

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,           )  
   )  
SNOWFLAKE FACTORY, LLC,                   ) OTA NO. 18053161  
   )  
                    APPELLANT.                )  
   )  
   )

## TRANSCRIPT OF PROCEEDINGS

Van Nuys, California

Tuesday, October 29, 2019

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
6150 Van Nuys Blvd., Van Nuys, California, 91401,  
commencing at 11:50 a.m. and concluding  
at 3:09 p.m. on Tuesday, October 29, 2019,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

1 APPEARANCES:  
2  
3 Panel Lead: Hon. ANDREW KWEE  
4  
5 Panel Members: Hon. TERESA STANLEY  
6 Hon. DANIEL CHO  
7  
8 For the Appellant: ANDREW MATOSICH  
9 WILLIAM GREGORY TURNER  
10  
11 For the Respondent: STATE OF CALIFORNIA  
12 DEPARTMENT OF TAX and  
13 FEE ADMINISTRATION  
14 By: MENGJUN HE  
15 MONICA SILVA  
16 LISA RENATI  
17  
18 TAX COUNSEL  
19 Legal Division  
20 P.O. Box 1720  
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I N D E X

OPENING STATEMENT

PAGE

Mr. Matosich

9

Ms. He

54

DEPARTMENT'S  
WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

(None offered)

APPELLANT'S  
WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

Andrew Matosich

88

E X H I B I T S

(Appellant's Exhibits were received at page 8.)

(Franchise Tax Board's Exhibits were received at 8.)

1           Van Nuys, California; Tuesday, October 29, 2019

2                               11:50 a.m.

3

4           JUDGE KWEE: We're now opening the record in the  
5 appeal of Snowflake Factory, LLC, before the Office of Tax  
6 Appeals. The OTA Case Number 18053161 and today's date is  
7 Tuesday, October 29th, 2019. The time is approximately  
8 11:50 a.m., and this hearing is being convened in Van  
9 Nuys, California.

10           For the record will the parties please state  
11 their names and who they represent. We will start with  
12 the representative for the taxpayer, Snowflake Factory.

13           MR. MATOSICH: My name is Andrew Matosich, and  
14 I'm the founder and manager of Snowflake Factory, LLC.

15           JUDGE KWEE: Okay. And for CDTFA?

16           MS. HE: Mengjun He for CDTFA.

17           MS. SILVA: Monica Silva for CDTFA.

18           MS. RENATI: And Lisa Renati for CDTFA.

19           JUDGE KWEE: Okay. Thank you.

20           So today's hearing is being heard by a panel of  
21 three administrative law judges. My name is Andrew Kwee,  
22 and I am the lead judge. Judge Teresa Stanley to my left,  
23 then Daniel Cho to my right, are the other members of this  
24 tax appeals panel. All judges are going to meet after the  
25 hearing today and produce a written decision as equal

1 participants. Although the lead judge, myself, will  
2 conduct the hearing, any judge on this panel may ask  
3 questions or otherwise participate in this appeal to  
4 ensure that we have all the information necessary to  
5 decide this appeal.

6           So the documentary evidence marked for  
7 identification includes Exhibits A through H, which are  
8 described in CDTFA's exhibit index, and the taxpayer's  
9 evidence consist of the documents described in its  
10 October 14th, 2019 exhibit list, which are documents,  
11 Bullet Points 1 through 6.

12           And in addition, there is exhibit --  
13 documentation that was submitted today, or documents  
14 submitted today marked as exhibit -- marked for  
15 identification as Exhibit 7. CDTFA has objected to this  
16 document, which is titled "Self-Report Concerning  
17 Registration of the Following Aircraft." And the  
18 objection that was raised by CDTFA is that this was  
19 submitted after the deadline.

20           At this point, CDTFA, I am going to sustain the  
21 objection and exclude this document as evidence on the  
22 basis of our Regulation 3420, which provides that exhibits  
23 must be submitted 15 days before the hearing. And also,  
24 on the basis that the deadline specified in our minutes  
25 and orders gave a deadline of October -- gave a deadline

1 before this was submitted of, basically, 15 days before  
2 the hearing. This document was submitted, basically, on  
3 the day of the hearing, so it is untimely.

4           However, the taxpayer is free to refer to this  
5 doc -- make the arguments mentioned in this document  
6 during their presentation. This document does appear to  
7 mostly be argument, which could be referenced in the  
8 presentation by the taxpayer. But with that said, we are  
9 going to exclude the physical document from the  
10 evidentiary record, which would be the documents listed in  
11 the taxpayer's index, Exhibits 1 through 6 as the evidence  
12 marked for identification for the taxpayer.

13           In addition, there were also some objections that  
14 were ruled upon during the briefing process. And there  
15 was one additional objection that the taxpayer had raised,  
16 which was to the titles of the documents listed in the  
17 exhibit index. But the taxpayer is going to be addressing  
18 those arguments at the time of the hearing. They're more  
19 towards whether the documents are correctly summarized.  
20 OTA informed the taxpayer and the parties that the exhibit  
21 index title is not evidence. It's the documents  
22 underneath that are evidence, so we're not excluding any  
23 of the documents for CDTFA's exhibit list at this time.

24           So will the parties please confirm if I gave an  
25 accurate summary of what was discussed.

1 CDTFA, is that a -- did I give an accurate  
2 summary of what was discussed just now?

3 MS. HE: Yes. Thanks.

4 JUDGE KWEE: Okay. And Mr. Matosich, have I  
5 given an accurate summary of what was discussed before we  
6 went on the record?

7 MR. MATOSICH: Yes, Your Honor.

8 JUDGE KWEE: Okay. Thank you.

9 So the above evidence, with the exception of  
10 Exhibit 7, is now admitted into the oral hearing record.

11 (Appellant's Exhibits 1-6 were received  
12 in evidence by the Administrative Law Judge.)

13 (Department's Exhibits A-H were received in  
14 evidence by the Administrative Law Judge.)

15 JUDGE KWEE: And just to confirm, CDTFA, you have  
16 no further objections to any of the taxpayer's exhibits?

17 MS. HE: Correct.

18 JUDGE KWEE: Okay. And Mr. Matosich, you have no  
19 further objections at this time to CDTFA's exhibits?

20 MR. MATOSICH: Yeah. As I stated before going on  
21 the record, I'll raise my objections during the argument  
22 and presentation of the documents.

23 JUDGE KWEE: Okay. Thank you.

24 So there is one issue that is going to be decided  
25 today in this appeal, and that is: Whether California use



1 tax applies to Appellant's storage, use, or consumption of  
2 the aircraft. In resolving this issue, the parties have  
3 raised several arguments that will also be resolved and  
4 addressed in the written decision.

5 So with that said, I believe we're ready to  
6 proceed with the taxpayer's opening presentation. I'm not  
7 going to swear you at this point because you've reserved  
8 time afterwards to do your testimony. So at this point  
9 you just may proceed with your presentation, Mr. Matosich.

10 MR. MATOSICH: Thank you, Your Honor.

11 My hope is that the Wi-Fi connection will be good  
12 enough to allow the iPads to cycle through with the  
13 presentation. If that is not the case, please let me  
14 know. I do have paper copies of it, and I will leave it  
15 behind when we're done for the benefit of the panel and  
16 for the counsel for CDTFA.

17

18 OPENING STATEMENT

19 MR. MATOSICH: So the first question is, why are  
20 we here? Five years into this, why am I sitting here?  
21 Why are we impaneled? Why are we still discussing this  
22 issue? And the best way I can describe it to myself and  
23 my wife was, no good deed goes unpunished.

24 This was supposed to be a very simple transaction  
25 between a seller of an aircraft and a buyer of an

1        aircraft. The seller was an Oregon company. The broker  
2        was an Oregon broker. The airplane was an Oregon plane.  
3        It was supposed to be purchased in Oregon. That was the  
4        essence of the deal. And as I will describe as our  
5        testimony, it's already testified too. The deal just went  
6        awry and became compressed in terms of time and  
7        last-minute changes had to be made.

8                And that is the source of the issue that's before  
9        the panel right now. My hope is that this presentation  
10       will make it eminently clear and that the credibility of  
11       the witnesses who have testified under oath, myself and  
12       four others, will make it very clear as a matter of  
13       undisputed fact. This matter can be resolved as a  
14       question of law.

15               And secondly, to the extent that there is a  
16       factual issue before this panel, that the overwhelming  
17       evidence is in favor of the intent of the parties, which  
18       governs the transfer of title in the State of California,  
19       was that the intent was to transfer title in Oregon, which  
20       was done in Oregon. So in summary -- is this presentation  
21       changing?

22               JUDGE KWEE: We're at "Presentation Summary"  
23       right now.

24               MR. MATOSICH: Okay. Great.

25               The undisputed facts in front of this panel, as

1 we sit here today right now, is the transfer. The title  
2 could not transfer in the State of California because the  
3 Appellant came into neither actual or constructive  
4 possession of the aircraft in the State of California.

5 Now, even if those facts, which should not be in  
6 dispute, are disputed, the overwhelming evidence is clear  
7 that it was the intent of the parties to transfer title of  
8 the aircraft not in California but in the State of Oregon.  
9 And the parties did, in fact, do so.

10 If this panel should, however, find either as a  
11 matter of law or as a matter of fact, the title did  
12 transfer in the State of California, the aircraft is still  
13 exempt from both sales and use tax. It was functionally  
14 used outside the State of California, and it returned to  
15 California and is exempt from use tax on the basis of the  
16 Interstate Commerce Exemption 1620(b)(5)(c)(3).

17 Stepping back to 2015, on or about  
18 January 20th, 2015, I, as manager of Snowflake Factory,  
19 became aware of an aircraft that was being offered for  
20 sale that was then presently in Ontario, California. I  
21 went to Ontario California to see the aircraft. It had  
22 not yet been advertised. There in a hangar in Ontario is  
23 the aircraft. This photograph was not actually taken in  
24 Ontario, but it is representative of the aircraft in the  
25 state that I saw it on August 20th, 2015.

1           When I was there at the aircraft on behalf of  
2     Snowflake Factory, a gentleman by the name of Mike Stevens  
3     introduced himself as president of Fleet Planes, Inc. He  
4     indicated to me that he represented the seller, and MV  
5     Forger, a company that I understood at the time to be  
6     involved in the production and distribution of cutlery.

7           JUDGE KWEE: I'm sorry. Do you mind if I break  
8     in here? I believe you're testifying as to the facts. So  
9     I'm not sure if it might be helpful for me to swear you in  
10    at this point so that I -- we could actually rely on this  
11    as evidence, the statements that you're making.

12          MR. MATOSICH: Judge Kwee, if you would like, you  
13    could certainly swear me, but all of this has already been  
14    testified to in my declaration, the declarations of John  
15    Barnett and the declaration of Mike Stevens.

16          JUDGE KWEE: Okay. I apologize. If you're just  
17    summarizing evidence that's in the record, then you may  
18    proceed.

19          MR. MATOSICH: Okay. Thank you.

20          As Mike Stevens has actually admitted in his  
21    declarations, he was involved in this transaction between  
22    Snowflake Factory and MVF. John Barnett, in his  
23    declaration already before the panel, has confirmed that  
24    Fleet -- he -- it was known to him to be in the business  
25    of selling aircraft, and that he had done business

1 personally with Mike Stevens and Fleet Planes, Inc., in  
2 the past.

3 As I testified in my declarations -- in my  
4 declaration, I knew that Fleet was in the business because  
5 Snowflake had been looking for an aircraft for some time.  
6 And he saw many advertisements in publications like  
7 Controller where Fleet would advertise aircraft --  
8 expensive aircraft for sale in the State of California.  
9 This particular advertisement is actually from March of  
10 2016. Unfortunately, Controller does not go back to 2015.  
11 But I will be testifying this afternoon that I saw  
12 advertisements exactly like this in 2015 in advance of the  
13 sale at issue here.

14 Furthermore, filed with the Secretary of State in  
15 the State of Oregon in 2015 is an amended annual report on  
16 behalf of Fleet Planes, Inc., indicating its business was  
17 aircraft sales. So between January 20th and January 22nd,  
18 Fleet and Snowflake hammered out the essence of the deal  
19 between MV Forger and Snowflake Factory. The aircraft  
20 simply stated, owned by MVF was to be transferred to  
21 Snowflake Factory in the State of Oregon with Fleet acting  
22 as the broker.

23 Is it tracking?

24 JUDGE KWEE: I think, Mr. Matosich, someone is  
25 calling you. I'm just going to decline the call.

1           MR. MATOSICH: I'm sorry. Yeah. It should be on  
2 "do not disturb." I apologize, Your Honor. Are you still  
3 on the presentation?

4           JUDGE KWEE: We're good now. Thank you.

5           MR. MATOSICH: I'm sorry. I apologize again.

6           JUDGE KWEE: Just one minute. You have another  
7 call.

8           MR. MATOSICH: I apologize.

9           JUDGE KWEE: Okay. We're good now.

10          MR. MATOSICH: Okay. I'm sorry.

11                 Then on January 23rd, the agent for the seller,  
12 for the Fleet planes, Mike Stevens, notifies Snowflake  
13 that the owner of the aircraft, MVF, wanted to do a  
14 hurry-up 1031 exchange. And they wanted to close their  
15 exchange on the 27th of January. That was not the usual  
16 contemplation of the parties. Again, the original  
17 transaction was supposed to be MVF to Snowflake in the  
18 state of Oregon. Very clean. Very clean.

19                 The problem with meeting the demands of MVF was  
20 that it was expected at the time that the aircraft would  
21 still be sitting in California. It was prepurchase  
22 pre-prepurchase inspection corrections to make it  
23 airworthy and capable of flying, return to flight. As I  
24 testified in my declaration, I objected to this proposal.  
25 John Barnett confirms that I objected to this proposal.

1 The seller emphatically states that we would not agree to  
2 take title or delivery of the aircraft in California. But  
3 we only had two-and-a-half days to figure this out, over a  
4 weekend.

5 So the original contemplation was that MVF would  
6 sell the plane directly to Snowflake Factory. It was  
7 suggested by John Barnett -- and he testifies to this in  
8 his declaration -- that Fleet interposed itself between  
9 MVF and Snowflake Factory. Fleet would purchase the  
10 aircraft from MVF. And then as the seller himself has  
11 stated, it was the intent that Fleet would then hold the  
12 aircraft and complete the sale to Snowflake Factory in  
13 Oregon. The problem is that Fleet didn't have the money  
14 or the available cash, or so we were told, to complete the  
15 transaction.

16 So John Barnett, who was involved in the  
17 transaction at this point in time because he was going to  
18 be designated as the seller's forwarding agent to effect  
19 delivery, suggested that Snowflake loan the money to Fleet  
20 to complete the transaction. Snowflake agreed, but we  
21 wanted a full set of loan docs. These bullet points are  
22 summarizing the testimony already on the record in the  
23 form of the declarations of myself, John Barnett, and the  
24 seller. Fleet declined. Mike Stevens wanted to keep the  
25 deal very simple, limit it to one page. That was his M.O.

1           Since escrow had already been opened, John  
2 Barnett contacted the escrow agent to see if, in fact,  
3 there was a way the deal could actually be handled in the  
4 context and the contours of the existing already-opened  
5 escrow. And it was the escrow agent who suggested using  
6 the FAA Bill of Sale as a security instrument, as a  
7 security document to secure the loan from Snowflake  
8 Factory to Fleet.

9           This has been attested to, not only by John  
10 Barnett, not only by myself but, specifically, by the  
11 seller himself in the declaration. The FAA Bill of Sale  
12 is to be used as a security instrument for the loan from  
13 Snowflake Factory to Fleet, until such time as Snowflake  
14 Factory accepted -- excuse me -- inspected and accepted  
15 the aircraft, which was by contract specifically to occur  
16 in Portland, Oregon, as originally contemplated between  
17 MVF and Snowflake Factory.

18           So the deal that was reached between the  
19 percipient parties to the transaction, the purchaser, the  
20 seller, and witnessed by John Barnett, as testified in his  
21 declaration, was for Snowflake Factory to make a loan to  
22 Fleet. Fleet would purchase the aircraft from MVF. MVF  
23 would transfer its ownership in the aircraft to its  
24 then-broker, Fleet, in the business of selling aircraft.  
25 Fleet would then return -- and would give a bill of sale



1 to Snowflake Factory with the stated intent and agreement  
2 that it was simply to act as security until such time, if  
3 ever, as Mike Stevens has already testified, Snowflake  
4 Factory accepted the aircraft after inspection, after  
5 delivery.

6 As the declarants have already testified and is  
7 part of the record, the seller was obligated by contract  
8 to complete the sell by delivery of the aircraft to  
9 Portland, Oregon. Snowflake had no right to possess or  
10 control the aircraft until delivery inspection and  
11 acceptance. Barnett would be immediately appointed to be  
12 the forwarding agent by the seller, under the seller's  
13 control and authority, ownership of the aircraft. And  
14 only upon the mutual signature of the delivery certificate  
15 incorporated into the purchase agreement would ownership  
16 of the aircraft pass as and when attested to by the  
17 parties and notarized as the agreed form included in the  
18 contract requirement.

19 At the time the agreement was reached, the  
20 parties understood that this transaction was to be a sale  
21 on approval. By that, they understood that after  
22 inspection of the aircraft, Snowflake had the right to  
23 reject the aircraft for any reason. And so on  
24 January 26th, as the declarations of John Barnett, the  
25 seller, and myself have already attested, the actual

1 purchase agreement was agreed and exchanged and executed.  
2 And in that doc -- I apologize. My keynote has just  
3 failed. I'll bring it up again. I apologize.

4 Are your screens active?

5 JUDGE KWEE: We're on the first page of the  
6 presentation.

7 MR. MATOSICH: You're back to the first page of  
8 the presentation.

9 JUDGE STANLEY: Oh, I can see it.

10 MR. MATOSICH: All right. And now?

11 JUDGE STANLEY: Now I'm at a different place.

12 MR. MATOSICH: Okay. So this is where I left off  
13 before it crashed. I apologize.

14 So in that agreement signed on October 26th, the  
15 parties agreed that there would be three attachments  
16 regarding significant terms in the agreement. So the  
17 agreement is not just one page. The agreement is the  
18 principal terms of the agreement and the main body, the  
19 one page that Mike insisted on, but had the additional  
20 three attachments. Those attachments were a work order, a  
21 Landmark Aviation, which is now TECHNICAir -- Signature  
22 TECHNICAir in Fresno, California. So all the work that  
23 was to be concluded by the seller.

24 There was an Appointment of Agent Form confirming  
25 that John Barnett would be appointed as the forwarding

1 agent of the seller, the owner, to transfer the aircraft  
2 to Oregon and to execute the aircraft delivery certificate  
3 or aircraft delivery receipt. I'll call it the delivery  
4 certificate, which was also specifically referenced and  
5 incorporated into the purchase agreement.

6           So the text that is being highlighted here in the  
7 purchase agreement shows all those relevant points. The  
8 seller was responsible for completing the work order work  
9 and the condition of the agreement. The seller was  
10 obligated to deliver the aircraft to Portland, Oregon.  
11 The seller was required to engage John Barnett. The  
12 delivery of John Barnett was authorized -- the seller was  
13 required to authorize and did authorize John Barnett to  
14 execute the delivery certificate specifically referenced.  
15 And the seller acknowledged in the agreement that the risk  
16 of loss was his or its until purchaser takes delivery and  
17 physical possession of the aircraft.

18           I turn now to the delivery certificate. Stated  
19 in the deliver certificate is confirmation that the  
20 aircraft was required to be delivered in Portland. In the  
21 delivery certificate, it stated that the right to inspect  
22 the airplane by Snowflake Factory. It may be unartful.  
23 It may not be as clear as all lawyers may like, but it's  
24 right there. Acceptance, also a condition of the  
25 agreement attesting to the fact that Snowflake Factory had

1 the right to reject the aircraft as set forth in this  
2 delivery certificate, again, incorporated into the  
3 agreement.

4 And, critically, is the language confirming that  
5 ownership would transfer only upon the signature by both  
6 parties notarized as to the location and identity of the  
7 parties signing below. And so it was on January 26th the  
8 explicit agreement of the parties that the seller was  
9 obligated to complete the sale by delivery of the aircraft  
10 to Portland. Snowflake Factory had no right to possess or  
11 control the aircraft prior to delivery inspection  
12 acceptance. The bill of sale was only a security  
13 instrument. And only upon mutual signature of a delivery  
14 certificate in the form incorporated into the agreement  
15 and the written agreement by the parties executed on  
16 January 26th, would ownership transfer.

17 And so it was on the 27th, the date by which MV  
18 Forger insisted, that its portion of the now  
19 new-reconstituted agreement enclosed that had been agreed  
20 to by the parties, Snowflake made the loan to Fleet.  
21 Fleet acquired the aircraft. Ownership of the aircraft  
22 was transferred from MVF to Fleet, and Fleet granted  
23 security instrument consistent with the intentions of the  
24 parties, consistent with the understanding that the  
25 delivery certificate would control -- the security of the

1     FAA Bill of Sale was simply used as security. Holding the  
2     pink slip, like, for a car.

3             It's important to this analysis to point out that  
4     Snowflake never came into possession or control of the  
5     aircraft in the State of California. That is already on  
6     the record in the form of the declarations in front of the  
7     parties -- in front of the panel today. John Barnett was  
8     appointed the agent on the 26th, not the 27th, on the  
9     26th. Before any transaction happened, the aircraft --  
10    control of the aircraft was transferred to John Barnett to  
11    prepare the aircraft for delivery and delivery out of  
12    state.

13            I testified already, and I'm prepared to affirm  
14    and confirm today if necessary, that at no time did  
15    Snowflake attempt to exercise control over the aircraft.  
16    At no time did we have the right to exercise control of  
17    the aircraft. At no time did we exercise control of the  
18    aircraft until after inspection and acceptance in  
19    Portland, Oregon. John Barnett confirms that. And an  
20    importantly, the decision itself on which this appeal is  
21    based says there is no dispute that the seller completed  
22    its performance in reference to physical delivery of the  
23    property in Portland.

24            The plane was not delivered to Snowflake.  
25    Snowflake did not have possession of the aircraft. It had

1 no control of the aircraft in the State of California.

2 Now, this is actually a video, and I apologize.

3 I attest that it may not actually render as quickly, given  
4 the limitations of the jetpack we're using and the  
5 reception we have in this room. I apologize. But this is  
6 actually a video of the aircraft arriving on the ramp in  
7 Portland, Oregon on February 10th, 2015. I'm taking this  
8 video. John Barnett, the pilot, the designated forwarding  
9 agent for the seller is sitting in the cockpit.

10 Are we tracking? I apologize.

11 JUDGE STANLEY: His screen wasn't moving.

12 JUDGE KWEE: I saw it on her screen. Thank you.

13 MR. MATOSICH: I apologize.

14 And so after the aircraft arrived in Portland and  
15 only after the aircraft arrived in Portland, did I who had  
16 flown there commercially -- I have testified to this as  
17 well. I flew there commercially. If I owned the aircraft  
18 I would have been on board. But I flew there commercially  
19 to inspect and, hopefully, accept the aircraft. John  
20 Barnett confirms this in his declaration. Only after his  
21 arrival in Portland, Oregon, did I inspect, ask about the  
22 airworthiness of the aircraft, confirm the records that  
23 were onboard in the aircraft, and accept that aircraft as  
24 airworthy and consistent with the plane that Snowflake was  
25 going to acquire.

1                   And only then did we go inside and sit down  
2     before a notary public in Portland, Oregon -- I believe we  
3     were -- it was on the ramp of Atlantic Aviation in  
4     Portland, Oregon. We sat in the conference room and  
5     executed this delivery certificate. It confirms that  
6     ownership of the aircraft transferred from seller to buyer  
7     on the date written below. And as Barnett and I have  
8     testified already in our declarations, it was only then  
9     that Snowflake received the keys to the aircraft.

10                  One of the declarations in front of you is a  
11     declaration by Tom Johnson. He is the insurance broker  
12     that first issued insurance on the aircraft for Snowflake  
13     Factory. He's testified, based on his preliminary  
14     understanding of the transaction and the agreement between  
15     the parties, that there was not an insurable interest in  
16     the aircraft until Snowflake either came into possession  
17     or ownership of the aircraft. And, therefore, would not  
18     issue insurance on the aircraft until I called him from  
19     Portland and confirmed to him that we had accepted  
20     delivery of the aircraft -- acceptance of the aircraft,  
21     that ownership had transferred. And it was only then that  
22     Airpower issued the insurance certificate on the aircraft.

23                  After the aircraft has been inspected, accepted,  
24     after the delivery certificate had been signed and  
25     notarized, it was only then the aircraft had its first

1 functional flight and flew from Portland, Oregon to  
2 Glacier Park International in the State of Montana. That,  
3 again, is attested to in the declarations already before  
4 the panel.

5 The Department and the decision below and in our  
6 preconference hearing has conceded the question of whether  
7 or not the use of the aircraft subsequent to its first  
8 entry into State of the California, complies with the  
9 Interstate Commerce Exemption 1620(b)(5)(c)(3). That is  
10 not an issue before this panel.

11 The questions on appeal here as succinctly  
12 summarized by Judge Kwee, effectively is, is use tax  
13 owing? But as part of that, the question is as the  
14 Department has framed it in its argument, where did title  
15 transfer? Title is both an issue of law. What is title?  
16 What are the constituent parts of title to make title  
17 under the law of the State of California? And as to the  
18 transfer of title, what was the intent of the parties as  
19 to where, when, and how that title would transfer? 2401  
20 makes this very clear. I'll be citing authority  
21 momentarily that makes that incredibly clear based on  
22 prior Supreme Court authority in the State of California  
23 that it is the parties' intent that governs where title  
24 transfers.

25 Now, if that is to be disbelieved and title is



1 still found to transfer in the State of California, the  
2 occasional use exception, this underlined decision put  
3 forth and that Department has argued here, exempts the  
4 sale from sales tax transaction does not apply. It simply  
5 does not apply. 6396 is -- Section 6396 is the only  
6 exception that gets the aircraft exempt from sales tax in  
7 the State of California as a sale in interstate commerce.

8           The return of the aircraft and its subsequent use  
9 is exempt, contrary to the Department's assertion. Under  
10 6248 and 6248(c) -- Section 6248 and Section 6248(c), as  
11 an aircraft used in interstate commerce. So Department  
12 relies on Section 6006 for its definition of sale as to  
13 when -- as to what is the constituent elements of what a  
14 sale is in the State of California. 1610, the flip side,  
15 what is a purchase in the State of California, and they  
16 rely in the underlined decision on 1610.5 as to where  
17 title transfers.

18           The key elements are title or possession as  
19 element number one of a property for a consideration. I  
20 will demonstrate momentarily or argue momentarily that  
21 none of these elements are satisfied in this transaction.  
22 Starting with possession. The declarants, Mike Stevens,  
23 John Barnett, Andrew Matosich have all testified that  
24 there was no attempt to exert control or possession of the  
25 aircraft. There was no right to exert control or

1     possession of the aircraft. And there was no possession  
2     in the State of California.

3             So under 6006, possession as an element of a sale  
4     does not apply. And, in fact, the Department itself in  
5     acknowledging that the aircraft was properly developed --  
6     delivered by the seller to the State of Oregon  
7     acknowledges that possession did not transfer in the State  
8     of California.

9             The next element, title. What is title under  
10    California law? In our brief we set forth that a citation  
11    Cal.Jur.3d, summarizing the essence of what title is in  
12    the State of California. It is just that is proper  
13    rightful possession of property. This has gone undisputed  
14    before by the Department. Expounding on that, the case of  
15    Northrop versus the State Board of Education -- Board of  
16    Equalization, said that title is ownership; all of the  
17    rights, privileges, powers, and immunities an owner may  
18    have.

19            In our brief we cite Parkmerced for the  
20    proposition that title can be divided into legal title and  
21    equitable title, which the FAA recognizes even on its own  
22    bill of sale. Critically, the Northrop report held that  
23    title in California must be the union of the right of  
24    possession with possession. Now, as lawyers I'm sure  
25    we're sitting here thinking well, wait a minute. You

1     don't have to actually physically possess something in  
2     order to actually have title.

3             That technically is not what the law in the State  
4     of California says, and the Department at least has not  
5     contradicted what I have set forth -- what Snowflake has  
6     set forth is the law of the State of California. Still it  
7     begs the question of whether or not for the purposes of  
8     title and what constitutes title, whether or not there is  
9     a concept of constructive possession as it applies to  
10    titles of these matters. Whereas, the Department concedes  
11    that there is no possession in the State of California,  
12    the question is whether or not there was any constructive  
13    possession.

14            In the case of Northrop versus the State Board of  
15    Equalization is somewhat instructive on this point. In  
16    the case, Northrop and Boeing had a contract. Under the  
17    contract, Northrop kept title of certain equipment that it  
18    was using to manufacture parts for the Boeing 747. This  
19    equipment together with the parts moved back and forth  
20    between Northrop here in California and Boeing in the  
21    State of Washington. The deal between the parties was  
22    very complex and dealt with a number of matters, including  
23    tax issues.

24            But the question was, whether or not there had  
25    been a sale of this equipment from Northrop to Boeing

1 under the agreement and the facts and circumstance of the  
2 case. The court acknowledged that Boeing came into  
3 possession of the property from time to time. But it was  
4 troubled by the fact that Northrop contractually had a  
5 retention of title. And so the court looked for other  
6 indicia of what might constitute a sale, effectively,  
7 putting forth the proposition of constructive possession  
8 in the State of California.

9 The court wanted something more than simply a  
10 naked right to obtain title. It wanted to see whether or  
11 not there was absolute discretion to move the property,  
12 whether there was unfettered power to divest the property  
13 and title, unconditional obligation to purchase the  
14 property, and the unequivocal assumption of risk of the  
15 property, of loss of the property. Now, in the Northrop  
16 case, the court found all of these. Boeing had all of  
17 these, not the least of which Boeing decided to apply for  
18 with the IRS and take an investment tax credit.

19 And as constituent of that, it was required -- it  
20 was required to actually accept the proposition that it  
21 actually had the beneficial ownership of the equipment.  
22 In our case none of these four factors apply. It's quite  
23 clear from the seller's declaration itself that we would  
24 not have any right to take possession or have control of  
25 the aircraft until it had been delivered and accepted in

1 the state of Oregon, if ever. John Barnett confirms that  
2 he was under control of the aircraft at all times.

3 So we did not have the -- Snowflake did not have  
4 the absolute discretion to remove the property from the  
5 other party. It was committed to John Barnett on the  
6 26th. John Barnett remained in control of the property  
7 and was under instruction from the seller, the owner of  
8 the aircraft, to deliver that property to the State of  
9 Oregon. Similarly, we did not have any unfettered power  
10 to divest the other party of title. As the contract makes  
11 it very clear, there was a delivery certificate that had  
12 to be acknowledged before ownership will transfer. That's  
13 what the delivery certificate says on its face. We did  
14 not have the power to compel the seller to sign the  
15 delivery certificate, nor were we under an obligation to  
16 sign the delivery certificate if the aircraft, for  
17 whatever reason, is not acceptable.

18 We also, for the very same reason, did not have  
19 unconditional obligation to purchase the property. This  
20 was a sale on approval. The seller acknowledges in  
21 uncontroverted testimony before this panel, this was a  
22 sale on approval. That Snowflake Factory had the right to  
23 reject the aircraft for any reason.

24 Finally, the face of the one-page main body of  
25 the agreement makes it clear on its terms that the seller

1       remained at risk for loss of the property. So if the law  
2       of California is that constructive possession is allowed  
3       in addition to absolute possession, Northrop is  
4       instructive. Applying Northrop to the facts of this case,  
5       even under these additional four rigorous criteria that  
6       Northrop set forth, Snowflake did not have possession or  
7       constructive possession of that aircraft in the State of  
8       California. And absolute possession, title, does not  
9       exist. You must have both.

10               On a similar vein on the question of property, in  
11       the case of General Dynamics versus -- Corporation versus  
12       County of L.A., which was referenced in the Northrop  
13       decision, Justice McComb in a concurring opinion basically  
14       said that ownership is the right to possess and use. We  
15       did not have the right to possess. We did not have the  
16       right to use. The right to use is critical under a use  
17       tax analysis. We did not have the right to use the  
18       aircraft in the State of California until after delivery,  
19       inspection, and acceptance in Portland Oregon.

20               Finally, is the question of consideration.  
21       Annotation 4950468 is a question of, basically, what  
22       appears a related-company transaction or an aircraft owned  
23       by Company 1 was being transferred to Company 2, two  
24       parties. And it was, effectively, a transfer for no  
25       consideration. It was being transferred from one to the

1     other for convenience of the parties.

2             The potential taxpayer in that case specifically  
3     asked the Department in reference to an FAA Bill of Sale  
4     whether or not if, in transfer of that property, there was  
5     actually no consideration despite the requirement of a  
6     recitation of consideration in the bill of sale whether or  
7     not that would actually constitute sale. The Department  
8     was emphatic on the point. As long as there is no  
9     consideration, it doesn't matter what the face of the FAA  
10    Bill of Sale says. There's no consideration, and the sale  
11    fails for lack of consideration.

12            In our case, it is -- I'm sorry. Is it hung up?  
13    I apologize.

14            JUDGE KWEE: Mine is no longer in display.

15            MR. MATOSICH: I apologize. I can -- let me see  
16    if I can restart it.

17            JUDGE KWEE: Great. Thank you.

18            MR. MATOSICH: Unfortunately, it doesn't seem to  
19    be initializing. I'm -- it's up on my screen. There we  
20    go.

21            JUDGE KWEE: Thank you.

22            JUDGE STANLEY: Mr. Matosich, would you mind  
23    going back to the prior screen? Because Judge Kwee's  
24    screen dropped out before you brought that one up.

25            MR. MATOSICH: Yes. Let me see if I can actually

1 do that.

2 JUDGE STANLEY: There's no need if it is going to  
3 bring it down.

4 JUDGE KWEE: Yes. You may proceed.

5 MR. MATOSICH: And I'm sorry. I'm relying on the  
6 good offices of Apple and Keynote. Did it appear on the  
7 screen? Are you seeing the annotation of 495?

8 JUDGE KWEE: Yes.

9 JUDGE CHO: I am.

10 MR. MATOSICH: Okay. Great.

11 The point I was making was that in this  
12 annotation, the taxpayer -- potential taxpayer is asked  
13 about whether or not, despite the formalities of the FAA  
14 Bill of Sale, whether or not if there is absolutely no  
15 consideration, whether or not a sale occurs, if in fact  
16 there is a transfer using an FAA Bill of Sale as an actual  
17 transfer of title as opposed to as a security instrument,  
18 whether or not there would be, in fact, a sale. And  
19 absent consideration, there is no sale.

20 And so this is where it crashed. If it crashes  
21 again, I apologize.

22 But -- so in this transaction, there was no  
23 consideration between Snowflake and Fleet. It was a loan.  
24 It was a loan for -- the loan for Fleet to purchase the  
25 aircraft from MVF and then security -- excuse me. The FAA



1 Bill of Sale was simply security.

2           So as a matter of law, title did not transfer in  
3 the State of California. The State has conceded that we  
4 did not have possession. Snowflake did not have  
5 possession of the aircraft in the State of California.  
6 Possession is critical not only for a sale on transfer of  
7 possession, but it is critical for a sale on title  
8 transfer because the constituent element of title in the  
9 State of California. We had -- we did not attempt to  
10 control the aircraft in the State of California. We did  
11 not have the right to control the aircraft in the State of  
12 California.

13           So absent possession and even constructive  
14 possession on the basis of the Northrop analysis, or the  
15 facts of this case, there was no possession in the State  
16 of California. And as a result, no title. Again, just  
17 summarizing the Northrop case, we lacked the absolute  
18 discretion to remove the property, the unfettered power to  
19 divest the other of legal title, the unconditional  
20 obligation to purchase, and the unequivocal assumption of  
21 risk.

22           Under Justice McComb's analysis, we also lacked  
23 property because we did not have the right to use the  
24 property, and there was no consideration given. The form,  
25 FAA Bill of Sale, was a security document consistent with

1 the law of California, which I'm going to turn to now.  
2 The intent of the parties was that document was a security  
3 instrument.

4 Now, the State is likely to say this is  
5 preposterous. The bill of sale on its face says that the  
6 seller is the full legal and beneficial title of the  
7 aircraft. That by signing the instrument below, that it  
8 is conveying all rights, title, and interest in and to the  
9 aircraft. Snowflake is prepared to stipulate that if the  
10 Department wishes to treat the FAA Bill of Sale and its  
11 four corners as the complete and fully integrated  
12 agreement between the parties as to the transfer of title  
13 under California law to the aircraft, we will, in full  
14 satisfaction of our obligation for sale and use tax, pay  
15 the tax based on the consideration set forth on the face  
16 of the FAA Bill of Sale.

17 I'll take the dime out of my pocket right now and  
18 pay it, and we will be done. I wager, however, that the  
19 Department is not so prepared to stipulate. I mean, this  
20 is a serious offer. Is the Department prepared to  
21 stipulate or not? This is not theatrics. We are prepared  
22 to stipulate that this is the four corners of the  
23 agreement as the Department has argued for the past five  
24 years.

25 If this is the full sum total of the agreement

1       between the parties, we will pay our tax on the  
2       consideration stated on the face of that document in full  
3       satisfaction of our obligations, and we're done. We can  
4       go home. Will the Department so stipulate?

5               MS. SILVA: I thought this was argument.

6               JUDGE KWEE: Yeah, I --

7               MR. MATOSICH: I believe what I am making is part  
8       of my argument. I believe I'm entitled to actually offer  
9       up a stipulation to settle this case right now.

10              JUDGE KWEE: We can refer during the Department's  
11      presentation if they want to address it at that point.  
12      But at this point I think we should just proceed with that  
13      presentation as opposed to side track with sidebars. If  
14      that's okay, we can --

15              MR. MATOSICH: All right. That's fine. But it's  
16      a valid offer I'm making now. If there's a procedure that  
17      I'm unaware of, I apologize. I'm not represented by  
18      learned counsel today.

19              JUDGE KWEE: If the parties would like a recess  
20      to discuss this, I don't think there's a need to break at  
21      this point.

22              MS. HE: Yeah. The Department does not intend to  
23      respond to that.

24              JUDGE KWEE: Okay.

25              MR. MATOSICH: So contrary to California law,

1     which makes it very clear, the instrument -- the agreement  
2     between the parties which the Department has put forth as  
3     being the FAA Bill of Sale is the sum total of the  
4     agreement, the consideration stated in that agreement. I  
5     doubt very much the Department will stipulate to them  
6     because much more is stated in the actual purchase  
7     agreement for the aircraft.

8             The taxpayer's rights advocate opinion, which we  
9     have submitted as part of our additional supplementation,  
10    acknowledges the difference between a document of title  
11    and title itself. And that's really what this FAA Bill of  
12    Sale is, if it were the sum total of the agreement between  
13    the parties, if the four corners of that document were the  
14    agreement, then tax would only be due on the  
15    consideration. But we know that it is not. The  
16    Department acknowledges or should acknowledge that it is  
17    not.

18            As the First District held in a recent case, the  
19    City of Fontana versus The Department of Tax and Fee  
20    Administration, documents may be important, even  
21    disposed but should not be a litmus test, nor should the  
22    four corners of that document become a fetish. I argue  
23    for the past five years that's what the FAA Bill of Sale  
24    has been in this matter. The purchase agreement sets  
25    forth a much higher level of consideration, which is why

1 we're sitting here today based on the tax on a million  
2 dollars versus the one dollar recited in the consideration  
3 in the FAA Bill of Sale.

4 And it is in recognition of that, that one must  
5 look beyond the four corners of the FAA Bill of Sale is  
6 why we are sitting here. What the Department in five  
7 years has not been willing to consider, although, the  
8 documents have been in front of them since the first  
9 filing was made in August of 2015, is the delivery  
10 certificate and its intended effect, it's agreed effect,  
11 and, ultimately, it's effect upon signature of the  
12 parties, the only people who are actually participants in  
13 the underlying transaction at issue here.

14 In Portland, Oregon, only there would ownership  
15 transfer, and that is the only place where, in fact,  
16 ownership title under California law did transfer. If the  
17 panel is disinclined to see that as a matter of law, based  
18 on undisputed fact, the title could not have transferred  
19 in the State of California, and that is a disputed matter  
20 of fact. It is the steer -- the clear state of the law in  
21 the State of California, that it is the intent of the  
22 parties that governs when title will transfer.

23 In the same Fontana case -- this recent case, the  
24 court is very clear that Section 2401 governs the question  
25 properly referred to by the Department and here the Office

1 of Tax Appeals for determining how to determine when,  
2 where, and how title transfers. In fact, the decision  
3 conducted in analysis of 2401 includes that, although,  
4 2401 is informative, it does not necessarily overrule any  
5 of the prior case authority in the State of California.

6 And it is that prior state -- prior authority in  
7 the State of California that makes it very clear that  
8 intent of the parties governs when as a matter -- as an  
9 issue of fact, when title transfers of property between a  
10 buyer and a seller. Here the seller has stated that  
11 Snowflake would not agree to take title in California.  
12 The seller confirms the intent was for the seller to  
13 complete the sale in the state of Oregon.

14 And emphatically, the seller declares that an FAA  
15 Bill of Sale was not intended to convey complete title  
16 from the seller to the purchaser. It was the purchase --  
17 it was the -- it was acting only as the security  
18 instrument until such time we accepted -- Snowflake  
19 accepted the aircraft. The intent of the parties is  
20 further evidenced by the agreement itself.

21 The written agreement summarizing the parties'  
22 agreement reached over that fitful weekend of trying to  
23 solve the issue we confronted was delivery was to be  
24 acquired in Portland. The seller was required to appoint  
25 a forwarding agent, which it did on the 26th. The seller

1       remained at risk for all loss until acceptance.

2       Snowflake, the purchaser, was not obligated to accept the  
3       plane, not entitled to control it, not entitled to possess  
4       it, and free to reject it.

5               And the parties made very clear in that written  
6       agreement by virtue of the delivery certificate and its  
7       expressed explicit language, that ownership title could  
8       only transfer on mutual execution of the certificate after  
9       delivery, acceptance -- inspection and acceptance.  
10       Furthermore, the conduct of the parties shows the conduct  
11       is consistent with the intent and the written agreement.  
12       John Barnett was entrusted with the aircraft, had  
13       exclusive control over the aircraft.

14               The Department acknowledges that the seller  
15       fulfilled the obligations to deliver the aircraft to  
16       Portland, effectively, conceding the question of  
17       possession in the State of California. Further in  
18       conduct -- in further, consistent with the intent and the  
19       agreement, the conduct of the parties, I, on behalf of  
20       Snowflake, inspected the aircraft only in Portland. I  
21       accepted the aircraft only in Portland, and we signed the  
22       delivery certificate only in Portland.

23               So as an issue of fact, the overwhelming evidence  
24       in front of this panel is that based on the sworn  
25       statements of the parties, the written agreement, and the

1     conduct of the parties, is that title was not intended to  
2     and did not transfer in the State of California. The FAA  
3     Bill of Sale was not complete and fully integrated in  
4     agreement between the parties. It was by agreement of the  
5     parties as is allowed under the State of California  
6     serving -- and served only as a security instrument.

7             As previously stated, we did not have the right  
8     to control, possess, or use the aircraft. The intent was  
9     to transfer, and the actions of the parties were to  
10    transfer title only in Oregon. And we had the right to  
11    reject the aircraft for any reason. And that brings us to  
12    the sale on approval.

13            Regulation 1628(b)(3)(c) states unequivocally  
14    that when a sale is on approval, sale does not occur until  
15    the purchaser accepts property. The only percipient  
16    witnesses to the transaction have testified that this was  
17    a sale on approval. The seller has acknowledged that the  
18    purchaser has the right to reject the aircraft for any  
19    reason. In the Department's regulations, sale on approval  
20    is not conditioned on any other factor.

21            Presumably, as we argue in our brief, there is no  
22    other predicate. Its' a sale on approval. Until  
23    acceptance, title does not move. Title as a matter of law  
24    does not move. Title as a matter of fact does not move.  
25    Again, it is the uncontroverted testimony of the parties



1       that this was a sale on approval. And the decision  
2       ignores that uncontroverted testimony.

3               The decision found that it was not a sale on  
4       approval based on what it calls the purported  
5       understanding. It expected to find in the agreement a  
6       specific reference. That is not required under California  
7       law. And I was about to demonstrate as a matter of fact,  
8       it is there. It is there in the delivery certificate.  
9       But more importantly here, the decision doesn't even  
10      mention the declaration of the seller, which was before  
11      the Officer of the Appeals Bureau.

12             It doesn't even take that into account. It just  
13      simply looks to the declarations of John Barnett and the  
14      purchaser. Personally, that makes me wonder whether or  
15      not the full file is actually in front of the officer and  
16      member. Contrary to the decision there is language. The  
17      language is contained in the delivery certificate. The  
18      delivery certificate specifically references the rights to  
19      accept the aircraft -- the right to inspect and accept the  
20      aircraft. It does not say accept or acceptance of the  
21      delivery. It says acceptance and the delivery and  
22      inspection.

23             This was a sale on approval. We can't wish it  
24      away. Uncontroverted testimony as to the nature of the  
25      agreement, the delivery certificate sets forth that right.

1 We're under no obligation to accept the aircraft. We  
2 could have rejected it for any reason. Counter to the  
3 parties, it's consistent with that understanding. And,  
4 critically, under a use tax analysis, if the aircraft had  
5 been rejected, clearly no use tax would be owing. And so  
6 in summary, title did not transfer in, California, either  
7 as a matter of fact or as a matter of fact.

8 Now, should this panel conclude otherwise -- and  
9 I hope not -- I think the evidence is clear. The law is  
10 clear. Should the panel reach the conclusion that title  
11 did transfer in the State of California, the sale from the  
12 seller to the purchaser is still exempt from sales tax  
13 under California law, not on the basis of the occasional  
14 sale rule as the Department would have us. It's exempt  
15 under 639 -- Section 6396. And the return of the aircraft  
16 back to California was also exempt under what I consider a  
17 proper reading of the statutory authority and regulations  
18 promulgated consistent with that statutory.

19 The Department admits that the seller was in the  
20 business of selling aircraft. The Department concluded,  
21 however, that the seller was not in the business of  
22 selling aircraft in the State of California. The seller  
23 also, as best I can determine based on the opinion,  
24 requires that the seller be a seller under California law  
25 before any sales are subject to sales tax. This quote

1 taken from the decision puts that forth. There's no  
2 evidence that the seller engaged in/or conducted business  
3 as a seller within the State.

4 We believe the Department is in error in this  
5 point, and here is why. Section 6275(a) says that every  
6 person making a retail sale is a retailer, regardless of  
7 whether they're a retailer by any other reason.  
8 Section 6283 does put forth an exception for retailers who  
9 are not required to hold a seller's permit. But 628 --  
10 Section 6284 takes that away. It doesn't refer to a  
11 seller. It doesn't refer to a retailer. It refers to a  
12 person.

13 And if a person is engaged in the business of  
14 selling vehicles, mobile homes, commercial coaches,  
15 vessels, or aircraft, then he or she shall not be excused  
16 from the requirements of Article 2 and 6066 compelling  
17 that retailer to have a permit. Specifically, it denies  
18 the exception under 6283. Here, as we've already  
19 demonstrated, the seller of this aircraft was in the  
20 business. The Department concedes the seller was in the  
21 business of selling aircraft.

22 Now, Regulation 1684(c)(1) says a retailer is  
23 engaged in business in this state as defined in  
24 Section 6203, if the retailer has a representative, an  
25 agent, a salesperson, or any other person operating in

1 California. Based on the testimony that is already before  
2 the panel in the declarations already submitted, when I  
3 went out to Ontario, I met Mike Stevens. Mike Stevens is  
4 the president of Fleet Planes Sales or Fleet Planes, Inc.

5 He represented himself that he was involved in  
6 the transaction, and he did, in fact, handle the  
7 transaction, as his own declaration attest. Furthermore,  
8 6481(c)(1) sets forth that a retailer is engaged in  
9 business in the state as defined in Section 6203 if the  
10 retailer owns real or tangible personal property in  
11 California, as the Department itself has argued, the bill  
12 of sale setting forth who has equitable and legal title to  
13 the aircraft.

14 The seller attesting by this document that, in  
15 fact, the seller had both legal and equitable title to the  
16 aircraft on the date set forth on that FAA Bill of Sale.  
17 On the 27th, the aircraft was in the State of California.  
18 So at that time, the seller in the business of selling  
19 aircraft had property in the State of California. A  
20 representative in the State of California representing the  
21 transaction, property in the State of California being  
22 sold by a seller in the business. Thus, under 1684, the  
23 seller was engaged in the business of selling aircraft in  
24 the State of California.

25 Furthermore, as further evidence of the seller

1     being in business, the seller put his dealer number on the  
2     FAA Bill of Sale. So any person who is engaged in the  
3     business of selling tangible personal property is required  
4     to have a seller's permit. The seller was a person, a  
5     retailer, and seller under California law. Thus, the sale  
6     at issue here is subject to sales tax.

7             And what does all this matter? Why am I spending  
8     all this time? Why am I taking us down this road? One,  
9     is to show that the Department is actually in error as to  
10    its conclusion as to status of the seller and the  
11    importance of that -- this transaction. And the analysis  
12    that we must go through to determine if, in fact, the  
13    title transferred in the State of California, whether or  
14    not this is a taxable transaction and is a taxable sales  
15    tax for use tax towards the ultimate tax liability line.

16            So our argument has been, as we set forth in our  
17    briefs, is that 6396 is the only available exemption from  
18    the sales tax, not the occasional sale, but 6396 sale and  
19    interstate commerce as reflected also in Regulation  
20    1620(a)(3)(b). And reason for this is because the  
21    question will arise, when was the use that is triggering  
22    the use tax, when did that use occur? On January 26th  
23    before any paperwork moved between the parties, the  
24    aircraft was committed to John Barnett. We had no right  
25    to control or possess or use the aircraft.

1           Again, Department has acknowledged this. So the  
2   use of the aircraft was not its transportation for  
3   purposes of delivery from Fresno, California, to Portland,  
4   Oregon. But instead, the first functional use of the  
5   aircraft occurred out of the State of California in its  
6   flight from Portland, Oregon to Kalispell, Montana at  
7   Glacier Park International. Thereafter, the aircraft came  
8   back into the State of California.

9           In 1620(b)(c), of course, that's for the  
10   presumption of use --

11           THE HEARING REPORTER: I need you to slow down at  
12   this point. When you're reading from a document, you need  
13   to slow down.

14           MR. MATOSICH: I apologize. You were trying to  
15   communicate that to me, and I'm sorry. I apologize.

16           THE HEARING REPORTER: Thank you.

17           MR. MATOSICH: So Regulation 1620(b)(3) sets  
18   forth the first functional use test, and this is to  
19   clarify. The plane leaves the state under a 6396  
20   analysis. The first functional use is out of the state,  
21   not the delivery flight. This brings us to the final  
22   point -- I'll make it then I'll wrap up my presentation --  
23   is the interstate commerce itself.

24           This argument was somewhat difficult to make in  
25   our briefs. And I would just like to try and elucidate a

1     little bit on it, if I can, to try and make the point  
2     here. It's a technical construction issue, but it is an  
3     important issue in terms of what we've used in the proper.

4             6020(b)(1) basically says that use tax applies to  
5     any property that is, basically, not used and is not  
6     otherwise -- excuse me -- that is otherwise exempt from  
7     sales tax. And 1620(b)(5)(c)(3) says that the property is  
8     an aircraft, use tax will -- I apologize. I'm sorry. I'm  
9     trying.

10            THE HEARING REPORTER: So am I.

11            MR. MATOSICH: I apologize.

12            If the property is an aircraft, use tax will not  
13     apply. If one-half or more of the flight time traveled by  
14     the aircraft during the six-month period immediately  
15     following its entry into the state is commercial flight  
16     time traveled in interstate or foreign commerce. Again,  
17     this has been conceded. The use of the aircraft  
18     post-entry into the State of California has been conceded  
19     with the Department.

20            The Department, however, says that the Interstate  
21     Commerce Exemption as articulated in 1620(b)(5)(c)(3) is  
22     inapplicable because it is predicated on where the  
23     aircraft was purchased. We disagree, and here's why. In  
24     2004 the legislature revised Section 6248 changing from  
25     90 days to 12 months, heretofore, generally known 90-day

1 test.

2           The intent as stated in the legislation itself  
3 and in the bill analysis of that legislation was that the  
4 changes made in that section were not intended to apply to  
5 aircraft used in interstate commerce or foreign commerce.  
6 So 6248(a) sets out the test, changing the 90 days to  
7 12 days and other provisions. But the legislature added  
8 6248(c) which we know the legislature is presumed to act  
9 with intent, and adding -- it says in this section -- the  
10 entire section shall not apply to any vehicle, vessel, or  
11 aircraft used in interstate or foreign commerce.

12           Meaning, that the predicate of where the aircraft  
13 is purchased and the period of time that it must stay  
14 outside the state for establishing presumption does not  
15 apply to aircraft used in interstate or foreign commerce.

16           Now, in 2004 the Board redrafted Regulation  
17 (b) (4), the prior 90-day test and created (b) (5), setting  
18 forth the 12-month test. Now, in modifying the terms from  
19 (b) (4) to (b) (5), either the Department making the changes  
20 consciously attempted to include the effect of 6248(c) or  
21 alternatively, it failed to do so. And in which case, the  
22 Department's reliance on it is misplaced.

23           This is not intended to be read. It's just  
24 simply to show the significance of the change from (b) (4)  
25 to (b) (5). The redraft was extensive. So in redrafting



1 (b) (4) and (b) (5), you can see in (b) (4) the predicate of  
2 the aircraft being purchased outside the State of  
3 California is clearly set forth in the superior clause of  
4 (4). The exceptions or exemptions follow the word, unless  
5 the colon, and then you have the subordinate sections  
6 below it.

7 That was not the case in the drafting of (5) --  
8 of (b) (5), the predicates of the 12-month test, the  
9 purchase outside the functional use set forth, but the  
10 subordinate clauses are not those of the exemptions. The  
11 subordinate clauses are those of further qualification for  
12 application of the test and the presumption.

13 So all four of these qualifiers are just that,  
14 further qualifications under the initial statement of the  
15 rule. In the new (b) (5), subdivision (b) is expressly and  
16 presumably intentionally not subject to the statement of  
17 the rule as it was in (4). So, again, in (b) (4) used in  
18 interstate commerce was an exemption to the stated rule.

19 In (b) (5), Section (b) sets forth as an  
20 independent and separate clause, not a subordinate clause,  
21 the manner by which you may submit evidence rebutting the  
22 presumption. But, again, in Section (b) (5) it's not  
23 subordinate to the rule. It is separate and distinct. So  
24 whereas, the Interstate Commerce Exemption in (b) (4) prior  
25 to the modification of 6248 and the inclusion of 6248(c)

1 in 2004 was clearly using the interstate or foreign  
2 commerce was subject to the test and the place of  
3 purchase.

4 But that is not the case in the independent  
5 clause in (b) (5). (C) stands alone. And, in fact, if the  
6 legislative intent expressed in 6248(c) is to be followed  
7 and carried out as would be required by the Department in  
8 enacting regulations pursuant to statute, it cannot apply.  
9 Because 6248(c) expressly takes out the 12-month test and  
10 the place of purchase in matters involved in interstate  
11 and foreign commerce -- in aircraft involved in interstate  
12 or foreign commerce.

13 And if the Board had a different intention, it  
14 could have clearly stated as such as it did in Section  
15 (d), following Section (c) where it clearly states not  
16 withstanding subdivision (b) (5) (a) above. Aircraft or  
17 vessels the purchase and use of which are subject to the  
18 12-month test. It does not --

19 JUDGE CHO: You may want to slow down for our  
20 reporter.

21 MR. MATOSICH: I'm sorry.

22 JUDGE CHO: When you start reading it's --

23 MR. MATOSICH: I -- again, I apologize. I've  
24 been admonished three times, and I apologize.

25 So subsection (d) says notwithstanding

1 subdivision (b) (5) (a) above, aircraft or vessels the  
2 purchase of which -- excuse me -- the purchase and use of  
3 which are subject to the 12-month test described in  
4 subdivision (b) (5). If Subsection (c) of 1620 (b) (5) were  
5 intended to be subject to the predicate 12-month test and  
6 the place of purchase, the Department could have and  
7 should have used the very language it used in  
8 Subsection (d). It did not. (B) (5) (c) stands on its own.

9           So the return of the aircraft, if the panel  
10 should find that title transferred in the State of  
11 California, the plane leaves under 6396, and it comes back  
12 6248(c) and in a proper construction of 1620. Entry into  
13 the State of California is when the airplane returned  
14 because it leaves the state under 6396. It is not used or  
15 functionally used in the state. Therefore, its entry is  
16 not at the point of title transfer. It is at the point it  
17 returns to the state after its first functional use out of  
18 state, which is allowed under 6396.

19           So proper application of the exemption as we see  
20 it, is to read regulation 1620(b) where (b) (1) sets forth  
21 the application of use tax to property. And (b) (5) (c) (3)  
22 sets forth the exemption for aircraft that are  
23 purchased -- that may be purchased within the state or  
24 outside the state, purchased and returned to the State of  
25 California, and not subject to use tax under the

1 Interstate Commerce Exemption.

2           So in conclusion, this panel can find as a matter  
3 of law based on undisputed facts, that title did not  
4 transfer in the State of California because there is no  
5 dispute as to where possession or even constructive  
6 possession, if allowed under the law of the State of  
7 California, occurred. Possession -- we did not possess  
8 the aircraft. We did not have the right to possess the  
9 aircraft.

10           So as a matter of law, title could not have  
11 transferred in the State of California. The Department  
12 admits possession did not transfer. Possession is a  
13 critical element of title. We had neither possession nor  
14 constructive possession. As a matter of fact, the intent  
15 of the parties governs. That's clear under 2401 of the  
16 Commercial Code. And it is clear as the First District  
17 has just made very clear in the City of Fontana case under  
18 prior Supreme Court precedent in the State of California.  
19 It is the intent of the parties that governs.

20           It is not the Department to insert its intent or  
21 its reading. It is the intent of the parties. The  
22 seller, the purchaser, and an independent percipient  
23 witness to the transaction have all testified as to the  
24 intent of where and when title was to transfer; not in the  
25 State of California, in the State of Oregon.

1           However, if the panel should find otherwise,  
2           again, the plane leaves free of sales tax under a 6396  
3           analysis and returns under what we would argue is a proper  
4           reading of 6248 and the application of 1620(b)(c) --  
5           excuse me (b)(5)(c)(3).

6           And that concludes our presentation.

7           JUDGE KWEE: Okay. Thank you.

8           And at this point, I'll reserve questions until  
9           you do your testimony. But before we turn it over to  
10          CDTFA for their presentation, I think the reporter might  
11          need a break. So how about we take a 10-minute break and  
12          come back at 1:25.

13          (There is a pause in the proceedings.)

14          JUDGE KWEE: So I believe we're ready to go back  
15          on the record now.

16          So CDTFA has raised an objection to the taxpayer  
17          leaving a paper copy of the presentation, which was  
18          discussed today on the basis that it would not be  
19          evidence. And the panel agrees that the document is not  
20          evidence, but we believe it might be helpful to accept as  
21          basically a document that's part of our record, just not  
22          evidence in the record. So we will allow a transcript to  
23          be left behind, provided copies are also provided to CDTFA  
24          and a copy provided to the court reporter.

25          Do you have enough copies for that?

1           MR. MATOSICH: We only have five copies prepared.  
2           So if one for the panel is sufficient, one for the  
3           reporter, one for CDTFA, we'll still have enough. I could  
4           leave the other two behind if you want. I would like to  
5           retain a copy for my records so that I know what we  
6           actually left behind.

7           JUDGE KWEE: Okay. I believe one copy for the  
8           panel will be sufficient.

9           MR. MATOSICH: Okay. One for the reporter and  
10          one for the panel and --

11          THE HEARING REPORTER: Can I ask a question?

12          JUDGE KWEE: Sure.

13          THE HEARING REPORTER: Can we go off the record  
14          for a moment?

15          JUDGE KWEE: Sure. Off the record.

16          (There was a pause in the proceedings.)

17          JUDGE KWEE: We'll go back on the record now.

18          So with that said, I believe we're ready to move  
19          on to CDTFA's opening presentation, so you have time.

20          MS. HE: Yes. Thank you.

21

22                               OPENING STATEMENT

23          MS. HE: Contrary to all the arguments we've just  
24          heard, the evidence establishes that title to the aircraft  
25          passed to Appellant on January 27th, 2015, while the

1 aircraft was located in California. This makes the  
2 aircraft transaction the purchase of sale in California.  
3 Because of this, the interstate commerce use provision as  
4 provided in Regulation 1620(b)(5)(c) is not applicable.  
5 And Appellant, having purchased the aircraft from someone  
6 other than the person required to hold a California  
7 seller's permit, is liable for use tax as properly  
8 determined by the Department.

9           There are two main issues in this appeal. First,  
10 where title to the aircraft passed to Appellant such that  
11 a sale of the aircraft occurred. And second, whether the  
12 interstate commerce use provision, as provided in  
13 Regulation 1620(d)(5)(c) applies to purchases in  
14 California.

15           First on the issue of title transfer, Revenue and  
16 Taxation Code Section 6010.5 provides that the price of  
17 sale of tangible personal property is a place where the  
18 property is physically located at the time the act of  
19 constituting the sale occurs. Since Revenue and Taxation  
20 Code, Section 6006(a) provides that sale means and  
21 includes any transfer or title or possession of tangible  
22 personal property for consideration. The place of sale is  
23 the place where the tangible personal property is located  
24 at the time the transfer of title or possession occurs.

25           Further, Regulation 1628(b)(3)(d) applying the

1 rules set forth in California UCC Section 2401 and is  
2 written, Revenue and Taxation Code Section 6010.5 provides  
3 that unless explicitly agreed that title is to pass at a  
4 prior time, the sale occurs at the time and place at which  
5 the retailer completes its performance with reference to  
6 the physical delivery of the property.

7 In other words, title to the property can pass  
8 prior to delivery if the parties explicitly agree to that.  
9 And contrary to Appellant's arguments, that's exactly what  
10 happened here. Title passed prior to delivery as shown by  
11 the following evidence.

12 The Department's Exhibit A, the Aircraft Purchase  
13 Agreement, so titled by the parties, show that aircraft  
14 purchase agreement requirements seen at Article 1 that I  
15 quote, "Close must occur by end of the day 27th,  
16 January 2015," unquote. In other words, the aircraft  
17 purchase agreement causes for consummation of the sale and  
18 the purchase transaction by January 27th, 2015, with the  
19 purchaser having to pay in full and seller having to  
20 transfer full title of aircraft upon close on  
21 January 27th, 2015, pursuant to the aircraft purchase  
22 agreement.

23 It's undisputed by the Appellant, fulfilled its  
24 end of the bargain as the purchaser and the purchase  
25 agreement by paying the full one-million-dollar purchase



1 price by close of escrow on January 27th, 2015. The  
2 Department's Exhibit B, the FAA Aircraft Bill of Sale,  
3 shows that consistent with the purchase agreements,  
4 mandate that close occur by end of January 27th, 2015, and  
5 to fulfill seller's end of the contracts.

6 The parties caused the FAA Bill of Sale to be  
7 filed on January 27, 2015, on the day of close of the  
8 escrow. And the FAA Bill of Sales states in relevant part  
9 that I quote, "The owners of full, legal, and beneficial  
10 title to the aircraft done this 27th day of January 2015,  
11 hereby sale grant transfer and deliver all rights, title,  
12 and interest in and to such aircraft onto Snowflake  
13 Factory, LLC, singly this aircraft forever and the  
14 warrants and the titles thereof," unquote.

15 The language, the owners of full legal and  
16 beneficial title here by sale grant transfer to legal all  
17 rights, title, and interest to Snowflake Factory, LLC,  
18 carries such global planeness and distinctness that there  
19 is no need for inference and room for difficulty and stand  
20 in the effect of a transfer that the seller had both legal  
21 and beneficial title to the aircraft and then transferred  
22 all to Appellant on January 27th, 2015, retaining no  
23 rights, title, or interest whatsoever.

24 It's hard to conceive of any title transfer  
25 provisions more explicitly than that. And based on these

1 documents, clearly, full title, not just legal title to  
2 the aircraft, passed from seller to Appellant on  
3 January 27th, 2015. And because the language in this  
4 contractual document is clear and explicit, even though  
5 need for inference and no room for difficulty in  
6 understanding the transaction at issue in accordance with  
7 California Rule.

8 And whatever different understanding or is  
9 subject of intent, the parties now alleged to have before  
10 finalizing the purchase agreement and the bill of sale,  
11 even if true, i.e., relevant to the contract as it was not  
12 integrated into and further contradicts the final  
13 binding-legal documents before us. The aircraft purchase  
14 agreement and the FAA Bill of Sale which clearly and  
15 explicitly provide how to transfer full title transfer  
16 both legal and beneficial on close on January 27th, 2015,  
17 while the aircraft was still in the California.

18 And contrary to Appellant's argument, the  
19 Department never stated that FAA Bill of Sale was the only  
20 contract argument. Our position is based explicitly on  
21 both the purchase agreement and the FAA Bill of Sale.  
22 While not necessary to complete the sale, but as further  
23 evidence of the title transfer, the four legal and  
24 beneficial title transfer on January 27th, 2015, and the  
25 consistent with the purchase agreement and the FAA Bill of

1 Sale recorded, the Department's Exhibit C shows that  
2 Appellant filed an aircraft registration application with  
3 FAA dated January 27th, 2015, with the FAA receipt date of  
4 January 28th, 2015.

5 The certification section of the form states  
6 impertinent part that I quote, "I/we certify that the  
7 above aircraft is owned by the undersigned Appellant,  
8 which was Appellant's manager. And the legal incidents of  
9 the aircraft" -- "the legal incidents of the ownership is  
10 attached or has been filed with the Federal Aviation  
11 Administration."

12 So not only do we have an explicit agreement on  
13 transfer of all rights, title, and interest in and to the  
14 aircraft, including all the legal and beneficial title by  
15 seller to Appellant on January 27th, 2015. But also, we  
16 have Appellant himself unequivocally confirming such a  
17 full title transfer and asserting its full ownership of  
18 the aircraft on January 27th, 2015, while the aircraft was  
19 in California.

20 The Department notes that this FAA file copy of  
21 the registration document directly contradicts the  
22 June 28th, 2018 declaration under penalty of perjury by  
23 Appellant's president -- that was in page 5,  
24 paragraph 14 -- that the aircraft was registered with the  
25 FAA on February 13, 2015.

1           The Department's Exhibit D, the Glacier Jet  
2     Center aircraft hangar lease agreement reflects an  
3     effective date of day 1st, February 2015, which was before  
4     delivery of the aircraft in Portland and while the  
5     aircraft was in California, and it recites that. I quote,  
6     "Lessee is the owner of that aircraft described on  
7     Exhibit A, and the aircraft was the aircraft at issue,"  
8     unquote.

9           Again, Appellant asserted that it was the owner  
10    of the aircraft on the date while the aircraft remained in  
11    California before the out of state delivery. The  
12    Department's Exhibit E, the declaration by Appellant's  
13    manager and member, dated August 20th, 2015, also confirms  
14    that title passed in California. Specifically,  
15    paragraph 9, page 3, of the declaration states, I quota,  
16    "As the aircraft purchase agreement states, solely for the  
17    convenience of the seller, Snowflake took title to the  
18    aircraft while the aircraft was still undergoing its post  
19    prepurchase inspection corrective work in Fresno,  
20    California," unquote.

21           This statement confirms that Appellant's member  
22    and manager and experienced attorney and sophisticated  
23    business person by his own account, understood that title  
24    transferred on January 27, 2015, and that was required by  
25    the purchase agreement with a mandated close date of

1 January 27, 2015.

2 And two, the parties, in fact, did fulfill the  
3 contractual requirement and apparently took title in  
4 California. Similarly, those Department's Exhibit A, the  
5 aircraft-purchase agreement in paragraph 2 and Exhibit B,  
6 the FAA Aircraft Bill of Sale on the front is stamped on  
7 the right, indicates that escrow on the transaction was  
8 handled by Insured Aircraft Title Services, Inc., which  
9 touts itself on its web as the world's leading aircraft  
10 title and escrow company facilitating the buying and  
11 selling of the aircraft around the globe each day since  
12 1963.

13 So the fact of the escrow company's filing of the  
14 FAA Bill of Sale and the timing of such filing by close of  
15 escrow and its close of escrow on January 27th, 2015, are  
16 all evidence that an escrow company of well-known  
17 experienced title company specialized exclusively in  
18 aircraft transactions was informed by the parties of the  
19 parties' actual mutual intent and agreement to require not  
20 only full payment by Appellant, the purchaser, but also  
21 title transfer -- for title transfer by seller upon close  
22 of escrow with no contingencies and possibilities for any  
23 alleged sale on approval or sale upon delivery or any  
24 other reason.

25 In addition, the parties' choice of the form for

1 the escrow to file with the FAA the bill of sale instead  
2 of an equally simple short FAA form, which is called  
3 Aircraft Security Agreement -- it's only one page with a  
4 certification at the back -- for filing security interest,  
5 also clearly indicates that the parties' instructions to  
6 the escrow was cause for title transfer, not merely  
7 recording the security interest, otherwise they would have  
8 instructed the escrow company to file the security  
9 interest, one-page form. And the escrow company,  
10 obviously, only acts upon the mutual agreement of parties,  
11 and it did carry out the parties' agreement accordingly.

12 Last but not least, Appellant's various  
13 declarations also make it clear that the closing deadline  
14 of January 27th, 2015, was mandated without room for  
15 negotiation whatsoever, the order for the prior owner to  
16 file a 1031 exchange. Such a circumstance makes it  
17 imperative that the sale -- complete sale occur on  
18 January 27, 2015, leaving no room whatsoever for the  
19 possibility of a sale on approval or on delivery.

20 The above evidence clearly establishes that all  
21 rights, title, both legal and beneficial title, and the  
22 interest to the aircraft passed from the seller to  
23 Appellant on January 27th, 2015. Therefore, a sale within  
24 the meaning of Section 66006(a) occurred on  
25 January 27, 2015. And this is true, irrespective of when

1 and where lease last passed or when insurance or other  
2 responsibility of ownership and the purchase agreement  
3 passed.

4 All the evidence I just discussed also directly  
5 refutes Appellant's arguments that the transaction was a  
6 sale on approval or a sale on delivery or that FAA Bill of  
7 Sale only transfer the security interest. And since it's  
8 undisputed that the aircraft was in California on  
9 January 27th, 2015, the January 27th, 2015, sale and  
10 purchase of the aircraft occurred in California and  
11 Appellant owes use tax as the Department has determined.

12 Turn next to the issue of applicability of the  
13 interstate of commerce use provisions of Regulation  
14 1620(b)(5)(c). Regulation 1620(b)(5) on its face provides  
15 that Subdivision (b)(5)(c) is not an independent clause as  
16 Appellant asserts, but it's a subordinate provision of  
17 Subdivision (b)(5) which applies only to aircraft  
18 purchased outside of California. Accordingly, the  
19 interstate commerce use provision is not applicable to  
20 this appeal because as I just discussed, the aircraft and  
21 the sale and the purchase took place in California.

22 And more specifically, contrary to Appellant's  
23 argument, the first sentence of Subdivision (b)(5)  
24 Paragraph A says as relevantly I quote, "Except as  
25 provided in Subdivision (b)(5)(d) below, the provision of

1 subdivision (b) (5) will apply," unquote. This opening  
2 sentence makes it very clear that only  
3 Subdivision (b) (5) (d) is accepted from (b) (5), and that  
4 (b) (5) (c) is not accepted from carriage but by (b) (5),  
5 applicable only to aircraft purchased outside of  
6 California.

7 This is clear from the regulations organization  
8 that Subdivision (b) (5) is organized by first providing  
9 the rebuttable presumption in (b) (5) (a) of the intended  
10 purchase in California for those out-of-state purchases  
11 brought in California and then providing ways to get out  
12 of the presumption in Subdivision (b) (5) (b) and (b) (5) (c).  
13 This is further confirmed by the plain text of  
14 Subdivision (b) (5) (c) itself, which provides, I quote, "If  
15 the property is an aircraft, use tax would not apply if  
16 one-half or more of the flight time traveled by the  
17 aircraft during the six-month period immediately following  
18 its entry into this state is -- show flight times traveled  
19 in interstate commerce -- in interstate or foreign  
20 commerce," unquote.

21 The provision of the six-month period --  
22 six-month test period for aircraft starting immediately  
23 following its entry into the state, obviously, we request  
24 that aircraft to be first out of the state when purchased.  
25 Similarly, the last sentence in Subdivision (b) (5) (c)



1 states, I quote, "Such use that was referring to the  
2 inter -- use interstate commerce, will be accepted as  
3 proof of an intent that the property was not purchased  
4 when used in California," end quote.

5 This proof of intent language clearly speaks  
6 against the presumption of the intent of purchase for use  
7 of California as set out in Subdivision (b) (5) (a) in the  
8 same regulation for aircraft purchase outside of  
9 California. In other words, Subdivision (b) (5) (c)'s own  
10 regulatory context and language provide that it does not  
11 stand on its own but instead is entitled to other  
12 Subdivision (b) (5) (c) provisions regarding the presumption  
13 for out-of-state purchases, and that it functions as one  
14 way to regard that presumption of intended purchase in  
15 California.

16 The text and obligation of the subdivision is  
17 also clear and is consistent with the regulatory  
18 (unintelligent). As Appellant stated, Subdivision (b) (5)  
19 was added as a new subdivision in 2002 to Regulation 1620  
20 to implement SB1100, which amended Section 60248 of the  
21 Revenue and Taxation Code to provide the 12-month test for  
22 vehicle, vessel, aircraft purchased outside of California.

23 The amended Revenue and Taxation Code,  
24 Section 6248(c) provides that, I quote, "This section  
25 shall not apply to any vehicle, vessel, or aircraft used

1 in interstate or foreign commerce pursuant to regulation  
2 prescribed by the Board," end quote.

3 The reference about the regulation prescribed by  
4 the Board for interstate or foreign commerce use, that's a  
5 reference to the provisions the Department added to  
6 regulation 1620, which between 1999 and 2002 which  
7 incorporated an interstate commerce use component to the  
8 analysis of whether an aircraft, vessel, or vehicle  
9 purchased out of state was nonetheless considered purchase  
10 for use in California to be subject to California use tax.

11 The fact that the Department's regulation on use  
12 tax in the context of the interstate commerce has always  
13 only applied to out of state purchases is made very clear  
14 by Regulation 1620, the regulation dealing specifically  
15 with vehicles, vessels, and aircraft. Which states in  
16 Subdivision (e) -- that's Regulation 1610(e) that I quote,  
17 "Out of state purchases of vehicle, vessel, and aircraft.  
18 Regarding the applicability of tax to the out of state  
19 purchase of a vehicle, vessel, or aircraft, see  
20 subdivision (b) of Regulation 1620," end quote.

21 The rule-making file in 2004 or Regulation 1620  
22 (b) (5) took note of the scheduled mandate that no change  
23 be made to the Board's existing regulation on interstate  
24 commerce use. And states, I quote, "As mandated statute  
25 sticks to make no change to the applicability of use tax

1 to vehicles, vessels, or aircraft used in interstate or  
2 foreign commerce pursuant to board regulation. New  
3 Subdivision (b) (5) (c) reflects the language of existing  
4 Subdivision (b) (4) (b) of Regulation 1620.

5 Such a clear regulatory context leaves beyond a  
6 doubt that there's no distinction whatsoever between  
7 subdivision (b) (4) (b) and (b) (5) (c) of Regulation 1620  
8 relating to the interstate commerce use. Since Appellant  
9 agrees that (b) (4) only applies to purchases outside of  
10 California, and since both the undenied statute and the  
11 rule-making file for Regulation 1620 (b) (5), those  
12 explicitly say to make no change to the Board's existing  
13 regulation on use in interstate commerce. There can be no  
14 distinction whatsoever between Regulation 1620 (b) (4) (b)  
15 and (b) (5) (c) contrary to Appellant's assertion. So it's  
16 clear that the interstate commerce use provision is not  
17 applicable to Appellant's aircraft purchase in California.

18 Lastly, regarding Appellant's other miscellaneous  
19 arguments. Appellant's argument that this is a sales tax  
20 transaction fails because Revenue and Taxation Code,  
21 Section 60283 and the Regulation 1610 (c) (2) (a) provide  
22 that the sale in this state of an aircraft is exempt from  
23 sales tax when the retailer is other than the person  
24 required to hold a California seller's permit. Instead  
25 the purchaser must pay use tax.

1           The key language overlooked by Appellant is being  
2     required to hold a seller's permit, pursuant to Article 2  
3     commencing with Section 1666 of Chapter 2. Section 66,  
4     Application for Permit, provides in subdivision(a), that  
5     every person desiring to engage in or conduct business as  
6     a seller within this state shall file with the board  
7     application for a permit for each place of business. In  
8     this case the Department is not ignoring that the seller  
9     sold aircraft. And the Department is also not arguing  
10    this sale is exempt from sales tax because it was an  
11    occasional sale. That was never the Department's  
12    position.

13           But that in and of itself, does not mean the  
14    seller was required to hold a California seller's permit  
15    given the permit requirement, I just discussed, is also  
16    tied to a place of business in California. Here the  
17    seller was an out-of-state business, and there's no  
18    evidence that the seller had a place of business in  
19    California to be required to hold a California seller's  
20    permit. Therefore, this transaction, even a sale in  
21    California is exempt from sales tax, but instead the  
22    transaction is subject to use tax as the Department  
23    properly determined.

24           In addition, whether exempt -- the exemption  
25    under Section 6283 and Regulation 1610(c)(2)(a) applies to

1 the sale of the aircraft in California here as Appellant  
2 argued. That's the only argument we actually agree.  
3 Given that the contract requires delivery as the  
4 destination out of the state and delivery was actually  
5 made out of state, the sale in California, even if not  
6 exempted by Section 6083, would still be exempt and the  
7 Revenue and Taxation Code, Section 6396 and Regulation  
8 1620(a)(3)(b) for sales in California. That exemption  
9 applies where the tangible, personal, property pursuant to  
10 the contract of sale, is required to be shipped and is  
11 shipped to a point outside of this state by the retailer.

12 But Section 6396 exemption does not help  
13 Appellant, contrary to his belief, because this exemption  
14 applies only to sales. In other words, it's only a sales  
15 tax exemption, not a use tax exemption. And  
16 Regulation 1620(b)(1) says very clearly, whenever a sale  
17 is exempt from sales tax, as is the case may be, whether  
18 it's under Section 6396 or under 6283, whenever the sale  
19 is exempt from sales tax, use tax applies. Of course,  
20 unless any of the 1620(b) exception applies. But as I've  
21 just discussed, due to the sale in California, the  
22 provision for use tax exemption and the Regulation 6220(b)  
23 does not apply here.

24 As to Appellant's other arguments that the  
25 transaction was a sale upon approval within the meaning of

1     the UCC Section 2326, such that the sale does not occur  
2     until the purchaser accepts a property. A sale on  
3     approval is one in which the delivered goods may be  
4     returned by the customer even though they conformed to the  
5     contract.

6             Here, however, the truth is despite any purported  
7     understanding of any of the parties involved in the sale  
8     and regardless of the fact that the salable risk of loss  
9     prior to delivery, there's just no language in the  
10    purchase agreement or the FAA Bill of Sale that even  
11    remotely suggest that Appellant had any unconditional  
12    right to return the aircraft even if the aircraft conforms  
13    to the contract's specifications.

14            The same goes for Appellant's argument that the  
15    bill of sale transferred only a security interest. Not  
16    only do those arguments find no support in the purchase  
17    agreement or any other objective evidence, that's also  
18    directly contradicted by the FAA Bill of Sale language and  
19    as well as Appellant's assertion of ownership of the  
20    aircraft in its FAA registration application and in its  
21    lease agreement. And further, the arguments define the  
22    basic logic behind the circumstance of the strict closing  
23    deadline due to the prior owner's 1031 exchange deadline,  
24    and to define the commonsense, given the parties'  
25    sophistication in business transactions.

1           Appellant's argument that the delivery slip  
2       explicitly provided for transfer of ownership upon  
3       delivery, distorts the actual language in the slip.  
4       Instead of truthfully stating that the delivery slip is a  
5       true provision is that responsibility of ownership of --  
6       and risk of loss for the aircraft transfer from seller to  
7       the purchaser. The Appellant represented in its opening  
8       brief over and over again that the delivery slip says to  
9       transfer ownership, which Appellant then argues constitute  
10      clear and convincing proof to rebut the FAA Bill of Sale,  
11      but that proof is just made up fiction. As responsibility  
12      of ownership does not equate ownership or title.

13           The ownership refers to the fact of having title  
14      to the property rights to possession or control as  
15      Appellant himself acknowledged in its opening argument.  
16      But responsibility of ownership refers to being  
17      responsible for all the obligations and consequences  
18      associated with being the owner; such as taking the recent  
19      loss, paying property taxes, et cetera.

20           Taking the responsibility of ownership and the  
21      use of (unintelligent) does not occur when a transaction  
22      into -- a transfer of ownership. A common example  
23      consists, you know, in the -- pardon me. Sorry.

24           You know, in the commercial lease context it's  
25      very common to come across triple leases. So in those

1 situations the lessee would pay for the insurance, will  
2 pay for property tax, and pay for maintenance, which are  
3 typically the responsibility of the owner. But taking  
4 those responsibilities of ownership does not make the  
5 lessee the owner nor the owner a non-owner suddenly.

6           So contrary to Appellant's argument, delivery  
7 slip does not memorialize any understanding in pass of  
8 title or ownership on the delivery date. He only said  
9 responsibility of ownership and risk of loss should pass  
10 upon delivery. Similarly, Appellant's reliance on the  
11 recent loss clause as proof that the title did not  
12 transfer is misplaced. As who bears the responsibility  
13 for risk of loss is determined in California UCC  
14 Section 2509, which is without regard to who has title.

15           And Subdivision (b) of 2509 places squarely the  
16 risk of loss on seller in the contract, like the one at  
17 issue, which requires delivery at a designation. As you  
18 know when California adopted the UCC rules in 1963, the  
19 emphasis in the prior California law on title to property  
20 in determining risk of loss, priority, amongst others, et  
21 cetera have been abandoned. In its place the code sets  
22 forth separate rules for risk of loss, priority, et  
23 cetera, all independent of the location of title.

24           This is apparent from mostly common in the  
25 official text of Section 2-101 of the UCC as well as from



1 the explicit provisions of the California UCC  
2 Section 2401. The comment in the official context in  
3 Section 2-101 of the UCC states, as it's relevant here,  
4 that the arrangement of the present article -- that's the  
5 current UCC -- is in terms of the contract for sale and  
6 the various steps of its performance. The legal  
7 consequences as stated as following directly from the  
8 contract and action taken under it without resorting to  
9 the idea of when property or title passed or was to pass  
10 as being the determining factor.

11 Similarly, California UCC Section 2401 states, I  
12 quote, "Each provision of this division with regards to  
13 rights, obligations, and remedies of the seller, the  
14 buyer, the purchaser, or other party's advice irrespective  
15 of title to the goods. Along the same line, courts have  
16 also emphatically rejected similar arguments asserting  
17 title based on insurance coverage."

18 For example, in Chevron USA, Inc., versus the  
19 State Board of Equalization, the California Appellant  
20 Court in response to a similar argument asserting title  
21 based on who carried the insurance coverage stating, I  
22 quote, "So what," unquote. The court went on to explain  
23 that is no authority that a purchase of insurance by a  
24 party means delivery or possession of or title to the  
25 property.

1                   And that's the citation to the Chevron case is 53  
2   Cal.App.4th 289. So it's a settled law that a statement  
3   regarding risk of loss is not a statement regarding the  
4   passage of title nor proof of title. Appellant argues  
5   today in its opening statement that as a matter of law  
6   there could have been no sale in California because  
7   Appellant took no possession or control of the aircraft,  
8   but as I stated at the outset, sale occurs upon transfer  
9   of title or possession. And as the code revision,  
10   Appellant himself showed upon the PowerPoint, legal  
11   possession is not -- legally no possession is necessary to  
12   establishes a sale because Revenue and Taxation Code,  
13   Section 1606(a) the last sentence states that transfer of  
14   possession includes only transactions found by the Board  
15   to be in lieu of the transfer of title, exchange or  
16   barter.

17                   So transfer of title is the way to transfer  
18   ownership. But transfer of possession only constitutes  
19   sale when the transfer of possession was in lieu of the  
20   transfer of title. Appellant spent much time discussing  
21   the Northrop Corp. versus BOE case. But that case  
22   Appellant representative that in that case the title  
23   requires possession. But what the case actually said is,  
24   for example, in discussing the tooling ownership.

25                   The tooling was, of course, in Northrop's

1 possession during the audit period except of a such time  
2 as rotating use, tooling was in Boeing's possession in  
3 Washington. This in and of itself does not prevent title  
4 from passing to Boeing. So while title is tied to right  
5 up to possession, the evidence suggest that Appellant did  
6 have right of possession which is inherent in its full  
7 title to the aircraft as granted by FAA Bill of Sale.

8 And also the purchase agreement, while prohibit  
9 the seller from doing anything to the aircraft after close  
10 of escrow other than to reposition for delivery out of  
11 state, has no limitation on Appellant's right to  
12 possession or control. Of course, limiting what the  
13 seller can do after close of escrow is Appellant's  
14 assertion of right of control of the aircraft. Since as  
15 discussed previously, the evidence establish that title  
16 transfer in California, the place of sale is in  
17 California. And with the sale exempt from sales tax,  
18 Appellant is properly subject to use tax on its use,  
19 storage, or other consumption of the aircraft in  
20 California.

21 And just some overall comment to Appellant's  
22 opening statement. We agree with the Appellant that the  
23 liability, the decision can be made as a matter of law,  
24 but at the law represented by Appellant. Appellant's  
25 liability is clear given the applicable law into evidence.

1           But the law and the evidence are not in favor of  
2     him as he alleged, but against him as the facts are clear  
3     as established by the clear and explicit language in the  
4     aircraft purchase agreement and the FAA Bill of Sale that  
5     the seller, the owners of full legal and official title of  
6     the aircraft, did sell, grant, transfer, and deliver all  
7     rights, title and interest in and to the aircraft owner,  
8     Snowflake Factory, LLC.

9           So there's no need for inference and no room for  
10    difficulty understanding the effect of the transfer. And  
11    there's no ambiguity in the legal documents about this.  
12    And the risk of a loss provision, that's just provided in  
13    accordance with the UCC provision in such destination  
14    contracts without regard to title as suggested and  
15    discussed. So they don't create an ambiguity about the  
16    title transfer.

17          Given such clear and explicit language in the  
18    contracts, and as a matter of law the language of the  
19    contract, both in the aircraft purchase agreement and FAA  
20    Bill of Sale is to govern its interpretation as clearly  
21    and as specific as provided by Civil Code Section 1638.  
22    That section states if the language is clear and explicit  
23    and does not involve an absurdity, the contract -- the  
24    explicit language is to govern its interpretation.

25          Although, the parties' intent determines the

1 contracts meaning as case law has held over and over  
2 again, the relevant intent is objective intent as  
3 evidenced by words of the instrument, not parties' subject  
4 matter, such as those expressed in the declarations.

5 And to quote another case, it's Rodriguez versus  
6 Auto. That's 2013 Appellant. If the terms of the  
7 contract are ambiguous, there's no occasion for additional  
8 evidence of the parties' subjective intent since their  
9 actual intent for purpose of contract law is that to which  
10 manifested assent but executing the agreement. And of  
11 course, the Civil Code also said, clearly, in Section  
12 1639, when a contract is reduced to writing, the intention  
13 of the parties is to be ascertained from the writing  
14 alone.

15 In view of such clear and explicit law  
16 provisions, the declarations have no place at all in  
17 determining what the parties' intended contract and did in  
18 fact contract. And even if the declarations can be  
19 considered, they cannot disprove the explicit terms of the  
20 title transfer provisions. As Appellant acknowledges and  
21 the California law, the Evidence Code Section 662, the  
22 owner of the legal title to property is presumed to be the  
23 owner of the full beneficial title.

24 And this presumption may be rebutted only by  
25 clear and convincing evidence. But here, all Appellant

1     has offered as proof is just a set of declarations, which  
2     in essence, are unsubstantiated allegations which has no  
3     basis in objective evidence whatsoever. They attracted so  
4     much doubt and painted such a highly and unlikely set of  
5     alternative facts, given the contract delivery of choice  
6     of goods, the parties' sophistication and the  
7     circumstances of the strict and close deadline and the  
8     parties' course of conduct following the close of escrow,  
9     that in no way can the declarations meet the clear and  
10    convincing standard.

11           Appellant may not agree with this result and  
12    attempts to muddy the waters to obscure the true facts by  
13    the Appellant's attempts to have this appeal decided on an  
14    alternative set of facts based solely on its digressions  
15    without regard to the explicit contract and bill of sale  
16    language to the contrary must fail because as I've just  
17    said, California law requires that the clear and explicit  
18    language of the contract to govern its interpretation.

19           And as discussed previously, the language of the  
20    contract in this case are so clear and explicit, so they  
21    will govern the contract. And the Appellant cannot now  
22    make a new contract for the parties or to rewrite the  
23    clear terms of the lawful contract through the subjective  
24    intent as expressed in the declarations. And, of course,  
25    they -- given they have no proof at all with so much

1 contradiction with the objective evidence on the record,  
2 they cannot meet the clear and convincing evidence.

3 And for the record, I'd also like to take a look  
4 at the party we have here. The purchaser, Appellant, has  
5 as its member and manager, an attorney with extensive  
6 legal and business experience in negotiating deals,  
7 structuring contracts and structuring financing  
8 transactions. He served for about 16 years as a former  
9 partner and executive vice president, general counsel, and  
10 then vice president of business affairs for Summit  
11 Entertainment, LLC, the film studio that produced and  
12 distributed the world-wide box office success Twilight and  
13 its sequels.

14 The Hollywood Reporter called him and another  
15 officer there, the pair of legal eagles at Summit. During  
16 his well-decorated career there, the member oversaw  
17 Summit --

18 JUDGE KWEE: I'm sorry. Are you referring to  
19 information in the record or is this outside research that  
20 you performed?

21 MS. HE: We did not put that on the record. But  
22 this experience was covered briefly in Appellant's own  
23 declaration, which we did put in the record.

24 JUDGE KWEE: Okay. Thank you.

25 MS. HE: Yeah. That's in the Department's

1 Exhibit E.

2 So the member --

3 MR. MATOSICH: And if I may, as flattering as the  
4 Hollywood Reporter article was, that is not in the record.

5 MS. HE: Yeah. But the point I'm making is  
6 Appellant is highly sophisticated and has extensive legal  
7 and business exposure. And seller, Fleet Planes, Inc., as  
8 Appellant indicated, is an established aircraft broker and  
9 dealer based in Oregon. And the parties' escrow company,  
10 Insured Aircraft Services, Inc., is a world leading -- a  
11 leading world escrow company specializing exclusively in  
12 aircraft transactions.

13 So this transaction here at issue was not based  
14 on some inexperienced persons not knowing what the terms  
15 chosen for the contract mean. But instead, they were done  
16 by and between highly experienced and sophisticated  
17 parties and involves multimillion-dollar purchase -- a  
18 million-dollar purchase of an aircraft.

19 So with all the parties' background in mind,  
20 let's now review Appellant's supporting declarations which  
21 indicates that the parties had an understanding that a  
22 sale was a sale on approval, or it only conveyed as  
23 security interest or title or ownership would not and did  
24 not pass upon delivery. But by their own accounts in the  
25 declaration, based on this understanding, some last-minute



1 changes were made to the pending written purchase  
2 agreement to reflect the party's understanding.

3           Given such an order of events and given the  
4 sophistication of the parties and the multimillion dollar  
5 purchase at stake, as well as the handling of the escrow  
6 by a well-established escrow company specializing  
7 exclusively in aircraft purchases and further, given  
8 Appellant's poor understanding of the legal effect of the  
9 title document and the legal effect of a contract without  
10 all the explicit terms, one would expect that the purchase  
11 agreement or some other written agreement, such as escrow  
12 instructions or other things, would reflect such a  
13 purported understanding, if indeed the purported  
14 understanding was agreed upon and acted upon.

15           But what is the reality? The legally binding  
16 reality is that first off, the aircraft purchase agreement  
17 and the bill of sale, the only two documents the parties  
18 executed binding each other in this transaction give no  
19 indication whatsoever the aircraft transaction was for  
20 sale on approval. Of course, the close date -- mandated  
21 close date for January 27th, 2015, leaves no room for  
22 contingencies or uncertainties and has no room or  
23 tolerance for any alleged sale on approval or sale upon  
24 delivery at the destination.

25           And then when you look at Paragraph 2 of the

1 aircraft purchase agreement, it said, "Purchaser shall  
2 (unintelligible) remainder of the purchase price after  
3 satisfactory completion of the prepurchase inspection."  
4 This indicates that the only occasion purchaser had to  
5 reject the aircraft is at the completion of the  
6 prepurchase inspection which refutes allegation of an open  
7 sale on approval.

8 And also as the case pointed out, requiring a  
9 purchase -- for purchase price at the time of contract was  
10 wholly inconsistent with the idea for a sale on approval  
11 transaction. And there's no objective evidence whatsoever  
12 to support that. And then we have the FAA Bill of Sale  
13 with such verbal plainness and distinctiveness that the  
14 full title, both legal and beneficial title, passed from  
15 seller to Appellant forever.

16 So, again, despite the highly sophisticated  
17 parties involved and Appellant's understanding of the  
18 consequence of the documents, the parties made no attempt  
19 to place any limitation on this document in the purchase  
20 agreement or elsewhere. And even with the required  
21 delivery out of state that got into the agreement, the  
22 purchase agreement, actually went into great detail to  
23 avoid saying anything to contradict the title transfer.

24 Paragraph 5 says, "Recent loss or damage to the  
25 aircraft shall pass to purchaser when purchaser takes

1 physical possession of the aircraft at the POX." It could  
2 have just easily said, "Title and the risk of loss shall  
3 pass," but did not. Similarly, the delivery slip only  
4 says -- contrary to what Appellant wanted to believe --  
5 "Responsibility of ownership and the recent loss shall  
6 pass." It could have more easily said, "Ownership  
7 transfer," using fewer word. But, again, it did not.

8 All of these choice few words and issue of other  
9 key words in the contract show a clear and deliberate  
10 intent to pass title in California. And the law is clear.  
11 Once you have title transfer in California, the delivery  
12 outside of California does not matter anymore.

13 And I think I would just stop here and leave the  
14 remainder for the closing argument.

15 Thank you.

16 JUDGE KWEE: Okay. Thank you. So at this time I  
17 believe --

18 MR. MATOSICH: May I be heard?

19 JUDGE KWEE: Oh, sure.

20 MR. MATOSICH: I would just like to respond, if I  
21 could. And I would like to respond with the following  
22 motion. Opposing Counsel's argument is very detailed and  
23 very extensive, and I commend her on it. I would have  
24 expected to see that in Department's brief because it's  
25 very detailed. And as a matter of due process, I would

1 have expected to see that level of argument and that level  
2 of specificity and recitation of code and regulations in  
3 the opposition brief, which was not there.

4 I would like to move to have the opportunity to  
5 review the transcript and to respond to it in the detail  
6 that she just articulated all the various arguments with.  
7 We were more than prepared to respond to a very detailed  
8 brief in response to our very clear and authoritative  
9 brief.

10 Unfortunately, the Department did not file such a  
11 brief. It filed the underlying decision in roughly two  
12 pages of argument. The argument that we have just heard  
13 goes well beyond the scope of that brief. In our  
14 preliminary hearing as to the scope of this hearing, it  
15 was to be limited, effectively, to the arguments raised in  
16 the brief. The arguments are being advanced here right  
17 now are well beyond that scope. And I believe -- and I'm  
18 moving the panel to allow Appellant to have the  
19 opportunity to review the record and to respond to those  
20 very detailed argument. Because heretofore, they have not  
21 been advanced, and we've not been afforded the opportunity  
22 to respond to them.

23 JUDGE KWEE: And back again to CDTFAs position.

24 MS. HE: Yeah. We object to that, obviously.

25 The Department's position has never changed. That sole

1 issue is whether title transferred in California. And all  
2 the arguments, all the citations to it, and everything  
3 else, that was raised by Appellant in various points. And  
4 it also goes to the exact same issue as the -- as narrowed  
5 down in the prehearing conference order.

6 So we did not bring anything new. In fact,  
7 Appellant, actually, brought a lot of new facts or  
8 misrepresented facts, which necessitated us going into --

9 MR. MATOSICH: I'm going to object to that  
10 characterization as to the facts. That is argue -- that  
11 is not only argumentative, it is unfounded.

12 MS. SILVA: So there's nothing in our argument  
13 that went outside of the argument from the decision and  
14 recommendation as to the Department's position as to why  
15 this is taxable. It all included where the sale occurred  
16 and how the one regulation is not applicable as has been  
17 argued.

18 So we have not swayed outside from the argument  
19 that we have had and have only countered some arguments  
20 that have been made today here with respect to  
21 specificity.

22 JUDGE KWEE: Okay. Why don't we take a brief  
23 recess for our court reporter and also for us to discuss  
24 this. And we'll get back at -- how about 2:30 and resume  
25 this proceeding. That's nine minutes from now.

1 (There is a pause in the proceedings.)

2 JUDGE KWEE: We're going on the record.

3 Okay. So there is follow-up. When we went off  
4 the record, we discussed the objection to new arguments  
5 that might have been raised in the hearing. And it was  
6 decided that OTA is going to provide a copy of the  
7 transcript of what is said today to the parties. At that  
8 point, the parties will each have 45 days from the date  
9 the transcript is provided to provide: A, their closing  
10 arguments; and B, any responses that they may have to new  
11 arguments that were raised during the course of the  
12 hearing.

13 After the close of the 45-day period, the record  
14 will be closed, and then just written opinion will be  
15 issued within 100 days from that time frame. The parties  
16 are not required to provide any additional follow-up  
17 during this time frame. This time frame is, if the  
18 parties would like to provide closing arguments and  
19 rebuttals.

20 Okay. So with that said, the taxpayer has  
21 indicated that he doesn't have an objection. And I'm not  
22 sure if CDTFA had an objection for the record. But if you  
23 would like to make an objection, now is your chance.

24 MS. SILVA: No objection.

25 JUDGE KWEE: Okay. So at this point, we're going

1 to proceed with testimony from the taxpayer's  
2 representative, Mr. Matosich, after which we will adjourn  
3 the hearing.

4 So, Mr. Matosich, you may proceed.

5 MR. MATOSICH: Well, Your Honor, I need to set up  
6 some equipment just for the purpose of just reviewing some  
7 of the documents at issue that are relevant to my  
8 testimony.

9 JUDGE KWEE: Okay. Perfect. And also, I will --

10 MR. MATOSICH: I mean I -- I don't have to.  
11 There's only one or two documents that I'm sure you have  
12 not already seen. But if it's convenient and if it's  
13 helpful, I would be happy to do so.

14 JUDGE STANLEY: Can I offer that we do have all  
15 the documents in front of us in our laptops. So if you  
16 just want to refer to an exhibit number, we can look at  
17 them simultaneously.

18 MR. MATOSICH: There's only one. There's a  
19 document that's been objected to. And then, of course, I  
20 make reference to the current FAA registration form as  
21 a -- basically, as for judicial notice of it because it is  
22 distinctly different from that which was signed in 2015.  
23 And is relevant, effectively, to issue credibility and  
24 certification.

25 JUDGE KWEE: Is the current FAA document in

1 record?

2 MR. MATOSICH: It is not, but it is on the FAA  
3 website. And it can -- may be judicially noticed.

4 JUDGE KWEE: Okay.

5 MR. MATOSICH: And -- and it only goes to the  
6 point as to the certification. I can make that point in  
7 my testimony in relation to the certification required and  
8 the associated penalties from these statements.

9 JUDGE KWEE: Okay. Why don't you just do the  
10 testimony at this point. I don't think we need -- since  
11 it's something we could potentially take official notice  
12 of. But at this point I would have you swear. If you  
13 would raise your hand and -- stand and raise your right  
14 hand.

15

16 ANDREW MATOSICH,  
17 produced as a witness, and having been first duly sworn by  
18 the Administrative Law Judge, was examined and testified  
19 as follows:

20

21 JUDGE KWEE: Thank you. You may sit.

22

23 APPELLANT TESTIMONY

24 MR. MATOSICH: My testimony is in the form of a  
25 prepared statement, after which I'm certainly open to any



1 questions.

2 Members of the panel, counsel for the Department,  
3 I'm Andrew Matosich the founder and manager and a member  
4 of Snowflake Factory, LLC. I appreciate the opportunity  
5 to be heard on this matter. In addition to my testimony  
6 today, this panel has before it the previously sworn  
7 testimony of four other percipient witnesses to various  
8 aspects of the transaction under consideration today:

9 Mike Stevens the president of the seller, Fleet  
10 Planes, Inc.; John Barnett, the seller for the agent and a  
11 percipient witness to the formation of the agreement  
12 between Fleet and Snowflake; Mike Talbot general manager  
13 of Glacier Jet Center with whom I personally negotiated a  
14 hangar-lease agreement for the storage of the aircraft  
15 after Snowflake had accepted the aircraft; Tom Johnson,  
16 founder of AirPower Insurance who brokered the first  
17 insurance written on the aircraft.

18 MR. KWEE: I'm sorry. I'm being asked if you  
19 could slow down a little.

20 MR. MATOSICH: Oh, I'm sorry.

21 MR. KWEE: Thank you.

22 MR. MATOSICH: Tom Johnson founder of AirPower  
23 Insurance, who brokered the first insurance written on the  
24 aircraft, which was issued on February 10th, 2015.

25 None of these declarants owed me or Snowflake any

1 obligation or owe me or Snowflake any obligation. None of  
2 these individuals have been shown to have any reason or  
3 incentive to say anything but the truth in their sworn  
4 declarations. And now personally have none that would so  
5 incentivize them. According to the declarations  
6 submitted, each was under oath and aware of the penalty of  
7 perjury, as was I in submitting my declarations.

8           The Department, however, has attempted to impeach  
9 my sworn testimony, and by implication, that of the other  
10 declarants in this matter, not by cross-examination or by  
11 calling percipient witnesses, with the following four  
12 documents: The form bill of sale; the signed registration  
13 application; the signed hangar-lease agreement; and the  
14 declaration from me that accompanied the initial filing  
15 with the Department on August of 2015.

16           This prepared testimony attempts to contextualize  
17 the documents and their intended purpose and to counter  
18 the Department's many assertions about them and by  
19 implication about my veracity and my credibility. It is  
20 my veracity and credibility, according to the Department,  
21 that is at the heart of the Department's case. It is fair  
22 for you to question me. It is fair for you to wonder  
23 whether there's an ulterior motive.

24           Obviously, the tax liability here is not  
25 insubstantial. Certainly, one can ascribe to be in

1 motivation to be less than truthful in the declarations  
2 that I have submitted to the Department and to the  
3 testimony that I am giving to you today. It is not,  
4 however, by implication fair for the Department to ascribe  
5 that to others.

6           So who am I? If you're going to judge my  
7 veracity and my credibility, if that is central to the  
8 Department's case against our position, who am I? I'm a  
9 Montana native where I flew from yesterday to be here  
10 today. I received my undergraduate degree in political  
11 science in history with a minor in the Russian language  
12 from the University of Montana. For just short of five  
13 years, I was an analyst with the Offices of Soviet  
14 Analysis at the Central Intelligence Agency at their  
15 headquarters in Langley.

16           In 1989 I left the CIA to attend the University  
17 of Virginia School of Law. Please do not hold any of the  
18 typographical errors in my brief against that fine  
19 institution. After law school, I practice with two  
20 national law firms. In 1995 I left private practice to  
21 become the general counsel of a small entertainment  
22 company that opposing Counsel referenced.

23           Summit enjoyed some commercial success. In 2012  
24 we sold the company, and I founded Snowflake Factory. In  
25 addition to some entertainment properties the company

1 continues to build up Snowflake, investment in startup  
2 companies, real estate, and other businesses. I'm a  
3 private pilot. And although, I have been a partner in  
4 aircraft in the past, I personally had not been involved  
5 in the acquisition of an aircraft prior to the acquisition  
6 of the aircraft which is the subject of these proceedings.

7 My prior ownership was simply to buy into a  
8 partnership that had already acquired the aircraft prior  
9 to my buy-in. Although Snowflake had been looking for an  
10 aircraft for almost two years by the time the opportunity  
11 to purchase 441XRAY, the aircraft at issue here, I was  
12 still relatively unfamiliar with the process documents and  
13 significance of all for tax purposes the various forms to  
14 be filed at the time of the transaction.

15 Yes, I am an attorney admitted to practice before  
16 all the courts in the State of California. Yes, I'm also  
17 a businessman. But in this transaction, I was acting as  
18 neither a sophisticate, nor was I acting as an attorney.  
19 This transaction was supposed to be a simple one. As I  
20 stated in the beginning of my argument, it was supposed to  
21 be an Oregon plane owned by an Oregon company brokered by  
22 an Organ broker/dealer that was supposed to be consummated  
23 on the ground in the Portland, Oregon.

24 Prior to January 23rd, 2015, the basic one-page  
25 agreement with the original seller, MV Forger, that Mike

1       Stevens prepared and had it -- and had it concluded all  
2       with signatures when Snowflake received the news that  
3       there was a 1031 exchange that had to be handled on a  
4       hurry-up basis.

5               JUDGE CHO: I'm sorry. Just a reminder to talk a  
6       little bit slower.

7               MR. MATOSICH: I apologize.

8               JUDGE CHO: Reading always makes you talk faster.

9               MR. MATOSICH: I'm sorry. I feel awkward. It's  
10      like -- I apologize again.

11              So on the 23rd of January when we found out that  
12      MV Forger wanted to close a 1031, I objected. The plane  
13      was still going to be in California on January 27th. We  
14      did not bargain for a California plane, and we were not  
15      entirely aware of all the issues at that time that would  
16      flow in acquiring a California plane.

17              As I said in the beginning of my argument earlier  
18      today, no good deed goes unpunished. We would not be  
19      sitting here if I had just said no to the deal. But I was  
20      persuaded to see if we could not make the deal happen in  
21      the time we had available to us. Barnett suggested  
22      loaning Fleet the money to buy the plane so Fleet could  
23      conclude the sale in Oregon, and I welcomed that degree of  
24      creativity.

25              My concern was timing and how to properly secure

1 the money that would be used for the loan. Stevens  
2 objected to a full set of loan documents, and it became  
3 obvious there really was no time for that. The escrow  
4 agent then said that she could easily process two  
5 separate -- two sets of paperwork as much as she could  
6 want. One set for the transfer from MVF to Fleet and a  
7 second effecting the loan -- effecting the loan from  
8 Snowflake to Fleet.

9 According to Barnett, it was she who suggested  
10 using the bill of sale as collateral as a security  
11 instrument, something that she said had been done before.  
12 So we agreed the FAA Bill of Sale would be security for  
13 the loan. The loan would be used by Fleet to buy the  
14 plane, and Fleet would conclude the work that was  
15 remaining to be done, make it airworthy, turn it over to  
16 Barnett, and have it delivered to Oregon where the deal  
17 would be consummated and be concluded as it was originally  
18 contemplated with MVF.

19 Now, during this process and another prior plane  
20 deal that Snowflake had come close to concluding, the FAA  
21 Bill of Sale has almost been referred to as the title. I  
22 knew that there is no federal title, per se, for aircraft.  
23 I knew that the FAA Bill of Sale would be used on the FAA  
24 registry to give notice to potential creditors and other  
25 services.

1           But we, Stevens, Barnett, and the escrow officer  
2     referred to it as title, like, a paper title to a car. It  
3     does not mean that I was or any of us were forming any  
4     legal opinion about what constituted title in the State of  
5     California, or that we understood, despite any proscribed  
6     legal sophistication, that we understood the arcane nature  
7     of how title is used under the tax code in the State of  
8     California.

9           We use the word title as a colloquialism  
10    shorthand for the document, the FAA Bill of Sale. Now,  
11    there's not more I can say about the form that has not  
12    already been said. I just want to reiterate that it was  
13    not my intent that that document was to convey title. The  
14    agreement between the parties from my understanding of the  
15    agreement was that it was not conveying title.

16          Now, the registration. The Department has  
17    introduced the FAA Aircraft Registration Form that I  
18    signed on January 27th, 2015. They point to its date that  
19    it certifies ownership, that it has my signature. And  
20    they basically ask the question, if you told the FAA on  
21    January 27th, 2015, that you own the plane then why are  
22    you telling the State of California now that you did not?  
23    It's a fair question. If I were sitting in your seats,  
24    I'd be asking that question.

25          First, this is the first time that the Department

1 has produced the registration form as evidence or rebuttal  
2 during the administrative hearing process. If my memory  
3 serves correctly, it was mentioned in passing the  
4 Department's analysis after I request for redetermination  
5 but was not produced. It was not mentioned in the  
6 decision nor was it mentioned in the Department's brief in  
7 response to our brief here.

8 It only came in on the sua sponte request from  
9 Judge Kwee to have additional documents added after we had  
10 concluded our briefing, and the Department had decided not  
11 to file a reply to our reply. Now, that doesn't mean that  
12 the document isn't valid. That doesn't mean that the  
13 document doesn't stand for its proposition. That's fair.

14 I'm saying this because my credibility is at  
15 issue here. There seems to be an implication that by not  
16 raising the registration in any of our paperwork, that  
17 somehow, I was trying to hide something from this panel,  
18 which is not the truth. Had it been raised in their  
19 response to our brief, we would have addressed it and  
20 addressed it squarely as I am about to do factually with  
21 my testimony.

22 When I signed that document in 2015, there was  
23 nothing nefarious going on. As I just testified, this was  
24 Snowflake's first rodeo, so to speak. This is the first  
25 time that Snowflake, and certainly I on behalf of



1     Snowflake, had been involved in an aircraft purchase  
2     transaction. Both the bill of the sale and registration  
3     were processed through escrow. Yes, it was a  
4     sophisticated escrow agency upon which I was relying.

5             As in a purchase of a house, all the paperwork  
6     other than the written agreement originated and was  
7     processed through escrow. Regarding the registration  
8     application, Snowflake had been advised by the escrow  
9     agent that in order to lawfully fly the aircraft it would  
10    need a pink slip. And back in 2015, based on the actual  
11    physical form, the final carbon copy at the back of the  
12    registration was pink. At the bottom of the registration  
13    form -- which you can refer to -- it does say that holding  
14    that pink copy allows the registrant -- the registrant  
15    applicant to fly the aircraft under the authority of the  
16    application for up to 90 days.

17            The escrow agent had advised me that in order to  
18    fly the aircraft after we accepted the aircraft, we would  
19    need that pink slip. So as a matter of course, I signed  
20    that document as of the 27th so that it could actually be  
21    submitted to the FAA, and the pink slip could actually be  
22    in our position. And as when the aircraft would be  
23    accepted, we would be able to lawfully fly.

24            Now, I take the Department's position, and I take  
25    it seriously. I'm a member of the bar in the State of

1 California. I'm a licensed pilot to fly federally. I do  
2 not take lightly making these statements to the Federal  
3 Aviation Administration. I do not take lightly and have  
4 not made statements of fact to the State of California.  
5 The registration as filed on January 27th, 2015, was, yes,  
6 technically an error. We did not own the aircraft on that  
7 date.

8 And although, the document is being disallowed  
9 admission into evidence, after consulting with an attorney  
10 in Oklahoma City and positing to that attorney the  
11 circumstances of how that document was signed  
12 perfunctorily in order to get a pink slip and advising the  
13 same as to the actual facts of this transaction, we have  
14 self-reported to the FAA that misstatement on that form.  
15 And this is where I would bring up today's form because it  
16 is materially different from the one in 2015.

17 It says squarely and clearly on its face that a  
18 misstatement is subject to criminal liability up to a  
19 \$250,000 fine and up to 5 years in jail. So if you want  
20 to doubt my veracity, consider that I am, within the  
21 statute of limitations, submitting and self-reporting the  
22 error on that form to the FAA. And I'm prepared for  
23 whatever consequences flow my way because I am not  
24 misstating the truth to you, members of this panel and the  
25 State of California.

1           The Department also relies on the contract with  
2     the Glacier Jet Center. The declarations that are already  
3     in front of the party -- excuse me, in front of the panel,  
4     clearly indicate that that agreement was not concluded  
5     until February 11th, 2015. The declaration or statement  
6     under oath of Mike Talbot who was then and still is the  
7     manager of the Glacier Jet Center affirms that agreement  
8     was not concluded until the 11th and was signed on the  
9     11th and was backdated only for the purpose of their  
10    internal administrative convenience.

11           The lease payment was a complete and/or lease  
12    payment. It was a number that we bargained over and  
13    concluded while I was there on the 11th. So the contract  
14    did not actually form. The recitals in the contract as to  
15    the ownership were just between the parties and part of  
16    their form. It was not a statement that we owned the  
17    aircraft on the 1st. We weren't even there on the 1st.  
18    The agreement was negotiated and agreed on the 11th.

19           Finally, my declaration from August 20th of 2015,  
20    I believe. In filing the paperwork, asking for the  
21    exemption under the Interstate Commerce Exemption, I did  
22    state that we took title to the aircraft while the  
23    aircraft was here on the ground in the State of  
24    California. That was in reference to the FAA Bill of  
25    Sale. I stated as much in a subsequent declaration on

1 August 20th, 2006.

2 Now, the Department did not produce that  
3 declaration. They did not produce the declarations that  
4 were submitted in support of that declaration. It's a  
5 one-way ratchet with the Department. They don't ask for  
6 clarification or have not asked me for clarification, but  
7 we did clarify the nature of the FAA Bill of Sale.

8 Finally, there is the conduct of the parties. I  
9 ask not entirely as a rhetorical question. Why, if we  
10 intended, as I did not, title to transfer in the State of  
11 California, why didn't I just jump into the airplane and  
12 fly to Portland? Why did it even have to go to Portland?  
13 Why did it fly to Montana? Why was it flown in interstate  
14 commerce? Why did we bother to go through the  
15 application? Why, if in fact, we felt the title  
16 transferred in the State of California would we even  
17 bother?

18 I can assure you that in the five years since we  
19 made the application, I've spent personally more hours on  
20 this matter than the tax lie -- if you were to attach a  
21 standard billing rate to me as an attorney or even a  
22 salary to me as an entertainment executive, than this  
23 matter is worth. That doesn't saying anything in and of  
24 itself. But it would hopefully go to my veracity and  
25 credibility as to why we are continuing to pursue this.

1           The economically efficient matter would be to  
2       simply admit and pay the tax and be done, but that's not  
3       the truth. There's really nothing more that I can say.  
4       But if you have any questions or if the State would like  
5       to cross-examine me as to my veracity, I'm certainly open  
6       to it.

7           JUDGE KWEE: All right. And I believe at this  
8       time CDTFA does have an opportunity to ask questions of  
9       the witness.

10          MS. HE: We have no questions.

11          JUDGE KWEE: Okay. So I do have a couple of  
12       questions, and I think my panel members may also. But I  
13       just wanted to clarify, and I think you might have  
14       discussed this at the beginning of your presentation. So  
15       with regards to the one-million dollar payment that was  
16       paid to the seller for the airplane, was that paid through  
17       escrow?

18          MR. MATOSICH: Which payment?

19          JUDGE KWEE: Oh, so the aircraft purchase  
20       agreement, I understand that there was a sale for the  
21       airplane for one-million dollars. And that's referenced,  
22       I believe, in your Purchaser's Declaration, Exhibit B.

23          So Appendix B -- Exhibit B, where it says, "Fleet  
24       Planes, Inc., an Oregon corporation hereby agrees to sell  
25       to Snowflake Factory, a California limited liability

1     company, a 1982 Cessna Conquest serial... for the sum of  
2     one-million dollars under the following conditions." And  
3     the document that is discussed by both parties.

4             I just want to make sure I understand the details  
5     here. So that one-million dollars, that was paid through  
6     escrow; is that correct?

7             MR. MATOSICH: The million dollars, yes. The  
8     million dollars, I think actually at the time escrow may  
9     have already been funded. I do not actually recall as I  
10    sit here today. But escrow may have already been funded  
11    in anticipation of the MVF/Snowflake transaction. And so  
12    the million dollars was sitting there. That was -- that  
13    was part of the convenience. The money was this. The  
14    money was readily available. Fleet Planes didn't have it  
15    and couldn't basically, so effected the two-step  
16    transaction that Barnett suggested. So --

17            JUDGE KWEE: So I guess what we're trying to  
18    clarify is because escrow closed on the 27th, is it  
19    correct to say that the one-million dollars was paid to  
20    the -- was disbursed from escrow to the seller on the  
21    27th -- January 27th?

22            MR. MATOSICH: Well, the -- whether the money  
23    went from the escrow account to the seller or went  
24    directly to MVF I -- I honestly don't recall. I'm happy  
25    to supplement that with an actual factual statement to

1     that effect, but I honestly don't recall. But its purpose  
2     was to be used by Fleet planes to pay MVF.

3             MVF did transfer ownership of the aircraft to  
4     Fleet, and Fleet by virtue of the bill of sale represented  
5     that they had title. And there is, as a matter of record  
6     which you can take judicial notice, there is an FAA Bill  
7     of Sale, I believe, from MVF to Fleet on record.

8             JUDGE KWEE: Okay. So, basically, the  
9     disbursement of funds was not held up on the acceptance of  
10    the delivery in Oregon? Is that --

11            MR. MATOSICH: Well, the funds had to be paid to  
12    MVF for Fleet to acquire the aircraft.

13            JUDGE KWEE: Okay.

14            MR. MATOSICH: Yeah. So that had to happen.  
15    That was the -- that was the hurry-up nature of the  
16    1031 Exchange. They needed to close that deal, and that's  
17    why John suggested -- John Barnett suggested that Fleet  
18    could interpose itself between MVF and Snowflake and then  
19    complete the sale in Oregon.

20            JUDGE KWEE: Okay. So I guess one difficulty I'm  
21    having grasping this is it seems you have 1031 transaction  
22    with the original owner of the aircraft. And in order to  
23    qualify, I guess they have to have -- make an exchange or  
24    sale within a certain amount of days. And I'm just  
25    wondering is it the case that they are saying, hey, the

1 sale occurred on January 27th because that's our deadline  
2 for the 1031. But then Snowflake Factory is saying the  
3 sale occurred on 2/10 because that's when the out-of-state  
4 transaction occurred. I'm just wondering if there is,  
5 like, some conflict there that the parties are actually  
6 both wanted different days of this agreement and trying to  
7 consolidate it so that there was a sale for Snowflake on  
8 the 2/10 and the sale for the ultimate owner there, the  
9 seller of the aircraft on January 27th?

10 MR. MATOSICH: Yeah, look. There's -- I  
11 understand. It's a form over substance question or  
12 substance over form question, I suppose. This is not an  
13 artifice. Right? It was not our intent to construct an  
14 artifice. Our intent basically was to do a two-step sale.  
15 Sale one, MVF to Fleet for a million dollars. So Fleet  
16 sold -- excuse me -- MVF sold Fleet the aircraft for a  
17 million dollars.

18 Now, Fleet has attested to that, to title while  
19 the aircraft was sitting in California. The transaction  
20 between Snowflake and Fleet was not a sale. It was a loan  
21 that was basically repaid when the aircraft was ultimately  
22 accepted in Oregon. So the 1031 Exchange was complete as  
23 of the 27th as far as I know.

24 I mean, I'm testifying to things outside my  
25 direct knowledge. I assume that they concluded their 1031



1 Exchange because they had asked -- MVF had asked to  
2 conclude the -- that part of the transaction.

3 So they got the airplane off their books. It was  
4 sold to Fleet. And that basically ended MVF's involvement  
5 in the transaction.

6 JUDGE KWEE: Okay. I guess on the aircraft bill  
7 of sale that has been discussed by the parties, I guess  
8 I'm just trying to understand because that does have the  
9 language that their -- the seller does hereby grant sale  
10 transfer and deliver all the rights, title, and interest  
11 in it to such aircraft to Snowflake. And that was Fleet  
12 Planes to Snowflake.

13 And I'm just wondering the legal significance of  
14 this document because it appears that it was recorded with  
15 the FAA and trying to consolidate that with the argument  
16 that -- well, the other document that has the aircraft  
17 sale-purchase agreement required for acceptance in Oregon,  
18 and I'm just trying to figure out the rights of the  
19 parties.

20 For example, there was a dispute with the  
21 acceptance because, you know, the sale -- this FAA  
22 document says that the sale of right, title, and interest  
23 occurred on the 27th, and I'm trying to, you know, like  
24 consolidate or put the two together and how they interact  
25 together. That's kind of the difficulty I'm trying to

1 understand.

2 MR. MATOSICH: Sure, I understand. And I  
3 appreciate the State's attribution to me to great legal  
4 sophistication, but in this transaction, I was acting  
5 basically as a businessman. There was a million-dollar  
6 transaction. And I know that seem like a lot of money,  
7 but in the world of airplanes a million dollars is not a  
8 lot of money.

9 You can get a modern small aircraft today that  
10 are four seaters that can approach a million dollars in  
11 cost. It's just the nature of the cost of that  
12 transaction, and this was a plane that was readily  
13 available. We've been looking for a long time, and the  
14 deal was a hurry-up deal. At some point as a businessman  
15 what you do is you say, let's not get in the way of the  
16 transaction. That doesn't mean that we're sloppy.

17 But the contract that you're having difficulty  
18 with, if I understand your question correctly, was the  
19 original contract between MVF and Snowflake. That's how  
20 it started, and that was very clean and very easy. Now,  
21 the date of the anticipated closing was not the 27th. It  
22 hadn't even been formally decided and agreed because we  
23 didn't know when the aircraft would actually be finished  
24 and done. The seller couldn't actually say -- tell us  
25 when that plane would be finished from its post

1 prepurchase correction work.

2           So that document was over that weekend hurriedly  
3 modified within the artificial constraints that Stevens  
4 imposed of. He wanted to keep the document to one-page.  
5 I said in my declaration actually that, you know, I rue  
6 the day that I didn't actually insist as a matter of fact  
7 that that contract have more detail. But I was relying on  
8 the fact that I had John Barnett who understood what the  
9 true nature of the transaction was. I wasn't expecting  
10 Fleet to contest it and by virtue of their declarations  
11 they have not contested the nature of that transaction.

12           It was let's get this done. And that document  
13 was not well purposed or well suited for the two-step  
14 transaction, admittedly. But the fundamental elements of  
15 the transaction, as I argued earlier today in argument,  
16 are there as to the delivery certificate and the intent of  
17 the parties as it related to the agreement. So the intent  
18 was clear. And this is a -- again, it's a two-step  
19 transaction. So the document you're looking at really has  
20 no bearing as to the Fleet MVF transaction. You would  
21 have to ask Fleet and MVF what transpired in their  
22 transaction. And you'd have to ask MVF whether or not  
23 they met the requirements for their 1031 Exchange.

24           This document, unfortunately, was basically a  
25 sales contract that had to be modified at the end in a

1     hurry-up fashion to accommodate that 1031 Exchange but  
2     doesn't relate to their 1031 Exchange at all. So it's not  
3     as though you're telling the IRS -- Snowflake had nothing  
4     to do with the 1031. Snowflake is not telling the IRS,  
5     oh, here's a 1031, and then telling you, no there was no  
6     1031 because that happened 10 days later.

7             That was the point of doing the two-step deal was  
8     to allow Fleet -- excuse me -- allow MVF by selling the  
9     airplane to Fleet to meet its timely deadline and to  
10    create more time to get the aircraft finished and  
11    ultimately back to work where the deal with MVF was  
12    supposed to happen. So MVF is out of the picture. Fleet  
13    has assumed ownership and responsibility for the plane.  
14    Basically, Mike Stevens as the broker for MVF said I'm  
15    going to step in and effectively do you a favor. I'll  
16    take ownership of the airplane. You guys get your 1031  
17    done, and I'll deal with Snowflake.

18            Does that answer the question? I'm sorry.

19            JUDGE KWEE: Yes, I believe that was helpful.  
20    I'm not sure if my co-panelists have additional questions.

21            JUDGE STANLEY: Yes.

22            JUDGE KWEE: I'll turn it over to Judge Stanley.

23            JUDGE STANLEY: I'm also trying to wrap my head  
24    around the fact that both sides have referred to escrow  
25    and what's in there and what's not in there, but we don't

1     have that in our record. Is there any existing copy of  
2     the escrow instructions?

3             MR. MATOSICH: I don't know. Honestly, I don't  
4     know whether we have the escrow instructions or not. I  
5     can certainly look.

6             JUDGE STANLEY: Well, I'm not sure if that's --  
7     it might be a little bit too late for that. So I guess  
8     we're going based on whatever your recollection of what  
9     was in escrow at this point?

10            MR. MATOSICH: Yeah. Unfortunately, at this  
11    point unless -- again, if you want to open up for  
12    additional documents and submissions, I'm -- and so if I  
13    can find them.

14            JUDGE STANLEY: I'll leave that up to Judge Kwee  
15    whether he wants to do that. But I do want to know just a  
16    couple of things that I think would be helpful. You  
17    believe that the whole transaction was involved in one  
18    escrow. So MVF sold and was out, then Fleet became the  
19    owner.

20            MR. MATOSICH: Yes.

21            JUDGE STANLEY: Was there ever any follow-up with  
22    the release of the bill of stale lien or cancellation of  
23    the debt because Fleet -- until you received the plane,  
24    Fleet owed you a million dollars, and you had a security  
25    interest in their jet.

1           MR. MATOSICH:  It's actually not a jet.  It's a  
2   turbo prop.  But we --

3           JUDGE STANLEY:  Oh, I'm sorry.

4           MR. MATOSICH:  Yeah.  We were holding that.  We  
5   were holding the bill of sale as security.  We did not --  
6   I think that was the point of opposing Counsel's argument.  
7   She questioned why didn't we even bother to file.  I think  
8   it was a one-page form.  And again, despite my purported  
9   sophistication, I was unaware that there was a one-page  
10  security form.  It was not proposed by the escrow agent at  
11  the time.

12           And so we did not file the form alluded to  
13  earlier in argument by opposing counsel.  And so we had --  
14  we were holding an FAA Bill of Sale, which I don't want to  
15  engage in an argument, but it's not title itself.  It is a  
16  document filed on the FAA registry that puts people on  
17  notice, and the FAA acknowledges this.  It is decided  
18  under State law.  But there was no, sort of, formal  
19  cancellation that had to be filed with the FAA because the  
20  whole point was to put potential creditors on notice with  
21  the actual bill of sale.

22           And that's what the bill of sale and registry is  
23  for as I understand it.  I could be wrong.  I'm sorry.  
24  Again, it's because I'm -- it's not necessarily percipient  
25  testimony, but as we understood it at the time, the

1 registration with the FAA was simply to put other people  
2 on notice. And so we effected our purpose of securing our  
3 interest and loan in the aircraft because in theory it  
4 wouldn't be able to go anywhere without somebody doing a  
5 title check and saying, oh, there is a bill of sale here.  
6 What does this mean?

7 But the ultimate meaning and the ultimate intent  
8 as I understand it under law is the intent of the parties.  
9 Whether the FAA Bill of Sale -- I think we actually have  
10 this in our brief. Whether the bill of sale effects  
11 transfer of title or not is up to the parties. It is the  
12 intent of the parties. And I understand from the  
13 perspective of the Department trying to understand what  
14 the parties actually did or ascribed motivations to our  
15 conduct that may not necessarily be there, but the FAA  
16 Bill of Sale was not intended to convey title. It  
17 merged -- effectively it merged on acceptance of the  
18 aircraft. And that was kind of the beauty and simplicity  
19 of the transaction. We -- I'm sorry.

20 JUDGE STANLEY: Yeah, you're going back to  
21 argument.

22 MR. MATOSICH: I apologize.

23 JUDGE STANLEY: I'll just stop you there. But I  
24 do have another question, though, because you posited here  
25 that MVF as of the 27th was out, which in your

1 testimony --

2 MR. MATOSICH: That is my understanding. Yeah,  
3 that is my understanding. Yes.

4 JUDGE STANLEY: -- in your testimony that would  
5 make Fleet then, the owner --

6 MR. MATOSICH: Yes.

7 JUDGE STANLEY: -- until that delivery and  
8 acceptance?

9 MR. MATOSICH: Correct.

10 JUDGE STANLEY: Therefore, when you signed the  
11 delivery and acceptance agreement and it list that the  
12 risk of ownership is on the seller, does the MVF -- is MVF  
13 referred to as the seller at that point or --

14 MR. MATOSICH: No.

15 JUDGE STANLEY: -- Fleet?

16 MR. MATOSICH: No, I -- the documents on their  
17 face should be clear. Fleet is identified as the seller.  
18 In the one-page main body of the agreement, Fleet is  
19 identified as the seller on the delivery certificate. And  
20 so in reference to the seller, Fleet was the seller. So  
21 in the two-step transaction in the second part of the  
22 transaction, Fleet took ownership and sold the airplane.

23 JUDGE STANLEY: Okay. And who hired Mr. Barnett?

24 MR. MATOSICH: Mr. Barnett was hired by Mike  
25 Stevens, Fleet Planes, Inc.



1 JUDGE STANLEY: Okay. So he was in the employee  
2 of Fleet at --

3 MR. MATOSICH: Well, he's --

4 JUDGE STANLEY: -- at all times?

5 MR. MATOSICH: Yeah. I mean, based on his  
6 testimony as I understand it, what Mr. Barnett did or does  
7 was to act in this capacity on other transactions. So he  
8 was engaged, and I don't -- I'm not privy to the terms of  
9 their relationship. But he was engaged by Fleet and was  
10 acting as -- he was appointed as an agent of Fleet.  
11 That's the appointment of the agency form, which was  
12 specifically called put in the agreement. And then on the  
13 26th that document, which was exchanged between the  
14 parties, he appointed Mr. Barnett as the agent, as the  
15 seller's agent.

16 JUDGE STANLEY: All right. Nothing more.

17 MR. MATOSICH: Thank you.

18 JUDGE KWEE: Judge Cho?

19 JUDGE CHO: I don't have any questions. Thank  
20 you.

21 JUDGE KWEE: Okay. So I believe at this point  
22 we're ready to adjourn the hearing unless there's anything  
23 further the parties would like to bring up before we close  
24 this hearing today. Okay. So then today's hearing --  
25 well, thank you everyone for coming in.

1           And the judges will be holding this record open.  
2       Basically, it will probably be two weeks before we provide  
3       the transcript to you, possibly two weeks. At that point,  
4       the parties will have 45 days to provide their closing  
5       statements and any follow-up rebuttals that they have.

6           OTA will let the parties know when the transcript  
7       is available. Is it possible we can contact the parties  
8       by e-mail to let them know and to furnish the transcript  
9       by e-mail? Is there any objection?

10           MR. MATOSICH: No objection, Your Honor.

11           JUDGE KWEE: And for CDTFA?

12           MS. HE: No objection.

13           MS. SILVA: No objection.

14           JUDGE KWEE: Okay. So we will contact you as  
15       soon as the record is available.

16           And, basically, today's record is now adjourned.  
17       The record is being held open. Thank you.

18           (Proceedings adjourned at 3:09 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was  
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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 5th day  
of November, 2019.

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ERNALYN M. ALONZO  
HEARING REPORTER