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BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
NEUROSKY, INC.,) OTA NO. 19125615
)
) APPELLANT.)
)
)
_____)

Transcript of Virtual Proceedings,
taken in the State of California, commencing
at 1:00p.m. and concluding at 2:19 p.m. on
Thursday, October 21, 2021, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ SUZANNE BROWN

Panel Members: ALJ NATASHA RALSTON
ALJ DANIEL CHO

For the Appellant: STANLEY YANG

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION

AMANDA JACOBS
SCOTT CLAREMON
JASON PARKER

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I N D E X

E X H I B I T S

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California; Thursday, October 21, 2021

1:00 p.m.

JUDGE BROWN: We will go on the record. Good afternoon. We are here for -- we're on the record for the Appeal of NeuroSky, Inc. This is OTA Case Number 19125615, and today is October 21st, 2021, and it is about 1:00 p.m.

I am Administrative Law Judge Suzanne Brown, and with me today are co-panelists Daniel Cho and Natasha Ralston. I will start by asking the parties to identify themselves for the record. I'll start with the CDTFA representatives, if you could each identify yourselves, please.

MS. JACOBS: Amanda Jacobs for the California Department of Tax and Fee Administration.

MR. CLAREMON: Scott Claremon, also from the CDTFA.

MR. PARKER: And Jason Parker from the CDTFA also.

JUDGE BROWN: And next for the Appellant, Mr. Yang, go ahead please.

MR. YANG: Hi. I'm Stanley Yang from NeuroSky, Inc.

JUDGE BROWN: Okay. Thank you all very much.

1 Mr. Yang, you had indicated previously that
2 you're going to have another employee of NeuroSky
3 participating as well, but I don't see her.

4 MR. YANG: Yeah. She's just sitting here to help
5 me with the documents, but I'll be the main person.

6 JUDGE BROWN: Okay. Thank you. All right.

7 First, I will cover a few brief topics before we
8 begin presentations. I will remind everyone that the
9 Office of Tax Appeals is an independent agency. It is
10 separate and distinct from the California Department of
11 Tax and Fee Administration and, therefore, arguments and
12 evidence that CDTFA heard previously are not necessarily
13 part of the record before OTA. OTA's written opinion will
14 be based upon the briefs the parties have submitted to
15 OTA, the exhibits that will be admitted into evidence, and
16 the arguments presented at the hearing today.

17 We held a prehearing conference in this matter,
18 and I issued prehearing conference minutes and orders. As
19 we discussed at the prehearing conference and we confirmed
20 in the minutes and orders, the issue for the hearing today
21 is whether Appellant has established that an adjustment is
22 warranted to disallowed claimed nontaxable sales for
23 resale.

24 Mr. Yang, that's -- is that your correct -- is
25 that your understanding of the issue?

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MR. YANG: Correct.

JUDGE BROWN: And CDTFA, that is correct as well?

MS. JACOBS: Correct.

JUDGE BROWN: Thank you. Oh, and I did forget. I have not been doing this. I did forget to mention, to help our stenographer, we should be identifying ourselves before we speak. This is Judge Brown. My apologies, Ms. Alonzo. I will try to remember, and I will ask everyone to please identify yourselves before you speak.

All right. Next, we have documentary exhibits that are proposed for admission into evidence. As I explained during the prehearing conference, OTA's regulations require that proposed exhibits must be submitted at least 15 days in advance of the hearing. We have received, and I marked as exhibits OTA -- CDTFA's exhibits, they're marked as letters A through S. And I have compiled these into a hearing binder that OTA sent to the parties previously. First, let me just confirm that those are the only documents that are either party is submitting as exhibits into evidence today.

I'll start with CDTFA. Those are -- that you have no additional exhibits; correct?

MS. JACOBS: Amanda Jacobs. This is correct.

JUDGE BROWN: This is Judge Brown. And Mr. Yang, I will ask you the same question. Appellant has not

1 identified any additional documents other than the ones
2 that are in the -- that I've already mentioned as
3 Appellant's exhibits; correct?

4 MR. YANG: This is Stanley Yang, and that's
5 correct.

6 JUDGE BROWN: Thank you.

7 I will note as I mentioned previously, all of the
8 briefs are part of what the panel will consider as well.
9 And I know Appellant submitted documents attached to
10 Appellant's briefs. But I've gone through them, and it
11 appears to me that all the documents that aren't briefs,
12 generally, seemed to be already covered in the exhibits
13 that we have. So Appellant's documents were just copies
14 of the documents that CDTFA has already submitted and that
15 we are already marked as exhibits.

16 And, Mr. Yang, does Appellant have any objection
17 to admission of any of these Exhibits A through S into
18 evidence.

19 MR. YANG: No.

20 JUDGE BROWN: Okay. And if there's no objection,
21 I will admit CDTFA's Exhibits A through S into evidence.

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

24 So now that I have admitted the documents and the
25 exhibits into evidence, we can move on to discuss the

1 witnesses. As we --

2 Mr. Yang, is it my understanding that you are the
3 only witness that will be testifying for Appellant today?

4 MR. YANG: Yes, correct.

5 JUDGE BROWN: And I'll just confirm CDTFA is not
6 planning on calling any witnesses; correct?

7 MS. JACOBS: Amanda Jacobs. That's correct.

8 JUDGE BROWN: Thank you.

9 This is Judge Brown. I will just go over briefly
10 what the order of events will be today. First, I will
11 swear in Mr. Yang as a witness, and after that we will
12 hear Appellant's presentation and Mr. Yang's testimony.
13 And then there will be questions for the witness. And
14 then we will have CDTFA's presentation. And then there
15 may be questions from the ALJs. And then Appellant has
16 time for a rebuttal and maybe additional questions from
17 ALJs, and then we will conclude. And we have the time
18 estimates. I have 20 minutes for Appellant's presentation
19 and also 20 minutes for CDTFA's presentation, and an
20 additional 5 minutes for Appellant's rebuttal.

21 Does anyone have any questions about anything
22 about this process or anything that you would like to
23 raise that I have not yet covered? Then I will say if --
24 this is Judge Brown. If no one has any questions, we can
25 proceed with Appellant's presentation. I'll remind the

1 other participants to please mute your microphones while
2 Appellant's representative is speaking.

3 Mr. Yang, before you begin, I will swear you in
4 as a witness. If you could please raise your right hand.

5

6

STANLEY YANG,

7

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

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11

JUDGE BROWN: This is Judge Brown. Thank you
12 very much. Mr. Yang, you can proceed with Appellant's
13 presentation.

14

15

PRESENTATION

16

MR. YANG: Okay. First of all, I'd like to thank
17 everybody for being here for this matter.

18

19

We -- I'd like to clarify that this happened
several years ago, and I was not involved in the process
20 until we -- I was made aware of the case as CEO of the
21 company. But since then, our CFO who was handling this
22 case, Cherry Hu. She has retired, so not really anybody
23 in the company was actually familiar with the actual
24 documents that -- that went through. But I was present
25 during the business transactions with these clients.

1 So let me kind of give a brief overview of what
2 happened. We have had this client from -- or this
3 customer from Massachusetts at the time. The company's
4 name was called Mobe, M-O-B-E. And they purchased about
5 \$600,000 worth of microchips from our company. So when we
6 prepared the paperwork, my understanding was that we
7 prepared it as shipping it to Massachusetts as an
8 out-of-state sale. And we would process that paperwork
9 and sales taxes accordingly with California to
10 Massachusetts.

11 However, the reason why I said I was a witness,
12 and I was there present at the business transaction was
13 their CEO visited our office here in California, in San
14 Jose right before -- right after we finished the
15 negotiation and right before we shipped. So what happened
16 was we invoiced them, and they were supposed to pay us.
17 So we shipped. We started shipping the products.

18 Now, microchips are very small, so they come in
19 two boxes. And since he was in our office -- actually,
20 visiting us in California. I was meeting him for lunch.
21 He said, hey, we -- how about -- I'm flying back. How
22 about you give me one box? There are two boxes, and each
23 box is very small. You ship one box, and I'll carry one
24 box back so that we don't have to wait. My office doesn't
25 have to wait. They can have the microchips, you know,

1 tomorrow. And I said sure. That's not a problem, I said,
2 but I don't have it with me. What do I do?

3 And he said how about you ship it to my wife's
4 sister's flower shop here in San Mateo near the airport so
5 I can pick it up tomorrow morning, and I'll get on the
6 airplane. And that's what we did. We ship one box to his
7 office in Massachusetts and one box to this flower shop.
8 That address was provided by him. So several years later
9 we didn't think much of it.

10 Several years later it -- when we were audited,
11 it was shown that this shipment went to a California
12 location and the sales tax or sales transaction was not
13 executed properly. However, we feel that it was -- we
14 just following the instructions. And everybody can see a
15 flower shop would not want to buy, you know, half --
16 basically, \$300,000 worth of microchips to use. They're
17 selling flowers and plants. I was simply shipping it to
18 this client, and that's -- that was all in our paperwork
19 was a process as such.

20 But then when we are told that we have to -- the
21 sales tax for this portion of the transaction was not done
22 properly within California. Typically, we would -- we
23 were instructed to ask the client to pay this California
24 tax. Well, unfortunately, that client -- because this is
25 several years later, they had gone out of business. And

1 we -- we spent over a year going after the -- them, the
2 board members and the CEOs, but they were not very
3 responsive.

4 They felt like they've done the appropriate tax
5 transactions, what not, in Massachusetts, and this was a
6 California to Massachusetts transaction. They didn't feel
7 obligated to pay California tax, and here we are. We --
8 we feel it's unjust to ask NeuroSky to pay for the sales
9 taxes for another company that they're supposed to pay
10 for, but they went out of business. That's number one.

11 Number two, it was a shipment to a location they
12 wanted us to ship to so that they could carry it back to
13 their state. So the whole transaction, actually, went out
14 of state, not in state. And that's why we felt this sales
15 transaction -- sales tax in California or half of that
16 transaction, which is the amount of \$300,000, is not quite
17 correct because the end product actually arrived in
18 Massachusetts.

19 So that was as a witness when I was in the
20 meeting, that's what happened, and I was -- we were
21 instructed by their CEO to ship that product to this
22 flower shop near the airport in San Francisco so he could
23 pick it up. Our shipping and receiving department
24 recorded the transaction as shipped to this flower shop,
25 not end destination as the Massachusetts company, and

1 that's what happened. I don't know what the details are
2 personally as a witness beyond this because that's what --
3 what -- to the extent I was involved.

4 So the group of people that were handling this
5 shipping and -- and finance side from our company has
6 since retired or moved onto different companies. And I
7 have a new set of employees here who none of them have any
8 recollection of doing this particular transaction. Our
9 marketing sales and myself, we remember this case that
10 they specifically instructed us.

11 Now I'd like to say that there is no reason. We
12 never sold anything to any flower shops in our existence
13 over the past 14, 15 years. And none of -- no flower shop
14 in the world is going to buy \$300,000 worth of microchips.
15 So this is clearly an instruction from a client who just
16 out of convenience, he wanted to carry the box back to
17 Massachusetts, to Boston with him. And that's why we did
18 it that way.

19 JUDGE BROWN: This is Judge Brown. Thank you,
20 Mr. Yang. Is that your -- is that the end of your
21 presentation at this time?

22 MR. YANG: Yes.

23 JUDGE BROWN: Okay. This is Judge Brown. Then I
24 will ask -- turn to my -- actually, I guess I will first
25 turn to CDTF and ask if they have any questions for this

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witness.

MS. JACOBS: Amanda Jacobs. No questions.

JUDGE BROWN: This is Judge Brown. Thank you.

Next, I will turn to my co-panelists and ask if they have any questions for Mr. Yang. Judge Ralston?

JUDGE RALSTON: This is Judge Ralston. I have no questions at this time.

JUDGE BROWN: This is Judge Brown. Judge Ko [sic]? I'm sorry. Judge Cho. I apologize.

JUDGE CHO: This is Judge Cho. Just a couple of quick clarifying questions, Mr. Yang.

MR. YANG: Sure.

JUDGE CHO: So you said you were having lunch with the CEO of Mobe, and then he had asked you to just ship the second box of microchips to the flower shop; right?

MR. YANG: Correct.

JUDGE BROWN: Okay. This is Judge Cho. And then you were able to ship that to the flower shop? Or your company was able to ship that to the flower shop, and then the CEO -- Mobe CEO picked it up the next morning before he flew back to the Massachusetts; is that correct?

MR. YANG: Yes. He told me so. So I called. I used my cellphone to call our shipping department and say, hey, ship one box to this address and the other box to

1 Massachusetts. And that's happened.

2 JUDGE CHO: This is Judge Cho. Thank you. And
3 then so it's your testimony that the first -- the box that
4 you shipped to the flower shop then went out to
5 Massachusetts through the CEO -- through Mobe's CEO; is
6 that correct?

7 MR. YANG: Yeah. Yeah. He picked it up because
8 he was flying out of San Francisco Airport the next day.
9 And the flower shop is in San Mateo, which is very close
10 to San Francisco Airport. And that was -- that shop is --
11 was his sister's -- his wife's sister's shop. That's what
12 he told me. So he was going to stay there and pick it up
13 and fly out the next day.

14 JUDGE CHO: This is Judge Cho. Thank you. So
15 did you ever get a confirmation that he actually took the
16 box to Massachusetts through an email or some other kind
17 of written documentation?

18 MR. YANG: That, I don't know. I -- I -- all we
19 know is that they actually produced the same amount of
20 products. It was a wristband. It was chips going into a
21 bunch of wrist bands, you know, one of those step counter
22 exercise wristbands. They produced the right number of
23 wristbands because we have to supply some kind of software
24 for them as well. So we knew the numbers were correct.
25 That was not doc -- I don't have any documents saying he

1 picked it up and -- and flew out, but we knew that through
2 the subsequent the -- because once we sold it, we have to
3 support them. We knew that they received the entire
4 amount of chips.

5 JUDGE CHO: This is Judge Cho. Thank you. Then
6 I guess -- I don't know if now is the right time to ask
7 this, but in one of exhibits I believe there's an email
8 from some -- from Julie Dormier. And she said that
9 Healthware still maintained some of the microchips for
10 sale in California. They said -- she said it was still in
11 inventory. That seems to be a little bit contradictory to
12 what you just stated right now. Do you know the reason
13 why she would say that?

14 MR. YANG: I don't know. I don't know. Because
15 once we ship, it's out of our control. And it's -- it's
16 highly doubtful that it would be in inventory somewhere
17 because these chips don't just come in separate packs.
18 They are vacuum sealed in a reel in tape. You can't
19 just -- they have to go through machines to be opened and
20 to be unloaded and to be soldered onto electronic boards.
21 So it's very unlikely that they would open a box in a
22 non-clean environment and risk of contaminating the chips.

23 So -- but since we sold them, we have no control
24 of those chips. So I would not know why this -- they
25 would say they still have inventory left. But I would

1 think, you know, you buy a little more than what you need,
2 right? So you create -- let's say you need -- you
3 needed -- I believe they bought -- I can't even remember
4 the number. They bought a few hundred-thousand units.

5 And, basically, if we were to do something.
6 Let's say I want to build 100,000 units. I would buy
7 about 105,000 units just make sure if I have any defects I
8 can still make up the 100,000 units. So you will always
9 have a little bit of inventory, but I doubt that inventory
10 is left in California.

11 JUDGE CHO: This is Judge Cho. Thank you for the
12 clarifying responses. Those are all the questions I had.

13 JUDGE BROWN: This is Judge Brown. Thank you.

14 Mr. Yang, I -- my first question is very basic.
15 I want to ask what this one box that you shipped to --
16 that NeuroSky shipped to the flower shop in California,
17 that covers all of the tangible personal property sales
18 that are in dispute in this case; correct? It was just
19 that one box?

20 MR. YANG: Yes. We had one transaction, and they
21 come in two boxes. One of them was shipped to
22 Massachusetts. That part of it is not in dispute.

23 JUDGE BROWN: Okay. Okay.

24 MR. YANG: It's -- it's the one box that was
25 shipped to the flower shop.

1 JUDGE BROWN: This is Judge Brown. And when you
2 say that you had lunch with your customer, at that time
3 the customer was Healthware; correct?

4 MR. YANG: I'm sorry. Can you repeat that?

5 JUDGE BROWN: What -- well, I guess, what was the
6 name of the customer at the time that it got --

7 MR. YANG: Mobe.

8 JUDGE BROWN: It was Mobe. Okay.

9 MR. YANG: Yeah. M-O-B-E.

10 JUDGE BROWN: Okay. This is Judge Brown.
11 Mr. Yang, do you know what experience your employees had
12 with the sales for resale process and resale certificates,
13 the employees that were handling this, like the CFO?

14 MR. YANG: Yeah. We have very good and extensive
15 experience in this. This came out of the audit as one
16 infraction out of the past, you know, over 10 years we are
17 in business. We had one infraction from the auditor that
18 was sent to our office. So I believe -- and we have -- I
19 don't know how many transactions we've done. So I believe
20 we have thousands, if not, tens of thousands of
21 transactions. This is the only thing that pop up.

22 And I still believe our shipping department --
23 well, they didn't make a mistake. It was shipped to
24 California, but it was intended for this total transaction
25 of doing business with a Massachusetts company.

1 JUDGE BROWN: This is Judge Brown. I think those
2 are all the questions that I have at this time. If my
3 co-panelists don't have anything further, then I will say
4 that we can -- Judge Ralston, do you have something?

5 JUDGE RALSTON: Judge Brown, yes. This is
6 Judge Ralston. I do have a quick question.

7 So you stated earlier that the -- that NeuroSky
8 provided support for the chips after they were -- made it
9 to Massachusetts. Can you explain a little bit more.
10 Were there, like, different, I guess, requests? You know,
11 would there be several different requests or -- or if you
12 could just explain that process a little more. Thank you.

13 MR. YANG: Okay. So once they put the chips --
14 when a customer buys a bunch, even though they buy -- they
15 buy samples way before that, and they build them into
16 products. When they buy a bunch of microchips, they would
17 do a test production run before they throw the whole thing
18 in just in case nothing is wrong. Otherwise, you just
19 wasted you're entire shipment that you bought, right?

20 So they would do a certain amount of production
21 run. Maybe -- that's why they buy a little more than what
22 they actually need, and they will always -- hopefully,
23 they have a little more left in inventory. During this
24 production run, there would be most likely -- nobody is
25 very lucky. Very few in my years of experience, that your

1 first run is perfect. You usually have some problems.
2 Sometimes it's our problems. Sometimes it's their
3 problem. Sometimes there is a software problem or
4 hardware problem.

5 So our engineers would work with them to make
6 sure that their production running through -- that initial
7 production run -- call that a practice, if you will -- is
8 smooth. Now, during that time we also verify with them,
9 okay, you have this many chips in your hands. So that's,
10 you know -- if X number is what you need, you don't -- you
11 don't build beyond that X number. You want to leave a
12 little extra room for the X number plus -- maybe plus an
13 extra 5 percent just in case.

14 Because even when you have everything down pat,
15 when you go through a production process, you always would
16 have a little loss, maybe 2 or 3 percent due to
17 manufacturing defects. So we would work with them to make
18 sure that they have the right amount. The reason is it's
19 very difficult if they -- let's say they need
20 100,000 units of final products and they only made 90 --
21 95,000, and they're short 5,000. It's very difficult for
22 us to get 5,000 -- chips come in a lot.

23 You don't just take 5,000 and special -- I mean,
24 you can do it, but very costly to do so. So we are very
25 careful in working with them to make sure that they --

1 they're just right. If they need more, that would mean
2 they want another production run of the same equal amount
3 or more.

4 JUDGE RALSTON: Thank you. This is
5 Judge Ralston.

6 JUDGE BROWN: This is Judge Brown. Then I will
7 say if there are no further questions for Appellant at
8 this time, we can move onto CDTFA's presentation.

9 CDTFA, you can begin whenever you are ready.
10 And --

11 MR. CLAREMON: This is -- oh, sorry.

12 JUDGE BROWN: -- so go ahead.

13 MR. CLAREMON: This Scott Claremon with the
14 CDTFA. Is it okay if we take, like, just a five-minute
15 recess, just because there's a lot of testimony there that
16 we want to make sure --

17 JUDGE BROWN: Yes, that's fine. We'll take a --
18 just five minutes is all you need? Five minute recess --

19 MR CLAREMON: Is that okay?

20 JUDGE BROWN: Yeah, that's totally fine. I
21 can --

22 MR. CLAREMON: Okay.

23 JUDGE BROWN: We'll take a five-minute recess.
24 And we'll remind everyone to please mute your microphones
25 and turn off your cameras because we are still streaming

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to YouTube.

MR. CLAREMON: Okay. So just stay on the line
but --

JUDGE BROWN: Stay on the line --

MR. CLAREMON: Okay.

JUDGE BROWN: -- and mute and turn off your
cameras.

MR. CLAREMON: Great.

JUDGE BROWN: We will take a five-minute recess.
I'll say it's almost 1:30, so let's say 1:35.

MR. CLAREMON: Thank you, Judge Brown.

JUDGE BROWN: We're off the record briefly.

(There is a pause in the proceedings.)

JUDGE BROWN: All right. We are back on the
record in the Appeal of NeuroSky, Inc., after a short
break.

Can I just check in with CDTEFA. Are you on the
line, and can you hear me?

MS. JACOBS: Amanda Jacobs. Yes, I can hear you,
and I'm on the line.

JUDGE BROWN: Okay. Mr. Parker and Mr. Claremon?

MR. PARKER: I'm here.

MR. CLAREMON: I'm here.

JUDGE BROWN: And Appellant, Mr. Yang?

MR. YANG: I'm here.

1 JUDGE BROWN: Okay. And I see my co-panelists.
2 So I believe we can resume with the proceedings.

3 We had just completed Appellant's presentation
4 and questions from the Administrative Law Judges. And
5 next we're going to move on to hearing CDTFA's protection.

6 CDTFA, whenever you're ready.

7

8 PRESENTATION

9 MS. JACOBS: Amanda Jacobs from CDTFA.

10 Appellant here is a developer and retailer of
11 health and fitness electronics that sells various
12 biosensor products, such as headsets, wristbands, and
13 applications designed to monitor a user's biometric
14 information. The sole issue is whether Appellant has
15 established that an adjustment is warranted to its
16 disallowed claimed nontaxable sales for resale with regard
17 to two sales invoiced March 31st, 2015, and
18 April 13th, 2015, made to Mobe LLC during the audit period
19 of April 1st, 2013, through March 31st, 2016.

20 Mobe appears to be an out-of-state health and
21 fitness adviser based in Franklin, Tennessee. The
22 evidence shows that the property was shipped to
23 Appellant's location in San Jose, California, and was
24 delivered to an address provided by Mobe in South San
25 Francisco, California; Exhibits K and L.

1 We're not exactly sure if Mr. Yang was discussing
2 the same transactions at issue, given that the invoices we
3 received from Appellant regarding these transactions,
4 Exhibit K -- Exhibits K and L show there were two
5 shipments to the South San Francisco address, and there
6 were two pallets on each shipment showing 40 and 60
7 cartons, not the two mentioned by Mr. Yang.

8 It is undisputed that Mobe did not hold a
9 California seller's permit at any time during the
10 liability period and, specifically, when the two sales
11 were made. It's also undisputed that Mobe did not provide
12 Appellant with a single document intended to be a resale
13 certificate for either sale. However, Appellant contended
14 that the purchase order sales agreement and various
15 emails, Exhibits J, M, P, and R, when considered together,
16 contain the elements of a resale certificate as required
17 by Regulation 1668.

18 As you're aware, under the Revenue & Taxation
19 Code Sections 6012 and 6051, sales tax applies to a
20 retailer's gross receipts from the retail sale of tangible
21 personal property in California, unless the sale is
22 specifically exempt or excluded from taxation by statute.
23 A retailer's gross receipts are presumed to be taxable
24 until proven otherwise. And the burden is on the seller
25 to establish that a sale is not a sale at retail, unless

1 the seller timely and in good faith takes a resale
2 certificate from the purchaser; Revenue & Taxation Code
3 Section 6091.

4 Subdivision A of Regulation 1668, which
5 interprets and implement -- and interprets and implements
6 Revenue & Taxation Code Sections 6091, 6092, and 6093
7 states that a resale certificate relieves the seller from
8 liability for the sales tax and duty of collecting the use
9 tax if taken in proper form as set forth in
10 subdivision(b), and in good faith from a person who is
11 engaged in the business of selling tangible personal
12 property, and who holds a California seller's permit.

13 According to Regulation 1668(b), a resale
14 certificate must contain these essential elements: The
15 purchase's signature, name address, and seller's permit
16 number, and a description of the property, and a statement
17 that the property described was purchased for resale. The
18 certificate should also contain it's execution date.
19 However, an otherwise valid resale certificate will not be
20 considered invalid solely on the ground that it's undated.
21 A document containing these essential elements is the
22 minimum form, which will be regarded as a resale
23 certificate; Regulation 1668(b) (2).

24 According to Regulation 1668 subdivision (c), a
25 seller will be presumed to have taken the resale

1 certificate in good faith, if the resale certificate
2 contains these essential elements and otherwise appears to
3 be valid on its face. As previously stated, Appellant has
4 contended in its brief that the purchase order, sales
5 agreement, and various emails, Exhibits J, M, P, and R,
6 when considered together, contain the elements of a resale
7 certificate.

8 It's undisputed that Mobe did not hold a
9 California seller's permit at any time during the
10 liability period. However, Appellant contends that a
11 March 27th, 2015, email from Nancy Tong, Exhibit M,
12 relaying the seller's permit number of True Life
13 Botanicals, LLC, fulfills this essential requirement. The
14 email states, and I quote, "Mobe's reseller ID number is
15 SRBH102-260812. Mobe is associated with True Life
16 Botanicals LLC, to which SRBH102-260812 is associated
17 with. In the event that NeuroSky is asked about this
18 issue, Mobe will confirm that this reseller number is
19 associated with Mobe LLC," Exhibit M.

20 This email is the only piece of evidence
21 Appellant has presented where a permit number was given
22 and Appellant was simultaneously informed that the permit
23 number belonged to a different entity. Appellant
24 apparently searched our website to verify the permit
25 number was valid, Exhibit N. It is clear, from both the

1 email and the sales and use tax permanent verification
2 page, that the permit number belonged to True Life
3 Botanicals, LLC, a separate legal entity from Mobe. And
4 today Mr. Yang has further provided testimony that
5 Appellant was informed by Mobe's CEO about the nature of
6 True Life Botanicals, LLC, and -- so knew it was not the
7 same entity.

8 A resell certificate only relieves the seller
9 from liability if the purchaser holds a California
10 seller's permit, which is one of the essential elements of
11 a resale certificate pursuant to Regulation 1668(b)(1)(c).
12 Specifically, it has been the Department's longstanding
13 position that a resale certificate that contains the
14 seller's permit number of a different entity does not
15 qualify as a valid resale certificate as stated in Sales
16 and Use Tax Annotations 475.0105, 475.0185, and 475.0511,
17 which was highlighted by the panel before this hearing.

18 Accordingly, since the email sent to Appellant
19 explicitly stated that the seller's permit number was
20 associated with a different entity, and Appellant
21 confirmed that to be the case and today tells us that he
22 knew that to be the case, the documents provided by
23 Appellant, even if taken together, lack the essential
24 element of the purchaser's seller's permit number.

25 In addition to lacking a valid seller's permit

1 number, there are additional technical defects with the
2 combination of documents Appellant has claimed -- was
3 claiming as a resale certificate.
4 Regulation 1668(b)(1)(a) requires that a resale
5 certificate must include the signature of the purchaser,
6 purchaser's employee, or authorized representative. The
7 Department does accept a scanned copy of the signature
8 that is faxed or emailed to the seller or digital
9 signatures that meet the requirements of Government Code
10 Section 16.5 as described in the Compliance Policy and
11 Procedures Manual Section 150.050 and Publication 103 and
12 the Audit Manual Section 0490.50.

13 Here, however, the sender's name at the end of an
14 email does not constitute a digital signature. I'm
15 referencing Exhibits R and P. Additionally, Regulation
16 1668(b)(1)(d) requires the certificate state that the
17 property is being purchased for resale. In the
18 March 27th, 2015, email, Nancy Tong, Exhibit M,
19 misidentifies a seller's permit number as a reseller's ID
20 number. It does not actually state that the property was
21 being purchased for resale -- quotes, "for resale," as is
22 required by Regulation 1668(b)(1)(d). While Appellant
23 claims that this is to be inferred from the term sheet,
24 Exhibit J, the regulation specifically requires this
25 statement. Other terminology, such as nontaxable or

1 exempt are specifically labeled as unacceptable by our
2 regulation.

3 Responding to the panel's specific question
4 before this hearing regarding how Annotation 475.0026.875
5 may apply to the facts in this case, we find it
6 distinguishable. This annotation describes a situation in
7 which we determined an out-of-state purchaser taking title
8 to property in California did not need a seller's permit
9 if it made no sales in California. In that instance, a
10 seller may accept a resale certificate in good faith if
11 the purchaser states on the certificate that they are not
12 required to hold a permit pursuant to Regulation
13 1668(b)(1)(c).

14 Subdivision (b)(1)(c) states that if the
15 purchaser is not required to hold a permit because the
16 purchaser sells only property of a kind of which the
17 retail sale of which is not taxable, e.g., food products
18 for human consumption or because the purchaser makes no
19 sales in this state, the purchaser must include on the
20 certificate a sufficient explanation as to the reason the
21 purchaser is not required to hold a California seller's
22 permit in lieu of a seller's permit number.

23 In both the Regulation and Annotation
24 475.0026.875, an explanation as to the exception must be
25 provided on the resale certificate. However, in this case

1 we have no evidence that Mobe provided such an explanation
2 and, in fact, we have evidence that Mobe provided the
3 seller's permit number of a different entity. Even amid
4 the sundry of documents Appellant presented, essential
5 elements of a resale certificate are missing,
6 specifically, the seller's permit number or sufficient
7 explanation as to why one was not required, the
8 purchaser's signature, and a statement that the property
9 was purchased for resale.

10 Since three of the five essential elements are
11 not present, it is not reasonable to find that together
12 these documents constitute a valid resale certificate. A
13 seller is presumed to have taken a resale certificate in
14 good faith if only the resale certificate contains the
15 essential elements and, otherwise, appear to be valid on
16 its face. Here, as I just discussed, Appellant was not
17 presented with a single document that appeared valid on
18 its face. Rather, Appellant received two emails over a
19 month apart; one, which included an unsigned purchase
20 order; and the other which explicitly provided the
21 reseller ID number of a different entity, which Appellant
22 confirmed by checking the Department's website, and which
23 Appellant apparently new belongs to a different entity.

24 The various documents did not contain all the
25 essential elements of a resale certificate. Accordingly,

1 there's no presumption that Appellant took a certificate
2 in good faith and, in fact, it did not. Appellant, as we
3 heard, is a sophisticated seller with approximately 10
4 years of experience with sales and use tax compliance
5 prior to the sales at issue, and they could not take such
6 a certificate in good faith.

7 The mere statement that True Life Botanicals was
8 associated with Mobe is insufficient because it indicates
9 that the seller's permit number did not belong to the
10 purchaser. Therefore, again, it could not have accepted
11 these documents in good faith. The situation is
12 distinguishable from Annotation 475.0045, which was raised
13 by the panel. That annotation addresses a situation in
14 which a purchaser issued a single retail -- a single
15 resale certificate. And the seller's permit number, while
16 invalid, was, quote, "regular on its face," end quote.
17 Which is to say it was not obvious it contained false or
18 incorrect information.

19 Here, however, Appellant was told by the
20 purchaser, Mobe, that the seller's permit number belonged
21 to a different entity, a fact Appellant verified when it
22 checked the Department's website. We're also not sure how
23 much we rely on this annotation, which was published in
24 1986, with regard to the appearance of a legitimate
25 seller's permit number, now that sellers have access to

1 the Departments' website to verify a seller's permit
2 number.

3 Now, that sellers can easily check that a
4 seller's permit number is valid, and in so doing, will
5 necessarily see the name of the person holding the permit,
6 absent the specific facts of that annotation, it doesn't
7 seem likely that a seller can take a resale certificate in
8 good faith that was held by a different entity. In sum,
9 Appellant did not take a valid resale certificate in good
10 faith.

11 Finally, if a seller fails to timely obtain a
12 resale certificate in the proper form, Regulation 1668(e)
13 offers relief of the viability only when the seller shows
14 the property was, in fact, resold or being held for resale
15 by the purchaser, and has not been used for any purpose
16 other than retention, demonstration, or display while
17 holding it in a regular course of business, or was
18 consumed by the purchaser and tax was reported to the
19 Department on the purchaser's sale and use tax return, or
20 was paid to the Department pursuant to an assessment or
21 audit.

22 A seller who does not timely obtain a resale
23 certificate may use any verifiable method of establishing
24 it should be relieved of liability for tax, including the
25 use of an XYZ letter. That is a CDTFA approved form that

1 may be sent to the seller's customers inquiring as to the
2 disposition of the property purchased and is discussed in
3 Regulation 1668(f). However, a response to an XYZ letter
4 is not equivalent to a valid resale certificate. And the
5 Department is not required to relieve a seller from
6 liability for tax based on a purchaser's response to an
7 XYZ letter. Rather, it is merely an item of evidence
8 which may help a seller prove that the sale was not at
9 retail -- was not at resale, Annotation 475.0850.

10 According to information provided by Appellant's
11 former representative, Russell Lee, in his
12 August 24th, 2017, email, which can be found in Exhibit Q,
13 Mobe used the property as promotional items.
14 Additionally, the August 17th, 2016, email from Mobe's
15 chief financial officer, Julie Domer -- Julie Domier,
16 Exhibit S, stated that Mobe had sold none of the property
17 and was instead using it for marketing, testing, software
18 training, and employee and client use in Minnesota and
19 presumably Washington State where it allegedly filed and
20 paid use tax. Appellant also obtained an XYZ letter from
21 Mobe dated May 26th, 2016, which is found in Exhibit O,
22 referencing only one of the two transactions at issue; the
23 March 31st, 2015, invoice, which is Exhibit K, indicating
24 that Mobe purchased the items for resale, and they were in
25 resale inventory and had not been used.

1 However, the preponderance of evidence
2 establishes the two transactions were sales at retail and,
3 thus, subject to tax. There's no evidence supporting the
4 statements that the property was originally purchased for
5 resale and that some of it, according to Exhibit S, was
6 still being held for future sale or use. Exhibits Q and S
7 clearly indicate that none of the property was resold and
8 at no time has Mobe held a California seller's permit. If
9 Mobe intended to resell out of state, it could have
10 indicated on that on a resale certificate in lieu of a
11 seller's permit number but instead supplied an erroneous
12 seller's permit number.

13 While Exhibit S indicates that as of
14 August 17, 2016, some of the property was being used in
15 Minnesota and possibly Washington State, there is, again,
16 no other evidence to support this claim or any claim that
17 the property was being used in Massachusetts. And such
18 use would not fall under one of the four scenarios listed
19 in Regulation 1668(e) that must be shown to relieve a
20 seller from liability. Accordingly, the preponderance of
21 evidence establishes that the property was purchased for
22 use by Mobe.

23 With regard to Mr. Yang's testimony today,
24 unfortunately for Appellant, there's a significant legal
25 difference between shipment in state and out of state,

1 even if the purchaser plans to take it out of state.
2 Regulation 1620(a)(1) and (a)(3) address that. Also, at
3 no time today did Mr. Yang indicate that the sale was
4 represented as a sale for retail -- sale for resale.
5 Appellant has, therefore, not met its burden of proving
6 these transactions were not of retail. For these reasons,
7 we request that the appeal be denied.

8 Thank you.

9 JUDGE BROWN: This is Judge Brown. Thank you,
10 CDTFA.

11 I'll remind everyone now you can unmute, and I
12 will ask my co-panelists if they would like to ask CDTFA
13 any questions.

14 Judge Cho, would you like to begin.

15 JUDGE CHO: This is Judge Cho. Yeah, just a
16 couple of quick clarifying questions, I hope. In the
17 exhibits, Exhibit G, G as in Gary, if you look at page 4
18 of Exhibit G, the auditor states that the bill to customer
19 is located out of state and no seller's permit or nexus in
20 California. I was just wondering do you know how the
21 auditor came to that conclusion? Was it based off the
22 documents that were provided to the auditor at that time,
23 or did the auditor go out and contact Mobe directly?

24 MR. PARKER: This is Jason Parker. Typically,
25 the auditors will look to see if the customer is

1 registered in the state or required to have a permit in
2 this state. So they are an Out of State customer. They
3 may have come here to make purchases. However, if they
4 were not making sales in this state, they were not
5 required to have a seller's permit at that time.

6 JUDGE CHO: Okay. This is Judge Cho. So the
7 reason why I'm asking this question is it goes back to the
8 annotation that CDTFA brought up with respect to the
9 out-of-state customer. I was just wondering whether there
10 was sufficient -- whether the auditor found sufficient
11 information contained in the documents. I believe it
12 was -- give me one second. It was J -- Exhibits J, M, P,
13 and R to make a finding that the customer did not have
14 nexus in California.

15 Because I know CDTFA's position today is saying
16 that, based on the documents, there is no evidence that
17 this was an out-of-state customer who stated sufficiently
18 in those documents that they had no nexus in California.
19 But the question I have is well, the auditor made that
20 conclusion in the audit working papers, and I was
21 wondering where did he get that -- oh, sorry.

22 Where did he or she come to that conclusion? Was
23 it based on the same documentation that CDTFA is looking
24 at today? So I just want to make sure there's no real
25 conflict here between your conclusion today and the

1 auditor's conclusion back in the audit working paper.

2 Does that make sense, that question?

3 MR. PARKER: This is Jason Parker. No, the --
4 yes, your question does make sense. I believe that it is
5 the documentation that we have provided that they've
6 reviewed that they determined that they did not have --
7 you know, I'm not sure that they made the determination
8 that they didn't have nexus. But based on the types of
9 transactions that Mobe did and, you know, they were the --
10 it appeared they were the consumer of these types of items
11 as they didn't sell them. So they didn't make sales in
12 California. So I think they made that inference that they
13 were not required to hold a seller's permit in California.

14 Does that answer the question?

15 JUDGE CHO: This is Judge Cho. Yeah. That's a
16 pretty good answer.

17 But, Mr. Claremon, did you want to add anything?

18 MR. CLAREMON: Yeah, I do. Again, I think it
19 goes to the fact that it is two separate questions because
20 as we stated under Regulation 1620, even if they are an
21 out-of-state customer, if the sale takes place in-state,
22 we're talking about the application of sales tax. So the
23 sales tax would still apply. So, you know, the auditor
24 can use all the information to see that they're not
25 required to hold a seller's permit or even a certification

1 of registration use tax in this state, but that's not to
2 say a sales tax transaction to them wouldn't be subject to
3 sales tax.

4 The question that -- or not the question. But
5 the issue that annotation is addressing and that
6 regulation, like, specifically provides for is when they
7 make an affirmative representation that they will only be
8 reselling these things out of state. Just the fact they
9 don't have nexus doesn't -- doesn't -- is not a
10 representation that they're going to resale these things
11 out of state. They can very -- and, again, the facts of
12 the case are that they have not resold any of these things
13 out of state.

14 And so it's -- it's kind of a different issue
15 we're talking about. This -- not just that they're an
16 out-of-state company, but that they will be, in fact,
17 reselling these things out of state as opposed to using
18 them out of state or using them in state. Because they
19 could be using them in state even as someone not required
20 to hold a seller's permit or even someone without nexus,
21 possibly. I mean, you could come up with scenarios where
22 they don't have nexus, but that's less likely.

23 JUDGE CHO: This is Judge Cho. Thank you for
24 explanation. Moving onto the issue of the XYZ letter, I
25 just want to ask real quick. So the Department found that

1 the XYZ letter wasn't -- wasn't reliable based off of the
2 email -- was it Exhibit S; is that correct?

3 MS. JACOBS: This is Amanda Jacobs. Yes. Partly
4 based on Exhibit S, partly based on the fact that Mobe,
5 you know, Mobe had -- gave false information as to their
6 seller's permit number. And they also don't -- they never
7 provided any evidence to back up the XYZ letter. So,
8 typically, if you're responding with an XYZ letter and
9 you're making a claim, you would then include evidence to
10 support that claim. And that XYZ letter also doesn't
11 cover all of the issues -- all of the transactions at
12 issue. They only address one of the invoices, and there
13 are two at issue in this case.

14 MR. CLAREMON: And this is Scott Claremon. I
15 would add the representation of the XYZ letter is that
16 it's being held in resale in the regular course of
17 business. And the evidence here is that they've never
18 held a reseller's permit in California, and that they, in
19 fact, have never sold any of these products. So the
20 preponderance of the evidence indicates that these were
21 not -- that these were not, in fact, being held for resale
22 in the regular course of business.

23 The preponderance of the evidence is that they're
24 being held possibly for use out of state, which is the
25 evidence, at least before us, of what's happened with some

1 of these products.

2 JUDGE CHO: This is Judge Cho. Thank you very
3 much. I believe that's it for now.

4 So I'll turn it back to you, Judge Brown.

5 JUDGE BROWN: Thank you.

6 This is Judge Brown. And now I'll ask
7 Judge Ralston, if you want to unmute, do you have any
8 questions for CDTFA?

9 JUDGE RALSTON: This is Judge Ralston. Not at
10 this time.

11 JUDGE BROWN: Thank you.

12 This is Judge Brown. CDTFA, I guess I wanted to
13 ask -- pick up on what you were just answering about the
14 XYZ letter where you indicated that it wasn't -- the XYZ
15 letter the Department found, it was not reliable based on
16 Exhibit S, and based on the fact that Mobe gave false
17 information about being able to use True Life Botanical's
18 seller's permit, and also because there were -- Mobe
19 didn't provide any evidence to back up its representation
20 in the XYZ letter. I guess my question is, is there a
21 reason why we would expect Mobe to know to present that
22 evidence to back up its XYZ letter or expect Appellant to
23 have that evidence to back up the XYZ letter?

24 MR. CLAREMON: I mean Mobe did -- this is Scott
25 Claremon. Mobe did provide information. They, you know,

1 two years after the fact, they did provide information to
2 Appellant, but the information does not -- that they
3 provided does not back up the letter. The information
4 they provided is that they have not resold any of these
5 products. And the other information that is independent
6 of that representation is that they have never held a
7 California seller's permit.

8 And those are two pieces of evidence that when
9 we're determining whether someone is actually holding
10 something for resale in the regular course of business in
11 California, those are two -- you would find those to be
12 two compelling pieces of evidence that they are not doing
13 so.

14 JUDGE BROWN: This is Judge Brown. Thank you.

15 I wanted -- I had wanted to ask about Annotation
16 475.0045. And Ms. Jacobs, I think you really did cover
17 most of what I was going to ask anyway, and I appreciate
18 that you're proactive in trying to address my question. I
19 guess I wanted to ask to the extent that you're saying
20 that now we shouldn't rely on the annotation because now
21 we have the internet where this information can be
22 verified.

23 I guess I wanted to follow up and sort of ask the
24 same question about what's in the backup letter. Or I
25 don't know if you're -- I know technically I know that we

1 just -- it's just technically the annotation and not the
2 backup letter, but the backup letter does provide context
3 for the annotation. And because there was some language
4 in the backup letter to Annotation 475.0045 that I -- that
5 was kind of striking where it says that the seller's
6 permit number may otherwise be borrowed by the purchaser.

7 And I was just wondering that -- that seems to
8 have a very different philosophy than the argument that
9 you are making and the argument that's in Annotation
10 475.0511. I don't -- I understand that annotations are
11 not law, and I understand the arguments about how much
12 reliance we should give to them. I just thought is there
13 something I'm missing about why these two annotations that
14 are pretty close in time take such different philosophies,
15 and how we have interpreted that for this case?

16 MR. CLAREMON: I can answer. This is Scott
17 Claremon again.

18 JUDGE BROWN: Go ahead.

19 MR. CLAREMON: I think that's -- I do think that
20 philosophy is somewhat informed by the fact that it is an
21 older annotation, that it's -- it's -- the -- at this
22 point in time, the seller's permit number is the most
23 easily verifiable element on a reseller's certificate
24 because you do just have to go on the website and see who
25 it belongs to and that it's valid. But, again, when we're

1 talking with this annotation about whether it's applicable
2 to this case, that annotation -- that backup letter does
3 say, like, in the very last one is this is all, of
4 course -- then it says, you know, assuming it's taken in
5 good faith. Okay.

6 So I think you have to look at that in
7 combination with the fact of this case. Which is that,
8 whether or not it was borrowed or a related entity or a
9 predecessor entity, they -- like, this Appellant knew it
10 that wasn't theirs. As opposed to perhaps in the
11 scenarios they're talking about there, it was borrowed
12 and, again, it was represented as their own. And at that
13 time, there was -- it was less easily to bear -- easy to
14 verify, but it's certainly distinguishable in that fact.
15 At least that fact exists in this case that then we don't
16 know that fact is what they were contemplating there.

17 MS. JACOBS: And -- sorry. This is Amanda
18 Jacobs. I also wanted to point out that that annotation
19 discusses that the seller's permanent number or not -- I'm
20 sorry. The resale certificate is -- they used it in
21 quotes in the backup letter regular on its face, meaning
22 it contains all five elements, except one may be false.
23 And in this instance three, you know, two of the elements
24 are missing and one is false. And so I would argue that
25 it's distinguishable in that fact as well and that, you

1 know, this resale certificate compilation was not regular
2 on its face.

3 JUDGE BROWN: This is Judge Brown. Thank you,
4 CDTFA.

5 Co-panelists, do you have any further questions
6 for CDTFA before we move onto Appellant's rebuttal?

7 JUDGE CHO: This is Judge Cho, just a one quick
8 one. I know, CDTFA, you stated Mobe did not have a
9 California seller's permit so, therefore, it could not be
10 a retailer. But do you happen to have any information
11 that Mobe didn't have a seller's permit in any other
12 state? Could it still be a re -- or could it still have
13 been a sell for resale if Mobe had a resale certificate in
14 another state?

15 MR. CLAREMON: Again, no. This is Scott
16 Claremon. No, we don't. But so, again, we're just --
17 based on the evidence that we have determining whether we
18 think it's being held for resale in California, as
19 Ms. Jacobs did point out, though, that if that were the
20 intention, they could very easily have just made that
21 statement in the email that, we don't need a seller's
22 permit because we're going to sell these out of state.
23 And that was not the representation that they made.

24 JUDGE CHO: This is Judge Cho. Thank you.
25 That's all the -- that's the only clarifying question I

1 had.

2 JUDGE BROWN: This is Judge Brown.
3 Judge Ralston, if you don't have any further questions for
4 CDTEFA, then I will move on to hearing Appellant's
5 rebuttal.

6 All right. Mr. Yang, you have --

7 MR. YANG: Yes.

8 JUDGE BROWN: Okay. It is now time for your
9 rebuttal. And we had agreed you have five minutes, but
10 we're not pressed for time. So I would just like to -- I
11 would say if you are ready, you may proceed with your
12 rebuttal.

13 And I'll just remind everyone else to mute your
14 microphones if you are not speaking.

15 MR. YANG: Okay. Thank you, Judge Brown.

16

17 CLOSING STATEMENT

18 MR. YANG: I frankly -- quite frankly, I'm --
19 it's out of my league to understand all the codes that was
20 presented. And frankly, I'm a businessperson, and I was
21 trained -- I went to college as an engineer. So I
22 wouldn't know how exactly the seller and reseller permits
23 go and all that. So that's why I have a team for that.
24 But, unfortunately, that original team has gone, and then
25 I have a new team. So I apologize for my ignorance.

1 But all I can say is that we keep talking about
2 selling and reselling. These chips were not resale. Why
3 would anybody buy our chip and resell it at a markup?
4 Whoever buys them would rather come to us and buy them.
5 It will be cheaper, right? So, obviously, they were built
6 into something else. And, in fact, I know in this case
7 they were built into wristbands, and those wristbands were
8 not sold in California. I'm pretty sure because I -- I
9 saw them. I know the exact end customer, and they were
10 buying it for their employees for health tracking for the
11 employees.

12 So I don't have any evidence to support this, but
13 I know they weren't used in California. And, again, you
14 don't buy a chip and resell a chip simply because whoever
15 buys that can simply come to us and buy it for cheap.
16 Anybody who want -- if Mobe were to resell the chip, they
17 have to make a markup, otherwise why make all that effort,
18 right? And they wouldn't know how to support the chip,
19 whoever buys the chip.

20 So it went into a wristband. So the chips were
21 not resold. They went into a wristband, and the wristband
22 were sold to an end customer. That's what I know. But
23 I'm not sure how that applies to all the laws. All I know
24 is -- and just using my common sense, all I know is we
25 were told to ship these to a flower shop, and we did. And

1 maybe that was my mistake. I have to admit that.

2 I shouldn't -- I should have -- I should not have
3 called my shipping and receiving guy and say, hey, can
4 you -- I'm having lunch with this guy, Dennis. Ship it
5 to -- ship this half to this and ship the rest over there.
6 Maybe I shouldn't have done that. That will be my
7 mistake. But the truth of the matter is they all went and
8 ended up out of state. That's all I'm saying.

9 So, you know, just perhaps it's my ignorance, but
10 I wouldn't know the law so well like my finance
11 department, shipping departments would. Maybe -- you
12 know, this is a lesson learned. I would never tell my
13 shipping guy to not ship something or ship something
14 anymore. I'll just have them go by the books.

15 That's all I would like to say. Thanks.

16 JUDGE BROWN: This is Judge Brown. Thank you,
17 Mr. Yang. I think. I will begin with questions, and then
18 I'll turn to my co-panelists. Mr. Yang, so are you -- is
19 NeuroSky now arguing that these weren't sales for resale,
20 and that the panel should not -- does not need to examine
21 whether these were sales for resale.

22 MR. YANG: They were resale in a different form.
23 They were -- these were bought to be put into something to
24 be resold in a different form, but it's not a direct
25 resale. I don't know if that makes any difference.

1 That's all I'm saying. So, for example, if you bought our
2 chip, you wouldn't resell the chip. You would put it in a
3 health tracker or wristband or smart watch and then resell
4 it, sell the whole product that way.

5 JUDGE BROWN: I'll turn to my co-panelists now.
6 Judge Ralston, do you have any questions for Mr. Yang
7 following Appellant's rebuttal?

8 JUDGE RALSTON: This is Judge Ralston. Not at
9 this time.

10 JUDGE BROWN: Judge Cho, do you have any further
11 questions for Appellant?

12 JUDGE CHO: This is Judge Cho. I don't have any
13 questions. Thank you.

14 JUDGE BROWN: All right. Then I think that we
15 may have covered all of the presentations. All right.

16 CDTFA, do you have anything further?

17 MS. JACOBS: This is Amanda Jacobs. No, we do
18 not.

19 JUDGE BROWN: And Appellant, Mr. Yang, do you
20 have anything further?

21 MR. YANG: No. Thank you so much.

22 JUDGE BROWN: Okay. Well then thank you everyone
23 very much. This concludes this hearing. The record is
24 closed, and the case is submitted today.

25 The judges will meet and decide the case based on

1 the evidence, arguments, and applicable law. We will mail
2 both parties our written decision no later than 100 days
3 from today.

4 This hearing is now adjourned, and we are off the
5 record.

6 Thank you everyone.

7 (Proceedings adjourned at 2:19 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

That the foregoing transcript of proceedings was 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 10th day of November, 2021.

ERNALYN M. ALONZO
HEARING REPORTER