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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE OF APPEAL,)
)
DISPLAYIT INCORPORATED,) OTA NO. 18083582
)
APPELLANT.)
)
_____)

Transcript of Proceedings, taken at
12900 Park Plaza Dr., Suite 300, Cerritos,
California, 91401, commencing at 10:07 a.m.
and concluding at 11:46 a.m. on Thursday,
August 20, 2020, reported by Ernalyn M. Alonzo,
Hearing Reporter, in and for the State of
California.

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APPEARANCES:

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ JOSHUA ALDRICH
ALJ KEITH LONG

For the Appellant: MICHAEL CATALDO
JAVIER RAMIREZ

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION
MARIFLOR JIMENEZ
JASON PARKER
CHRISTOPHER BROOKS

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-9 were received at page 8.)

(Department's Exhibits A-J were received at page 8.)

P R E S E N T A T I O N

	<u>PAGE</u>
By Mr. Cataldo	10
By Ms. Jimenez	43

C L O S I N G S T A T E M E N T

	<u>PAGE</u>
By Mr. Cataldo	62
By Ms. Jimenez	66

1 Cerritos, California; Thursday, August 20, 2020

2 10:07 a.m.

3

4 JUDGE KWEE: We're going to go on the record now.

5 We're opening the record in the appeal of

6 Displayit, Inc. This matter is being held before the

7 Office of Tax Appeals. The OTA Case Number is 18083582,

8 and today's date is Thursday, August 20th, 2020. The time

9 is approximately 10:07 a.m., and this hearing was noticed

10 for Cerritos, California, and is being conducted

11 electronically with the agreement of the parties.

12 Today's panel will be heard by a panel of

13 three -- today's hearing panel of three Administrative Law

14 Judges, myself, Andrew Kwee. I will be the lead

15 Administrative Law Judge. Also Judge Josh Aldrich and

16 Keith Long will be the other members of this panel. All

17 three judges will meet after the hearing and produce a

18 written decision as equal participants. Although, the

19 lead judge, myself, will conduct the hearing, any judge on

20 this panel may ask questions or otherwise participate in

21 order to ensure we have all the information necessary to

22 decide this appeal.

23 At this point I'm going to ask the parties to

24 please state their names and who they represent, starting

25 with the representatives for the taxpayer.

1 MR. CATALDO: I'll jump in first. Michael
2 Cataldo, Cataldo Tax Law, representing Appellant,
3 Displayit.

4 MR. RAMIREZ: Javier Ramirez, with SingerLeewak,
5 representing the Appellant, Displayit.

6 MR. KWON: Glen Kwon working for SingerLeewak,
7 also representing Displayit.

8 JUDGE KWEE: Okay. Thank you.

9 And for CDTFA, would the representatives please
10 identify themselves for the record.

11 MS. JIMENEZ: Good morning Judge Kwee, this is
12 Mariflor Jimenez representing the CDTFA.

13 MR. PARKER: Jason Parker also with the CDTFA.

14 MR. BROOKS: Good morning. This is Christopher
15 Brooks, tax counsel for CDTFA.

16 JUDGE KWEE: Great thank you.

17 So I'm just going to go over -- I know we already
18 had a prehearing conference, and I'm just going to go over
19 the details of witnesses and evidence just to make sure
20 everyone is on the same page.

21 So to summarize, I understand there's no witness
22 testimony today. The presentations will consist entirely
23 of oral arguments. On exhibits, CDTFA has Exhibits A
24 through J. These exhibits were attached to the minutes and
25 orders that were sent out after our prehearing conference.

1 And Appellants has no objections to those exhibits. For
2 Appellant, Appellant has Exhibits Numbered 1 through 8.
3 Those were also attached to the minutes and orders, and
4 CDTFA has no objections to Appellant's exhibits.

5 In addition, after our conference, CDTFA -- not
6 CDTFA. Appellant submitted statement under penalty of
7 perjury requesting interest relief. That's a new document
8 which I'm marking for identification as Exhibit 9.

9 CDTFA, do you have a copy of the interest relief
10 statement?

11

12 MS. JIMENEZ: Judge Kwee, this is Mariflor
13 Jimenez. We do have a copy.

14 JUDGE KWEE: And does CDTFA have any objection to
15 admitting Exhibit 9, the Interest Abatement Relief
16 Statement, as evidence?

17 MS. JIMENEZ: We have no objection.

18 JUDGE KWEE: Okay. And for CDTFA was the summary
19 that I just provided regarding the exhibits and the
20 witnesses correct?

21 MS. JIMENEZ: That's correct.

22 JUDGE KWEE: Thank you.

23 And for the Appellant's representative, is the
24 summary that I just provided correct?

25 MR. CATALDO: Yes, it's correct.

1 JUDGE KWEE: Great thank you.

2 So the exhibits that were attached to the minutes
3 and orders, in addition to taxpayer's Exhibit 9, are now
4 admitted into evidence.

5 (Appellant's Exhibits 1-9 were received
6 in evidence by the administrative Law Judge.)

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

9 With that said I believe we are ready to go over
10 the issues that are going to be heard today, and there are
11 two issues. Just to quickly summarize, one is whether
12 adjustments are warranted to the liability as determined
13 by CDTFA. And on that aspect, there are three audit items
14 which are being disputed; sales over \$25,000 to everyone
15 but Sprint; sales over \$25,000 to Sprint; and tax paid
16 purchases resold and a deduction for purchases resold.
17 The second issue is whether there is a basis for interest
18 relief.

19 Does either party have any -- or do both parties
20 agree that it is a correct summary of issues, for CDTFA?

21 MS. JIMENEZ: Judge Kwee, this is Mariflor
22 Jimenez. No issues.

23 JUDGE KWEE: Okay. And for Appellant is that
24 also your understanding of the issues?

25 MR. CATALDO: This is Michael Cataldo. Yes, we

1 have complete understanding of the issues as you've
2 stated.

3 JUDGE KWEE: All right. Thank you.

4 And for -- I'll just briefly summarize the
5 process of today's hearing. We're going to start with
6 opening presentation for Appellant. Appellant has agreed
7 to 60 minutes for their opening presentation. After that
8 CDTFA will be able to make their open presentation. They
9 have 20 minutes for their opening presentation. Either
10 party may be asked questions by the panel, and after
11 questioning has concluded, we'll give each 25 minutes for
12 any closing remarks they wish to make.

13 Does either party have a question about that, or
14 any other questions that they would like to ask before we
15 start with opening presentations?

16 CDTFA, do you have any questions or concerns
17 before we start opening presentations?

18 MS. JIMENEZ: Judge Kwee, this is Mariflor
19 Jimenez. No questions.

20 JUDGE KWEE: Okay. Appellant, are you ready to
21 proceed with opening presentations too then?

22 MR. CATALDO: We are -- we are prepared, yes. We
23 have no other questions.

24 JUDGE KWEE: Okay. Thank you, Mr. Cataldo. You
25 may proceed with your opening presentation. You have

1 60 minutes.

2

3

PRESENTATION

4 MR. CATALDO: Thank you. So my clients,
5 Displayit, the Appellants in this manner is very pleased
6 to finally be able to be here in front of a body to
7 contest what's been a very long process with Respondent
8 and its audits. As you know from our briefs, the audit
9 has gone on over 10 years. Appellant has provided
10 substantially the same information for years and years
11 and, yet, has not been able to get to this point until
12 now.

13 And the main issue of that, we believe, was
14 causing this is one of the primary issues in this case is
15 the Sprint case that you had mentioned. It's our belief
16 that we have clear evidence that Sprint was subject to use
17 tax on the sales at issue. They stated as such, and it
18 seems that the Department is sort of taking two sides of
19 the same fence, if you will, in that they have asserted
20 and are collecting use tax from Sprint. And at the same
21 time, seeking to collect tax here from Appellant. And
22 that just seems inappropriate to be seeking to collect tax
23 on a single transaction twice.

24 And that was really the cause of, in our view,
25 why this has taken so long. All of the other issues in

1 this audit have been developed completely for years and
2 years, and there hasn't been any additional information or
3 documentation. This case has been dragging on for this
4 long, really, just because of what's going on with
5 Sprint's audit. And Sprint has stated and provided
6 Appellants with documentation to say they've paid it.
7 Appellant has provided Respondents with significant amount
8 of information on the Sprint issue that Sprint was subject
9 to use tax and did pay tax.

10 The level of information that Appellant provided
11 on this issue to the Department really is above and beyond
12 what could possibly be expected of a taxpayer. And, yet,
13 they continue to maintain for years and years that somehow
14 Displayit should also be subject to sales tax on the exact
15 same transactions.

16 Now, I'm going to go into a few of the issues.
17 Judge Kwee, you kind of laid them out, but there's a --
18 I'm going to break them up a little bit -- into a little
19 bit more detail. So we have the first issue that you
20 noted was the disallowed exempt sales over \$25,000 on an
21 actual basis. This is the non-Sprint issue. And within
22 that we have two -- two scenarios that we need to address.

23 One is the sales to ESC [sic] wherein the
24 Appellant provided the Department with an XYZ Letter from
25 ESC showing that ESC resold those -- those items. The

1 second issue is sort of a sub-issue of this issue one is
2 with respect to certain trade show booth sales that
3 Appellant sold and delivered into Las Vegas. And the
4 Respondent has insisted that these are subject to tax and
5 that Displayit is required to pay tax on these.

6 Then the -- so that's the first issue. So
7 there's two -- two issues -- sub-issues within it. Then
8 we have the Sprint issue which I just laid out briefly
9 before you, the issue that we believe has caused this long
10 delay. Then the third issue is regarding the tax paid
11 purchases resold credit. And then finally as you noted,
12 the interest abatement. So with that I will dive right
13 into the presentation.

14 So Appellant, Displayit, is a designer and
15 manufacturer of trade show booths. And so they
16 essentially setup and create booths for their customers
17 and display counters and what not. And the issue in this
18 case is the taxation of sales that Appellant has made to
19 certain of its customers.

20 And I would like to start off by just kind of
21 noting what the burden is in this case. We don't feel
22 that Respondent has met its very first initial burden to
23 explain the basis of its determination. It must have some
24 evidence sufficient to support its determination, and
25 that's reasonable. And we don't believe that they have

1 done so in this case. And even if whatever its arguments
2 have been made would be sufficient to meet that initial
3 burden, we believe that we have established, based on the
4 documents and evidence in the case, that more likely than
5 not, Displayit's positions are correct.

6 ESC's sales, as our position were, are exempt
7 sales for resale. Appellant provided an executed XYZ
8 Letter from ESC -- ES3 -- pardon me -- verifying that the
9 sales at issue were indeed sales for resale. Not only did
10 they provide the XYZ Letter, the CFO of ESC submitted a
11 letter explaining, indeed, that was the case. Not only
12 did they -- they submit this letter, but they also
13 provided a multi-jurisdictional resale certificate from
14 Toyota just to show that they, that is ESC -- ES3
15 supplied -- resold these items to Toyota.

16 Now, what ESC does is they assist. And in this
17 case, assisted Toyota with training its sales associates
18 about new cars and how to go about marketing those things.
19 In connection with its work for Toyota in doing so, it
20 engaged Appellant to assist in providing with displays.
21 These displays were provided from -- by Appellant to ESC;
22 sold to ESC and ESC sold those displays to Toyota. This
23 is what the documents in the case said.

24 Respondent has not offered evidence to contradict
25 this. They simply served with support or any evidence

1 that these sales were just taxable retail sales simply
2 because, and I quote, "It's highly unlikely that the ES3
3 sold these items to Toyota because they were large. And
4 that ES3 allegedly did not have a California sales
5 permit."

6 So the fact that these things may be large is --
7 it's all relevant what is the size, for one. And
8 secondly, I don't think it has any bearing whatsoever on
9 whether the items were sold or resold. So it's not even
10 evidence. The fact that ES3 did not have a California
11 sales permit really has no bearing whatsoever on the issue
12 in this case.

13 In this case, the question is whether it was a
14 sale for resale, and did ES3 sell to Toyota, and the
15 document showed that they did. Now, should ES3 have had a
16 seller's permit in California? Maybe. Maybe not. But
17 that's not an issue in this case. Accordingly, the
18 Appellant believes that the documentation that they
19 provided is sufficient to establish that the sales for ES3
20 were nontaxable sales for resale.

21 The second sub-issue in Issue One concerns the
22 sale of trade show booths. Appellant sold and delivered
23 trade show booths to one of its clients, and it was
24 delivered in Las Vegas, Nevada. The transaction is not
25 taxable by California because it was delivered to Nevada.

1 It's a pretty simple issue, yet Respondents
2 maintain that it is taxable by California because
3 Appellant did not prove that the customer did not bring
4 the trade show booth back to California or to California
5 at all, for that matter, after the Las Vegas convention,
6 which is where it was delivered and what its purpose was
7 for, and for where it was used.

8 The property in question was delivered to
9 Appellant's customer in Nevada and used by a customer at a
10 trade show in Nevada. California does not have a right to
11 tax this transaction. Its suggestion that we are somehow
12 supposed to be able to prove what the customer did with
13 the property within the next 90 days in order to establish
14 that it's not taxable is not supported by law, nor is it
15 practical.

16 Every -- every sale that's made outside of
17 California, if it's made to someone who happens to have an
18 office location in California, is that going to be subject
19 to California tax if the seller doesn't track the use of
20 that thing for three months? I don't think so. That's
21 not what the law provides. So our position, again, is
22 that these were not subject to California tax. They were
23 delivered outside of California and, therefore, not
24 taxable.

25 I'm going to move onto the second issue, the

1 disallowed exempt sales to Sprint over \$25,000. I have
2 mentioned what the basis of this issue is earlier, and I'm
3 going to provide a little bit more detail as to our
4 argument. It's Appellant's contention that they should
5 not be taxed on the sales to Sprint because Respondent
6 audited Sprint for the same period and assessed use tax on
7 a projection basis capturing any tax that was not properly
8 reported.

9 There is very little doubt or no doubt that this
10 was actually subject to an audit. The actual sales at
11 issue in this case were subject to audit by Sprint, their
12 use tax audit. We've provided an XYZ Letter from Sprint
13 verifying that it accrued use tax. There's one piece of
14 evidence. Appellant provided use tax accrual work papers
15 showing the transactions at issue were subjects to tax by
16 Respondent in the Sprint audit, and that Sprint actually
17 paid use tax on the same transaction.

18 We can't have double taxation. You can't tax one
19 transaction to two people. Appellant also provided copies
20 of use tax returns filed by Sprint showing that they
21 actually paid use tax on the same transaction. Now, what
22 does Respondent have in reply to this? It has nothing in
23 reply to this. We have substantial evidence to show that
24 Sprint paid use tax on it.

25 Appellant [sic] has simply claimed that it has

1 some secret information that it can't reveal that shows
2 that's not the case. But that's not evidence, and it
3 should be disregarded by this panel. And as a result, it
4 essentially should be waived -- this issue waived if
5 that's the only thing that they brought up was we have
6 some information. We can't tell you, but you're wrong.
7 That's not evidence. There's no evidence whatsoever that
8 Respondent has provided on this issue that suggest that
9 Appellant should be paying tax on items for which Sprint
10 has already paid use tax.

11 I'm going to move on to the third issue, the
12 disallowed claims, tax paid, purchases, resold credit. So
13 the issue here is, normally, Appellant during the
14 operating of its business, it has a central purchasing
15 credit card where it makes large purchases for purposes of
16 its business. However, on occasion, employees in the
17 field who need to purchase additional materials to
18 complete a job; and in this case, they did so at stores
19 like Home Depot and various other stores with that credit
20 card.

21 Appellant did not present a resale certificate
22 for any of these credit card purchases. Respondent
23 contends that Appellant paid tax on credit card purchases
24 for home Home Depot and other big box stores. So they
25 conceded, yes, for these purchases you paid tax but just

1 Home Depot and other big box store. But just simply
2 asserted without any basis whatsoever that no tax was
3 charged on credit card purchases made from smaller stores.
4 There's no basis for this distinction.

5 Appellant did not present any of the stores where
6 it made credit card purchases here with a resale
7 certificate. Appellant paid tax on those credit card
8 purchases and is entitled to a credit for the tax paid on
9 those purchases for which it resold, including the small
10 stores. Again, it's important to remember Respondent
11 allowed sales to Home Depot. They -- they agreed that tax
12 was paid there. But is for -- I just don't understand
13 what the basis would be for, oh, it's a small store so you
14 didn't, which it just doesn't make any sense.

15 So the last issue is the interest abatement
16 issue. And for this one, I'm going to ask Mr. Ramirez to
17 jump in and explain the basis for this. I know I've
18 touched on it, discussing how this audit has unfolded, how
19 long it's taken, how many reaudits there are. Mr. Ramirez
20 has been involved in this case since the beginning. And
21 I'm going to hand it over to him now.

22 MR. RAMIREZ: Javier Ramirez with SingerLeewak
23 representing Displayit. Yes, I've been involved with the
24 audit since inception. Actually, not -- not during the
25 audit but we came on board shortly after the audit had

1 closed, and we represented the client through the appeals
2 process.

3 So to add a little history to the Sprint issue.
4 We have had multiple reaudits, and I know that the State's
5 contention is that we continue to provide information and,
6 therefore, they continue to reaudit. But that -- that's a
7 little bit disingenuous. Because at inception, when we
8 initially provided the XYZ Letters the State Board of
9 Equalization at the time, now the CDTFA, the auditor
10 basically confirmed and said, yes, you know, we do believe
11 that there are issues here. But we need you to provide us
12 documentation to support the XYZ Letter.

13 The auditor at the time requested one quarters
14 worth of information. That's one quarter's of information
15 to confirm that Sprint actually self-accrued use tax.
16 Now, the State pulled one quarter out of 2006. The Sprint
17 was currently under audit during that time. And I'm kind
18 of blending a couple -- this interest abatement issue
19 with -- in addition to the Sprint issue because I believe
20 we need to add a little bit of light on the Sprint matter
21 just a little bit more.

22 We provided -- over time after providing the XYZ
23 Letter, the State Board of Equalization came back and
24 noted, listen, we are not going to accept the XYZ Letter.
25 We believe there's issues with the issue. They couldn't

1 tell us why. They wouldn't confirm as to why they
2 wouldn't allow the XYZ Letter to be confirmed.

3 We went -- so in essence we -- we did comply with
4 the State and we provided them documentation in support
5 use tax accruals from Sprint and Nextel during the audit
6 period. It was outside of what the State had requested,
7 but it was still valid information. So we did provide and
8 showed that right up front that, yes, in fact Sprint did,
9 in fact, accrue use tax over the period that was in
10 question.

11 Now, at the first district hearing, we actually
12 sat with the CDTFA supervisor and auditor, and they said
13 exactly what Mr. Cataldo said, is that we have information
14 that we can't disclose to you, but you got to trust us.
15 This is information that we know, and we're going to
16 disallow the XYZ Letter that you provided. So after the
17 first district hearing, it is our contention that we
18 should have been allowed to present our case in front of
19 the State Board of Equalization.

20 But instead there were audit adjustments that
21 were required. So how long did that take to get those
22 audit adjustments? I don't know, close to two years. We
23 get scheduled for another district hearing as opposed to a
24 hearing in front of the State Board of Equalization. So
25 once again we're getting prepared for the same issue.

1 So we contact Sprint. We obtain additional
2 documentation to support the position and present it, same
3 facts, same issues, just additional more -- just
4 additional documentation to support it in the form of use
5 tax accruals. So Sprint did offer us additional
6 documentation, which we presented to the State.

7 Once again in front of -- at the hearing, the
8 State Board of Equalization, now the CDTFA, asserted well,
9 we know something about this Sprint that we can't
10 disclose. So we're going to disallow the -- we're still
11 going to disallow it. And once again -- but they allowed
12 us to present the information and send it back to reaudit
13 again to account for those additional transactions. How
14 long did that take? An additional two years.

15 So once again, we get scheduled for a third
16 district hearing. A third district hearing, which I don't
17 understand why we kept getting pushed to district hearings
18 instead of being pushed straight to the Board of
19 Equalization. So once again, we present additional
20 information related to Sprint to show even more support
21 that hey, look. We do have additional documentation to
22 support additional transactions that's very clear in the
23 form of MSA.

24 So went and provided -- we took the MSAs from
25 Sprint that they provided to our client, Displayit,

1 basically noting that do not charge us tax. We provided
2 this to the State Board of Equalization, and we presented
3 it at hearing. The MSAs were very clear. Do not charge
4 us tax. We self-accrue it. This is an assertion directly
5 from Sprint, and Sprint made these assertions. And we
6 provided those assertions to the State.

7 Once again, the State basically -- same
8 assertion. Listen, we know information. We know that the
9 XYZ Letters are questionable because there's information
10 that you don't know. So once again, there's -- since we
11 provided additional information to support the XYZ -- the
12 XYZs should be allowed. Guess what the State does? They
13 send it right back to reaudit for another two years.

14 Now it's -- we're six, seven years down the road
15 on the same exact issue. It makes absolutely no sense.
16 We should have been given the opportunity, if the State
17 was not going to allow and hold the position as tight as
18 they're holding, to present the issue to the State Board
19 of Equalization. But we were not afforded that
20 opportunity because they kept sending it back for reaudit
21 every single time we submitted additional information to
22 support that use tax actually was accrued by Sprint.

23 Now, in the fourth reaudit, Sprint actually
24 provided us a ton of information. They gave us one
25 complete year of accruals, all of 2005; above \$25,000 and

1 below \$25,000. At this point, we got an auditor that
2 actually knew what he was doing. And he actually went
3 back and looked at the Sprint audit.

4 And in the auditor's work papers and the
5 auditor's notes, he notes that yes, that they were
6 audited. And in the audit a projection was done. And in
7 that projection, there were Displayit transactions.
8 Therefore, in the percentage of error, we must have
9 captured all of those transactions and, therefore -- so
10 they dis -- they took out our audit to avoid the double
11 taxation that Michael Cataldo was just referencing, and
12 they eliminated everything under \$25,000.

13 Above \$25,000 for 2005, we actually provided the
14 use tax accruals from Sprint to confirm that every single
15 one of those transactions was actually accrued. They did
16 not provide us with 2006. And the State auditor that
17 actually made all the corrections, \$3.7 million worth of
18 adjustments in the fourth reaudit.

19 The auditor basically made the note that listen,
20 we're not going to go back and track every single item
21 transactions. We can't. It's too much. We can't do that
22 in the audit. It's either he didn't want to. He wasn't
23 allowed to. I don't know. But he didn't go through the
24 \$25,000 and above on an individual basis to confirm that
25 Sprint had actually -- that the State had actually accrued

1 those on Sprint's audit.

2 Now, I look at this auditor, the fourth reaudit,
3 and the work that we did with this reauditor, and that
4 should have been done in the first audit -- in the first
5 three audits. That same thing that the fourth auditor
6 looked at should have been looked at by the first auditor,
7 and we wouldn't have had four separate reaudits. So, yes,
8 was the last reaudits more successful for -- for our
9 client? Absolutely.

10 That's because the auditor took the time to go
11 look at the Sprint audit without telling us, and he told
12 us. He actually verbally told us, yes, I am looking at
13 the Sprint audit, and yes, there are duplications in tax.
14 And, therefore, I'm going to remove it. So it took four
15 reaudits, almost 11 years to get to the point where we had
16 an auditor actually look at the Sprint audit and identify
17 that there were double taxation issues and adjust
18 everything from \$9 million down to \$1.7 million.

19 Our contention with regards to this is that the
20 XYZ Letter that was issued initially was valid, and it
21 should have been accepted. And all Sprint transactions
22 should have been covered under the XYZ Letter. Having
23 said that, we should never have gone 11 years -- close to
24 11 year's worth of issues. This should have been heard
25 within two to three years, and we should have had the

1 opportunity to present it in front of the State Board of
2 Equalization.

3 Except we weren't afforded that opportunity
4 because every time we presented new information regarding
5 Sprint, it got sent right back to reaudit to adjust to
6 those small adjustments, because they weren't large
7 adjustments every time we presented. All we were doing
8 was providing information to show that Sprint actually
9 self-accrued tax. And it was their policy to self-accrue
10 tax.

11 So 11 years we believe is way too long. We
12 should have been given the opportunity within three years
13 to present in front of the State Board of Equalization,
14 and we were not.

15 JUDGE KWEE: This is Judge Kwee. Thank you.
16 Does that conclude Appellant's opening presentation?

17 MR. CATALDO: This is Michael Cataldo. Yes. I
18 think we'll stop here unless -- I think you're done. I
19 think we're done here.

20 MR. RAMIREZ: If I can -- if I could make one
21 additional comment with regards to tax paid purchases
22 resold. I would like to address additionally that we
23 actually did go back through the auditor's work papers and
24 every single -- pretty much all of the statements -- the
25 bank statements that the auditor looked at and referenced.

1 And in the auditor's work papers she noted that she
2 provided, and she gave -- she gave the client and agreed
3 that all the big box -- she didn't just say Home Depot.
4 She said Home Depot and big box transactions.

5 After going through the -- her -- the actual
6 invoices, the way the client actually broke out their, I
7 guess their statements, is they actually physically went
8 through and identified cost of goods sold items; actual
9 tangible personal property that was purchased. And they
10 broke them into three different buckets; tangible personal
11 property, FedEx and intangibles, meals and entertainment,
12 and services.

13 So the auditor, in her work papers, denotes that
14 a lot of the transactions were service-based. That's not
15 actually true. The transactions, because the client made
16 the effort to go through and identify only taxable
17 tangible personal property that was purchased. So when
18 they backed into their -- the tax paid purchases resold
19 credit, they took the amount of physical items purchased
20 for jobs that they would do, and then they backed into the
21 amount of tax that was measure that was available to them
22 that they could take the tax based resold credit.

23 We looked at all those numbers, and we took a
24 look at the big box. And the definition of big box by the
25 auditor's contention was basically just Home Depot. She

1 eliminated any other big store. So although she did give
2 the Home Depot credit, she did not afford the other big
3 box by definition.

4 And I wanted to make additional note that
5 Mr. Cataldo had mentioned, the resell certificate issues.
6 When a contractor or one of their employees goes to a
7 store to buy, they're not -- they don't carry resell
8 certificates. These are one-off transactions. So they
9 take their credit card. They go into Home Depot or one of
10 these stores, and they basically issue it and purchase
11 product. They purchase the product onsite just -- just
12 quick.

13 So these transactions, they're, you know, they're
14 all taxed. They're all within California, and they're all
15 taxed. So there's no -- there's no -- and the auditor
16 made the contention that, well, if we couldn't validate
17 it, if we couldn't see an invoice showing that you -- that
18 you actually paid sales tax, then it was deemed the tax
19 credit was not allowed. But these are one-off
20 transactions.

21 So the credit card statement is what they used.
22 And these are just, like, small invoices. They're not
23 group purchasing where you actually have the resale
24 certificate and the seller's permit on the invoice. This
25 is just an individual walking into a store and buying

1 product.

2 So to assert that -- that they -- oh, the XYZ
3 Letter, they must have issued -- I'm sorry -- resale
4 certificates is -- is just not reasonable. These
5 transactions are one-off transactions where sales tax was
6 paid over the counter by individuals who were employed by
7 Displayit just to finish jobs; just to get materials to
8 complete what they needed. Cost of goods sold items
9 that -- and they should be afforded the opportunity for
10 tax goods purchases resold.

11 And that's -- that's -- then I'll conclude.

12 JUDGE KWEE: Okay. Thank you.

13 This is Judge Kwee, and I did have a couple of
14 questions. I'm trying to think where to start. I'll
15 probably -- I'd like to start with the first issue of
16 disallowed sales over \$25,000 to retailers other than
17 Sprint. And I believe Mr. Cataldo had mentioned that you
18 provided the -- the Appellant provided documentation to
19 show that ES3 was required or did, in fact, resell the
20 displays to Toyota.

21 And I'm just wondering because I think that was a
22 fact in dispute with CDTFA. I was just wondering, can you
23 clarify which document in the record indicated that ES3
24 was reselling the backstage displays to Toyota?

25 MR. CATALDO: Yeah. So -- so what was attached

1 as our exhibit, and I'll have to pull up the exhibit list.
2 But it is the XYZ Letter from ES3, coupled with the letter
3 from the CFO of ES3 explaining what they do and what they
4 did. And then attached to that letter is a copy of the
5 resale -- the resell certificate at Toyota provided to
6 ES3. So that is what our evidence is that ES3 resold to
7 Toyota. Because why would they even have
8 multi-jurisdictional resell certificate from Toyota. They
9 don't sell car or car parts. So and not to mention that
10 their -- their letter explains what they did.

11 MR. RAMIREZ: If I can add some additional
12 information to that. ES3 was working with Displayit and
13 Toyota. This was a -- this transaction was concurrent.
14 It wasn't they sold it to ES3 who then held onto it, was
15 contracted with Toyota. Our client knew that this product
16 was going to Toyota through Es3. So it was a trans --
17 they knew it was a step transaction. It was sold to ES3
18 who in turn was contracted with Toyota, but it was all
19 concurrent. Everybody knew that there -- that the product
20 was going to Toyota.

21 So from our perspective, our client effectively
22 knew that their initial step, their initial transaction to
23 ES3 was an exempt transaction, sales for resale, because
24 they knew the next transaction after that was going to be
25 a sale to Toyota.

1 JUDGE KWEE: Okay. And this is Judge Kwee. And
2 just one quick question. The resell certificate, was that
3 signed prior to the transactions at issue?

4 MR. RAMIREZ: We received an XYZ Letter from ES3
5 confirming this. So there was no -- there was no resell
6 certificate on file. So, effectively, they went back and
7 they -- at the audit, they requested an XYZ Letter from
8 ES3 who then signed it and provided a letter. So they
9 actually provided a letter. In addition -- I'm sorry.
10 They provided the XYZ Letter. They provided a letter from
11 the CEO or CFO and the Toyota multi-jurisdictional resale
12 certificate. So they provided three documents in support
13 of the transaction that it was an actual sale for resale.

14 JUDGE KWEE: This is Judge Kwee. So to clarify,
15 the multi-jurisdictional resale certificate was attached
16 to the 2010 letter from ES3's CFO; is that correct?

17 MR. RAMIREZ: That's correct. This is Javier.
18 Yes, that is correct.

19 MR. CATALDO: This is Michael Cataldo. It is at
20 Appellant's Exhibit 6.

21 JUDGE KWEE: Okay. Thank you. And one -- well,
22 more than one, but another clarification question. So for
23 that first issue, the sales to ES3, I just wanted to
24 clarify because I think you broke that down into two
25 sub-issues. One was sales to ES3 with the XYZ

1 Letter/resale certificate. And the second sub-issue was
2 trade show booths delivered to Las Vegas.

3 And so in looking at the multi-jurisdictional
4 resale certificate that's mentioning Scion Backstage
5 Tourist structures, and I'm just wondering, is the second
6 sub-issue the trade show booths delivered to Las Vegas, is
7 that also sales to ES3? Or is that -- are those sales to
8 a different customer other than ES3?

9 MR. CATALDO: That's a different customer.
10 That's an unrelated sale. It's not related to ES3, the
11 trade show booth sale.

12 JUDGE KWEE: Okay. Thank you.

13 MR. RAMIREZ: I believe we missed one issue.
14 This is Javier, Judge Kwee. I believe we missed one issue
15 for below \$25,000, and that was the Bellus transactions.
16 Michael, if it's okay, can we please address that issue?

17 JUDGE KWEE: Yes. Just to clarify -- this is
18 Judge Kwee. Just to clarify, you're talking about a
19 different audit item, sales under \$25,000?

20 MR. RAMIREZ: Correct. Sales under \$25,000. If
21 it's okay, I'd like the opportunity to present that
22 particular issue?

23 JUDGE KWEE: This is Judge Kwee. Yes, please go
24 ahead.

25 MR. RAMIREZ: Okay. There were three

1 transactions that were noted under the -- for the
2 transactions below \$25,000 for Bellus. And those
3 transactions were disallowed, I believe primarily because
4 the owner of Displayit also owned Bellus. And -- and so
5 the XYZ Letter, they -- they purchased product from
6 Displayit with the intention to resell their product. So
7 the State Board of Equal -- an XYZ Letter was issued
8 and -- but denied primarily because they believe that one,
9 the entity -- the entity was not -- did not carry a valid
10 seller's permit at the time. And, therefore, it was --
11 and -- and that the XYZ Letter was signed by the CFO of
12 Displayit who also owned the subsequent entity.

13 And so it's our position that -- that it doesn't
14 matter whether or not that the entity was -- did not hold
15 a valid California seller's permit. The intent was that
16 they fully intended at -- when they purchased from
17 Displayit to resell their products to other individuals.
18 And so the mere fact that -- that the owner of Displayit
19 signed it should not make -- should not be relevant. It
20 should be a valid -- considered a valid transaction, a
21 valid XYZ letter stating that it -- that the product was
22 intended to be resold and, in fact, was resold.

23 JUDGE KWEE: This is Judge Kwee. Was that the
24 entirety of your additional issue with the sales under
25 \$25,000?

1 MR. RAMIREZ: That's the only remaining issue
2 that we had. Yes, sir.

3 JUDGE KWEE: Okay. This is Judge Kwee. I'm
4 just -- because this issue was listed as not at issue in
5 the minutes and orders, I think CDTFA might not be
6 prepared to address it. So I'm going to briefly turn to
7 CDTFA to inquire if they would like additional time after
8 the hearing to address this audit item, which I would like
9 to confirm if they are able to consider it or not.

10 MR. BROOKS: Your Honor, this is Christopher
11 Brooks. It's a bit late to be raising the issue. I mean,
12 we've been through the prehearing conference. We
13 addressed what the issues were going to be at this hearing
14 at the beginning of the hearing. Now they've introduced a
15 new issue. Yeah. We would certainly need more time, but
16 we don't think it -- we would suggest that the issue be
17 not even addressed.

18 It was already -- they already had an opportunity
19 to raise it if they thought it was something important.
20 But at the minimum, we would request time to prepare for
21 that because we were not prepared for it.

22 JUDGE KWEE: This is Judge Kwee. You know, I
23 believe going into the appeal they had raised this issue,
24 and then CDTFA had addressed it. And based on that
25 adjustments, they might have said it was not at issue.

1 But I believe it was still something that was within the
2 range of this appeal because it was in the opening brief.

3 So I would allow them to continue raising this
4 issue especially, considering the additional adjustments
5 going back and forth during the course of the appeal
6 before OTA. So I believe it would be fair just to allow
7 CDTFA time after the hearing to address this issue. And
8 I'm going to ask if 30 days would be sufficient or if not,
9 how much time CDTFA would like to address this audit item.

10 MS. JIMENEZ: Judge Kwee, this is Mariflor
11 Jimenez. We would need at least 30 days to address that
12 issue.

13 JUDGE KWEE: Okay. So -- and, Appellant, are you
14 okay with holding the record open in order to allow CDTFA
15 30 days to address the sales under \$25,000?

16 MR. CATALDO: Yes, we're fine with that. This is
17 Michael Cataldo. Yes, we're fine with that.

18 JUDGE KWEE: Okay. So when this hearing
19 concludes -- and I realize CDTFA hasn't had their opening
20 presentation yet. But when the hearing concludes, I will
21 hold the record open, and CDTFA will be afforded time to
22 address this issue. But in the meantime, I'd like to get
23 back to the questioning of the other issues.

24 So and I did have a couple of questions
25 remaining, and I believe my panel members have some

1 questions they would like to ask. So I'm going to move on
2 to the issue of sales to Sprint over \$25,000. So in
3 looking at the materials, my understanding was that -- so
4 the taxpayer mentioned the disallowed XYZ Letters. But my
5 understanding was that the reason that CDTFA had
6 disallowed them was because it had determined that
7 Appellant was acting as a construction contractor. And on
8 that basis, they couldn't have legally been allowed to
9 resell the materials to Sprint in absent -- while they
10 were acting as a construction contractor under Regulation
11 1521.

12 I believe that's my understanding of the issue.
13 And I realize to the extent, Sprint did pay use tax.
14 There would be a deduction or offset allowable. I'm not
15 sure if that's included in issue three, tax paid purchases
16 sold deduction. But I'm just wondering if the Appellant
17 could -- if they're disputing that the Appellant was
18 acting as construction contractor, or if they're disputing
19 the element that their customer -- that the Appellant
20 wasn't legally allowed to resell because they were acting
21 as construction contractor and regarded as the consumer
22 and retailer whether they were fixtures or materials.

23 I was wondering if Appellant would like to
24 address that aspect?

25 MR. RAMIREZ: So this is Javier Ramirez. We

1 issued multiple XYZ Letters. Although, Displayit did have
2 some, like, very few construction contracts. I mean,
3 they're primary -- their primary sale is the sale of
4 tangible personal property, displays -- displays to
5 Sprint. All displays to Sprint where none of them were
6 deemed to be construction contracts with the exception of
7 maybe a handful, like, a very small amount. And we're
8 talking about thousands and thousands of transactions.

9 And these are those -- they are booths that go
10 into, like, Verizon stores or into a, you know, into a
11 regular store. They're not the kind of booths that are
12 deemed construction contracts. The XYZ Letters that were
13 provided, we provided for all transactions through 2005
14 all the way through 2007 until Sprint became -- and opened
15 up a procurement company and a resale certificate was
16 issued.

17 At the time that they became a procurement
18 company, the resale certificate became valid and all
19 transactions were exempt from taxation as accepted -- and
20 accepted by the State Board of Equalization, now CDTFA.
21 So there was never -- I don't believe -- and that's the
22 first time I actually heard that the State's contention
23 was that they're a construction contractor and not -- the
24 XYZ Letter were not deemed valid because they're a
25 construction contractor.

1 They're not a primary contractor. They are a
2 seller of tangible personal property. And all
3 transactions that were primarily sold -- not all, but,
4 like 98 percent of all -- of all displays sold to Sprint
5 were the sale of tangible personal property and subject to
6 the XYZ Letters that we provided.

7 And Sprint issued XYZ Letters checking the box
8 that the items were purchased, and items purchased we
9 self-accrued use tax on. So no, I don't believe that's a
10 valid -- that's valid -- that's a valid argument.

11 JUDGE KWEE: Okay. This is Judge Kwee. I mean,
12 I don't want to state CDTFA's argument for them. So when
13 they have their opening presentation, on questioning I'll
14 ask them to clarify their argument on this issue. And I
15 would like to move to the tax paid purchases resold
16 aspect. And so my understanding was that the amount
17 allowed was based on an examination of purchase invoices.

18 And during your presentation, you indicated that
19 there was some issue about they allowed sales tax on big
20 box retailers like Home Depot but not on mom-and-pop
21 sales. And I'm just -- I just wanted to get some
22 clarification on that. So are you saying that the
23 purchase invoices, they didn't include the amount of tax
24 that was charged? I'm just wondering they wouldn't have
25 known from an examination of the purchase invoices which

1 transactions were taxed and which weren't.

2 MR. RAMIREZ: So the auditor -- this is Javier
3 Ramirez responding. The auditor evaluated the American
4 Express statements. So under the American Express
5 statements because the client -- that's how the tax paid
6 purchases resold credit were only for transactions that
7 were purchased outside or on-site, as opposed through
8 their purchasing Department.

9 So the auditor looked at -- basically, looked at
10 the statements and went through the statements to identify
11 which transaction -- you know, what kind of transactions
12 were actually being purchased. Attached to the statements
13 there were some receipts. But for the most part, you
14 know, when you're buying at a mom-and-pop store -- it's
15 not like the individual is buying at mom-and-pop stores
16 are actually saving their receipts. A lot of their
17 receipts were lost or filed away somewhere in -- in a box.

18 But like I said, they're one-off receipts. So
19 it's not like -- they were probably tucked away into
20 miscellaneous. This is not -- they didn't go to their,
21 like, normal purchasing. They are purchasing. So the
22 auditor made the -- made the assumption that -- and,
23 actually, I shouldn't say that the auditor made the
24 assumption because I don't know what her assumptions were.

25 But what she did was she basically disallowed it

1 and noted that it's assumed that -- that they didn't --
2 she couldn't verify that sales tax was paid. Then she was
3 going to disallow them, which she did, except for the Home
4 Depots and the big box retailers where it's clear they
5 had -- where they continued to -- and Home Depot had a lot
6 of invoices. So it was easy to determine that they
7 actually paid sales tax on these transactions because a
8 lot of them were attached. Because that's -- they -- they
9 did it in big form because they bought from their -- from
10 the construction portion of Home Depot.

11 So -- so I hope that answers your questions. So
12 that -- did I answer your question, hopefully?

13 JUDGE KWEE: This is Judge Kwee. That does
14 answer the question. Thank you. And this I believe my
15 last -- will be my last question. But I think there was
16 overlap because you were mentioning that Appellant would
17 make the purchases and pay tax, for example, to the Home
18 Depot and the mom-and-pop.

19 But then I'm wondering, does that also overlap
20 with the Sprint sales issue. Because you were for the
21 Sprint sales issue, Issue Two, I believe the argument was
22 that Appellant was reselling them. So are you -- so
23 you're saying that tax wasn't applicable? But then you're
24 also saying that you paid tax at the time of the purchase.
25 So you're claiming the tax paid purchases and resold

1 deduction and claiming -- so I guess that makes sense.

2 Okay.

3 MR. RAMIREZ: Once again this is Javier
4 responding. The Sprint issue is a -- is a very separate
5 and distinct issue. The Sprint issue is an issue of
6 taxability between Displayit and Sprint on the displays
7 they purchases and sold to Sprint. And Sprint had a
8 policy of self-accruing use tax. So all of their MSAs and
9 all of their transactions were -- were no tax was included
10 because Sprint made the assertion that they were the
11 responsible party to Displayit.

12 Through their MSAs and through their
13 documentation, through their POs, through all of their
14 invoices and their documentation basically stated that
15 if -- that they were not to be charged tax because they
16 self-accrued it. And so the tax paid purchases resold
17 credit is very different.

18 That's -- California transactions, if they were
19 working on a particular client, let's just say in Santa
20 Ana or in Los Angeles, and they didn't have -- and they
21 were installing, and they didn't have enough materials,
22 then they would run to Home Depot, buy those materials
23 that they needed to install, and then come back to that
24 job.

25 And so this is separate and distinct from the

1 Sprint transactions. These are pretty much everything
2 outside of that; California-based transactions, primarily.
3 There were transactions out of state, so there were
4 transactions where they -- where they purchased -- where
5 they did a job in a different jurisdiction, and they
6 actually went to those stores outside of California. And
7 there's no question that those transactions would be
8 deemed taxable in that state but not in California.

9 JUDGE KWEE: This is Judge Kwee. Okay. Thank
10 you. So you're not contending that you paid taxes --
11 Appellant paid taxes at the time of purchasing the booths
12 that were sold to Sprint then. That's entirely different
13 from Issue Three.

14 MR. RAMIREZ: This is actually -- yes, that's
15 what we're stating. It's a completely separate issue.

16 JUDGE KWEE: Okay. This Judge Kwee. Thank you.
17 And I believe that answered the questions that I had at
18 this time. I'm going to turn it over to my co-panelists.

19 I'll start with Judge Long. Judge Long, do you
20 have any questions for the taxpayer?

21 JUDGE LONG: This is Judge Long. I have a couple
22 of questions regarding Exhibit 6, the September 12, 2010,
23 letter from ES3's CFO. Just to clarify, the letter states
24 that they acted as a conduit engaging Displayit through
25 Toyota. Is there any information in the record regarding

1 who paid Displayit for the displays for the deliverables
2 and whether the deliverables were sent to ES3 or directly
3 to Toyota?

4 MR. RAMIREZ: This is Javier responding. ES3
5 paid Displayit. I do not have -- I do not know whether or
6 not it was drop shipped directly to Toyota or if it was
7 directly shipped to ES3. But it was -- but they were paid
8 by ES3.

9 JUDGE LONG: Okay. And regarding the length of
10 time of the audit, the 10-plus years and the interest
11 abatement request, I just wanted to clarify. For each
12 reaudit for they -- four reaudits, there's no dispute that
13 additional information was provided, or at least
14 additional detailed information was provided for each
15 reaudit; is that correct?

16 MR. RAMIREZ: So once again this is Javier
17 responding. The information that was -- the additional
18 information that was provided was simply additional
19 documentation from Sprint noting that they self-accrued
20 use tax. So no additional issues were addressed in these
21 reaudits regarding the above \$25,000 that were excluding
22 Sprint or below \$25,000. It was just primarily the Sprint
23 issue.

24 And so every time we -- we submitted information
25 to support the position, it seems to end up in another

1 reaudit to account for those transactions that we
2 provided. And they were large transactions granted. They
3 were -- we would provide additional quarter of use tax
4 accruals that could have been close to a million dollars
5 in transactions or little as little as \$50,000 in
6 transactions. And the State basically said, okay, we'll
7 make those corrections. We'll send it back to reaudit so
8 we can account for those transactions, which they did.

9 But it's not -- it wasn't a different issue. It
10 was the same basic issue arguing that the XYZ Letter
11 initially provided by Sprint should have been accepted
12 since all -- since they were in the business of
13 self-accruing use tax.

14 JUDGE LONG: Okay. Thank you. No more questions
15 from me.

16 JUDGE KWEE: This is Judge Kwee. I'm going to
17 turn it over now to Judge Aldrich for questions.

18 JUDGE ALDRICH: This is Judge Aldrich. I don't
19 have any questions at this time.

20 JUDGE KWEE: Okay. This is Judge Kwee. I'm
21 going to -- and at this point allow CDTFA to make their
22 opening presentation you. Have 20 minutes. You may
23 proceed.

24 MS. JIMENEZ: Thank you Judge Kwee.

25

1 program for two new car models.

2 ES3 purchased the property from Appellant without
3 paying sales tax reimbursement in reliance on Toyota's
4 resale certificate. And also provided is a one-page copy
5 of Toyota's resale certificate. And this will be on your
6 Exhibit F, page 677.

7 So ES3 does not have a seller's permit, and
8 there's no evidence their customer, Toyota, resold the
9 event displays or accrued tax on the cost of those
10 displays. So California imposes sales tax on the gross
11 receipt from retail sales of tangible property in this
12 state. Gross receipts are presumed to be taxable unless
13 proven otherwise.

14 Regulation 1668(a) explains that a burden of
15 proving that a sale of tangible personal property is not
16 at retail is upon the seller, unless the seller timely
17 takes in good faith a certificate from the purchaser that
18 the property is purchased for resale.

19 Now, in this case, Appellant is unable to produce
20 a timely valid resale certificate. So one of the methods
21 that we recognize to assist the retailer in satisfying its
22 burden of proving that the sales were for resale is the
23 use of XYZ Letters. These letters are sent in a form
24 approved by the Department to purchaser inquiring as to
25 the disposition of the property purchase.

1 Response to the XYZ Letter is not, however,
2 equivalent to a timely and valid resale certificate
3 received in good faith. And that's regulation 1668. The
4 Department is not required to relieve a seller from
5 liability of sales tax or use tax collection based on a
6 response to an XYZ Letter.

7 The Department may, in its discretion, verify the
8 information provided in the X -- in the response of the
9 XYZ Letter to determine whether the purchase was for
10 resale or for own use or whether the tax was paid by the
11 purchaser. Now, Appellant has not provided a valid resale
12 certificate timely taken in good faith from ES3.
13 Therefore, the sales to ES3 are presumed to be taxable
14 retail sales, unless Appellant proves that the sales were
15 for resale.

16 The invoices document sales to ES3, not to
17 Toyota. ES3's letter does not state that it resold the
18 property to Toyota. And that's on your Exhibit F,
19 page 676. It mentioned that ES3 acted as a conduit
20 between Appellant and Toyota. Appellant relied on what
21 ES3 described as Toyota's blanket exemption form.

22 If you look at the lower portion of that
23 certificate on Exhibit F, page 677, you'll see that its
24 application depends on content of an associated purchase
25 order. However, we haven't seen a copy of a Toyota's

1 purchase order that refers to this specific sale. If you
2 look at the top portion that says, "issued to seller
3 information", and the address and even the date, they're
4 all missing from this certificate.

5 So Appellant has not presented evidence of the
6 claimed transaction between ES3 and Toyota. So we have no
7 way to independently verify a resale by ES3 to Toyota.
8 Now, the four disallowed sales for resale involve the sale
9 of Scion Backstage Tour Structures and Graphics. When we
10 did the research, it indicates that during the year of
11 2007 an event named Scion Backstage Tour Driving Event was
12 held. So included with that event was a contest produced
13 and administered by ES3 and sponsored by Scion Toyota.
14 And that will be on your Exhibit I, page 784.

15 So based on that sales invoice's description and
16 the amounts involved, the Department concludes the item
17 purchased were large display structures and graphics used
18 at the events. These structures are not something that
19 Toyota would normally resell. Therefore, these structures
20 are subject to tax.

21 The Appellant representative mentioned a trade
22 show booth sale in Las Vegas as part of this audit item.
23 But I didn't hear the Appellant mentioning the name or the
24 invoice number. So I -- I can't address that contention.
25 But I will go on to the other sales over 25 -- \$25,000

1 sales to Sprint here.

2 So Item 2 is disallowed exempt sales to Sprint
3 Nextel over \$25,000, which were examined on an actual
4 basis for the audit period. The remaining audit issue in
5 contention are for transactions in 2006. Now, there are
6 no tax charged or reported, and we find no evidence that
7 Sprint Nextel self-report the tax due on those sales.
8 During the audit Appellant provided several XYZ Letter
9 responses; two of them for Nextel System Corporation, NSC.

10 NSC asserted that many of the transactions were
11 sales for resales to other Sprint companies. The
12 Department accepted the sales to NSC as sales for resales.
13 Another XYZ response is from Nextel of California, and
14 that's NCI. NCI asserted that the sales were for NCI's
15 use. However, NCI paid use tax with tax returns filed.
16 So many of these transactions were removed from the
17 calculation.

18 Now, on June 21st, 2017, Appellant has also
19 provided the MSA between Nextel and Appellant dated,
20 July 18th, 2005; and Nextel's sales and use tax returns
21 for third quarter 2006 and fourth quarter 2006; and an
22 excel data file that includes details of Nextel's accrual
23 of use tax for these two quarters. So based on the MSA,
24 Appellant asserts if it did not charge tax on its invoice
25 from Nextel, Nextel has specifically agreed to be

1 responsible and remit the tax.

2 Now, the contractual shifting of tax liabilities
3 between private parties does not change the retailer's
4 sales tax obligation. And that's Pacific Coast
5 Engineering Company versus State of California. The
6 existence and terms of the MSA are insufficient to
7 establish that Nextel actually self-reported the
8 applicable use tax for this time period. Without evidence
9 that Nextel, in fact, self-reported use tax on these 2006
10 purchases from Appellant, the Department finds that the
11 MSA provides no basis on which to reduce the measure of
12 tax.

13 Now, as far as Nextel sales and use tax return
14 for third quarter and fourth quarter 2006, the information
15 establishes that Nextel self-reported on use tax on some
16 of the disputed transactions. The Department made these
17 adjustments on an actual basis. The reductions were not
18 projected because Appellant did not provide Nextel use tax
19 data from the largest two quarters for which the
20 Department requested information from. Instead, Appellant
21 selected two different quarters.

22 In addition, the data from these two quarters was
23 missing many of the disallowed transaction, including the
24 largest individual sale of \$918,750. Therefore, the
25 Department has no confidence that Nextel accrued tax on

1 transaction in question. Since the claim regarding the
2 accrual and payment of tax directly to the CDTFA can't be
3 verified, the Department declines to reduce additional
4 measure of tax for this audit item.

5 Now, I'll address Audit Item 5, which is the
6 disallowed claim tax paid purchases resold. Now, the
7 amounts claimed as tax paid purchases resold prior to use
8 were examined. So instead of reporting the actual
9 amounts, the Appellant estimated the purchases resold
10 totals by summarizing all credit card purchases and
11 dividing it by 1.775 percent to exclude the tax from the
12 amounts.

13 So when we perform a test of the 2007 credit card
14 billing statements and reviewed all available
15 corresponding purchase invoices -- now not all purchase
16 invoices were available -- the Department noted that many
17 of the purchases were for services and not for tangible
18 personal property. Therefore, these acquisitions were
19 disallowed. However, the Department allowed all purchases
20 from Home Depot and other large chain retailers with the
21 presumption that tax was charged on all items purchased.

22 As far as other acquisition, if supporting sales
23 invoices with proof of sales tax were not made available,
24 the Department disallowed them. A percentage of error was
25 calculated, and this error rate is then applied to the

1 claim amounts to arrive at the disallowed tax paid
2 purchases resold of around \$1,506,000 for the audit
3 period. And that will be on your Exhibit B, page 451.

4 Now, the audit issue here is not disallowance of
5 claimed exemption -- the audit issue here is the
6 disallowance of claimed exemption for tax paid purchases
7 of items, which were later resold by the Appellant. Here,
8 the Appellant claimed tax credit on items that they did
9 not pay tax on. The determination of who is or who is not
10 responsible for the payment of tax on these purchases is
11 not the issue. The dispute involves whether the Appellant
12 is entitled to a deduction for sales taxes paid on good
13 that they ultimately resold.

14 With this contention the Appellant's submitted a
15 list which is also part of this exhibit. I believe that's
16 on their page 37. If you look at the title of the
17 heading, it says, "Listing of California Venders That Did
18 Not Charge Displayit Tax for Sales of Tangible Personal
19 Property." It says, "Not Charged."

20 This information just supports the Department's
21 analysis that most of the Appellant's credit card
22 purchases do not include sales tax. Therefore, no
23 adjustment to the disallowed claimed tax purchase amount
24 is warranted.

25 Now, Item 6 is abatement of interest. I know the

1 Claimant -- the Appellant is claiming that during the past
2 10 years the Department has subjected the Appellant to
3 multiple examinations with nominal changes despite
4 submission of documentation. The Appellant claims the
5 Department has unreasonably delayed appeal of this case
6 due to the excessive nature of our review.

7 Now, Revenue and Taxation Code Section 6593.5
8 allows for relief of all or any part of the interest
9 imposed due to unreasonable error or delay by the employee
10 of the Department acting in their official capacity. So
11 when we performed an analysis of this case and the
12 specific time spent during the audit process, the
13 settlement and appeals process, no errors or delays by the
14 Department were noted.

15 On several occasion during the appeals process,
16 the Appellant provided new information and documentation
17 which was not previously presented. Because of this, the
18 Department has issued multiple decision, plus four
19 reaudits had been performed. In each case, a detailed
20 explanation of allowable adjustment was provided by the
21 Department. There is no evidence of unreasonable errors
22 or delays by the Department during the appeals process.
23 Rather, the Department has attempted to resolve all issues
24 as efficiently as possible.

25 So in reviewing this case for preparation for

1 this hearing, I noticed that the Appellant's
2 representatives were the one that requested multiple
3 delays and postponements during the audit and appeals
4 process. If you take a look at the 414Z, which is the
5 assignment activity history, the audit started on
6 October 2nd, 2008, with the auditor meeting with the
7 Appellant's CPA. From November 21st, 2008 through
8 June 30th, 2009, there was a gap in time where the CPA was
9 busy with tax season and vacation. And that will be on
10 your Exhibit B, page 320.

11 After that delay, the auditor continued to work
12 with that CPA. On August 31st, 2009, almost a year after
13 the audit started, the Appellant was still organizing
14 shipping documents for other customers besides Sprint.
15 You'll see that on your Exhibit B, page 322. Now, the
16 current representative replaced the previous CPA on
17 October 2009. Immediately after this change, the new
18 representative had to postpone several appointments
19 because of family and personal illness in October and
20 November 2009.

21 Then in January, April, and May 2010, several
22 meetings were rescheduled by the representative as well.
23 The contact dates and detailed entries are on your
24 Exhibit B, page 327. On your page 329, on
25 August 11, 2010, the Department posted a notation. And

1 I'll quote this, "The auditor explained that the
2 completion of this examination has been delayed due to
3 taxpayer's numerous requests for additional time. In
4 addition, per auditor, the taxpayer representatives have a
5 tendency to provide fragmented or incomplete documentation
6 for our review. The taxpayer's representative had been
7 given a deadline in writing through our deadline date of
8 July 12, 2010. The auditor has given numerous other
9 verbal and e-mail warnings to the taxpayer's
10 representatives beyond deadline date of July 28, 2010,
11 which has already come and past. On October 15th, 2013
12 the appeals conference was held." And that will be on
13 your Exhibit F page 663.

14 Appellant submitted documentation and appeals
15 allowed their representative two additional weeks to
16 provide more documentation. Even after the appeals
17 conference, multiple extensions were requested between
18 October 2013 through January 2014. The Decision and
19 Recommendation, D&R, was issued on May 12, 2014, and the
20 case was returned to the field office for adjustments.
21 That will be on Exhibit F, page 674.

22 On July 20th, 2014, the Department filed a
23 Request for Reconsideration, and that's on your Exhibit H,
24 page 768. There was no response from the Appellant's
25 representative. So the Supplemental Decision and

1 Recommendation, SD&R, was issued on November 10, 2014,
2 recommending additional adjustments, Exhibit G, page 696.

3 On February 4th, 2015, the auditor once again
4 worked with the representative as you will see on
5 Exhibit B, page 585. However, because the
6 representative's health issues, additional time was again
7 requested. If you look at Exhibit B, page 586,
8 specifically, May 1st and May 8th, 2015, the
9 representative is unable to provide documentation because
10 the new attorney that is supposed to be working on this
11 case has not had time to prepare the additional documents.

12 On October 19th, 2015, the representative request
13 a Board Hearing. Now on December 4, 2015, a notice of the
14 Board Hearing scheduled for February 24, 2016, was sent.
15 Appellant's representative asked for a postponement for
16 that Board Hearing. A new hearing was immediately
17 scheduled for April 27, 2016. However, nine days before
18 the new Board Hearing, the case was pulled and deferred
19 for settlement review.

20 On June 21st, 2017, while in settlement,
21 representative filed a late request for reconsideration to
22 the SD&R that was issued on November 10, 2014, which is
23 almost three years later. This is to submit additional
24 documentation from Nextel to show that this customer
25 accrued and reported use tax on the disputed transaction.

1 And this will be on your Exhibit H, page 735.

2 The third reaudit was done to follow the SD&R
3 recommendation and was completed on September 22, 2017,
4 Exhibit H, page 583. On December 29, 2017, this case was
5 forwarded to OTA. And on February 25th, 2019 settlement
6 closed the case because they could not reach an agreement.
7 Now even as late as June 6th, 2019, when this case was
8 already with OTA, Appellant's representative stated that
9 he did not have additional information to submit, but he
10 still believes that more adjustments are warranted, and
11 more documentation will be provided. And this will be on
12 your Exhibit B, page 17.

13 We find that the Appellant's claim that the
14 Department has unreasonably delayed the appeal of this
15 case has no basis. We conclude that no interest relief is
16 warranted. Appellant has not provided documentation or
17 essential information to support any additional adjustment
18 to the audit findings. Also, we find no evidence of
19 unreasonable errors or delays by the Department during the
20 appeals process. It's the Appellant's representative that
21 requested numerous delays and postponement. Therefore, we
22 request the Appellant's appeal be denied.

23 This concludes my presentation. Thank you. I'm
24 available to answer questions you may have.

25 JUDGE KWEE: This is Judge Kwee. Thank you,

1 Ms. Jimenez. I guess I'll start with one question. So
2 you had indicated that CDTFA was unable to -- and just a
3 reminder to please mute your mic if you're not speaking.

4 So just to go back, you had mentioned on Issue
5 One, sales over \$25,000 to customers other than Sprint
6 that CDTFA was unable to address the second sub-issue,
7 which was trade show booth sales in Las Vegas to customers
8 other than ES3. And that's because the taxpayer had not
9 identified customer or customers which were impacted.

10 So I'm -- this is what I'm thinking. Since we're
11 holding the record open to allow CDTFA to respond anyway
12 to the other issue, I was thinking first, I would allow
13 Appellant time to specify in writing what the concerns
14 were with one, the sales I just noted to Las Vegas, and
15 two, the issue with the sales under \$25,000, which was
16 raised as a new issue during the hearing.

17 So Appellant would be given time to specify in
18 writing what its specific concerns were with those two
19 items. And then after that, CDTFA would be given an
20 opportunity to specify its response to those new concerns
21 that were raised during the hearing. And I would just
22 like to get input from the parties to determine if that's
23 something that they would be agreeable to, or what their
24 feelings are about that.

25 I'll start with CDTFA. What are your thoughts

1 about that?

2 MS. JIMENEZ: Judge Kwee, as far as the
3 transaction over \$25,000 other than Sprint, I'm prepared
4 to respond any of those sales. I just need specific
5 information more than that Las Vegas booth.

6 JUDGE KWEE: Oh, this is Judge Kwee. Okay.
7 Thank you. With that said, then I will turn it over to
8 Appellant's representative.

9 Appellant, I believe CDTFA is able address your
10 contention with respect to the Las Vegas booth, but I
11 believe they just had indicated that they need to know
12 what customer that you were referring to in order to
13 address it. Are you able to do that at this time?

14 MR. RAMIREZ: This is Javier Ramirez responding.
15 The over \$25,000 item that's in question that had to deal
16 with the Las Vegas trade booth is the first item,
17 Item Number 1, under auditor's report, under 12 A-1, with
18 the client name of Art Impressions Trade Show Booth for
19 Magic 2007.

20 JUDGE KWEE: This is Judge Kwee. And would CDTFA
21 like a short recess so that they can review their notes
22 and present a response on that? And also, is this enough
23 for you to be able to respond at this time?

24 MS. JIMENEZ: Judge Kwee, this is Mariflor
25 Jimenez. I can actually address that particular sales

1 transaction right now.

2 JUDGE KWEE: This is Judge Kwee. Go ahead,
3 please.

4 MS. JIMENEZ: Yes. This is Mariflor Jimenez. So
5 Appellant claims that one sale for a trade show booth in
6 Las Vegas considered titled transfer out of state for
7 \$25,663, I believe, and that should be removed. This
8 sale, to our impression, licensing is on your Exhibit B,
9 page 95, and it's a sale to a known California customer
10 located in Calabasas, California.

11 So it looks like Appellant sold a trade show
12 booth to this known California customer and shipped this
13 compartment to Las Vegas for the 2007 Magic Trade Show,
14 which is like a five-day event. And no resale card or
15 other exemption documentation was presented to support the
16 exempt status of the sale.

17 If you -- I want to address Regulation
18 1620(b)(2), which is purchase for use in the state. So
19 property delivered outside of California to a purchaser
20 known by the retailer to be a resident of California is
21 regarded as having been purchased for use in this state,
22 unless a statement in writing signed by the purchaser that
23 the property was purchased for use at a designated point
24 or points outside the state as retained by the vendor.

25 So without documentation the Department

1 recommends no adjustments. And that concludes my
2 presentation for that particular transaction.

3 JUDGE KWEE: This is Judge Kwee. Thank you for
4 that. And I did have another question on Issue 2, the
5 sales to Sprint over \$25,000. And I believe during
6 CDTFA's presentation they were addressing language in the
7 MSA that contractually shifted the burden of the tax or
8 who would be liable for the tax as between the parties.
9 And you were saying that wasn't sufficient because it
10 doesn't change who the law imposes the tax on.

11 But in listening to Appellant's argument I
12 understand that their argument was that they had received
13 XYZ Letters to prove or to establish that these were sales
14 for resale and facts. So I'm wondering, it seems like
15 you -- or the parties are talking about two different
16 aspects, and I'm wondering if you could you address this.

17 MS. JIMENEZ: Right. We did receive XYZ Letter
18 from specifically Nextel of, California, which is NCI.
19 And they did say it's for their own use. The auditor
20 tried calling, but they never responded. And that's why
21 we requested additional information, and that's where the
22 Appellant provided the third quarter 2006 and fourth
23 quarter 2006 information.

24 But once again, when we look at that information
25 there are missing transactions which includes that almost

1 million-dollar sale. Now, the total assessment that we
2 have for this particular issue is about 1.7 million. So
3 we're missing half.

4 JUDGE KWEE: Sorry I was muted. I just wanted to
5 quickly clarify then. So CDTFA, you're saying that you
6 already allowed some transactions to the extent that the
7 Appellant was able to provide -- prove that Nextel, NCI,
8 self-reported use tax, and the remaining amount at issue
9 is the \$1.7 million that has to do with transactions which
10 were not documented as use tax accruing and not otherwise
11 indicated on the XYZ Letters. Or are there transactions
12 that were indicated on the XYZ Letters, but you did not
13 accept them because you were unable to contact the person
14 who signed the resale, the XYZ Letter?

15 MS. JIMENEZ: Judge Kwee, my understanding is we
16 tried to contact them to ask specifically for those
17 transactions. And then when we have our sales that we
18 disallowed, we traced them to the information that was
19 provided, third quarter 2006 and fourth quarter 2006.
20 Some of the transactions were there. We allowed them.
21 But the ones that were not we disallowed.

22 JUDGE KWEE: Okay. This is Judge Kwee. Thank
23 you.

24 I believe I'll turn it over to the panel at this
25 time to see if the panel members would like to ask any

1 questions. Judge Long, do you have any questions to ask?

2 JUDGE LONG: No questions at this time.

3 JUDGE KWEE: Judge Aldrich, would you like to ask
4 any questions?

5 JUDGE ALDRICH: No questions at this time. Thank
6 you.

7 JUDGE KWEE: Okay. This is Judge Kwee. So I
8 believe we're ready to move onto closing presentations.
9 Appellant, to the extent I asked questions of CDTF, A,
10 you're welcome to address anything that might have come up
11 in your closing presentation. So I'll turn it over to
12 Appellant's representatives for their closing
13 presentation. You may proceed.

14 MR. CATALDO: Thank you.

15

16 CLOSING STATEMENT

17 MR. CATALDO: Michael Cataldo for Appellant.

18 Just to reply to some of CDTF, A's comments. So on the one
19 that we were just talking about, the known California
20 customer. And again I'd like to reiterate what we said in
21 our -- in the beginning of our argument. It's not
22 incumbent upon taxpayers to investigate what happens three
23 months after they make a sale just because some company
24 has a location in the state.

25 They're describing it as a known California

1 customer like that's some sort of evil. This customer
2 could be all over. It's not practical for someone to be
3 following sales, which were delivered into Nevada. This
4 is a very important thing that's just kind of glossed
5 over. These were delivered to Nevada. They were used at
6 a trade show in Nevada. So it's ridiculous for California
7 to say, hey, we're going to tax that even though it was
8 delivered into Nevada and used in Nevada.

9 Also, I'd just like to respond to, kind of, the
10 laundry-list items of -- of delays that are attributed to
11 Appellant in this matter throughout the audit. I mean,
12 we're talking about over 10 years. So it would not be
13 very difficult for me just pick out a few items okay.
14 Hey, we need an extension for this. We need some time
15 for this. This -- these -- this time is minuscule in
16 comparison to the overall time the entire audit took.
17 These are just little tiny things.

18 So the representative had a health concern back
19 in 2010 or 2011. We're in 2020 right now, and we're here
20 now, just today. So I don't -- I don't think that
21 supports the extensive delay in this matter. And I'd like
22 to finish, and I'd also like to permit Mr. Ramirez to add
23 anything that he would like to say. But I would like to
24 finish with kind of what I started with, which is it is
25 not proper for CDTFA to be playing both sides of the fence

1 with regards to this Sprint issue.

2 And in my view, this is the issue that has really
3 caused this thing to drag on for so long. They've audited
4 Sprint. Sprint has paid use tax. They paid use tax on
5 the exact transactions which are at issue here. So they
6 shouldn't be going after us and Sprint at the same time.

7 So Mr. Ramirez, I'd like to hand it over to you
8 if you have anything to add.

9 MR. RAMIREZ: Yeah. Thank you. This is Javier
10 Ramirez. To address the whole idea behind Sprint and the
11 transactions and the XYZ Letters, a comment was made that
12 it's Nextel and they tried to reach out to Sprint and
13 tried to comment and tried to get feedback.

14 They actually did speak to Sprint. Sprint
15 actually did have a conversation with the auditor at the
16 State Board of Equalization. So there was communication,
17 and it was disclosed to the State Board of Equalization,
18 now the CDTEFA that, yes, in fact, they did self-accrue
19 tax.

20 The issue there has always been the same. That
21 they were being audited, and they didn't -- during the
22 time that they were -- that Sprint was being audited, the
23 State did not want to confirm that they knew that there
24 were issues on Sprint. They wouldn't notify us. This was
25 brought up in the district hearing as well.

1 So and we're talking -- there are -- there were
2 multiple XYZ Letters issued for Nextel, for Boost, and for
3 Sprint. There were three different companies. Of course,
4 Sprint purchased Nextel. And at the time the purchased
5 Nextel, XYZ Letters then came out under Sprint. The
6 remaining \$1.7 million dollars of use tax that's
7 remaining, I know that Ms. Jimenez made the -- said it's
8 about 50 percent, making it -- making it sound that it's a
9 really large amount.

10 You're talking about \$9 -- close to \$10 million
11 worth of transactions-plus worth of Sprint transactions
12 during this entire audit period of which \$1.7 million for
13 2006 was in question. Everything else was quantified;
14 resale certificated -- not resale certificates -- XYZ
15 Letters, use tax accruals and -- shown that they actually
16 accrued it. And an auditor from the CDTFA confirming that
17 the Sprint transactions were -- that Displayit
18 transactions were actually included in the Sprint audit.

19 So in other words, we're trying to get -- they're
20 trying to get around that. But as Mr. Cataldo just
21 mentioned, they're trying to get both sides of the -- of
22 the pie here. Their -- they want to say that, oh, yeah.
23 Yes, we're going to give you some because it was part of a
24 projection, but we're going to hit you with the ones that
25 were actual base.

1 Either way, Sprint was audited, and the auditor
2 who audited Sprint picked up Displayit transactions in --
3 in total. And now they're coming back and disallowing the
4 XYZ Letter and saying that oh, that's taxable to you as
5 well. There's a clear double taxation issue here.

6 That's all I have to comment on that.

7 JUDGE KWEE: This Judge Kwee. I'm going to turn
8 it over to Mariflor or the CDTFA's representative for
9 their final presentation or their final closing remarks.

10 MS. JIMENEZ: Thank you, Judge Kwee.

11

12

CLOSING STATEMENT

13 MS. JIMENEZ: This is Mariflor Jimenez. The
14 Appellant's customer, ES3, Inc., does not have a seller's
15 permit. The documentation presented includes a letter and
16 a copy of the resale card from Toyota. The resale
17 certificate from Toyota is incomplete and the items
18 purchased are not those usually resold by Toyota. Also,
19 the application of this resale certificate depends on the
20 content of an associated purchase order. Appellant did
21 not provide this purchase order from Toyota.

22 The audit issue with Sprint and Nextel sales over
23 \$25,000 is for the year 2006. Appellant has failed to
24 provide documents to support tax was charged or reported
25 or that the customer self-report the tax due. In regard

1 to the disallowed claim tax paid purchase resold, the
2 Appellant estimated the tax paid purchases resold claim
3 amounts by summarizing all credit card purchases.

4 And as I mentioned, many of the purchases were
5 for services and not for tangible personal property. The
6 Appellant failed to provide detailed proof that the
7 property resold were tax paid. When it come to the
8 abatement of interest, our exhibit shows that it was the
9 Appellant's representative that requested multiple delays
10 and postponements. The representative also offered
11 fragmented documentation.

12 During the appeals process, new information and
13 documentation were provided which was not previously
14 presented. As a result, the Department has issued
15 multiple decision and performed four reaudits. We find no
16 evidence of unreasonable errors or delays by the
17 Department during the audit and the appeals process.
18 Appellant failed to establish a basis for interest relief.
19 The Department's audit findings and actions are reasonable
20 and fair.

21 Therefore, the Department request the Appellant's
22 appeal be denied. Thank you.

23 JUDGE KWEE: Okay. Thank you.

24 At this point, I'm going to check with the panel
25 members to see if they would like to ask any further

1 questions before we conclude today's hearing. Judge Long,
2 are you ready to conclude?

3 JUDGE LONG: This is Judge Long. I have no
4 questions. Thank you.

5 JUDGE KWEE: Okay. Thank you.

6 And Judge Aldrich are you ready to conclude these
7 proceedings?

8 JUDGE ALDRICH: I'm ready to conclude. Thank
9 you.

10 JUDGE KWEE: Okay. So just to summarize quickly.
11 CDTFA -- we discussed that CDTFA would have an opportunity
12 to address the new issue that was raised at the hearing,
13 and that was sales under -- the audit item for sales under
14 \$25,000.

15 CDTFA, I believe you were okay with 30 days. Is
16 that sufficient for you, CDTFA, to respond to that issue?

17 MS. JIMENEZ: Judge Kwee, this is Mariflor
18 Jimenez. That's perfect.

19 JUDGE KWEE: Okay. Great. So we're ready to
20 conclude then, and the record will be held open for 30
21 days. CDTFA, I will send out an order following today's
22 hearing to remind the parties of the due date to -- well,
23 to CDTFA of the due date to respond to the new issue that
24 was raised in this appeal to be approximately
25 September 30th, 2020.

1 Thank you everyone for coming in today. So the
2 judges are going to meet and decide the case after the
3 record is closed, so after September 30th. Approximately
4 100 days later you can expect to receive a decision from
5 us.

6 And we're ready to adjourn now. Thank you. The
7 case is now closed for today.

8 (Proceedings adjourned at 11:46 a.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was 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 25th day of September, 2020.

ERNALYN M. ALONZO
HEARING REPORTER