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

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.

APPEARANCES:

Panel Lead:	Hon. ANDREW KWEE
Panel Members:	Hon. TERESA STANLEY Hon. DANIEL CHO
For the Appellant:	ANDREW MATOSICH
For the Respondent:	STATE OF CALIFORNIA DEPARTMENT OF TAX and FEE ADMINISTRATION By: MENGJUN HE MONICA SILVA LISA RENATI

I N D E X

OPENING STATEMENT

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.)

(Department's Exhibits were received at 8.)

Van Nuys, California; Tuesday, October 29, 2019

11:50 a.m.

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

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

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

JUDGE KWEE: Okay. And for CDTFA?

MS. HE: Mengjun He for CDTFA.

MS. SILVA: Monica Silva for CDTFA.

MS. RENATI: And Lisa Renati for CDTFA.

JUDGE KWEE: Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

MS. HE: Yes. Thanks.

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

MR. MATOSICH: Yes, Your Honor.

JUDGE KWEE: Okay. Thank you.

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

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

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

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

MS. HE: Correct.

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

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

JUDGE KWEE: Okay. Thank you.

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

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

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

MR. MATOSICH: Thank you, Your Honor.

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

OPENING STATEMENT

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

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

aircraft. The seller was an Oregon company. The broker was an Oregon broker. The airplane was an Oregon plane. It was supposed to be purchased in Oregon. That was the essence of the deal. And as I will describe and as our testimony has already testified to, the deal just went awry and became compressed in terms of time and last-minute changes had to be made.

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

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

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

MR. MATOSICH: Okay. Great.

The undisputed facts in front of this panel, as

we sit here today right now, is the transfer. The title could not transfer in the State of California because the Appellant came into neither actual nor constructive possession of the aircraft in the State of California.

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

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

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

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

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

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

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

MR. MATOSICH: Okay. Thank you.

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

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

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

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

Is it tracking?

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

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

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

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

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

MR. MATOSICH: I apologize.

JUDGE KWEE: Okay. We're good now.

MR. MATOSICH: Okay. I'm sorry.

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

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

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

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

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

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

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

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

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

As the declarants have already testified and is part of the record, the seller was obligated by contract to complete the sale by delivery of the aircraft to Portland, Oregon. Snowflake had no right to possess or control the aircraft until delivery inspection and acceptance. Barnett would be immediately appointed to be the forwarding agent by the seller, under the seller's control and authority, ownership of the aircraft. And only upon the mutual signature of the delivery certificate incorporated into the purchase agreement would ownership of the aircraft pass as and when attested to by the parties and notarized as the agreed form included in the contract required.

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

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

Are your screens active?

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

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

JUDGE STANLEY: Oh, I can see it.

MR. MATOSICH: All right. And now?

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

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

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

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

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

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

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

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

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

And so it was on the 27th, the date by which MV Forger insisted, that its portion of the now newly reconstituted agreement closed that had been agreed to by the parties, Snowflake made the loan to Fleet. Fleet acquired the aircraft. Ownership of the aircraft was transferred from MVF to Fleet, and Fleet granted security instrument consistent with the intentions of the parties, consistent with the understanding that the delivery certificate would control -- the security of the FAA Bill

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

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

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

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

no control of the aircraft in the State of California.

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

Are we tracking? I apologize.

JUDGE STANLEY: His screen wasn't moving.

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

MR. MATOSICH: I apologize.

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

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

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

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

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

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

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

Now, if that is to be disbelieved and title is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, is the question of consideration. Annotation 495.0468 is a question of, basically, what appears a related-company transaction or an aircraft owned by Company 1 was being transferred to Company 2, two parties. And it was, effectively, a transfer for no consideration. It was being transferred from one to the

other for convenience of the parties.

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

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

JUDGE KWEE: Mine is no longer in display.

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

JUDGE KWEE: Great. Thank you.

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

JUDGE KWEE: Thank you.

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

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

do that.

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

JUDGE KWEE: Yes. You may proceed.

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

JUDGE KWEE: Yes.

JUDGE CHO: I am.

MR. MATOSICH: Okay. Great.

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

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

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

Bill of Sale was simply security.

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

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

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

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

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

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

If this is the full sum total of the agreement

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

MS. SILVA: I thought this was argument.

JUDGE KWEE: Yeah, I --

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

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

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

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

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

JUDGE KWEE: Okay.

MR. MATOSICH: So contrary to California law,

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

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

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

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

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

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

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

of Tax Appeals for determining how to determine when, where, and how title transfers. In fact, the decision conducts an analysis of 2401 and concludes that, although, 2401 is informative, it does not necessarily overrule any of the prior case authority in the State of California.

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

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

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

remained at risk for all loss until acceptance. Snowflake, the purchaser, was not obligated to accept the plane, not entitled to control it, not entitled to possess it, and free to reject it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He represented himself that he was involved in the transaction, and he did, in fact, handle the transaction, as his own declaration attest. Furthermore, 6481(c)(1) sets forth that a retailer is engaged in business in the state as defined in Section 6203 if the retailer owns or leases real or tangible personal property in California. And the Department itself has argued, the bill of sale setting forth who has equitable and legal title to the aircraft the seller is attesting by this document that, in fact, the seller had both legal and equitable title to the aircraft on the date set forth on that FAA Bill of Sale. On the 27th, the aircraft was in the State of California. So at that time, the seller in the business of selling aircraft had property in the State of California. A representative in the State of California representing the transaction, property in the State of California being sold by a seller in the business. Thus, under 1684, the seller was engaged in the business of selling aircraft in the State of California.

Furthermore, as further evidence of the seller being in business, the seller put his dealer number on the

FAA Bill of Sale. So any person who is engaged in the business of selling tangible personal property is required to have a seller's permit. The seller was a person, a retailer, and seller under California law. Thus, the sale at issue here is subject to sales tax.

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

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

Again, Department has acknowledged this. So the

use of the aircraft was not its transportation for purposes of delivery from Fresno, California, to Portland, Oregon. But instead, the first functional use of the aircraft occurred out of the State of California in its flight from Portland, Oregon to Kalispell, Montana at Glacier Park International. Thereafter, the aircraft came back into the State of California.

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

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

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

THE HEARING REPORTER: Thank you.

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

This argument was somewhat difficult to make in our briefs. And I would just like to try and elucidate a little bit on it, if I can, to try and make the point

here. It's a technical construction issue, but it is an important issue in terms of what we view is the proper construction of the interstate commerce exemption.

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

THE HEARING REPORTER: So am I.

MR. MATOSICH: I apologize.

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

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

test.

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

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

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

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

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

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

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

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

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

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

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

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

MR. MATOSICH: I'm sorry.

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

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

So subsection (d) says notwithstanding

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

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

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

Interstate Commerce Exemption.

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

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

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

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

And that concludes our presentation.

JUDGE KWEE: Okay. Thank you.

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

(There is a pause in the proceedings.)

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

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

Do you have enough copies for that?

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

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

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

THE HEARING REPORTER: Can I ask a question?

JUDGE KWEE: Sure.

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

JUDGE KWEE: Sure. Off the record.

(There was a pause in the proceedings.)

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

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

MS. HE: Yes. Thank you.

OPENING STATEMENT

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

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

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

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

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

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

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

The Department's Exhibit A, the Aircraft Purchase Agreement, so titled by the parties, show that aircraft purchase agreement requires in Article 1 that I quote, "Close must occur by end of the day 27th, January 2015," unquote. In other words, the aircraft purchase agreement calls for consummation of the sale and the purchase transaction by January 27th, 2015, with the purchaser having to pay in full and seller having to transfer full title to aircraft upon close on January 27th, 2015, pursuant to the aircraft purchase agreement.

It's undisputed by the Appellant, fulfilled its end of the bargain as the purchaser under the purchase agreement by paying the full one-million-dollar purchase price by close of escrow on January 27th, 2015. The

Department's Exhibit B, the FAA Aircraft Bill of Sale, shows that consistent with the purchase agreement mandate that close occur by end of January 27th, 2015, and to fulfill seller's end of the contracts.

The parties caused the FAA Bill of Sale to be filed on January 27, 2015, on the day of close of the escrow. And the FAA Bill of Sales states in relevant part that I quote, "The owners of full, legal, and beneficial title to the aircraft does this 27th day of January 2015, hereby sell, grant, transfer, and deliver all rights, title, and interest in and to such aircraft onto Snowflake Factory, LLC, singularly this aircraft forever and the warrants and the titles thereof," unquote.

The language, the owners of full legal and beneficial title hereby sell, grant, transfer, and deliver all rights, title, and interest to Snowflake Factory LLC, carries such verbal plainness and distinctness that there is no need for inference and no room for difficulty in understanding the effect of a transfer, that the seller had both legal and beneficial title to the aircraft and then transferred all to Appellant on January 27th, 2015, retaining no rights, title, or interest whatsoever.

It's hard to conceive of any title transfer provisions more explicitly than that. And based on these documents, clearly, full title, not just legal title to

the aircraft, passed from seller to Appellant on January 27th, 2015. And because the language in this contractual document is clear and explicit leaving no need for inference and no room for difficulty in understanding, it governs the transaction at issue in accordance with California Rule.

And whatever different understanding or subjective to the intent, the parties now alleged to have before finalizing the purchase agreement and the associated bill of sale, even if true, are irrelevant to the contract as it was not integrated into and further contradicts the final binding-legal documents before us. The aircraft purchase agreement and the FAA Bill of Sale, which clearly and explicitly provide having transfer full title transfer, both legal and beneficial, on close on January 27th, 2015, while the aircraft was still in the California.

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

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

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

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

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

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

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

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

January 27, 2015.

And two, the parties, in fact, did fulfill the contractual requirement and apparently took title in California. Similarly, both Department's Exhibit A, the aircraft-purchase agreement in paragraph 2 and Exhibit B, the FAA Aircraft Bill of Sale on the filing stamp on the right, indicates that escrow on the transaction was handled by Insured Aircraft Title Services, Inc., which touts itself on its web as the world's leading aircraft title and escrow company facilitating the buying and selling of the aircraft around the globe each day since 1963.

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

In addition, the parties' choice of the form for

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

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

The above evidence clearly establishes that all rights, title, both legal and beneficial title, and the interest to the aircraft passed from the seller to Appellant on January 27th, 2015. Therefore, a sale within the meaning of Section 6006(a) occurred on January 27, 2015. And this is true, irrespective of when

and where risk of loss passed or when insurance or other responsibility of ownership under the purchase agreement passed.

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

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

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

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

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

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

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

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

The text and organization of the subdivision is also clear and is consistent with the regulatory background. As Appellant stated, Subdivision (b)(5) was added as a new subdivision in 2004 to Regulation 1620 to implement SB1100, which amended Section 6248 of the Revenue and Taxation Code to provide the 12-month test for vehicle, vessel, aircraft purchased outside of California.

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

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

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

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

The rule-making file in 2004 for 16 -- Regulation 1620(b)(5), took note of the statutory mandate that no change be made to the Board's existing regulation on interstate commerce use. And states, I quote, "As the amended statute seeks to make no change to the

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

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

Lastly, regarding Appellant's other miscellaneous arguments. Appellant's argument that this is a sales tax transaction fails because Revenue and Taxation Code, Section 6283 and the Regulation 1610(c)(2)(a) provide that the sale in this state of an aircraft is exempt from sales tax when the retailer is other than the person required to hold a California seller's permit. Instead the purchaser

must pay use tax.

The key language overlooked by Appellant is being required to hold a seller's permit, pursuant to Article 2 commencing with Section 6066 of Chapter 2. Section 6066, Application for Permit, provides in subdivision(a), that every person desiring to engage in or conduct business as a seller within this state shall file with the Board application for a permit for each place of business. In this case the Department is not ignoring that the seller sold aircraft. And the Department is also not arguing this sale is exempt from sales tax because it was an occasional sale. That was never the Department's position.

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

In addition, regardless of whether exempt -- the

exemption under Section 6283 and Regulation 1610(c)(2)(a) applies to the sale of the aircraft in California here as Appellant argued. That's the only argument we actually agree. Given that the contract requires delivery as the destination out of the state and delivery was actually made out of state, the sale in California, even if not exemped by Section 6283, would still be exempt and the Revenue and Taxation Code, Section 6396 and Regulation 1620(a)(3)(b) for sales in California. That exemption applies where the tangible, personal, property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside of this state by the retailer.

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

As to Appellant's other arguments that the

transaction was a sale upon approval within the meaning of the UCC Section 2326, such that the sale does not occur until the purchaser accepts a property. A sale on approval is one in which the delivered goods may be returned by the customer even though they conformed to the contract.

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

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

sophistication in business transactions.

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

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

Taking the responsibility of ownership and the risk of loss does not turn a transaction into a -- a transfer of ownership. A common example consists, you know, in the -- pardon me. Sorry.

You know, in the commercial lease context it's very common to come across triple leases. So in those situations the lessee would pay for the insurance, will pay for property tax, and pay for maintenance, which are typically the responsibility of the owner. But taking those responsibilities of ownership does not make the lessee the owner nor the owner a non-owner suddenly.

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

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

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

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

For example, in Chevron USA, Inc. versus the State Board of Equalization, the California Appellant Court in response to a similar argument asserting title based on who carried the insurance coverage stating, I quote, "So what," unquote. The court went on to explain that is no authority that a purchase of insurance by a

party means delivery or possession of or title to the property.

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

So transfer of title is the way to transfer ownership. But transfer of possession only constitutes sale when the transfer of possession was in lieu of the transfer of title. Appellant spent much time discussing the Northrop Corp. versus BOE case. But that case Appellant represented that in that case the title requires possession. But what the case actually said is, for

example, in discussing the tooling ownership.

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

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

And just some overall comment to Appellant's opening statement. We agree with the Appellant that the liability, the decision can be made as a matter of law,

but not the law represented by Appellant. Appellant's liability is clear given the applicable law and evidence.

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

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

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

explicit language is to govern its interpretation.

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

And to quote another case, it's Rodriguez versus Auto. That's 2013 appellate case. If the terms of the contract are unambiguous, there's no occasion for additional evidence of the parties' subjective intent since their actual intent for purpose of contract law is that to which they manifested assent by executing the agreement. And of course, the Civil Code also said, clearly, in Section 1639, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone.

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

And this presumption may be rebutted only by clear and convincing evidence. But here, all Appellant has offered as proof is just a set of declarations, which in essence, are unsubstantiated allegations which has no basis in objective evidence whatsoever. They attracted so much doubt and painted such a highly and unlikely set of alternative facts, given the contract's deliberate choice of words, the parties' sophistication and the circumstances of the strict and close deadline and the parties' course of conduct following the close of escrow, that in no way can the declarations meet the clear and convincing standard.

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

And as discussed previously, the language of the contract in this case are so clear and explicit, so they will govern the contract. And the Appellant cannot now make a new contract for the parties or to rewrite the clear terms of the lawful contract through the subjective

intent as expressed in the declarations. And, of course, they -- given they have no proof at all with so much contradiction with the objective evidence on the record, they cannot meet the clear and convincing evidence.

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

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

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

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

JUDGE KWEE: Okay. Thank you.

MS. HE: Yeah. That's in the Department's Exhibit E.

So the member --

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

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

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

So with all the parties' background in mind, let's now review Appellant's supporting declarations which indicates that the parties had an understanding that a sale was a sale on approval, or it only conveyed as security interest or title or ownership would not and did

not pass upon delivery. But by their own accounts in the declaration, based on this understanding, some last-minute changes were made to the pending written purchase agreement to reflect the party's understanding.

Given such an order of events and given the sophistication of the parties and the multimillion dollar purchase at stake, as well as the handling of the escrow by a well-established escrow company specializing exclusively in aircraft purchases and further, given Appellant's full understanding of the legal effect of the title document and the legal effect of a contract with all the explicit terms, one would expect that the purchase agreement or some other written agreement, such as escrow instructions or other things, would reflect such a purported understanding, if indeed the purported understanding was agreed upon and acted upon.

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

delivery at the destination.

And then when you look at Paragraph 2 of the aircraft purchase agreement, it said, "Purchaser shall pay remainder of the purchase price after satisfactory completion of the prepurchase inspection." This indicates that the only occasion purchaser had to reject the aircraft is at the completion of the prepurchase inspection which refutes allegation of an open sale on approval.

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

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

Paragraph 5 says, "Recent loss or damage to the aircraft shall pass to purchaser when purchaser takes physical possession of the aircraft at the POX." It could have just easily said, "Title and the risk of loss shall pass," but did not. Similarly, the delivery slip only says -- contrary to what Appellant wanted to believe -- "Responsibility of ownership and the risk of loss shall pass." It could have more easily said, "Ownership transfer," using fewer word. But, again, it did not.

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

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

Thank you.

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

MR. MATOSICH: May I be heard?

JUDGE KWEE: Oh, sure.

MR. MATOSICH: I would just like to respond, if I could. And I would like to respond with the following motion. Opposing Counsel's argument is very detailed and

very extensive, and I commend her on it. I would have expected to see that in Department's brief because it's very detailed. And as a matter of due process, I would have expected to see that level of argument and that level of specificity and recitation of code and regulations in the opposition brief, which was not there.

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

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

JUDGE KWEE: And back again to CDTFA's position.

MS. HE: Yeah. We object to that, obviously. The Department's position has never changed. That sole issue is whether title transferred in California. And all the arguments, all the citations to it, and everything else, that was raised by Appellant in various points. And it also goes to the exact sane issue as the -- as narrowed down in the prehearing conference order.

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

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

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

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

JUDGE KWEE: Okay. Why don't we take a brief

recess for our court reporter and also for us to discuss this. And we'll get back at -- how about 2:30 and resume this proceeding. That's nine minutes from now.

(There is a pause in the proceedings.)

JUDGE KWEE: We're going on the record.

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

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

Okay. So with that said, the taxpayer has indicated that he doesn't have an objection. And I'm not sure if CDTFA had an objection for the record. But if you

would like to make an objection, now is your chance.

MS. SILVA: No objection.

JUDGE KWEE: Okay. So at this point, we're going to proceed with testimony from the taxpayer's representative, Mr. Matosich, after which we will adjourn the hearing.

So, Mr. Matosich, you may proceed.

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

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

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

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

MR. MATOSICH: There's only one. There's a document that's been objected to. And then, of course, I make reference to the current FAA registration form as a -- basically, as for judicial notice of it because it is distinctly different from that which was signed in 2015.

And is relevant, effectively, to issue credibility and certification.

JUDGE KWEE: Is the current FAA document in record?

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

JUDGE KWEE: Okay.

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

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

ANDREW MATOSICH,

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

JUDGE KWEE: Thank you. You may sit.

APPELLANT TESTIMONY

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

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

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

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

MR. MATOSICH: Oh, I'm sorry.

MR. KWEE: Thank you.

MR. MATOSICH: Tom Johnson founder of AirPower Insurance, who brokered the first insurance written on the

aircraft, which was issued on February 10th, 2015.

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

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

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

Obviously, the tax liability here is not insubstantial. Certainly, one can ascribe to me a motivation to be less than truthful in the declarations that I have submitted to the Department and to the testimony that I am giving to you today. It is not, however, by implication fair for the Department to ascribe that to others.

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

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

Summit enjoyed some commercial success. In 2012

we sold the company, and I founded Snowflake Factory. In addition to some entertainment properties the company continues to develop Snowflake, invests in startup companies, real estate, and other businesses. I'm a private pilot. And although, I have been a partner in aircraft in the past, I personally had not been involved in the acquisition of an aircraft prior to the acquisition of the aircraft which is the subject of these proceedings.

My prior ownership was simply to buy into a partnership that had already acquired the aircraft prior to my buy-in. Although Snowflake had been looking for an aircraft for almost two years by the time the opportunity to purchase N441X, the aircraft at issue here, I was still relatively unfamiliar with the process documents and significance of all for tax purposes the various forms to be filed at the time of the transaction.

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

Prior to January 23rd, 2015, the basic one-page agreement with the original seller, MV Forger, that Mike Stevens prepared and had it -- and all but been concluded all with signatures when Snowflake received the news that there was a 1031 exchange that had to be handled on a hurry-up basis.

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

MR. MATOSICH: I apologize.

JUDGE CHO: Reading always makes you talk faster.

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

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

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

creativity.

My concern was timing and how to properly secure the money that would be used for the loan. Stevens objected to a full set of loan documents, and it became obvious there really was no time for that. The escrow agent then said that she could easily process two separate -- two sets of paperwork as much as she could want. One set for the transfer from MVF to Fleet and a second effecting the loan -- effecting the loan from Snowflake to Fleet.

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

Now, during this process and another prior plane deal that Snowflake had come close to concluding, the FAA Bill of Sale had almost always been referred to as the title. I knew that there is no federal title, per se, for aircraft. I knew that the FAA Bill of Sale would be used

on the FAA registry to give notice to potential creditors and other services.

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

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

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

I'd be asking that question.

First, this is the first time that the Department has produced the registration form as evidence or rebuttal during the administrative hearing process. If my memory serves correctly, it was mentioned in passing the Department's analysis after our request for redetermination but was not produced. It was not mentioned in the decision nor was it mentioned in the Department's brief in response to our brief here.

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

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

When I signed that document in 2015, there was nothing nefarious going on. As I just testified, this was

Snowflake's first rodeo, so to speak. This is the first time that Snowflake, and certainly I on behalf of Snowflake, had been involved in an aircraft purchase transaction. Both the bill of the sale and registration were processed through escrow. Yes, it was a sophisticated escrow agency upon which I was relying.

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

The escrow agent had advised me that in order to fly the aircraft after we accepted the aircraft, we would need that pink slip. So as a matter of course, I signed that document as of the 27th so that it could actually be submitted to the FAA, and the pink slip could actually be in our possession so if the aircraft would be accepted, we would be able to lawfully fly.

Now, I take the Department's position, and I take it seriously. I'm a member of the bar in the State of California. I'm a licensed pilot to fly federally. I do not take lightly making these statements to the Federal Aviation Administration. I do not take lightly and have not made misstatements of fact to the State of California. The registration as filed on January 27th, 2015, was, yes, technically an error. We did not own the aircraft on that date.

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

It says squarely and clearly on its face that a misstatement is subject to criminal liability up to a $250,000 fine and up to 5 years in jail. So if you want to doubt my veracity, consider that I am, within the statute of limitations, submitting and self-reporting the error on that form to the FAA. And I'm prepared for whatever consequences flow my way because I am not

misstating the truth to you, members of this panel and the State of California.

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

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

Finally, my declaration from August 20th of 2015, I believe. In filing the paperwork, asking for the exemption under the Interstate Commerce Exemption, I did state that we took title to the aircraft while the

aircraft was here on the ground in the State of California. That was in reference to the FAA Bill of Sale. I stated as much in a subsequent declaration on August 20th, 206.

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

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

I can assure you that in the five years since we made the application, I have spent personally more hours on this matter than the tax lie -- if you were to attach a standard billing rate to me as an attorney or even a salary to me as an entertainment executive, than this

matter is worth. That doesn't say anything in and of itself. But it would hopefully go to my veracity and credibility as to why we are continuing to pursue this.

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

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

MS. HE: We have no questions.

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

MR. MATOSICH: Which payment?

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

So Appendix B -- Exhibit B, where it says, "Fleet Planes, Inc., an Oregon corporation hereby agrees to sell to Snowflake Factory, a California limited liability company, a 1982 Cessna Conquest serial... for the sum of one-million dollars under the following conditions." And the document that is discussed by both parties.

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

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

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

MR. MATOSICH: Well, the -- whether the money

went from the escrow account to the seller or went directly to MVF I -- I honestly don't recall. I'm happy to supplement that with an actual factual statement to that effect, but I honestly don't recall. But its purpose was to be used by Fleet Planes to pay MVF.

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

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

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

JUDGE KWEE: Okay.

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

JUDGE KWEE: Okay. So I guess one difficulty I'm having grasping this is it seems you have 1031 transaction with the original owner of the aircraft. And in order to

qualify, I guess they have to have -- make an exchange or sale within a certain amount of days. And I'm just wondering is it the case that they are saying, hey, the sale occurred on January 27th because that's our deadline for the 1031. But then Snowflake Factory is saying the sale occurred on 2/10 because that's when the out-of-state transaction occurred. I'm just wondering if there is, like, some conflict there that the parties are actually both wanted different days of this agreement and trying to consolidate it so that there was a sale for Snowflake on the 2/10 and the sale for the ultimate owner there, the seller of the aircraft on January 27th?

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

Now, Fleet has attested to that, to title while the aircraft was sitting in California. The transaction between Snowflake and Fleet was not a sale. It was a loan that was basically repaid when the aircraft was ultimately accepted in Oregon. So the 1031 Exchange was complete as

of the 27th as far as I know.

I mean, I'm testifying to things outside my direct knowledge. I assume that they concluded their 1031 Exchange because they had asked -- MVF had asked to conclude the -- that part of the transaction.

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

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

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

For example, there was a dispute with the acceptance because, you know, the sale -- this FAA document says that the sale of right, title, and interest

occurred on the 27th, and I'm trying to, you know, like consolidate or put the two together and how they interact together. That's kind of the difficulty I'm trying to understand.

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

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

But the contract that you're having difficulty with, if I understand your question correctly, was the original contract between MVF and Snowflake. That's how it started, and that was very clean and very easy. Now, the date of the anticipated closing was not the 27th. It hadn't even been formally decided and agreed because we

didn't know when the aircraft would actually be finished and done. The seller couldn't actually say -- tell us when that plane would be finished from its post prepurchase correction work.

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

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

they met the requirements for their 1031 Exchange.

This document, unfortunately, was basically a sales contract that had to be modified at the end in a hurry-up fashion to accommodate that 1031 Exchange but doesn't relate to their 1031 Exchange at all. So it's not as though you're telling the IRS -- Snowflake had nothing to do with the 1031. Snowflake is not telling the IRS, oh, here's a 1031, and then telling you, no there was no 1031 because that happened 10 days later.

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

Does that answer the question? I'm sorry.

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

JUDGE STANLEY: Yes.

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

JUDGE STANLEY: I'm also trying to wrap my head around the fact that both sides have referred to escrow and what's in there and what's not in there, but we don't have that in our record. Is there any existing copy of the escrow instructions?

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

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

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

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

MR. MATOSICH: Yes.

JUDGE STANLEY: Was there ever any follow-up with the release of the bill of stale lien or cancellation of

the debt because Fleet -- until you received the plane, Fleet owed you a million dollars, and you had a security interest in their jet.

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

JUDGE STANLEY: Oh, I'm sorry.

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

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

And that's what the bill of sale and registry is

for as I understand it. I could be wrong. I'm sorry. Again, it's because I'm -- it's not necessarily percipient testimony, but as we understood it at the time, the registration with the FAA was simply to put other people on notice. And so we effected our purpose of securing our interest and loan in the aircraft because in theory it wouldn't be able to go anywhere without somebody doing a title check and saying, oh, there is a bill of sale here. What does this mean?

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

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

MR. MATOSICH: I apologize.

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

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

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

MR. MATOSICH: Yes.

JUDGE STANLEY: -- until that delivery and acceptance?

MR. MATOSICH: Correct.

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

MR. MATOSICH: No.

JUDGE STANLEY: -- Fleet?

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

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

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

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

MR. MATOSICH: Well, he's --

JUDGE STANLEY: -- at all times?

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

JUDGE STANLEY: All right. Nothing more.

MR. MATOSICH: Thank you.

JUDGE KWEE: Judge Cho?

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

JUDGE KWEE: Okay. So I believe at this point we're ready to adjourn the hearing unless there's anything

further the parties would like to bring up before we close this hearing today. Okay. So then today's hearing -- well, thank you everyone for coming in.

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

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

MR. MATOSICH: No objection, Your Honor.

JUDGE KWEE: And for CDTFA?

MS. HE: No objection.

MS. SILVA: No objection.

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

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

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

HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 5th day of December, 2019.

_____
ERNALYN M. ALONZO
HEARING REPORTER