have a July 5th, 2011, installment note.
5 That's the actual note where the LLC assumes the debt that
6 the seller owed to the third party. And it was prepared
7 in conjunction with Exhibit 7. They were just prepared
8 the same day, so you have to read them together.

9 Exhibit 9 is a July 7th, 2011 filing with the
10 California Secretary of State. This is when Mr. Welker
11 formed the LLC. It's just a one-page printout showing the
12 effective date of July 7th that he formed the LLC for the
13 purpose of buying the business.

14 There's also Exhibit 10. That's another
15 July 7th, 2011 document. It's regarding the LLC filing
16 with the Alcoholic Beverage Control.

17 Exhibit 11 is also a document on July 7th. It's
18 modified escrow instructions. Basically, it was -- these
19 were put together for the buyer to take possession of the
20 business on July 11th, 2011. And then in conjunction with
21 that and on the same day, Exhibit 12 was prepared. It's
22 another July 7th document.

23 It's basically an escrow instruction. It lists
24 the escrow holder as -- and the buyer as the LLC. And it
25 again refers to the other document about taking possession

1 of the business. So they were prepared together. They
2 are integrated documents, and it was prepared by Ms. Hile
3 on July 7th.

4 Then we have a July -- Exhibit 13 is a July --
5 it's dated July 11, 2011. It's a covenant not to compete
6 with the LLC. This was issued by the seller. The seller
7 agrees not to compete with the LLC. It's consistent with
8 a requirement of the purchase agreement that for the sale
9 to occur, the seller had to agree to not execute the
10 covenant not to compete. The seller did that. It was
11 with the LLC, not with Mr. Welker.

12 Then we have Exhibit 14. It's a July 12th, 2011,
13 modified escrow instructions. Now, on that document it's
14 discussing the transfer of the contract rights to the LLC.
15 And in that document, it refers to escrow documents
16 prepared on July 11th.

17 Ms. Hile will testify that basically she prepared
18 this document on July 12th, although, it is based on
19 discussion and agreements which took place on July 11th.
20 This is one of the, I would call, key pieces of evidence
21 on which we disagree with the Department. Next, we have a
22 July 5th, 2011 --

23 MR. MCCLELLAN: Sorry to interrupt. The
24 Exhibit 14, actually, is referring back to agreements and
25 documents that dated are July 7th, 2011, not July 11.

1 MR. KAHN: Oh, did I say July? Then I stand
2 corrected. I meant July 7th because that is stated in the
3 document.

4 Exhibit 15 is a letter from the escrow to the
5 Board of Equalization. It lists the LLC as the buyer.
6 And I believe -- Exhibit 16 I believe I put the same date,
7 August 5th, for Exhibit 16. It's actually dated
8 August 8th. So if you want to just line out 5 and put in
9 the 8th, that's the actual date of the document for
10 Exhibit 16.

11 What that is -- that's essentially the same
12 letter that was sent on August 5th for Exhibit 15. It's
13 just another letter that escrow sent naming the LLC as the
14 buyer.

15 We have Exhibit 17. That's the escrow closing
16 documents that shows the LLC as the buyer, and all the
17 payments are credited to the LLC.

18 Exhibit 18 is an application for the LLC's
19 seller's permit, and it shows a starting date of
20 July 11, 2011. That's the date that the buyer took over
21 the operation of the business. And the starting date was
22 later changed.

23 We have Exhibit 19, which is the actual seller's
24 permit that was issued; the date the LLC took out the
25 permit. It also has a starting date on the permit of

1 July 11th, 2011, the date the buyer first occupied the
2 business.

3 Exhibit 20 is a March 13th, 2017, e-mail
4 where I -- it's an e-mail that I sent to the appeals
5 attorney. I was asking for the appeals attorney to assist
6 us in gaining the contents of Mr. Welker's file. The
7 reason why I was doing that is because the dates on his
8 account were changed.

9 ADMINISTRATIVE LAW JUDGE GEARY: We don't need to
10 know the reasons why. You can describe what the document
11 is if you think it's important.

12 MR. KAHN: Okay. Moving on, Exhibit 21 is a
13 general release. It involves a lawsuit that was filed
14 against the seller on behalf of Mr. Welker and the LLC.
15 It basically explains the events which transpired. So
16 that's why we provided that.

17 Exhibit 22 might arguably be outdated now because
18 of the discussion we had. It's an e-mail that -- or a
19 memorandum that BTFD, or the Department's employee, sent
20 to the appeals attorney. She was basically arguing why
21 Mr. Welker should be held liable. There were, what I had
22 pointed out, some misstatements in the memo. We had
23 discussed that during the prehearing conference.

24 ADMINISTRATIVE LAW JUDGE GEARY: Stick to
25 contents, please.

1 MR. KAHN: Okay. Exhibit 23 is actually two
2 e-mails. It's a March 23rd, 2017, e-mail from me to
3 Ms. Hile, the escrow officer, and she had a March 24
4 response. It's basically confirming the discussions which
5 took place on July 7th about the LLC purchasing the
6 business, and the circumstances under which he prepared
7 the documents, and that the July 12th document was based
8 on discussion taking place on July 7th, 2011.

9 Exhibit 24 is just a copy of the 2011 LLC income
10 tax return. Basically, it shows a page of the return. It
11 shows a \$238,000 loan. This just represents funds that
12 Mr. Welker advanced the LLC. And then the LLC treated it
13 as a loan on its income tax return. Those were the funds
14 used for the down payment to close escrow.

15 Exhibit 25 is an e-mail that I sent to the
16 appeals attorney. I won't get into the details, but it
17 relates to basically statements that the Department
18 employee had made in her -- in her memo that we said were
19 incorrect.

20 Exhibit 26 is more better explained in the -- in
21 the brief. It's based on an e-mail that I got from the
22 appeals attorney. He was asking a question that I just
23 thought was inappropriate, and I discussed in the brief
24 why that was inappropriate.

25 And Exhibit 27 is just the declaration signed by

1 Ms. Hile. It essentially covers the issues that we will
2 be covering in her testimony today.

3 So I'm ready to call the witnesses.

4 ADMINISTRATIVE LAW JUDGE GEARY: All right.

5 MR. KAHN: Okay. My first witness will be Todd
6 Welker.

7 ADMINISTRATIVE LAW JUDGE GEARY: Mr. Welker, if
8 you will remain standing when you get over there and face
9 me. And raise your right hand, please.

10

11

TODD A. WELKER,

12

produced as a witness by and on behalf of himself, and

13

having been first duly sworn by the Administrative Law

14

Judge, was examined and testified as follows:

15

16

ADMINISTRATIVE LAW JUDGE GEARY: Thank you. Make
17 yourself comfortable.

18

19

DIRECT EXAMINATION

20

BY MR. KAHN:

21

Q Mr. Welker for the business purchase that's at
22 issue here, did you ever intend to buy that business
23 personally?

24

A No. It was always intended to be purchased
25 through an LLC.

1 Q Did you inform the seller that that was your
2 intent that you would be forming an entity to complete the
3 purchase of the business?

4 A Yes, I did. And I actually asked him for his
5 accountant's phone number, and I started the process of
6 opening that LLC that same day.

7 Q Did -- so the seller did consent to forming an
8 LLC for the purpose of purchasing the business?

9 A Yes.

10 Q So just to clarify Smoochie's Management LLC was
11 formed for the purpose of buying the business; correct?

12 A Yes. It was the only assets that were in that
13 LLC ever.

14 Q As far as the purchase agreement, it's our
15 Exhibit 5. It's Appellant's Exhibit 5. It lists the
16 purchaser as Todd Welker or His Wholly Owned Affiliate.
17 Can you answer why the wording "Wholly Owned Affiliate"
18 appears in the agreement?

19 A Yes. I mean, it was always intentional to buy
20 the business with an LLC. I've owned several businesses
21 in my life, and I've never owned one personally. They've
22 always been owned by an LLC. The only reason it says my
23 name at all is because the LLC had not been formed yet.

24 Q But adding the wording "Or His Wholly Owned
25 Affiliate," that was intended so the entity --

1 A So the LLC could be inserted as the purchaser
2 before the -- before the transaction closed.

3 Q Did you have attorney advising you during the
4 purchasing process?

5 A No, I did not.

6 Q Okay. Was Ms. Bridget Hile, the escrow officer,
7 informed that business would be purchased by the LLC?

8 A Yes.

9 Q And when did you tell her that?

10 A The day that the purchase offer was signed.

11 Q On July 7th, 2011, did you and the seller inform
12 Ms. Hile that the LLC had been formed?

13 A Yes.

14 Q On that same date, did you inform her that all
15 the documents should reflect the LLC as the purchaser?

16 A Yes.

17 Q Can you please explain why you took out a
18 seller's permit in your name instead of the LLC initially?

19 A Yes. When I went down to pull the sales permit,
20 they said I could not get a permit in the LLC's name until
21 I received the documents back from the Secretary of the
22 State.

23 They suggested that I pull a tax -- a sales tax
24 permit in my name and come back down when I had the LLC
25 documents and they can back date it to the date -- the

1 same day and -- and put the seller's permit in Smoochie's
2 Management's name at that time, which is exactly how
3 everything transpired.

4 Q In other words, they told you that if you -- if
5 you take out the permit right now when the LLC is formed,
6 they would be willing to use the initial date of entry
7 into the business as the date for the LLC as the starting
8 date?

9 A That's correct, and that's exactly what happened.

10 Q When you later obtained the seller's permit for
11 the LLC, what was your understanding as to why the person
12 who waited on you put down a start date of
13 July 11th, 2011?

14 A For the LLC?

15 Q Let me explain. On the day you went in and you
16 took out a seller's permit for the LLC, you had your
17 account closed out. There is a starting date that shows
18 July 11, 2011. And what was your understanding about that
19 being the starting date?

20 A Because that was the date the LLC took over the
21 business from Beverly Bagels.

22 Q Can you explain why some of the paperwork shows
23 your name instead of the LLC? For example, there was a
24 lease that was signed with the landlord, and your name is
25 on it. There is not -- the LLC's name is not on it. Can

1 you explain why that happened?

2 A I don't -- and I'm -- it's, you know. It's a
3 long time ago. But as I remember it, the LLC -- I didn't
4 have the paperwork back from the LLC yet. It's a very
5 small landlord. He owns just a couple of little
6 buildings. It's a very small lease.

7 And so I signed it in my name, and I just never
8 remembered to take it out of my name. But every single
9 payment was made by Smoochie's Management and all the
10 expenses for that lease were expensed through the LLC.

11 Q Okay. I'm going to show you what's been listed
12 as Exhibit K, submitted by CDTFA.

13 ADMINISTRATIVE LAW JUDGE GEARY: Did you say K?

14 MR. KAHN: Exhibit K, as Kahn.

15 BY MR. KAHN:

16 Q Now this is the lease agreement; correct?

17 A Yes.

18 Q Okay. I noticed that there's a date of
19 July 6, 2011. Is that the date that you would have signed
20 this?

21 A Yes.

22 Q And that's -- is that one day before you formed
23 the LLC with the Secretary of State?

24 A One day before I got the paperwork back.

25 Q And is that why you put your name on there

1 instead of the LLC?

2 A Yes.

3 Q Okay. Were the gross receipts of the business
4 included on the LLC income tax return from
5 July 11th, 2011, forward?

6 A Yes.

7 Q That's all sales receipts?

8 A Everyday was booked through the LLC.

9 Q So although you might have reported sales when
10 you -- under the permit issued under your name, all sales,
11 even for that same period, were reported on the LLC --

12 A Yes.

13 Q -- income tax return; correct?

14 A That's correct.

15 Q And were all costs and expenses from July 11th,
16 2011, forward, also on the income tax return?

17 A Yes.

18 Q Can you explain basically why you sued the seller
19 of the business?

20 A I'm sorry?

21 Q Can you explain why you sued the seller later?

22 A Well, for multiple reasons. Fraud. Fraud was
23 the biggest. But, you know, he also as part of that
24 purchase offer agreement, was to transfer all rights to
25 the business unencumbered by any debts. Then it became

1 very obvious pretty quickly that he wasn't going to be
2 able to do that. He refused to give me my money back.
3 And so I had no other choice but to sue him.

4 Q So it was a breach of contract action --

5 A Yes.

6 Q -- that you were pursuing?

7 A Yes.

8 Q Okay. Thank you. And when you entered into
9 litigation with the seller, why were you the main
10 plaintiff?

11 A I really don't know. I had an attorney do all of
12 that work.

13 Q Okay. But the paperwork that I've seen, it does
14 mention the LLC operating the business. Is that all
15 correct?

16 A Yes.

17 Q And that's all in the -- is that in the complaint
18 and the documents which were filed with the court?

19 A Yes.

20 Q And is that also all concluded with the final
21 settlement agreement referencing the LLC as operating the
22 business being formed, et cetera?

23 A Yes.

24 Q And being the buyer of the business?

25 A Yes.

1 MR. KAHN: Thank you. Jesse, do you have a
2 question?

3 MR. MCCLELLAN: I do have a couple just follow-up
4 questions.

5 BY MR. MCCLELLAN:

6 Q Was there ever a time during this process in
7 which you intended to buy the business as an individual?

8 A No.

9 Q And all of this, to your knowledge, was clearly
10 understood by the seller of the business?

11 A That's correct.

12 Q Prior to receiving the notices of successor
13 liability, the bills that were issued by the agency for
14 the tax obligation, did they ever reach out to you to
15 discuss who purchased the business?

16 A No.

17 Q So they never asked you who you considered the
18 purchaser to be or ask for documents related to that?

19 A No.

20 Q I don't think I have anything else. Is there
21 anything that you would like to add as far as what we're
22 addressing here today?

23 A Yeah. This is been a huge ordeal on my life. I
24 feel like I've been mistreated and treated like a number.
25 That they had every opportunity to get the funds from the

1 person who stole this money, and they let him off with a
2 slap on the wrist and have been pursuing me aggressively
3 ever since then.

4 It's cost me my life savings, my kids' college
5 money. And they just treat it like it's not a big deal to
6 them, and it is a big deal. I'm a real person. I didn't
7 steal this money.

8 I acted honorably the whole time I had this
9 restaurant in my possession, but I'm the one sitting here
10 emotionally drained, financially drained, and still paying
11 for this. I have a \$700,000 liability hanging over my
12 head that I can never possibly pay.

13 But I'm just super disappointed to even have to
14 be here. I don't feel like it's fair.

15 MR. MCCLELLAN: Thank you, Todd. That's it.

16 ADMINISTRATIVE LAW JUDGE GEARY: Does the
17 Department have any questions for Mr. Welker?

18 MR. BONIWELL: We don't have any questions for
19 Mr. Welker.

20 ADMINISTRATIVE LAW JUDGE GEARY: Judge Hosey, do
21 you have any questions?

22 ADMINISTRATIVE LAW JUDGE HOSEY: I don't. Thank
23 you.

24 ADMINISTRATIVE LAW JUDGE GEARY: Judge Angeja?

25 ADMINISTRATIVE LAW JUDGE ANGEJA: Not yet.

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ADMINISTRATIVE LAW JUDGE GEARY: Not yet?

ADMINISTRATIVE LAW JUDGE ANGEJA: It might get answered in the course of the proceeding.

ADMINISTRATIVE LAW JUDGE GEARY: Mr. Welker, I have no questions. You can resume your seat at the table.

THE WITNESS: Thank you.

MR. KAHN: Can I ask you a question? Would we have a chance to recall the witness if necessary because Mr. Angeja brought up an important point.

ADMINISTRATIVE LAW JUDGE GEARY: Sure.

MR. KAHN: Something could come up.

ADMINISTRATIVE LAW JUDGE GEARY: You mean recall Mr. Welker to the stand?

MR. KAHN: Yes.

ADMINISTRATIVE LAW JUDGE GEARY: Sure.

MR. KAHN: Or Ms. Hile, if necessary.

ADMINISTRATIVE LAW JUDGE GEARY: Yes.

MR. KAHN: Okay. The next witness we have is Bridget Hile.

ADMINISTRATIVE LAW JUDGE GEARY: Raise your right hand, please.

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BRIDGET HILE,

produced as a witness by and on behalf of the Appellant,
and having been first duly sworn by the Administrative Law
Judge, was examined and testified as follows:

ADMINISTRATIVE LAW JUDGE GEARY: Thank you.

Please have a seat, Ms. Hile. Would you just state your
full name before you take the stand and spell your last
name.

THE WITNESS: It's Bridget Francis Hile, H-I-L-E.

ADMINISTRATIVE LAW JUDGE GEARY: Thank you. Go
ahead, Mr. Kahn.

DIRECT EXAMINATION

BY MR. KAHN:

Q Ms. Hile, could you tell us where you work?

A Santa Monica Escrow.

Q In July and August of 2011, did you personally
prepare all escrow instructions related -- and related
documents in the letters for escrow No. 6716.5, which was
for the sale of a business known as 17th Street Cafe and
Bakery?

A Yes, I did.

Q Who are the individuals you worked with?

A You mean on this deal --

1 Q The two individuals --

2 A -- or in my office?

3 Q -- for the sale of the business?

4 A Oh, Todd Welker and Lenny Rosenberg.

5 Q So these were the two people representing the
6 seller and the buyer?

7 A Yes.

8 Q Were you informed that Mr. Welker would be
9 forming an LLC for the purpose of purchasing and operating
10 the business?

11 A Yes.

12 Q What point in the process were you informed that
13 the LLC would be formed for the purpose of the business?

14 A The day we met, and I took their instructions.

15 Q So that would be on July 1st?

16 A Yes.

17 Q Okay. Thank you. To your knowledge was the
18 seller aware that the LLC would be formed for the purpose
19 of purchasing the business?

20 A Yes.

21 Q Can you explain why Mr. Welker is listed as the
22 buyer in the July 1st, 2011, escrow instructions? That's
23 Appellant's Exhibit 6.

24 A This was a time of the essence escrow. Normal
25 escrows take about 60 or 90 days or even more. So we had

1 to start the process immediately.

2 Q Okay. The information, though, when you prepared
3 these July 1st escrow instructions, did you take it from
4 the purchase agreement?

5 A Yes.

6 Q Okay. So that's pretty much the content of the
7 purchase agreement. That's what you put in the escrow
8 instructions based on what you had at that time?

9 A That's correct.

10 Q Okay. Thank you. On July 11th were you informed
11 by the parties that Smoochie's Management LLC had been
12 formed?

13 A Yes.

14 Q On July 11th were you also informed that the LLC
15 should be --

16 A Actually it was --

17 Q Okay. On July 7th were you also informed by the
18 parties that the LLC should be shown as the purchaser on
19 all of the related documents, and that it would be
20 completing the purchase?

21 A Yes.

22 Q So it was your understanding that the LLC would
23 be obligated under the purchase agreement?

24 A Yes.

25 Q So did you prepare the July 7th, 2011,

1 instruction showing the LLC as the buyer based on what the
2 parties told you?

3 A I -- I -- you know what, I have to see the
4 document.

5 Q Okay. Let me pull that out. Hold on real quick.
6 I'm showing the witness what is Appellant's Exhibit 11.
7 It's a July 7th, 2011, document entitled "Modified to
8 Original Bulk Escrow Instructions".

9 Now you prepared this form; correct?

10 A Yes.

11 Q And then did you also prepare which would be
12 Appellant's Exhibit 12. That's a one-page document
13 entitled "Instructions to Escrow Holder." You prepared
14 that document as well?

15 A Yes.

16 Q On this particular document, did you type in
17 everything so Mr. Welker only had to sign it?

18 A Yes.

19 Q So where it refers to "buyer taking possession"
20 and named the buyer as Smoochie's Management LLC, is that
21 based on what they told you that day?

22 A Yes.

23 ADMINISTRATIVE LAW JUDGE GEARY: Can you be more
24 specific about where you are on the document, sir? Are
25 you on 11 or 12?

1 MR. KAHN: I'm on 12.

2 ADMINISTRATIVE LAW JUDGE GEARY: All right.

3 MR. KAHN: Okay. So --

4 MR. MCCLELLAN: Judge Geary, and what he's
5 referring to is the bolded portion that says "Buyers
6 Possession," just under that.

7 ADMINISTRATIVE LAW JUDGE HOSEY: I'm sorry.
8 Which exhibit are we on?

9 MR. MCCLELLAN: 12.

10 ADMINISTRATIVE LAW JUDGE GEARY: Go ahead.

11 BY MR. KAHN:

12 Q Okay. So in other words you prepared these two
13 documents, our Exhibit 11, which is -- which basically
14 explains that the buyer is going to take possession as of
15 July 11, 2011, and that you prepared this document as well
16 all in the same day, and that these documents were meant
17 to be tied together or integrated?

18 A Yes.

19 Q Okay. So when you -- even though Mr. Welker's
20 name is down here as buyer and he signs there, did you
21 mean that the buyer was actually the LLC?

22 A Yes. The buyer is the LLC. Can I see that?

23 Q Sure.

24 ADMINISTRATIVE LAW JUDGE GEARY: Your reference
25 just a minute ago, "down there," you're referring to the

1 bottom of Exhibit 12?

2 MR. KAHN: Excuse me. First, I'm referring to
3 the bottom of Exhibit 11, and I think it says "Buyer." It
4 has Mr. Welker's signature on that. That would be
5 Exhibit 11.

6 ADMINISTRATIVE LAW JUDGE GEARY: Okay.

7 BY MR. KAHN:

8 Q So that's the question I pose to you where it
9 says name and buyer and Todd signs it. But did you mean
10 to put the LLC?

11 A It actually looks like it got cut off.

12 Q It didn't photocopy well.

13 A Yeah.

14 ADMINISTRATIVE LAW JUDGE GEARY: Do you have an
15 original?

16 MR. BONIWELL: If you look at Department's
17 Exhibit E, you can see the bold document.

18 MR. KAHN: Yeah. There's the full document.

19 BY MR. KAHN:

20 Q Okay. You listed buyer and you typed in his name
21 Todd Welker.

22 A Right.

23 Q And then the next document prepared the same day,
24 which that's Exhibit 12. It talks about the buyer taking
25 possession. It says, "Buyer's Possession." So you meant

1 to refer to the LLC as the buyer in Exhibit 11?

2 A Right.

3 Q Same as you did 12?

4 A Exactly. So this was typed first, and then I
5 recognized, oh, forgot to put in this LLC name.

6 MR. BONIWELL: I'm sorry. What was typed first?

7 THE WITNESS: The modification.

8 MR. KAHN: It would be your Exhibit E.

9 MR. BONIWELL: Okay.

10 THE WITNESS: The modification, that was typed
11 first. And then this was just a correction of my own
12 document.

13 BY MR. KAHN:

14 Q Okay. So both documents were prepared the same
15 day because you were told that the LLC was now the buyer;
16 correct?

17 A Right.

18 Q Okay. Now, let's go next to -- hang on. I got
19 to check my exhibit. I'm going to show you what's
20 Appellant's Exhibit 14. It's a July 12th document. It's
21 basically an assignment document stating that the contract
22 rights are being assigned to the LLC.

23 And can you explain why you didn't prepare this
24 document on July 7th?

25 A I probably did. The thing is our computer

1 automatically changes the date, and unless you remember to
2 go up and re-change it, you know, to the actual date you
3 receive the information --

4 Q Right. But did you actually prepare the document
5 on July 12th?

6 A That's correct. I did prepare it on July 12th.

7 Q But is it based on everything that transpired?

8 A Yes.

9 Q Can you just explain why you didn't do it on
10 July 7th like you did the other two?

11 A I was probably busy.

12 Q Okay. But this was all meant to apply to what
13 happened on July 7th; correct?

14 A That's correct.

15 Q 2011?

16 A Yes.

17 Q Okay. So just to confirm. All the documents you
18 made, the two July 7th documents and the July 12th, all
19 those documents prepared are based on what transpired and
20 what you were told on July 7th, 2011; correct?

21 A That's correct.

22 Q There's a couple of other documents I'm going to
23 show you. And these are documents that have Mr. Welker's
24 name on it. One of them is the Department's Exhibit M.
25 What it is, is it's a fictitious business statement, and

1 so it was filed in the local newspaper.

2 And what it says is that Todd Welker is the
3 purchaser of a business, and it specifies a date of
4 July 11th, 2011. Can you explain why this was filed in
5 Mr. Welker's name and not the LLC?

6 ADMINISTRATIVE LAW JUDGE GEARY: Well, hold on a
7 second. Have you established that this witness filed the
8 document?

9 MR. KAHN: Well, I believe --

10 THE WITNESS: Yes. Yes.

11 ADMINISTRATIVE LAW JUDGE GEARY: You did file it?

12 THE WITNESS: Yes. Yes.

13 ADMINISTRATIVE LAW JUDGE GEARY: Okay.

14 MR. KAHN: Good question.

15 ADMINISTRATIVE LAW JUDGE GEARY: Thank you.

16 BY MR. KAHN:

17 Q Can you just explain why his name appears as the
18 buyer, and it shows the date of July 11, 2011?

19 A Robotic procedure is what I'll tell you.

20 Q What does that mean?

21 A Based -- it's just, you know, every file we have
22 certain steps, and this is one of these steps. And it
23 doesn't mean it needs to be done right away, but I knew
24 that time was of the essence. So I'm preparing my
25 documents and doing my stuff and filed it.

1 Q Let me be more specific. When you filed this and
2 you put this date in, was it before July 11th when you
3 filed the document?

4 A I actually filed the document on -- it should say
5 right here on the actual document itself.

6 Q I see an invoice date, but that's when you were
7 invoicing.

8 A It should say -- oh, let's see.

9 Q Well, let me ask you this. Is this a mistake?
10 It says Todd Welker is the buyer.

11 A Yeah. This is a mistake, and I would have
12 re-filed with his LLC name.

13 Q Okay. Now, the other document I want to show
14 you, it's a document. It's the Department -- CDTFA's
15 Exhibit Q. What is -- it is a notice of amount that's
16 due. It's basically a document that the agency -- the tax
17 agency sends. And at this time -- at that time Board of
18 Equalization.

19 And they are responding to some notification you
20 must have sent to them about, business being sold. And in
21 there they list the buyer as Todd Welker. Now I notice
22 that this was received. It's dated August 4th, but it was
23 received into escrow on August 8th.

24 Now, can you explain why Mr. Welker's name would
25 appear on this document?

1 A It's based on my giving them all the notification
2 and information that the business was being sold.

3 Q Okay. So this was --

4 A At the very end of it.

5 Q I know you gave them an earlier point of time
6 before the LLC was formed and only Todd Welker was the
7 listed buyer at that time?

8 A Get the process going, yes.

9 Q So this is an outdated and obsolete document --

10 A Yes.

11 Q -- in your opinion?

12 A Absolutely. Absolutely, yeah.

13 MR. KAHN: Thank you. I have no further
14 questions.

15 MR. MCCLELLAN: I have a couple that I would like
16 to add, if I may?

17 BY MR. MCCLELLAN:

18 Q So as it pertains to the fictitious business name
19 that was filed, which was shown to you as Exhibit M, you
20 had mentioned that you had filed a correction --

21 A Yes. I filed a correction.

22 Q -- to the document; right?

23 MR. MCCLELLAN: And let the record show that is
24 Department's Exhibit L, which is the correction.

25 BY MR. MCCLELLAN:

1 Q As it relates -- as it relates to the
2 notification to the Board of Equalization, now CDTFA,
3 there was -- you had initially sent that notification to
4 them in the name of Mr. Welker. And you explained that
5 the LLC had not yet been formed.

6 But prior to receiving that notification, did you
7 send a letter to the agency correcting the name that the
8 notification should be in the LLC?

9 A I would have done that, yes.

10 MR. MCCLELLAN: What exhibit? Where is that,
11 Jesse?

12 MR. KAHN: Okay. You mean when the LLC is the
13 buyer?

14 MR. MCCLELLAN: Yes. They were August 5th.

15 MR. KAHN: There is an August 5th and August 8th
16 document. Let's see. Yeah, it's exhibits --

17 ADMINISTRATIVE LAW JUDGE GEARY: Mr. McClellan,
18 you guys are approaching what should be near the end of
19 your direct time.

20 MR. MCCLELLAN: I have only one more question.

21 MR. KAHN: It's Exhibit 15.

22 MR. MCCLELLAN: So taxpayer Exhibit 15 is the
23 letter that Ms. Hile had sent to the agency.

24 MR. KAHN: Let me show it to her just to make
25 sure.

1 BY MR. KAHN:

2 Q In other words is this the document that you sent
3 where it shows the LLC?

4 A That's correct, yes.

5 ADMINISTRATIVE LAW JUDGE GEARY: And that's
6 Exhibit 15?

7 MR. KAHN: Exhibit 15. And then there was a
8 second letter, Exhibit 16. It's basically the same letter
9 that you just sent three days apart.

10 ADMINISTRATIVE LAW JUDGE GEARY: That's fine.

11 MR. KAHN: Okay.

12 MR. MCCLELLAN: Thank you, Ms. Hile. I think I
13 just have two more questions.

14 BY MR. MCCLELLAN:

15 Q So one pertains to the issuance of the ABC
16 license. Are you familiar with that process? Is that
17 something you're involved with?

18 A Yes.

19 Q Okay. And is it your understanding that the ABC
20 license was transferred directly from the seller to
21 Smoochie's Management LLC?

22 A Well, yeah. Yes.

23 Q Okay. And to your knowledge, at any point in
24 time, was the liquor license ever transferred to
25 Mr. Welker as an individual?

1 A No.

2 Q And my last question is the same question that I
3 asked Mr. Welker. Prior to the bills being issued, and I
4 believe 2013 or thereabouts, do you recall if there was
5 ever any communication to you from the Board of
6 Equalization about who the purchaser actually was?

7 A That's a little bit more complicated than a yes
8 or no answer. I was dealing with two issues with the
9 Board of Equalization. I was dealing with a successor
10 liability from a previous transaction, and then the new
11 one.

12 Q Okay.

13 A And I had --w as constantly in contact on the
14 phone and e-mails, et cetera.

15 MR. KAHN: Can I clarify. I think just so the
16 panel knows what you're talking about. When you say
17 previous transaction, that is a previous owner of the
18 business who also had a tax debt. I think their name was
19 Montana. I don't know the full name; is that correct?

20 THE WITNESS: Yeah, that's correct.

21 BY MR. MCCLELLAN:

22 Q And ultimately you provided them with all of the
23 escrow documents and all the documents that you have for
24 this purpose?

25 A Yes, I did.

1 MR. MCCLELLAN: Okay. Great. I don't have any
2 further questions.

3 ADMINISTRATIVE LAW JUDGE GEARY: Department, do
4 you have anything for this witness?

5 MR. BONIWELL: No, thank you. We don't have any
6 questions.

7 ADMINISTRATIVE LAW JUDGE GEARY: Judge Hosey, any
8 questions? Judge Angeja? I have a question, at least
9 one.

10 THE WITNESS: Sure.

11 ADMINISTRATIVE LAW JUDGE GEARY: You said time
12 was of the essence for this escrow.

13 THE WITNESS: Yes.

14 ADMINISTRATIVE LAW JUDGE GEARY: Why was that?

15 THE WITNESS: It was going to be a shorter than a
16 normal transaction. It was going to be more of a 30-day
17 transaction. Well, it was going to try and be a 30-day
18 transaction.

19 But with the successor liability from the
20 previous owner, that was contingency on the purchase from
21 Todd. And it led to some trouble and some delays, and you
22 saw the whole -- I know you don't have the whole file.

23 ADMINISTRATIVE LAW JUDGE GEARY: Your file?

24 THE WITNESS: Oh, no. The whole story of the
25 transaction that took place.

1 ADMINISTRATIVE LAW JUDGE GEARY: I have whatever
2 the parties have given me.

3 THE WITNESS: Okay.

4 ADMINISTRATIVE LAW JUDGE GEARY: So it was time
5 was of the essence. You made that statement because it
6 was going to be shorter than normal escrow?

7 THE WITNESS: Right. Right. That's correct.
8 The buyer will -- the seller was going to leave. The
9 buyer was going to take responsibility of the business
10 prior to the issuance of the -- or not prior to the
11 issuance of a license -- based on successor of liability.

12 Todd was going to -- he was assuming a note from
13 a previous successor liability. We were waiting on that
14 to clear, and it took forever to get a yes or no answer
15 from the BOE. Well at the time it was BOE.

16 And that was -- that was the whole premise that
17 the transaction was kind of based on was whether or not he
18 could assume that liability or not. And --

19 ADMINISTRATIVE LAW JUDGE GEARY: There's a
20 preexisting successor on it?

21 THE WITNESS: Hm-hm.

22 ADMINISTRATIVE LAW JUDGE GEARY: Okay.

23 THE WITNESS: That's correct.

24 ADMINISTRATIVE LAW JUDGE GEARY: All right.

25 That's my only question. Any follow up?

1 MR. KAHN: Well, with your question, I don't know
2 if you want to ask Mr. Welker, because he did when we
3 discussed the case.

4 ADMINISTRATIVE LAW JUDGE GEARY: Do you have any
5 follow-up for this witness, Mr. Kahn?

6 MR. KAHN: No. No.

7 ADMINISTRATIVE LAW JUDGE GEARY: Okay.
8 Department, anything else?

9 MR. BONIWELL: No, thank you.

10 ADMINISTRATIVE LAW JUDGE GEARY: Judges? No.
11 You are excused from the witness stand.

12 THE WITNESS: Okay.

13 ADMINISTRATIVE LAW JUDGE GEARY: You have to
14 check with Mr. Kahn on whether or not you're excused from
15 the hearing room.

16 THE WITNESS: Thank you.

17 ADMINISTRATIVE LAW JUDGE GEARY: Thank you very
18 much, ma'am.

19 No other witnesses, Mr. Kahn?

20 MR. KAHN: No. We have no more.

21 ADMINISTRATIVE LAW JUDGE GEARY: Okay. Does the
22 Department have any witnesses?

23 MR. BONIWELL: We do not.

24 ADMINISTRATIVE LAW JUDGE GEARY: Okay. You said
25 at one point you waved your opening statement, and then

1 you indicated you reserved. Did you want to give an
2 opening statement at this point?

3 MR. BONIWELL: No, I didn't. I was just asking
4 if the time --

5 ADMINISTRATIVE LAW JUDGE GEARY: You're adding
6 time to make your argument. All right.

7 Are you doing okay?

8 THE COURT REPORTER: Yes, sir.

9 ADMINISTRATIVE LAW JUDGE GEARY: We're ready for
10 closing arguments. Let me ask. Who is giving the closing
11 arguments.

12 MR. MCCLELLAN: I am. Jesse.

13 ADMINISTRATIVE LAW JUDGE GEARY: You were both
14 asking questions of the witness. We usually try to keep
15 witness questioning to one representative for future
16 reference.

17 MR. MCCLELLAN: Okay. Thank you.

18 ADMINISTRATIVE LAW JUDGE GEARY: Are you going to
19 give both of the closing if there is a second one too?

20 MR. MCCLELLAN: Actually, the intent was for me
21 to make the opening and for Lucien to make the closing.

22 ADMINISTRATIVE LAW JUDGE GEARY: Okay. You can
23 proceed with your closing first.

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1 They eventually concluded at the appeals
2 conference was -- was really the first time that it was
3 expressed to us that they felt Mr. Welker was the
4 purchaser and not Smoochie's Management LLC. But a key
5 component -- and I would say a paramount component to this
6 case is, that Mr. Welker never intended to purchase the
7 business as an individual.

8 And unlike a sale of tangible personal property
9 where you have Code Section 6006 that governs transaction,
10 6006 does not govern the purchase or sale of a business.
11 So we don't have a scenario where there's going to be an
12 accidental sale that occurs prior to the anticipated time
13 or prior to the anticipated person.

14 As stated in the California Supreme Court case
15 Beatrice Company v. State Board of Equalization, the
16 determination of the issue of a tax liability can be as
17 much one of contract law as it is as tax law. And such is
18 the case in this matter.

19 The issue is who, under an agreement with the
20 seller, was the purchaser that was obligated to pay the
21 purchase price and assume the debt. The facts in evidence
22 make it clear that the LLC was the person that was
23 obligated under the purchase agreement to pay the purchase
24 price.

25 It's the party that assumes the debt. It's the

1 party that signed the security agreement to secure that
2 debt with the assets of the business that it owned. It's
3 the party that entered into a covenant not to compete.
4 It's the party that was listed on the documents as a
5 purchaser.

6 Ms. Hile just testified that Mr. Welker -- his
7 name was used in place of the LLC pending the issuance of
8 the documents from the Secretary of State. But,
9 ultimately, California provides a very clear guidance as
10 it pertains to the formation of contracts and how those
11 contracts are to be interpreted.

12 Civil Code Section 1550 establishes the essential
13 elements of the existence of a contract, and they consist
14 of the following: Parties capable of contracting their
15 consent, a lawful object, a sufficient cause or
16 consideration.

17 Civil Code Section 1565 tells us that consent
18 must be free you -- I'm sorry -- free, mutual, and
19 communicated by each to the other.

20 Civil code Section 1580 informs us that consent
21 is not mutual unless the parties agree upon the same thing
22 in the same sense.

23 And finally, Civil Code Section 1636 states that
24 a contract must be interpreted as to give effect to the
25 mutual intention of the parties as it existed at the time

1 of contracting.

2 So in summary, the law requires that we look to
3 the mutual intention of the parties at the time of
4 contracting to determine the meaning of the agreement.
5 And there is no dispute between the parties, the buyer and
6 the seller, who the purchaser was. And in this case the
7 purchaser was the LLC.

8 You've heard testimony of Todd Welker, to my
9 right, the managing member of the LLC, and Bridget Hile,
10 the escrow officer retained to facilitate the sale of a
11 business. And Mr. Welker testified that it was his intent
12 to form the entity to purchase the business, that he has
13 owned several businesses in his lifetime. He has never
14 owned a business as an individual.

15 Mr. Welker also testified that the seller was
16 informed of his intent to form an entity to make the
17 purchase of the business that he consented to him doing
18 so, and that that was done from the onset of the
19 discussions and negotiations that took place.

20 Ms. Hile testified that she was informed at the
21 very first meeting with the seller's president, Leonard
22 Rosenberg and Todd Welker, the managing member of the LLC,
23 that the purchase would be made by the LLC.

24 She also testified that she informed -- she was
25 informed that the LLC was formed, and that it should be

1 clearly documented in the documents prior to July 11,
2 2011, the date the Department claims the sale occurs.
3 Consistent with the party's intent, Exhibit 5 is a copy of
4 the purchase offer, which was prepared by the seller and
5 identifies the purchaser as Todd Welker or Wholly Owned
6 Affiliate.

7 Mr. Welker testified that he did not draft the
8 agreement. He did not have an attorney involved in the
9 process, but he understood the term "Wholly Owned
10 Affiliate" referred to the LLC that he discussed with the
11 seller leading up to the drafting of the document and
12 expressed the material condition to the purchase, that the
13 purchaser assume debt of the seller in the amount of
14 \$485,000 -- it's on page 1 of the agreement -- which
15 formed the majority of the purchase price.

16 Exhibit 8 is a copy of the July 5th, 2011,
17 installment note for the debt of the seller, that the LLC
18 assumed as required, in Section 3.05 of the purchase
19 agreement. The note was a condition of the sale and it
20 was assumed by the LLC.

21 Per page 3 of the July 1st, 2011, escrow
22 instructions states that, "Closing is conditioned on the
23 assumption of the debt by the buyer." Todd Welker never
24 assumed the debt as an individual. So by the agreement's
25 own terms, the sale never could have been made to

1 Mr. Welker as an individual.

2 Exhibit 7 is a copy of the July 5th, 2011,
3 security agreement related to the note that the LLC
4 assumed. And on this document Mr. Welker is also
5 identified as its managing member. The security agreement
6 secures the debt by the assets of the business, and it
7 would have no meaning if the LLC didn't have the assets of
8 the business by which the debt was secured.

9 Exhibit 9 is a copy of California Secretary of
10 State documents showing that the LLC was formed on
11 July 7th, 2011, prior to the transfer of the business.

12 Exhibit 10 is the LLC's filing with ABC
13 related -- dated July 7th, 2011. Mr. Welker testified
14 that the LLC was formed for the sole purpose of buying
15 this business.

16 ADMINISTRATIVE LAW JUDGE GEARY: You've got about
17 two minutes left, Mr. McClellan.

18 MR. MCCLELLAN: Okay. This -- if I -- if I may
19 have some additional time, I would say I could wrap this
20 up in probably five minutes if I may?

21 ADMINISTRATIVE LAW JUDGE GEARY: Wrap it up as
22 quickly as you can.

23 MR. MCCLELLAN: Okay. Thank you.

24 The ABC license was in fact transferred directly
25 from the seller to the LLC.

1 Exhibit 12 is a copy of the July 7th, 2011,
2 escrow instructions identifying the LLC as the buyer.
3 Mr. Welker signed it as the managing member.

4 Exhibit 13 is a covenant not to compete that the
5 seller issued to the LLC, not Mr. Welker, as of
6 July 11th, 2011. There would be no reason for the seller
7 to issue a covenant not to compete to the LLC if it was
8 not in fact the purchaser. And the covenant not to
9 compete with the LLC meaningless to Mr. Welker if, in
10 fact, he was the purchaser because the LLC would not be
11 operating the business.

12 Exhibit 14 is a copy of an escrow modification
13 document dated July 12, 2012, which confirms the LCC is
14 the buyer. Ms. Hile testified that document was prepared
15 on that date, but all of the information in the document
16 was conveyed to her by at least July 7, 2011.

17 In summary the evidence demonstrates the mutual
18 intent of the parties was for the LCC to be the buyer.
19 There is ample authority, literally hundreds of cases,
20 that support the notion that in order to interpret a
21 contract you look to the mutual intention of the parties
22 through the extent that there's ambiguities.

23 There's clearly some ambiguities here because you
24 have a Department coming to two different conclusions over
25 this transaction that the LLC is the purchaser or that the

1 individual is the purchaser. Ultimately, they chose the
2 individual. We think that potentially may be influenced
3 by the fact that the LLC no longer exist, and it can't
4 pursue it for any sort of collection.

5 But none-the-less, the document show that the LLC
6 was the purchaser. Intent of the parties is very clear in
7 our opinion in this case. I think to parse it in the
8 negative also shines some light on it. Why on earth would
9 the LLC be named as the purchaser on the documents; assume
10 the seller's debt, which is an expressed condition of the
11 sale and a condition of the close of escrow; sign a
12 security agreement with the assets of the business forming
13 the basis of the security; receive a sign covenant not to
14 compete from the seller; obtain an ABC license; and then
15 operate the business, recognizing from the very first day,
16 July 11, 2011, there's entries for sales in the books and
17 records of the business.

18 All that is reflected on the official statements
19 of the business. All that flows through to the income tax
20 returns of the business. The answer is that the LLC would
21 not do that if it was not the actual purchaser.

22 Any ambiguities in the form of the documents do
23 not serve to change or alter the undisputed intent of the
24 parties or the outcome of the parties's agreement, which
25 is to sell the business to the LLC.

1 showing the amount is paid, or a certificate stating that
2 no amount is due.

3 Furthermore, under Revenue and Taxation
4 Code 6812, if the purchaser of a business fails to
5 withhold from a purchase price as required, that purchaser
6 becomes personally liable for payment of the amount
7 required to be withheld by that purchaser to the extent of
8 the purchase price.

9 And as discussed earlier, Regulation 1702
10 explains how the purchaser may be released from the
11 obligation to withhold. The purchaser can either obtain a
12 certificate from the Department stating that no amounts
13 are due from the predecessor, or the purchaser will be
14 released from the obligation to withhold if the purchaser
15 makes a written request to the Department for a tax
16 clearance, and the Department fails to respond or fails to
17 respond in a timely manner.

18 So in this case, the only disputed fact is
19 whether Mr. Welker was the purchaser of 17th Street Cafe
20 and Bakery, such that he should be held personally liable
21 as the successor for the sales and use tax liabilities of
22 the seller, Beverly Bakery Incorporated because he failed
23 to withhold the amount due on the purchase price.

24 And in order for Mr. Welker to be the purchaser,
25 there must have been a sale of the 17th Street Cafe and

1 Bakery. And under Revenue and Taxation Code 6006
2 Subdivision (e), a sale includes a transaction whereby
3 possession and property is transferred, but the seller
4 retains title as security for the payment price.

5 So in other words, a business sale can occur when
6 the purchaser takes possession of the property from the
7 seller, even if the seller has not transferred title, or
8 the purchaser has not completed making payments.

9 So although Mr. Welker asserts it was his intent
10 for Smoochie's Management to be the ultimate owner and
11 operator pursuant to the terms of the transaction and the
12 actions of Mr. Welker, Mr. Welker purchased the 17th
13 Street Cafe and Bakery when he took possession of the
14 business on July 11th, 2011.

15 Mr. Welker's counsel discussed contract
16 interpretation, and he's correct that contracts should be
17 interpreted to give effect to the mutual intention of the
18 parties. This is consistent with California Civil Code
19 1636. However, Mr. Welker's counsel relies on laws
20 concerning contract formation to discuss mutual consent of
21 the parties.

22 And in this case, it's not a question of contract
23 formation. It's a question of contract interpretation.
24 And pursuant to the civil code, the standard governing
25 contract interpretation under Section 1639 is that when a

1 contract is reduced to writing, as it is in this case, the
2 intention of the parties is to be ascertained from the
3 writing alone when possible.

4 And in this case, we have a contract. It's
5 written, and it's possible to ascertain the intention of
6 the parties. So with that in mind, I would like to turn
7 to the contract at issue, and I'm going to be using the
8 exhibits, just forewarning you flipping between them.

9 So on July 1st, 2011, Mr. Welker signed the
10 purchase agreement, Department's Exhibit B and the -- what
11 I'm calling the opening escrow instruction -- Department's
12 Exhibit C. Mr. Welker signed both of these documents as
13 the buyer of the 17th Street Cafe and Bakery for a total
14 price of \$710,000.

15 And I would like to point out a few important
16 terms in these agreements. So looking at Department's
17 Exhibit B, the purchase agreement, on page 3, line 21. It
18 states, "Amendment: This agreement may be amended at any
19 time in writing executed by seller and purchaser."

20 And turning to Department's Exhibit C, the
21 opening escrow instructions on page 4 of that document.
22 At the top under the "Heading Escrow Instruction" the
23 second paragraph, it states, quote, "These escrow
24 instructions are not intended to supersede the real estate
25 purchase contract and receive for deposit. But to carry

1 out its terms and conditions in consummating the purchase
2 and sale, except as may be amended or modified by the
3 mutual written instructions of the parties," end quote.

4 And turning the page one more time in that
5 document, we are looking at page 4 of Exhibit C under
6 paragraph 3, and I apologize for the print but trust me, I
7 read this. It says, "Amendments counterparts legal
8 advise. No notice, demand, instruction, amendment,
9 supplement, or modification of these escrow instructions
10 shall be of any force or effect until mutely executed by
11 all parties and delivered to escrow holder.

12 "Any purported oral instructions, amendment,
13 supplement, modification, notice or demand deposited with
14 escrow holder by the parties or any of them shall be
15 ineffective and invalid."

16 So on July 1st, 2011, we know that Mr. Welker is
17 the main purchaser in the purchase agreement in the escrow
18 documents, and they're pursuant to the explicit terms of
19 the purchase agreement and escrow documents. Any
20 modification of the terms of the transaction must be
21 mutely executed by the buyer and the seller in writing.

22 Also on July 1st, Mr. Welker deposited \$5,000, a
23 personal check, into escrow. And later, on July 5th,
24 Mr. Welker deposited an additional \$220,000 into escrow.
25 Those are Department's Exhibits N and O. And Mr. Welker's

1 counsel argues that these deposits were made on Smoochie's
2 behalf and suggest they were contributions to the LLC.

3 But first, we don't rely on the source of
4 payments to determine the purchaser. Nothing in the
5 Revenue Taxation Code Section 6811 and 6812 require that
6 the purchaser must also be the person paying the purchase
7 price. And regardless of the source, Mr. Welker, as the
8 buyer, had the authority to release payments from escrow.

9 However, even with that in mind, all funds
10 deposited into escrow came from Mr. Welker's personal
11 accounts, and the majority of the funds were deposited
12 prior to Smoochie's existence. And documents from the
13 time of the transaction consistently indicate that the
14 money flowed directly from Mr. Welker into escrow with no
15 relation to Smoochie.

16 For example, the checks themselves are either
17 signed or omitted by Mr. Welker individually. Appellant's
18 Exhibit 17, which is the Master Settlement Statement, a
19 document offered by Appellant's representative of the
20 transaction, lists the deposits as being from Todd Welker
21 under the financial consideration while attributing other
22 items to Smoochie's Management.

23 And Appellant's Exhibit 21, similarly offered as
24 an example of the transaction, is the settlement agreement
25 from the rescission lawsuit. And it lists Mr. Welker

1 under item I as having deposited an excess of \$230,000
2 into escrow while simultaneously assigning other actions
3 to Smoochie's Management, such as Item M.

4 So looking at these documents that Mr. Welker was
5 moving funds in and out of escrow on behalf of Smoochie,
6 then we would expect to see that movement attributed to
7 Smoochie, but it is not. The reality is that Mr. Welker
8 handled cash as an individual buyer moving it from his
9 personal account into escrow and subsequently agreeing to
10 its release.

11 Getting back to the terms of the contract, on
12 July 5th was also discussed by Mr. Welker's counsel,
13 Mr. Welker executed the security agreement and installment
14 note on behalf of Smoochie. Neither of these documents
15 mutely amendment the terms of the purchase agreement and
16 escrow instructions. They merely detail the assumption of
17 a debt by Mr. Welker on behalf of Smoochie Management as
18 part of the purchase price for the business.

19 So focusing back on the terms of the contract, on
20 July 7th, Mr. Welker and the seller did execute a mutual
21 written modification to the escrow instructions. This is
22 Department's Exhibit E. This modification adds several
23 sections, including one that specifically allows the
24 buyer, Mr. Welker, to take possession of the business on
25 July 11, 2011.

1 It's worth noting that this day, July 7th, is
2 also the day that Smoochie Management was formed. And
3 according to Ms. Hile, the date that she was told that
4 Mr. Welker's right to purchase the business, transferred
5 Smoochie. However, Smoochie is not mentioned in the
6 modified escrow instructions.

7 And as discussed earlier, part of the terms of
8 the escrow, any oral instructions given to Ms. Hile are
9 ineffective and invalid. And Mr. Welker's counsel argues
10 that the July 7th instruction to escrow holder,
11 Department's Exhibit F, memorializes and/or reflects what
12 Ms. Hile was told, namely, that Mr. Welker transfer his
13 rights to purchase to Smoochie on July 7th.

14 However, this document would unilaterally execute
15 on behalf of Smoochie and does not contain any language
16 indicating that Mr. Welker is assigning his rights as
17 purchaser. As such a copy read to alter the terms of the
18 purchase agreement, because a transaction may only be
19 modified by mutual written instructions of the parties.

20 So the strongest evidence of the status of the
21 transaction on July 7th, is the unaltered purchase
22 agreement and mutely executed written escrow modification
23 signed by Mr. Welker, individually permitting him to take
24 possession of a business on July 11th. And this document
25 contains no records to Smoochie Management.

1 We can only surmise that the reference to
2 Smoochie Management in the instruction, which is
3 Department's Exhibit F, is either premature or simply an
4 error. Which based on Ms. Hile's testimony, it sounds
5 like it may have been an error.

6 So that brings us in our timeline to July 11th.
7 So on July 11th, Mr. Welker, under the terms of the
8 purchase agreement in escrow, was the named buyer of the
9 17th Street Cafe and Bakery. He made a third deposit into
10 escrow of \$13,000 and took possession of the business in
11 accordance to the terms of the escrow.

12 On the same date the covenant to compete was
13 executed by Mr. Welker on behalf of Smoochie Management.
14 However, this document while it's consistent with
15 Mr. Welker's stated intent that Smoochie ultimately be the
16 operator of the business, it does not alter the terms of
17 the purchase agreement or modify the escrow.

18 So when possession of the business transferred to
19 Mr. Welker, the seller, Beverly Bagels, retained title as
20 security for Mr. Welker meeting the conditions precedent
21 to closing escrow. And as a result, under Revenue and
22 Taxation Code 6006 Subdivision (e), a sale occurred and
23 Mr. Welker purchases the business.

24 And as the purchaser, he failed to recall the
25 purchase price as required under Section 6811 and 6812,

1 and, therefore, he should be held liable as a successor
2 for Beverly Bagels Inc.'s unpaid liabilities.

3 Thank you.

4 ADMINISTRATIVE LAW JUDGE GEARY: Thank you.

5 MR. MCCLELLAN: Judge Geary, if I may make a very
6 brief response just to address points and then turn it
7 over to Mr. Kahn. And then I believe my client also has
8 some comments he'd like to make.

9 ADMINISTRATIVE LAW JUDGE GEARY: You've got five
10 minutes.

11 MR. MCCLELLAN: Okay. I'll make --

12 ADMINISTRATIVE LAW JUDGE GEARY: And you're
13 already five minutes behind, and it's not because the
14 Department used excessive time.

15 MR. MCCLELLAN: Understood.

16 ADMINISTRATIVE LAW JUDGE GEARY: If you can keep
17 your comments -- the three of you -- I'll allow it.

18 MR. MCCLELLAN: I'll keep mine probably under 60
19 seconds, sir.

20 So real quick, for the record, 6006 (b) does not
21 pertain to a sale of a business. It pertains to a sale of
22 tangible personal property. Code Section 6011 and 6012
23 does not address a sale of a business. It similarly
24 pertains back to 6006, and the code sections are defined
25 as used in that section.

1 As it pertains to named purchaser, Mr. Welker
2 clarified that the purchaser was or Wholly Owned
3 Affiliate, in other words, or the LLC. It was a purchase
4 offer, not a purchase agreement. Civil Code Section 1622
5 expressly makes oral contracts valid. And the escrow
6 instructions dated July 1st at page 4 of -- expressly
7 state that the instructions do not supersede the contract.

8 With that I'll turn it over to you.

9 MR. KAHN: During the time I worked in the
10 Appeals Division, I probably wrote in over 700 decisions,
11 and I reviewed over 5,000. Many times I had to deal with
12 cases that involved contracts. The contract said this.
13 The parties did that.

14 I had to constantly tell the other attorneys that
15 the tax is based on what people actually did, not what
16 they promised to do. So if I agreed to sell my car to
17 Mr. McClellan and instead I sell it to Mr. Welker, it's a
18 sale to Mr. Welker.

19 I might have breached my agreement. I might not
20 have followed some of the conditions that everybody agreed
21 to, but ultimately the tax, in this case successor
22 liability, is going to be determined by what the parties
23 did.

24 So if in the agreement there were certain ways
25 that things were supposed to be done, or an assignment was

1 supposed to be made, or certain notice were supposed to be
2 given, if parties carried it out somewhat differently, you
3 still have to go by what the parties did.

4 It's only in the event that the parties have a
5 disagreement that they would be talking about what the
6 agreement said, and what condition somebody broke. And
7 I'm going to sue you, and, therefore, I'm going to
8 recover.

9 So again, a contract is a set of promises. The
10 tax law is based on what you do.

11 MR. BONIWELL: Are you talking to me?

12 MR. KAHN: Well, I'm talking -- so in this case
13 we have to look at what they actually did. Even stating
14 his intent doesn't matter. The question is: What did the
15 parties do? The answer is there was a transfer of a
16 business from the seller to the LLC. That's clear in the
17 escrow paperwork. And even the escrow paperwork can't put
18 conditions on the parties that they -- if they don't
19 follow these conditions, but the parties agree on it, they
20 just waive those conditions.

21 This is common. This happens every day. There's
22 nothing new here. And basically, what the Department is
23 trying to do is take a look at the agreement and hold the
24 parties to whatever they said in the agreement, when they
25 have every right to waive those conditions, and we look

1 ultimately to what they did.

2 So if a party -- the parties agreed to sell it to
3 the LLC, which they did, you can't say the sale never
4 happened because that's not what the agreement said. And
5 you've had testimony that the LLC was going to be the
6 intended purchaser. The LLC was the purchaser. The
7 escrow document shows us that.

8 As far as the down payment, every single LLC or
9 corporation has to have its initial funding somehow. If
10 somebody merely contributes cash on behalf of a commencing
11 corporation or LLC, it can either do a loan or it can be a
12 contribution. But merely making payment out of your
13 personal bank account does not mean that you're the
14 purchaser. It doesn't change the dynamics. Otherwise
15 nobody could ever fund another entity such as an LLC
16 corporation and not be held personally liable if something
17 goes wrong.

18 So there's nothing unusual about this. The
19 Department knows that this is normal, and it just happens
20 every day. So most of the evidence that they have here
21 that the Department is relying on, this is evidence
22 showing Mr. Welker's name at an earlier point in time when
23 he hadn't formed the LLC.

24 The paperwork did not catch up with the reality
25 of what finally happened when the LLC was formed. And you

1 can't rely on paperwork which is known to be inaccurate
2 and outdated or just wrong. And this is what the
3 Department is basing it on.

4 And so I'd like to quickly go over the exhibits
5 that they have. They have -- he hasn't made any mention
6 of it, but you got the June 30th --

7 ADMINISTRATIVE LAW JUDGE GEARY: Do you want to
8 leave any time for Mr. Welker to make a comment?

9 MR. WELKER: Yeah. I just wanted to say one
10 thing. The initial document that they keep referring to
11 as the purchase agreement was only a purchase offer. It
12 was the outline of what was expected to be the terms of
13 the deal. There's an indemnification clause in here.
14 There's all kinds of protection for me.

15 And when they refer to this purchase offer as the
16 purchase agreement, and they keep saying it says, "Todd
17 Welker was the purchaser," well they keep skipping right
18 over the part where it says, "Or His Wholly Owned
19 Affiliate."

20 So it wasn't that Todd Welker was the purchaser
21 according to the purchase agreement. Todd Welker or His
22 Wholly Owned Affiliate agreed to buy Beverly Bagels under
23 these conditions set forth in the purchase offer.

24 So when they keep saying Todd Welker was already
25 a purchaser in the July 1st agreement, that's not true,

1 and that's not fair. And it's not fair to leave out the
2 line that says "Or His Wholly Owned Affiliate" just to
3 make their case.

4 ADMINISTRATIVE LAW JUDGE GEARY: Do a quick wrap
5 up.

6 MR. KAHN: Really, what we have here is to be a
7 successor, you have -- must purchase a business or stock
8 of goods. It's the seller and the buyer that make that
9 determination. If CDTFA seeks to hold someone liable as a
10 purchaser, there has to be documentary evidence to prove
11 that there was in fact -- that they were in fact the
12 purchaser of a business.

13 All the relevant escrow document show that the
14 sale of the business was to the LLC, not to Mr. Welker.
15 There are no documents showing any ultimate sale to
16 Mr. Welker. Accordingly, there is simply no legal basis
17 to hold him liable under the facts of this case.

18 And since he did what he had a legal right to do,
19 you cannot hold him liable just simply because the
20 paperwork was -- some of it was outdated. It was less
21 than perfect. They didn't follow the conditions in the
22 contract to a T, none of that matters.

23 Ultimately, you have to look at whether he
24 purchased the business or not, there's just not evidence
25 that happened. And the agency can't seek to hold him

1 liable just simply because they want somebody to pay this
2 liability. It's not a basis. There has to be a
3 purchaser. He has to have made the purchase, and there
4 has to be documentary evidence of that. And all the
5 documentary evidence shows the LLC.

6 ADMINISTRATIVE LAW JUDGE GEARY: Thank you,
7 Mr. Kahn.

8 This concludes the hearing. Oh, excuse me. Yes,
9 Judge Angeja.

10 ADMINISTRATIVE LAW JUDGE ANGEJA: So I did have
11 one question.

12 MR. KAHN: Yes.

13 ADMINISTRATIVE LAW JUDGE ANGEJA: I understand
14 the argument that he wasn't a purchaser, but who is
15 saying -- and I haven't heard addressed -- is -- and
16 please explain. He's not a purchaser. How does he have
17 standing to be a plaintiff in a lawsuit and receive
18 \$75,000 in that settlement? And my related question is
19 what did Smoochie's receive in that settlement?

20 MR. MCCLELLAN: So I'll address that, and then
21 you can fill in any gaps that I have.

22 Ultimately, he was the real party and interest at
23 the time of the lawsuit. The LLC was essentially not
24 recognized as not going forward. He retained an attorney
25 to handle the lawsuit. He looked at the documents of the

1 lawsuit as the facts are explained in the settlement
2 agreement, they're consistent with everything we've just
3 provided.

4 ADMINISTRATIVE LAW JUDGE ANGEJA: We don't have
5 those proceedings in the record do we? Just the
6 rescission statement that was referred to?

7 MR. MCCLELLAN: They are. We submitted the
8 settlement documents for the lawsuit as an exhibit.

9 MR. KAHN: It's Exhibit 21.

10 ADMINISTRATIVE LAW JUDGE GEARY: Okay.

11 MR. KAHN: On the first page it basically gives a
12 sequence of events that occurred, and it spells out that
13 the LLC made the purchase and various other things.

14 MR. MCCLELLAN: And ultimately what happens a
15 year and a half later as it pertains to filing a lawsuit,
16 arguably is not relevant. If the attorney filed the suit
17 in the wrong name, then that perhaps could have been a
18 motion for the defendant to make.

19 ADMINISTRATIVE LAW JUDGE ANGEJA: I understand.
20 But the argument that you're quoting Beatrice, was that
21 he's not a party of interest. So it just occurred to me,
22 how does he appear as a party of interest as a plaintiff
23 in a lawsuit?

24 MR. MCCLELLAN: Yes. And to clarify my citation
25 to Beatrice, I cited for the proposition only that

1 contract law can be every bit of important in making the
2 right decision, the coming to the truth of the matter as
3 tax law. Not that Beatrice is on point to this case,
4 because I don't think that it is.

5 MR. KAHN: Just real quick, just to continue to
6 answer your question. Exhibit 21, the first page, it
7 basically recites the LLC was the purchaser of the
8 business. And if you look to the last page -- last two
9 pages actually where people have signed. They have a spot
10 where Todd signs individually, and then it also mentions
11 Smoochie's Management. It's the second to the last page
12 of this exhibit.

13 So the information is there. It wasn't -- he
14 wasn't suing. He may have been the named plaintiff. It's
15 just the way that the case was plead. But it fully
16 mentions what happened and how the LLC was the purchaser
17 and the LLC is part of the settlement agreement.

18 ADMINISTRATIVE LAW JUDGE ANGEJA: All right. I
19 have no more questions.

20 MR. WELKER: To answer your questions about what
21 the funds were used for, they were used for legal bills
22 and paying vendors at Smoochie's Management.

23 ADMINISTRATIVE LAW JUDGE GEARY: All right.
24 Anything else?

25 This concludes the hearing. I'm closing the

1 record now. As I indicated in my earlier comments, within
2 100 days we'll issue a written decision, and we'll send
3 copies to the parties and their representatives. Thank
4 you very much for coming.

5 (Proceedings adjourned at 12:29)

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HEARING REPORTER'S CERTIFICATE

I, Lynne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 27th day of December, 2018.

ERNALYN M. ALONZO
HEARING REPORTER