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APPEARANCES :

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ SUZANNE BROWN
ALJ JOSHUA LAMBERT

For the Appellant: JOSEPH A. VINATIERI
PATRICIA VERDUGO

For the Respondent: STATE OF CALIFORNIA
DEPARTMENT OF TAX AND
FEE ADMINISTRATION
COURTNEY L. DANIELS
SCOTT CLAREMON
JASON PARKER

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14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

PRESENTATION

	PAGE
By Mr. Vinatieri	28
By Ms. Daniels	59

APPELLANT'S

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
David Whitney	32	44		

REBUTTAL

	PAGE
By Mr. Vinatieri	73

E X H I B I T S

(Appellant's Exhibits 1-17 were received at page 15)

(Department's Exhibits A-J were received at 15)

CLOSING ARGUMENT

	PAGE
By Mr. Claremon	79
By Mr. Vinatieri	83

1
2 Sacramento, California; Wednesday, May 25, 2022

3 9:32 a.m.
4

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. It looks
6 like the livestream is recording, so we're good to start.

7 So we're opening the record in the appeal of
8 Adler Tank Rentals. This matter is being heard before the
9 Office of Tax Appeals. The OTA case number is 18011850,
10 and today's date is Wednesday, May 25th, 2022. The time
11 is approximately 9:32 a.m. So this hearing is being
12 conducted in Sacramento, California, and we're also live
13 streaming this on our public YouTube channel.

14 Today's hearing is being heard by our panel of
15 three administrative law judges. My name is Andrew Kwee
16 and to my left is Josh Lambert and to my right is Suzanne
17 Brown. And we are the three judges on this panel.

18 So after today's hearing, the three of us will
19 meet and produce a written decision as equal participants.
20 Although I will be conduct the hearing, any judge on this
21 panel may participate in the hearing to ensure that we
22 have all the information needed to decide this appeal.

23 Sorry. I -- it feels like it's going in and out
24 with the sound volume. I'll try and just stay at one
25 distance from the microphone.

1 For the record, would the parties please state
2 their names and who they represent. I'll start with
3 representatives for the Tax Agency.

4 MS. DANIELS: Hi. I'm Courtney Daniels. We are
5 representing CDTFA. I have Scott Claremon and also Jason
6 Parker with me today.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.
8 And for the Appellant, who do we have present?

9 MS. VERDUGO: Patricia Verdugo, counsel for
10 Appellant.

11 MR. VINATIERI: And good morning. Joe Vinatieri
12 on behalf of the Appellant.

13 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

14 And I believe you have a witness. Is your
15 witness here and ready?

16 MR. VINATIERI: Yes. It's David Whitney. He's
17 sitting behind me.

18 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

19 So as you probably got a message or email around
20 on Friday, the lead ALJ, Natasha Ralston -- she is
21 unavailable. So she is being replaced by Judge Josh
22 Lambert, and I was taking her place as the lead
23 administrative law judge.

24 Did either of the parties have any -- objections
25 or concerns to having Judge Josh Lambert take over for

1 Natasha Ralston on this panel? This is Judge Lambert.

2 MR. VINATIERI: No objection.

3 MS. DANIELS: No objections.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

5 Thank you.

6 So, before we start with the presentations, as I
7 mentioned, we did have some questions. I was going to go
8 over the order of presentation, but I did have some
9 additional questions I wanted to ask just to make sure
10 everyone's on the same page.

11 So I'll start with the witness. You mentioned
12 that David Whitney was going to be testifying for the
13 Appellant.

14 MR. VINATIERI: Yes.

15 ADMINISTRATIVE LAW JUDGE KWEE: So my
16 understanding is he's vice president and controller for
17 Appellant and also for the parent company, McGrath
18 RentCorp; is that correct?

19 MR. VINATIERI: Yes. Vice president and
20 corporate controller.

21 ADMINISTRATIVE LAW JUDGE KWEE: Vice President
22 and Corporate Controller. Okay.

23 Okay. And CDTFA, you don't have any witnesses;
24 that's correct?

25 MS. DANIELS: That's correct.

1 ADMINISTRATIVE LAW JUDGE KWEE: And you don't
2 have any objection to the testimony of David Whitney?

3 MS. DANIELS: No, we do not.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

5 So as far as the video, I believe each party has
6 a video. Appellant's video is Exhibit 13 and CDTFA's
7 video is a link to Exhibit K; is that correct?

8 MS. DANIELS: That's correct.

9 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And for
10 Appellant, my understanding is that your video is on the
11 laptop beside you. Are you all set to go with -- do you
12 know how to operate the laptop so, when we start with the
13 hearing, you'll be able to just push play?

14 MR. VINATIERI: Yes.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So how is
16 that going to work? Is the video going to play before the
17 witness testimony, and the witness will then testify about
18 it? Or --

19 MR. VINATIERI: What we intend to do is I'll be
20 asking the witness some questions. And, at one point in
21 time, we'll push the button, and you'll see the video.
22 And Mr. Whitney will basically discuss what's being
23 portrayed on the video so everyone understands what we're
24 looking at.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Perfect.

1 So then it'll be playing during witness testimony. That
2 makes sense. Thank you.

3 And for CDTFA, there was -- there is an issue
4 with -- with your video. From my understanding, you only
5 provided a YouTube link, but you didn't provide an actual
6 file -- like, playable file for your video.

7 And the problem with that is, you know, when we
8 have evidence in the record, we need to have it saved to
9 our file. We can't accept a YouTube link because, for
10 example, the -- the video could change, or it could be
11 removed.

12 We need to have something on the record that, you
13 know, for example, if there's an appeal, we have something
14 to show what was submitted to us. And the link, you know,
15 that could -- that could change. We can't accept the
16 link.

17 Is it possible for CDTFA to provide, like, an MP4
18 or some sort of video file that could be uploaded to our
19 record?

20 MS. DANIELS: So the link that we were offering
21 is actually -- well, the video is one of Appellant's
22 videos that they have on their YouTube channel. As it's
23 owned by them, we don't have the availability of being
24 able to download it and present it to you without some
25 sort of permission, probably, from them.

1 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So if we
2 don't have a video for you -- because we can't -- we can't
3 admit a YouTube link into evidence because that's not
4 something that can be stored for us, you know, especially
5 since it can be removed at any time or changed or deleted.

6 Is it possible, instead of the video, since you
7 only had about 12 seconds, maybe, of the video that you
8 wanted us to view -- is it possible that you could just
9 show photographs of the pertinent screens?

10 It looked like the pertinent screens might have
11 been just the -- the trailers that were moving that you
12 wanted to show. Is it possible you could just submit
13 screenshots of what you wanted to show from the video from
14 those 12 seconds?

15 MR. CLAREMON: Yeah. If we could have the
16 opportunity to do that after the hearing, we'd like that.
17 It might not be necessary because it is similar to other
18 videos and photos that are -- that are in evidence.

19 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I can
20 get back to you. So there's two options, but I will get
21 back to you after -- before the hearing closes to
22 determine whether you want to submit pictures in lieu of
23 the video. And also, how -- if you did want to hold the
24 record open to submit those pictures, how much time would
25 CDTFA need to do that?

1 MR. CLAREMON: I mean, no more than a few days to
2 see if we could somehow get the video or take pictures of
3 it.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I'll
5 tentatively put 15 days, and we can come back to that.

6 So I'll turn to Appellant. Would Appellant have
7 any objection to CDTFA submitting pictures in lieu of a
8 video, or potentially submitting a video, if they're able
9 to download it?

10 MR. VINATIERI: My recollection from the
11 prehearing conference was, Courtney, you referred to the
12 video. But I think we were going to -- it wasn't going to
13 actually be used at the hearing here today. It was just
14 for your information. Did I get that right?

15 MS. DANIELS: That is correct. It was for the
16 panel to view. It did not necessarily need to be seen
17 during the hearing; however, we're happy to try to submit
18 it in a way that it can be saved in accordance with your
19 rules.

20 ADMINISTRATIVE LAW JUDGE KWEE: Right. Yeah.

21 So the only issue that we had was that we can't
22 admit the YouTube link. We actually needed a video
23 downloaded. So since -- if they can't download a video,
24 we would just accept pictures.

25 MR. VINATIERI: Pics are -- that's fine with us.

1 That's not an issue.

2 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

3 MR. VINATIERI: Well, is the panel -- the panel
4 will not be seeing the video?

5 ADMINISTRATIVE LAW JUDGE KWEE: Oh, so just one
6 second.

7 (Reporter interrupted)

8 ADMINISTRATIVE LAW JUDGE KWEE: Is your
9 microphone on? It's -- I'm -- we're getting messages that
10 -- what you're saying isn't -- isn't being picked up on
11 the YouTube? Or it's -- it's being very, very low. If
12 you could --

13 MS. VERDUGO: So if the video is not in evidence
14 then, will the panel be still viewing it if it's not in
15 evidence? Or will they only look at -- will you only look
16 at the pictures?

17 ADMINISTRATIVE LAW JUDGE KWEE: So we would be
18 viewing what they submit, either a picture or downloaded
19 video. And that would be -- we would holding the record
20 open to allow them to submit the pictures or the video
21 from the link.

22 It's just that the only problem is -- so we're
23 not going to look at the link, or we're not going to
24 consider the link, until they submit it as a downloaded
25 video or they submit the pictures.

1 And what we would consider is whatever they
2 submit. It's just that we -- we just can't admit a
3 YouTube link because that's not something that we could
4 store in our record.

5 MS. VERDUGO: Right. Right.

6 ADMINISTRATIVE LAW JUDGE KWEE: That was the only
7 problem.

8 MS. VERDUGO: So our concern was that you
9 wouldn't view something that wasn't actually in evidence.
10 So you will only view whatever they actually are able to
11 submit into --

12 ADMINISTRATIVE LAW JUDGE KWEE: So -- So --

13 (Reporter interrupted)

14 MS. VERDUGO: So you -- the panel will only view
15 pictures or video that is actually submitted into
16 evidence; correct?

17 ADMINISTRATIVE LAW JUDGE KWEE: That is correct.

18 MS. VERDUGO: Okay.

19 ADMINISTRATIVE LAW JUDGE KWEE: We will only
20 consider or review what is submitted. And, if they
21 submit, for example, after 15-days, the video, you'll have
22 an opportunity to -- to raise any concerns. And we can
23 consider any objections that you have at that time.

24 MS. VERDUGO: Okay. Thank you. That was my
25 question.

1 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

2 Okay. So I'll get back to the video after the
3 hearing and we'll determine whether or not we even need
4 the video or if CDTFA wants to submit it or not. So I
5 think we're good there.

6 So -- and to double check with the exhibits -- so
7 then we have Exhibits A through K, but K was the video.
8 So that's potentially A through J for CDTFA. And my
9 understanding is that there's no objection
10 from Appellant to CDTFA's Exhibits A through -- through J
11 or, potentially, the video, K, if they have a video; is
12 that correct?

13 MR. VINATIERI: That's correct.

14 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So for
15 Appellant, we have Exhibits 1 through 17. And I
16 understand there's no objection for Exhibits 1 through 15;
17 however, Exhibit 16 and 17 are new. So I'd double check
18 with CDTFA. Do you have any objections to the new -- the
19 photographs that are 16 and 17?

20 MS. DANIELS: No objections.

21 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

22 So then I will admit Exhibits A through J for
23 CDTFA and 1 through 17 for Appellant into evidence.

24 And we will get back to the admissibility of K,
25 or whether or not there's going to be a K, before we

1 conclude the hearing.

2 (Appellant's Exhibit Nos. 1-17 were received in
3 evidence by the Administrative Law Judge.)

4 (Respondent's Exhibit Nos. A-J were received in
5 evidence by the Administrative Law Judge.)

6 ADMINISTRATIVE LAW JUDGE KWEE: So with that, I
7 did have a couple additional questions about the issues to
8 be heard.

9 So on the agenda, the issue was described as
10 whether or not the property was MTE. I was going to
11 slightly revise the phrasing of the issue statements
12 because, generally, we address it in terms of whether tax
13 applies or not. Would either party have concerns if I
14 rephrase the issue as whether California Use Tax applies
15 to Appellant's out-of-state leases of the equipment?

16 My understanding was that the only issue was the
17 out-of-state leases of the property because whether or not
18 it was MTE impacted whether or not they had to pay taxes
19 on the fair rental value. So that -- I was trying focus
20 the -- the issue a little bit.

21 So it would be whether California Use Tax applies
22 to Appellant's out-of-state leases of the equipment.

23 Is -- does either party have -- I guess, does
24 CDTFA's -- is that phrasing of the issue okay for you?

25 MS. DANIELS: We agree with that phrasing.

1 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

2 And for Appellant, do you have any concerns with
3 that phrasing of the issue?

4 MR. VINATIERI: I -- I do have concerns. The
5 record all the way up to here has been "Is this -- is the
6 equipment in question mobile transportation equipment?"

7 If it is, then it's -- it's as CDTFA says it is
8 in terms of taxability. If it's not --

9 ADMINISTRATIVE LAW JUDGE LAMBERT: Mr. Vinatieri,
10 could you please -- when you speak, you have to be pretty
11 close to the mic, or else it can't hear you on YouTube at
12 all.

13 MR. VINATIERI: Okay. Let's try it again.

14 My -- my only concern is this has come all the
15 way up through the process with whether -- is this MTE, or
16 is it not?

17 I'm a little -- everything you just said is
18 correct, in terms of out of state, because it does relate
19 to the out-of-state leases. But it strikes me now --
20 maybe it's not that big a deal, but it strikes me now --
21 kind of changing things around. Because the whole record
22 up to now has -- has been MTE, or not.

23 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So, I
24 guess, that's fair. It was addressed at the pre-hearing
25 conference as MTE, and since you have an objection, I'll

1 just leave it as whether the property was MTE.

2 So that would still -- ultimately, the -- the
3 question that -- to decide. So, I guess, that's fine.

4 So I did have just a couple of questions to
5 understand if there was areas that aren't in dispute or
6 are -- I guess, just to narrow the focus of the inquiry, I
7 just wanted to confirm my understanding that certain items
8 weren't in dispute.

9 So for CDTFA, to the extent, if any, that OTA
10 determined the equipment qualifies as tangible personal
11 property and was not MTE -- CDTFA, of my understanding,
12 you agree that the tax would have been reported correctly
13 if this was considered TPP; is that correct?

14 MS. DANIELS: Yes, I believe that's correct.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

16 And for Appellant, my understanding is that it's
17 undisputed that there was no tax paid at the time of
18 purchase. It was an election to pay tax on -- on the fair
19 rental value.

20 So there's no dispute that there was no tax, or
21 tax reimbursement, paid when you purchased the property?

22 MR. VINATIERI: That's accurate.

23 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

24 And also, so to the extent, like, that we found
25 any portion of this as it did constitute MTE, would there

1 be -- is it undisputed that California Use Tax would apply
2 to the extent that this were determined to be MTE? Or
3 is -- was there a separate issue aside from that?

4 MR. VINATIERI: If the panel were to find that
5 some of this is MTE, then I think the tax consequence is
6 as you indicate.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Cool.

8 So -- and that would make sense that -- to
9 limiting the issue to whether this is MTE then.

10 Did you want to say something?

11 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah. Just,
12 these mics are very sensitive. So you have to kind of,
13 like, actually be really close, or else we can't hear you.

14 Maybe you could lift it up and pull it close to
15 your mouth? Its -- there pretty sensitive. Can you try
16 it out now.

17 MR. VINATIERI: One, two, three, four, five.

18 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah. You
19 have to be really close.

20 MR. VINATIERI: Yeah. Its -- its difficult.

21 ADMINISTRATIVE LAW JUDGE LAMBERT: I know.

22 MR. VINATIERI: You almost feel like, you have to
23 swallow it.

24 ADMINISTRATIVE LAW JUDGE KWEE: That is really
25 good, though. I heard you very well when you -- just a

1 couple seconds ago, when you were trying to swallow it.

2 MR. VINATIERI: Yeah. Well, it doesn't taste
3 very good. I'm going to tell you that right now.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I think
5 we're good.

6 So there's no dispute about the potential
7 applicability of, you know, an out-of-state -- a credit
8 for tax paid to another state, 6406, is -- because my
9 understanding was that you were paying tax to other states
10 on the rentals for out of state?

11 MR. VINATIERI: That is accurate.

12 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

13 MR. VINATIERI: Did you hear that?

14 ADMINISTRATIVE LAW JUDGE KWEE: Oh, yeah. I
15 heard you loud and clear. I think -- Judge Lambert, is --
16 that was good; right?

17 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah. That's
18 better. It -- yeah.

19 MR. VINATIERI: Just -- jump in. Because I --
20 I'm going to be moving around. So if I miss it, please
21 let me know.

22 ADMINISTRATIVE LAW JUDGE LAMBERT: Yeah. I think
23 when you -- even turning your head sometimes can change
24 the volume.

25 MR. VINATIERI: Yeah. That's part of the issue.

1 Yes.

2 ADMINISTRATIVE LAW JUDGE KWEE: He's the tech
3 person. We have someone monitoring the IT channel. So
4 the -- if he jumps in -- yeah. Thank you.

5 MR. VINATIERI: Absolutely.

6 ADMINISTRATIVE LAW JUDGE KWEE: Sorry for the
7 interruptions.

8 So, there was one other thing which wasn't
9 entirely clear to me.

10 So in the CDTFA decision, it listed seven types
11 of equipment. And in Appellant's briefing, you had listed
12 the equipment as boxes, small tanks, and large tanks? But
13 it -- and it looked like, for the most part, it was -- you
14 just had, like -- you lumped some of them together.

15 But do you agree that there were -- because since
16 CDTFA decision had the larger spread of potential
17 categories, do you agree that those were seven types of --
18 of equipment at issue? Or do you not agree with the --
19 the titles for the seven types of equipment provided by
20 CDTFA and their decision?

21 MR. VINATIERI: Yes, what we have done is the
22 vast majority -- and you'll here this in testimony -- the
23 vast majority of the equipment, are what we call "tanks".
24 There's some boxes -- it constitutes -- the tanks are,
25 like, 80 percent of the liability here; 20 percent are the

1 boxes.

2 So, I mean, we can ask Mr. Whitney, when he sits
3 here from -- from the company, but we basically -- because
4 the vast majority are the tanks. That's really, what the
5 major issue here.

6 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I
7 guess -- and what I -- the reason I was just asking is, to
8 the extent OTA determined, like, some categories were MTE
9 and some were not MTE, would there be any dispute between
10 the parties as to how to allocate that? Or would OTA
11 be -- just be able to say, for example, the Poly Tank is
12 MTE and the -- and I'm just making up a random example.
13 I'm not saying -- trying to say what I was, you know --
14 where we're going with this -- and the boxes are not MTE?

15 Would there be a dispute between the parties
16 about what that allocation would be that we would need
17 briefing on? Or would it be straightforward -- that we
18 could just say the boxes are this and the tanks are that,
19 and -- and the parties would agree to however that
20 allocation came -- came out?

21 MR. VINATIERI: From -- from my viewpoint, as I
22 said, 80 percent, 20 percent. 80 percent is the -- the
23 tanks, and 20 percent is the boxes.

24 And there's an issue relative to the boxes, and
25 we'll get into it -- relative to whether they are

1 permanently attached, and whether they constitute MTE.

2 But I -- I'm of the belief that if -- the way the
3 panel were to go -- you'd probably be able to see because
4 in the exhibits, it is broken down. And you can kind of
5 tell what's a tank and what's a box.

6 And, I mean, it's how many angels can dance on
7 the head of a pin? Because there's different types of
8 boxes, also.

9 So, I mean, you can really slice it and dice it,
10 but I think, in general, it would be more like the
11 80 percent, the 20 percent.

12 But, as I said, Mr. Whitney is here and maybe we
13 can ask that question of him.

14 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Yeah. So
15 I'll wait before getting specifics for, you know, your
16 presentation and the witness testimony.

17 And, CDTFA, if OTA were to ask, you know, for
18 example, Items A were one type of property and Items B
19 were another type of property, would that present a
20 concern? Or is that something that CDTFA could, you know,
21 determine without any additional briefing required?

22 MS. DANIELS: Our understanding is, between the
23 tanks and the boxes, there's different specific
24 characteristics that you would be deciding on.

25 So if you were to -- to use your example -- if

1 you were to decide the Poly Tank was this, or not, we
2 would agree that all the Poly Tanks have the same
3 characteristics, and that would make sense.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

5 MS. DANIELS: Does that answer your question?

6 ADMINISTRATIVE LAW JUDGE KWEE: Yes, it does.

7 Thank you.

8 MS. DANIELS: Okay. Great.

9 ADMINISTRATIVE LAW JUDGE KWEE: With that said, I
10 believe those were all the questions that I --

11 Oh. There -- there was also a second issue, and
12 that was whether Appellant was entitled to a bad debt
13 deduction. And my understanding is the only dispute there
14 had to do with whether or not it was MTE or not. If it
15 was MTE, then it wouldn't be eligible; and, if it
16 was [sic], then it would be eligible for a bad debt
17 deduction; is that correct?

18 MR. VINATIERI: That's correct.

19 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

20 (Reporter interrupted)

21 ADMINISTRATIVE LAW JUDGE KWEE: Oh, I'm sorry.

22 It's -- the questions was a bad debt deduction.

23 (Reporter interrupted)

24 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Okay.

25 And the last thing was, on the briefing,

1 Appellant had raised a Taxpayer Bill of Rights claim. And
2 I just wanted to clarify that OTA lacks jurisdiction to
3 address that until after a decision is issued. I -- so
4 you understand that we're not going to be addressing that
5 Taxpayer Bill of Rights claim at this time.

6 Depending on what the opinion said, then you
7 could potentially file one later. But you can't file that
8 right now. It's premature. Is that -- do you understand?

9 MR. VINATIERI: Understood. I just wanted to
10 make sure that it was raised so there's no issue, relative
11 to exhaustion, in -- in putting people on notice.

12 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

13 And, CDTFA, you don't have any concerns about
14 that -- not raising the Taxpayer Bill of Rights claim at
15 this time?

16 MS. DANIELS: No, thank you.

17 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

18 So, with that said, I believe the order of
19 presentation that I had written down from the prehearing
20 conference was we would have 15 minutes for the taxpayer's
21 opening presentation; and then, CDTFA would have
22 20 minutes for their presentation.

23 After that, we would have 25 minutes for the
24 witness; and that time would include the playing of the
25 video. And after that, they have written down 10 minutes

1 for Appellant's rebuttal and then 10 minutes per party for
2 closing remarks.

3 Mr. Vinatieri, was that -- the order of
4 presentation -- the question that you had? Or did you
5 have concerns about that?

6 MR. VINATIERI: I do. And -- as we put together
7 our presentation, the way we set it up, I would like to
8 begin on our opening. And then, in the opening, at one
9 point, I'd like Mr. Whitney to come up and do his
10 testimony, and I'm assuming cross-exam to the extent that
11 it's there -- redirect.

12 And then, once he's done, I'd like to finish my
13 closing. Because he's going to be talking about some
14 things that -- some pieces of equipment that are already
15 in the record and in the briefs and -- and you already
16 admitted into -- into evidence.

17 So it's a little -- a variation on -- on that
18 theme.

19 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So it
20 would be your opening presentation, which would include --
21 followed by witness testimony and the video; followed by
22 closing remarks; and then, it would turn over to CDTFa for
23 their presentation; and then, it would be ten minutes per
24 party for any final remarks. Is that what you're
25 envisioning?

1 MR. VINATIERI: Yeah. No. After Mr. Whitney
2 finishes, then, I will finish my opening --

3 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

4 MR. VINATIERI: -- which is relatively short, at
5 that point in time.

6 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And then
7 there'll be no return -- would we return to the -- and
8 then we'll go to CDTFA at that point. We would not go
9 back to the witness unless they had questions for -- for
10 cross?

11 MR. VINATIERI: That's correct.

12 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And -- the
13 time estimates, then -- would we consolidate the
14 25 minutes of witness testimony with your opening? So we
15 would get 40 minutes then? Is that what you're looking
16 at?

17 MR. VINATIERI: Yes. That should be plenty.

18 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And,
19 CDTFA, would you have any concerns about the restructuring
20 of the order of presentation?

21 MS. DANIELS: No. Just to clarify that we would
22 have the opportunity for any sort of cross right after the
23 witness; and then, the Appellant would continue with their
24 presentation.

25 ADMINISTRATIVE LAW JUDGE KWEE: That's correct.

1 You would have the -- the right to cross-examine the
2 witness before they conclude with their opening
3 presentation.

4 MS. DANIELS: Then, yes, we have no problems with
5 that.

6 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So since
7 you're going to have the witness testify during the
8 opening portion, I would go ahead and swear the witness
9 in, at this point, just so we don't have an interruption
10 during your opening presentation.

11 Mr. Whitney, if you would go to the microphone
12 and raise your -- your hand.

13
14 DAVID WHITNEY,
15 called as a witness on behalf of the Appellant, having
16 first been duly sworn by the Administrative Law Judge.

17
18 THE WITNESS: I do.

19 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.
20 You may sit down.

21 MR. VINATIERI: Thank you.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Then, are
23 there any questions, from either party, before we turn it
24 over to Mr. Vinatieri for his opening presentation?

25 MS. DANIELS: None from us.

1 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

2 Then, Mr. Vinatieri, you may proceed. You have
3 40 minutes for your opening, presentation, and witness
4 testimony.

5 MR. VINATIERI: Thank you.

6
7 PRESENTATION

8 BY MR. VINATIERI, Attorney for Appellant:

9 So, good morning to everyone.

10 We are Joe Vinatieri and Patricia Verdugo of
11 Bewley, Lassleben & Miller, counsel for the Appellant,
12 Adler Tank Rentals, LLC. With us, you've just met, is
13 David Whitney. He is the vice president, corporate
14 controller of Adler Tank.

15 It's good to see everyone and -- especially
16 coming out of COVID -- and back together again. And we
17 appreciate the opportunity to present our case.

18 So the issue here is whether the equipment -- and
19 I'm going to point here; this is one of our exhibits --
20 whether the equipment that's leased by Appellant is,
21 quote, mobile transportation equipment, or MTE, as alleged
22 by the department. It is not.

23 Let's break it down. It certainly is mobile, as
24 it can be moved to a customer's site. There's no question
25 that this container is equipment.

1 This thing's going back and forth, the sound. Is
2 it -- is it me? I hear it go loud and go soft.

3 ADMINISTRATIVE LAW JUDGE KWEE: I'm not getting
4 any concerns raised by the IT team right now. So I think
5 you're good to just proceed.

6 MR. VINATIERI: Okay. I'll keep going then.

7 So there's no question the container is
8 equipment, as I've indicated. But it's missing -- it's
9 missing the critical second "transportation element".

10 It's incapable of transporting persons or
11 property substantial distances, or any distances for that
12 matter. There's no transportation. That's the key
13 component, the second element, of the definition of MTE.

14 So the statute defines MTE by providing examples
15 of mobile transportation equipment, such as -- close
16 quote -- truck trailers, reusable cargo shipping
17 containers, among others. We see that in 6023.

18 The Regulation identifies the common factor of
19 these examples and, more specifically, defines MTE as,
20 quote, equipment for use in transporting persons or
21 property for substantial distances, unquote -- and, again,
22 provides examples to the statute. And that, of course, is
23 Reg. 1661.

24 So, here, the equipment at issue is "not for
25 use", not for use in transporting persons or property.

1 The equipment is designed to be used, and is used, only
2 for temporary, safe storage and containment of hazardous
3 and nonhazardous materials.

4 So we will show, and our witness, Mr. Whitney,
5 will testify that, number one, the equipment is not
6 designed to transport persons or property. Number two,
7 the equipment cannot legally or physically be used to
8 transport persons or property. And, third, the equipment
9 is not used for transporting persons or property. It's
10 not used.

11 So Mr. Whitney will present and narrate a video
12 that shows how the tanks are continuously used for
13 containment of hazardous and nonhazardous materials at the
14 customers site only, in a stationary manner. Not moving.

15 The Department takes the position that, because
16 the tanks are equipment and the equipment is mobile, in
17 the sense that the equipment can be moved, that the
18 equipment must be for use in transporting persons or
19 property.

20 It is not. And CDTFA's position is
21 suppositional, not based upon fact. Neither the statute,
22 nor the Regulation, provides that all equipment that's
23 mobile is MTE. If that was the intention, the legislature
24 would have so stated, and it did not.

25 Although we agreed that the tanks and boxes --

1 they are equipment and they are mobile, they are not for
2 use in transporting persons or property. And, once again,
3 it's the second element that's missing. Transportation.

4 Furthermore, whereas we've already presented, and
5 will present, actual facts in support of our position,
6 including thorough evidence presented by Mr. Whitney's
7 testimony, the Department relies on supposition and
8 hypotheticals to support its erroneous position. And we
9 find that throughout the DNR, the Decision and
10 Recommendation.

11 For example, Appeals Bureau states that this or
12 that, quote, suggests, closed quote, or implies other
13 facts not in evidence, including certain hypothetical uses
14 of the tanks.

15 So a focus for us is we have to look at what the
16 actual facts are in evidence, and the Department provides
17 none. It's based upon supposition.

18 So, here, despite their similarity and appearance
19 under the facts, once again, in evidence. The Adler tanks
20 and boxes are not designed, intended, or used for
21 transport of persons or property, but instead are only for
22 use in stationary containment at the customer's site.

23 Again, we ask that you focus on the actual facts
24 and not supposition.

25 So for the actual facts, what we'd like to do is

1 have Mr. Whitney come up right now. And I have questions
2 for him and -- relative to the facts of this matter.

3 Mr. Whitney, can you come on up here?

4 MR. WHITNEY: Hi.

5 Can you hear me okay? Testing, testing.

6 Alright. Great.

7 MR. VINATIERI: We there? Okay.

8

9 DAVID WHITNEY,

10 having been called as a witness on behalf of the Appellant
11 and previously sworn by the Administrative Law Judge, was
12 examined and testified as follows:

13

14 DIRECT EXAMINATION

15 BY MR. VINATIERI:

16 Q Mr. Whitney, you've been sworn. Would you please
17 state your name, address, and position with Adler Tank
18 Rentals?

19 A My name is David Whitney. Our address is 5700
20 Las Positas Road, in Livermore, zip code 94551. I'm the
21 vice president, corporate controller, and principal
22 accounting officer.

23 Q And, Mr. Whitney, would you just briefly give us
24 some of your educational background and professional
25 credentials?

1 A Sure. I graduated college from Cal State East
2 Bay, at the time it was Hayward. Out of college, I joined
3 one of the largest international public accounting firms
4 in Oakland as an auditor. After about four years as an
5 auditor, I joined the Permanente Medical Group, which is a
6 part of Kaiser Permanente.

7 After about nine years, I left there as their
8 regional accounting manager and joined McGrath RentCorp in
9 2000. I joined them as the corporate controller. And
10 McGrath RentCorp is a publicly traded company on the
11 Nasdaq, been in business since 1979.

12 I'm a certified public account in California.

13 Q And, just briefly, when you graduated from Cal
14 State East Bay, what was your degree in?

15 A Sorry. I graduated with a -- in business
16 administration with a BS and an emphasis in accounting.

17 Q Okay. Thank you. And how long have you been
18 with Adler? And what's been some of your positions at
19 Adler?

20 A As I just mentioned, I joined McGrath RentCorp in
21 2000 and became vice president and principal accounting
22 officer in 2006.

23 McGrath acquired Adler Tank Rentals in 2008. I
24 am the controller of both entities and was intimately
25 involved in the evaluation of the acquisition, the

1 strategic reasoning behind it, diligence, and integration
2 of the business. And I've become intimately involved in
3 both the strategy, the operations, and the functioning of
4 the business within McGrath.

5 Q And your current role at Adler as corporate
6 controller, what does that consist of?

7 A Typical -- typical accounting functions that you
8 would be familiar with like, paying accounts payable
9 vendors, accounts receivable, customer payments, banking,
10 general ledger close, financial reporting, and various
11 compliance areas.

12 As I mentioned, McGrath and Adler are part of a
13 publicly traded company. So we're governed by the
14 Securities and Exchange Commission. And there are a lot
15 of requirements for public reporting on a quarterly and
16 annual basis, as well as compliance with controls and
17 various aspects of being a publicly traded company.

18 In addition to those compliance areas, I'm
19 responsible for all the tax areas, sales tax, property
20 tax, and income tax.

21 In addition to the traditional accounting areas,
22 we're -- we're intimately involved with helping the
23 business run accurately and appropriately, in terms of
24 safeguarding assets, putting systems and processes in
25 place to support the business.

1 And our -- our Livermore location is an active
2 branch office of our Adler Northern California operations.
3 So we interact closely with drivers and dispatch,
4 salespeople, and regional management there. So we're very
5 closely involved with the -- with the -- with the
6 management of the business.

7 Q So you're out -- out in -- out in the yard on
8 occasion?

9 A We're out looking at equipment, inspecting it,
10 making sure it's there, making sure it's not impaired,
11 and -- have a close contact with the equipment.

12 Q And why don't you just briefly describe, if you
13 would, the Adler business.

14 A Sure. Adler runs its business through 24 branch
15 sales offices and over 50 physical locations throughout
16 the United States. We have two large operations: One in
17 Northern California and another in Southern California.

18 And, through those operations, we -- we work
19 closely with our customers to provide the equipment that
20 is needed for their uses.

21 Our equipment is used on a very short-term
22 basis -- could be a handful of days or a number of months.
23 The average rental term is roughly three months that a
24 customer is using our equipment on their site.

25 The process for getting the equipment is, the

1 equipment is hauled to the customer site empty. The
2 customer then utilizes the equipment once it's in place,
3 dumping and pumping various solids and fluids into the
4 tank.

5 Once the equipment is complete, and during that
6 time the customer is using it, the materials are
7 evaluated, they're profiled, continuously filled, and --
8 and removed via vacuum truck. It's a third party process.

9 But once the customer is complete with the
10 containment and their project is over, the equipment is
11 emptied; it's cleaned; and then we coordinate with the
12 customer and haul and return the -- the asset back to our
13 physical location so that it can then be re-rented to a --
14 its next customer.

15 Q So in terms of -- of -- your customers, that use
16 this equipment -- I'm looking back here at -- at the --
17 21,000 Tank, for containment. And what are the -- what
18 are the types of things that -- substances that are
19 contained for this tank?

20 A Sure. So the -- the asset is used as -- as, I
21 think, I mentioned earlier -- as a -- as a containment of
22 various types of bad stuff: Fluids and solids that are
23 hazardous; and -- and some nonhazardous; slurry -- slurry;
24 waste water; water; oil and mixtures; toxic wastes from an
25 EPA site. So various types of fluids and solids are

1 stored in the -- the tank.

2 In addition, the -- the industries and customers
3 that utilize the tank are in, as an example, in oil -- an
4 oil refiner, where they're doing a turn around or
5 maintenance on their tank, they need our tank to contain
6 their fluids; environmental remediation; an EPA toxic
7 site; waste water treatment; and any infrastructure or
8 construction that may risk touching water or needs water,
9 or a solution, contained.

10 And it -- at the -- at the point that it's on the
11 site, it's really in use when it's stationary and -- and
12 at the -- at the customer's location.

13 Q Okay. Let's go ahead and we'll do the video. I
14 think we have two types of -- of tanks here.

15 Do you want to just -- before we start it, do you
16 want to go ahead and tell them what they're going to be
17 looking at here?

18 A Yeah. I took -- I took a couple notes.

19 We tried our best to work with our marketing team
20 to put some examples of the use of our tank. What we're
21 going to show you is what we refer to as an "Open-Top
22 Tank" that is being delivered to a customer site. You'll
23 see it quick -- quickly being used and then emptied.

24 We'll, then, move to a 21k Tank. They're also
25 referred to as "Frac Tanks", and that's a Closed-Top Tank.

1 And it was already in use, but we've got a gentleman that
2 we'll show as cleaning and emptying that tank.

3 And then we'll go back to the Open-Top Tank,
4 showing it being removed from its site. So --

5 MR. VINATIERI: Thank you.

6 If we can, roll it.

7 ADMINISTRATIVE LAW JUDGE KWEE: One minute. I
8 need to switch it over to the video.

9 Okay. I think we're ready now.

10 MR. WHITNEY: Okay. Can you still hear me?

11 Great.

12 You can see here there's a tractor-trailer that's
13 pulling up to the customer site and backing in. You'll
14 see a red U-shape, we refer to it as a "tongue", that is
15 on the back of the tractor-trailer with a pulley and a
16 winch. That is how the -- the tank is temporarily
17 attached to the tractor-trailer.

18 It's now being backed into place carefully and,
19 shortly, will be lowered into -- into its location.

20 You can see from the top, that's an Open-Top
21 Tank. You see the "OT" there. You can see slowly,
22 carefully, this very heavy tank is being lowered.

23 Once in place, the customer begins pumping fluids
24 and using the tank. You can see some mud -- muddy oil
25 being pumped into the tank.

1 We'll see, now, the -- the customer is cleaning
2 the tank and removing all fluids from the tank.

3 We've transitioned, now, to the Closed-Top Tank.
4 And the cleaning company is, now, looking through a
5 man-way on the end of the tank and is -- has begun working
6 on emptying and cleaning that tank.

7 That black tube there is attached to a vacuum
8 truck. That is a third-party, contracted entity that the
9 customer coordinates to remove and help support the
10 cleaning process. You can see they're hooking that up to
11 a manifold and slowly working to remove the contents.

12 In a moment we'll -- they'll show a brief inside
13 component of the tank. There's a cord there. He is
14 pressure washing the tank to ensure that any solids or
15 fluids that are on the walls of the tank are removed.

16 BY MR. VINATIERI:

17 Q That hose we see there, that's going to his
18 truck; right?

19 A Yeah. That's a -- that's a -- the black hose is
20 going to -- you can kind of just see the back of the truck
21 there that is being -- the fluids are being pumped into.

22 Q That's -- that's not an Adler tank -- truck?

23 A That is not an Adler truck.

24 Now, you can see the inside of the 21k Closed-Top
25 Tank after it has been cleaned and all the contents are

1 removed.

2 Now, back to -- back to the Open-Top Tank. It is
3 now -- now that it is clean and empty, it is being
4 removed.

5 And you can see the two axles at the back, slight
6 amount of clearance there.

7 Again, that is an empty tank slowly being removed
8 back to our yard.

9 Q So, Mr. Whitney, we spent some time showing the
10 nature of cleaning out the tank. Why is that so
11 important?

12 A Sure. The tank -- there are a couple of reasons.

13 First, the -- the tank needs to be clean and
14 empty for it to be transported back to our -- our
15 facility. The -- the 21k Tank is 30,000 pounds. It's
16 40 feet -- 45 feet long and 11 feet high.

17 With just a small amount of fluids -- and I'll
18 point here to the -- the -- the poster board to my right.
19 It just shows here that you -- we do not allow contents in
20 the tank. Not even a small amount.

21 First off, it would be very dangerous to
22 transport on our highways. Second off, with just a small
23 amount of fluids, it would break the axles. So it's
24 really physically not possible.

25 In addition, there are -- there are numerous

1 federal and state requirements that -- and regulations --
2 that govern the movement of anything that has a hazardous
3 or has -- has waste in it.

4 And, in California, there are particular rules
5 that are referred to as the "drip dry" standard, and this
6 comes from the California Department of Toxic Substances
7 and Controls.

8 In an essence, what this standard is saying, in
9 layman's terms, is that any container or vessel must be
10 drip dry. Meaning anything that was in the --
11 the container must -- if it was a solid, must be scraped
12 and had removed. Any liquid must not pour out of the
13 container if that container were to be dumped upside down.

14 So, California has a very high standard for not
15 allowing hazardous materials in containers traveling over
16 the roadways. So both from a physical perspective, and a
17 safety and regulatory perspective, we just don't -- we
18 don't move these assets with any -- any contents, or any
19 equipment, in them.

20 Q So it's fair to say, then, that looking at the
21 video, looking at the Exhibit behind you, at any time does
22 one of your pieces of equipment transport persons?

23 A No. It's neither designed, nor intended, to move
24 persons. And it would not be safe.

25 Q And it wouldn't be capable of transporting

1 persons for a substantial distance; is that correct?

2 A No, that is correct.

3 Q And at any time does the Adler equipment
4 transport property?

5 A No.

6 Q So the only use, as I understand it, of the
7 equipment is while it's stationary, sitting at a
8 customer's site; is that correct?

9 A Yes, that is correct.

10 Q And you talked a little bit about the cleaning of
11 the tanks. There's a -- a --

12 I was wondering whether you have some specific
13 standards that relate to how you expect the tank -- the
14 condition of the tank, to be when you have back at your
15 yard -- cleanliness, et cetera. Can you tell us what
16 those standards are?

17 A Sure. In order to comply to the standards that
18 we refer to, in terms of the safety and so that we don't
19 have damage to the tank or run afoul of any of the
20 requirements, the -- the tank must be clean.

21 And in order for a tank to be clean, the various
22 access points to the tank -- the valves, the manifolds,
23 the man-ways, need to be opened, cleaned, and emptied into
24 the tank. And, as you saw in the video, the tank itself
25 needs to be emptied.

1 And depending upon the materials in the tank, we
2 may need to remove any solids that are on the walls, chip
3 them off, spray them off using a power washer. And,
4 ultimately, everything must be removed from the tank --
5 tank prior to it -- for it to be ready for -- to be
6 transported back to our location.

7 Q So, Mr. Whitney, just to sum up, your equipment's
8 mobile, meaning it's transported empty to a job site like
9 we just saw; correct?

10 A Yes. Yes. Sorry.

11 Q And when it's transported back out of the job
12 site, back to your yard, it's empty, it's mobile; correct?

13 A Yes.

14 Q So the only time the property, the equipment in
15 question, is being used is when it's stationary at the
16 site of your customer; is that correct?

17 A Yes. That is correct.

18 MR. VINATIERI: Okay. Thank you.

19 I have no further questions of Mr. Whitney.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

21 I'll turn it over to CDTFA. Did CDTFA have any
22 questions that they would like to ask the witness?

23 MS. DANIELS: We would like to request a short
24 recess before we question the witness, if possible.

25 ADMINISTRATIVE LAW JUDGE KWEE: Oh. Sure. How

1 much time would be fine for you?

2 MS. DANIELS: Yeah. 10 to 15 minutes.

3 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

4 For Appellant, is a 15 minute recess, is that
5 okay for you?

6 MR. VINATIERI: That -- that works.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So the
8 time is approximately 10:20, now. How about we come back
9 at 10:35?

10 MR. VINATIERI: Thank you.

11 ADMINISTRATIVE LAW JUDGE KWEE: Okay. We'll go
12 off the record now.

13 Thank you.

14 (Off the record)

15 ADMINISTRATIVE LAW JUDGE KWEE: So we are ready
16 to resume. So we will go back on the record. And we are
17 still live streaming, so you don't have second -- seven
18 second pause here.

19 So I will turn it over to CDTFA. If you have
20 questions on cross, it's now your turn.

21 MS. DANIELS: Just a few questions for
22 Mr. Whitney.

23

24 CROSS-EXAMINATION

25 BY MS. DANIELS:

1 Q We have questions regarding Adler's smaller
2 tanks, the 10k and the Poly Tank.

3 First, are they capable of being used to
4 transport nonhazardous waste?

5 A No.

6 Q Are they capable of transporting any property,
7 other than nonhazardous waste?

8 A No.

9 Q So these tanks are transported on the -- on a
10 truck bed; correct?

11 A The -- the Poly Tank and the 10k are on a truck
12 bed, and they -- they need to be empty. Especially the
13 Poly Tank, as -- as -- it has internal Poly baffles, and
14 it can't be transported with any equipment or property
15 inside of it.

16 Q Okay. Thank you.

17 And then we had a clarification as to Adler's
18 inventory.

19 So we've heard different numbers stated about the
20 percentage of Frac Tanks. And we'd like clarification as
21 to whether 80 percent of Adler's inventory is Frac Tanks,
22 or whether that 80 percent is a combination of what is
23 being described as, both, "Frac and Weir Tanks"?

24 A Yes. It's a combination of all of our tank
25 categories.

1 So, the Frac Tank is, generically, our
2 21,000-gallon tank, or a 10,000-gallon tank, Poly Tank.
3 So all of those tanks, collectively, are approximately
4 80 percent of our fleet.

5 MS. DANIELS: Thank you.

6 We have no further questions.

7 MR. WHITNEY: Thank you.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay. This is
9 Judge Kwee.

10 I -- I did have a couple questions, for the
11 witness.

12 You have the sign over there. That sign, is that
13 on, you know, small tanks and large tanks and the boxes?
14 Or is that not on everything?

15 MR. VINATIERI: And before you answer -- you're
16 referring to Exhibit 17?

17 ADMINISTRATIVE LAW JUDGE KWEE: Yes. I'm
18 referring to the sign that says -- 17 -- that says, "Do
19 not lift from the rear of the tank."

20 I was just curious, what that is -- what types of
21 equipment that is posted on.

22 MR. WHITNEY: Yeah. Those are all our wheeled
23 tanks: so the 21k, the Weir, the Open-Top Tanks.

24 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Is that
25 also on small tanks? Or are small tanks not --

1 MR. WHITNEY: Not the tanks that are -- that are
2 transported on the back of a -- of a tractor-trailer.

3 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

4 And so, for example, in the video, the first tank
5 was an Open-Top Tank. Is that a considered a small tank
6 or a large tank?

7 MR. WHITNEY: That's a large tank because it has
8 and axle and wheels.

9 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

10 MR. WHITNEY: Anything with the wheels.

11 ADMINISTRATIVE LAW JUDGE KWEE: Oh. Any --
12 anything with the wheels is a large tank. Okay.

13 And a question about the boxes -- I believe it
14 was mentioned in the briefing that the boxes could be used
15 to transport property is -- is that your understanding?
16 Or is that not your understanding?

17 MR. WHITNEY: Yes. The boxes are used by the
18 customer. And, in some situations, the materials in the
19 box need to be transported to a waste facility to be
20 disposed of depending upon the contain -- what's in --
21 what's inside the box and the toxic nature of the
22 materials.

23 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So,
24 anything listed as a box could potentially transport
25 property. Is that a correct statement?

1 MR. WHITNEY: So, the box temporarily is winched
2 on to the back of a tractor-trailer and then delivered --
3 disposed -- the contents are disposed of, and the box goes
4 back to the customer site to continue its use. And then,
5 once it's done, it's similarly cleaned and emptied, and
6 then we'll come and pick it up empty and clean from the
7 customer site.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And for
9 the small tanks and the large tanks, they could -- neither
10 of those categories could be used to transport any --

11 MR. WHITNEY: No. They're kept stationary, and
12 then a vacuum truck would come and remove the contents.

13 Those are mostly fluids that are in those tanks.
14 And so the fluids are removed from a vacuum truck and then
15 disposed of by the customer.

16 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And I
17 believe you might have just mentioned this, but just to
18 clarify, the boxes are only 20 percent of the liability?
19 And the small tanks and the large tanks combined -- and, I
20 guess -- all the tanks, are 80 percent of the liability,
21 approximately?

22 MR. WHITNEY: They're 20 percent of the fleet. I
23 can't comment on the liability, but they're 20 percent of
24 the fleet.

25 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

1 And, I guess I have a quick question for CDTFA.

2 So I was asking this earlier, before we started,
3 and so, I think, for example, if OTA were to determine
4 that the boxes were MTE but the tanks were not MTE, is
5 there a way for you to allocate that in making a
6 determination?

7 Is -- would that be problematic because you have
8 to determine, you know, which tanks were in state versus
9 out of state? Is that something that would be -- require,
10 I guess, a re-audit to do? Or is that something that
11 could be easily determined?

12 MR. CLAREMON: I can handle that.

13 So it's our understanding that the -- the sample
14 used for the out-of-state leases -- it's all 21k and 18k
15 Tanks. So I -- I don't think a re-audit would be
16 necessary. And that's -- that's Schedule 12B, I believe.
17 Or 12B.2?

18 It would -- we do not have that type of
19 information for the bad debt deductions. That's Schedule
20 12D. It does list the transactions at issue.

21 And so, I think, we -- we would accept an
22 estimate based on the numbers discussed, like, a
23 reasonable one.

24 It -- it might, depending off when it -- if it
25 fell 80/20. It might be a problem if there's a different

1 determination between the tanks.

2 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

3 MR. CLAREMON: But we could also -- do an
4 examination of the records for those transactions that are
5 listed on 12D, if they have them.

6 And we would be willing to do that.

7 ADMINISTRATIVE LAW JUDGE KWEE: Okay. But, if it
8 were just broken down between tanks and boxes, CDTFA would
9 be fine doing an -- an 80/20 ratio on the bad debt
10 deduction? Is that what you were saying?

11 MR. PARKER: Depending on if all -- if all of the
12 boxes were determined to be TPP or MTE, or all of the
13 tanks, if there's an even 80/20 split, we would be willing
14 to do a -- an estimate of allowing 20 percent. So --

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

16 And, for Appellant, just, I guess, would you have
17 any objections if -- if that were the case -- it was an
18 even split -- would you have any objection to allocating
19 the bad debt deduction 80/20?

20 And I'm not saying this is the direction we're
21 going. I just wanted to make sure that it's something
22 that we could potentially --

23 MR. VINATIERI: Let me inquire first.

24 ADMINISTRATIVE LAW JUDGE KWEE: -- consider.

25 MR. WHITNEY: Yeah. We'd like to --

1 Can you hear me?

2 We -- we'd like to cooperate and work with the
3 agency to conclude this.

4 ADMINISTRATIVE LAW JUDGE KWEE: Okay. So I won't
5 get into that at this time. And yeah -- probably
6 premature, now, to get into that.

7 So, I think, those were the questions that I had.
8 Just, if you bear with me for one -- one minute.

9 Okay. I'll turn it to the co-panelists.

10 Judge Brown, did you have any questions for the
11 parties? Or for, I guess -- for the witness, David
12 Whitney?

13 ADMINISTRATIVE LAW JUDGE BROWN: I don't think I
14 have any questions at this time. Thank you.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

16 And Judge Lambert do you have any questions for
17 the witness?

18 ADMINISTRATIVE LAW JUDGE LAMBERT: I have no
19 questions at this time. Thanks.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

21 So I believe we're done with questions for the
22 witness --

23 MR. VINATIERI: Judge Kwee, I want to follow-up
24 on, too, Mr. Whitney -- on two items that you talked
25 about. You asked about Exhibit 17, which is the warning.

1 ///
2

BY MR. VINATIERI:

3 Q So, Mr. Whitney, is that warning seen -- found on
4 other pieces of equipment?

5 A It's primarily on the wheeled tanks. So it's the
6 18k, the Open-Top, the 21k, which is a majority of the
7 tank category, in our fleet.

8 Q Okay. Thank you. And with respect, there's a
9 question about the boxes. And you said they were "lynched
10 temporarily". What do you mean by that?

11 A So similar to what we saw in the video --

12 Q Excuse me. Winched. Winched. Lynched?
13 Freudian slip.

14 A They're winched on to the back temporarily so
15 they can be transported to the waste disposal site. And
16 then they are brought back and brought -- winched down on
17 to the -- to the ground, utilized, and that -- so they're
18 temporarily affixed to the tractor-trailer.

19 Q And they're never permanently affixed?

20 A That is correct.

21 Q Okay. Thank you.

22 MR. VINATIERI: No further questions.

23 ADMINISTRATIVE LAW JUDGE KWEE: Okay. If neither
24 party has -- or if, CDTFA, you don't have any follow-up
25 questions for the witness --

1 MR. WHITNEY: Thank you.

2 ADMINISTRATIVE LAW JUDGE KWEE: -- then I will
3 turn it back to Mr. Vinatieri to conclude his opening
4 presentation.

5 MR. VINATIERI: Thank you. We will -- I'll
6 finish it up.

7 So what we got -- what we just received from
8 Mr. Whitney -- and I'm glad everyone's engaged, asking
9 questions. Because what you got from Mr. Whitney is
10 first-hand, credible, reliable, and relevant evidence.
11 That is the type of evidence that the -- the panel can
12 rely upon in making a determination on the question in
13 front of the panel.

14 But, at the same time, not only do we have his
15 verbal testimony, but we have a series of exhibits that
16 have already been admitted into evidence. And so I wanted
17 to -- I'll just briefly go through a couple of those.

18 He hit on -- on some of them, but I want to give
19 you the -- the actual document so that you have in front
20 of you, both verbal testimony under penalty of perjury, as
21 well as documentary evidence that's contemporaneous, and,
22 basically, put together in the course -- ordinary course
23 of business upon which reasonable persons are custom to
24 rely. And that's a precept relative to what is a
25 substantial evidence upon which a panel can make a

1 decision.

2 That documentary evidence that I'm going to go
3 through very briefly is a series of technical and
4 non-technical brochures and specifications. And,
5 specifically -- some of which Mr. Whitney discussed. We
6 have put them in our brief, and they have already, as
7 indicated, been admitted into evidence. And, with that,
8 let me just briefly go over a couple of them.

9 First of all, we have Exhibit 11. And this is
10 called specifications for Adler products. And the thing I
11 want to show to you here is the fact that the Exhibit 11,
12 the specs, show that the equipment is not designed to be
13 used to transport persons or property.

14 And you'll see it in there. It's to prevent
15 environmental contamination. It's designed to facilitate
16 safe -- safe storage of hazardous, nonhazardous materials.

17 We saw in the cleaning out of the one tank, the
18 Closed-Top Tank -- you saw the epoxy coating on the inside
19 of the tanks which present -- prevents contamination. And
20 there -- Mr. Whitney didn't talk about, but there's double
21 walls which also ensure environmental protection against
22 accidental leaks.

23 Mr. Whitney talked about transporting any -- any
24 materials in these tanks would -- would be hazardous,
25 catastrophic, and -- and against California law.

1 He talked about RECRA, and he talked about some
2 of the other requirements they have. And there's a
3 major --

4 (Reporter interrupted)

5 MR. VINATIERI: Yeah. He talked about -- he
6 talked about RECRA. That's the Environmental Remediation
7 Recycling, RECRA. R-E-C-R-A.

8 And the fact that you cannot carry this stuff on
9 the highways. It's -- it's very simple. And that's why
10 they're cleaned. That, and Mr. Whitney didn't talk about
11 it --

12 And I'm sorry. I keep forgetting that you're
13 there, Madam Court Reporter.

14 The part of the problem on the highway is, if you
15 imagine, if there's anything in those tanks that sloshes
16 and goes back and forth, you can end up with a rollover.
17 And they're just not built to carry anything in them
18 because of the -- the instability of -- of the unit.

19 Exhibit 16, right over here, I keep referring to
20 it. This is the immense size of -- of the most commonly
21 used Adler tank right here. I mean, a picture is worth a
22 thousand words. Yes, it's got two tires on it and an
23 axle, but you just heard what happens if it's used
24 improperly.

25 And Exhibit 17 over here, the other pictorial --

1 very clear. And -- and you asked questions about it. I
2 appreciate the fact that you did ask questions. Because
3 it's very clear: "Do not lift from the rear of the tank.
4 Do not lift with contents in the tank. Lift from the
5 front of the tank or from lifting points on the roof --
6 injuries, structural damage."

7 So it's -- it's there for the public. It's for
8 everyone to see. That's how important the -- it is that
9 these properties be treated correctly.

10 And then, lastly, Exhibit 8 is the Product Line
11 Overview of the containment tanks and the boxes. And the
12 Exhibit, if you look at it, shows that the equipment
13 cannot legally -- I'll say it again -- or physically be
14 used to transport persons or property.

15 So what's concerning is that the Appeals Bureau,
16 in its decision, actually acknowledged -- actually
17 acknowledged the structural design and legal limitations
18 that prohibit the transportation of persons or property.

19 And nonetheless, contrary to their own guidance,
20 said, "MTE must be construed narrowly." The Bureau
21 broadly applied the MTE rules here. And this is on page
22 11 in the DNR.

23 The Appeals Bureau also has taken what is
24 unreasonable and non-commonsensical, suppositional
25 position that any residue -- the hypothetical dirty

1 tank -- dirty tank could establish that the tank is used
2 for transporting property. That's -- that's stark
3 supposition.

4 And the Appeals Bureau admitted, in its
5 interpretation, that its extraneous and statutory
6 application and regulatory interpretation of the MTE
7 provisions, nearly to the breaking point, close quote. We
8 submit this interpretation -- the DNR interpretation
9 absolutely shatters the statutory application. It doesn't
10 break it; it shatters it.

11 So the facts that are now clearly in evidence
12 between what Mr. Whitney had to say in his sworn
13 testimony, and the documentation that are the Exhibits
14 that have been asked and -- and accepted into evidence --
15 they all clearly show the equipment cannot be physically,
16 legally, safely moved with any contents.

17 And therefore, they cannot and are not, quote,
18 used to transport persons or property -- I'll go back to
19 what I said in the beginning, in the opening -- it's
20 missing MTE, mobile equipment, but has to be
21 transportable.

22 And we're missing that critical second element in
23 mobile transportation equipment. All you have to do is,
24 basically, look at this and say to yourself, "is the
25 subject property -- is this property -- is it really

1 mobile transportation equipment in light of all that we
2 know?" And the fact of the matter is, no, it's not MTE.

3 Thank you.

4 ADMINISTRATIVE LAW JUDGE KWEE: Thank you.

5 And --

6 This is Judge Kwee.

7 I just had a quick clarification, I guess, on
8 your position on the boxes versus the tanks. So, from my
9 understanding as far as the boxes go, the position is
10 that, because they're only temporarily attached, they're
11 not a component part of MTE. Is that a correct
12 understanding?

13 MR. VINATIERI: You're absolutely correct.

14 ADMINISTRATIVE LAW JUDGE KWEE: Okay. And as far
15 as the tanks, I understand you're arguing that they can't
16 be used to transport property over substantial distances.
17 But are you also arguing that they're not component parts
18 of MTE? Or is that aspect only for the -- the boxes?

19 MR. VINATIERI: Yeah. None of this is component
20 parts.

21 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Got it.
22 Thank you. That helps clarify it.

23 And I'll turn it to -- before I move over to
24 CDTFA, I'll check with the panel to see if the panel has
25 any questions for Appellant.

1 Judge -- Judge Brown, do you have any questions
2 for Appellant?

3 ADMINISTRATIVE LAW JUDGE BROWN: Not at this
4 time. Thank you.

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

6 And Judge Lambert, do you have any questions for
7 Appellant?

8 ADMINISTRATIVE LAW JUDGE LAMBERT: I have no
9 questions at this time. Thanks.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

11 So, now, we will turn it over to CDTFA. And if
12 my notes have it correctly, CDTFA, you have 20 minutes for
13 your opening presentation.

14 MS. DANIELS: Thank you.

15

16 PRESENTATION

17 BY MS. DANIELS, Attorney for Respondent:

18 Good morning. Again, my name is Courtney
19 Daniels. And I'm joined by Scott Claremon and Jason
20 Parker.

21 So the primary issue in this case is whether the
22 equipment in question leased by Appellant qualifies as
23 mobile transportation equipment, or MTE. The issue
24 underlies two audit items in dispute: first, unreported
25 use tax on out-of-sale leases and, second, disallowed

1 claimed bad debt deductions.

2 It is important to note that there are generally
3 two categories of property at issue in this case: First
4 the large 21k containment tanks, or Frac Tanks, and
5 open-top tanks, called Weir Tanks, which are available in
6 10,000, 18,000, and 21,000-gallon capacities.

7 These large tanks have a single axle and two
8 tires, which are utilized to transport the tanks to job
9 sites, as we've seen.

10 The second court -- category is the smaller
11 storage boxes, which are the 10K Tank, the Poly Tank,
12 Dewatering Box, Roll-Off Box, and Vacuum Box. And all of
13 these must be affixed to a truck or trailer to be
14 transported.

15 It is also important to note that we've heard
16 here that 80 percent of Appellant's rental fleet is
17 comprised of its large Frac and Weir Tanks. In fact, the
18 audit sample used to calculate underreported out-of-state
19 leases is 100 percent comprised of these large tanks.

20 As described in Exhibit D at the Worksheet 12B.2,
21 this sample was generated from Appellant's Asset Activity
22 Report for units acquired in 2012. All of the assets
23 listed on the Report, and leased out of state, were Frac
24 and Weir Tanks.

25 Appellant's arguments regarding the smaller

1 storage boxes that they affixed to the trucks for travel
2 are irrelevant to the issue of unreported out-of-state
3 leases.

4 In any event, the Department correctly identified
5 that all of the Appellant's property at issue is MTE; thus
6 we will first address why Appellant's Frac Tanks and Weir
7 Tanks, the large tanks that are transported on their own
8 wheels and axles, are in fact MTE. And then we will
9 address the storage boxes that must be affixed to a truck
10 or trailer to be transported.

11 Revenue and Taxation Code 6023 defines MTE to
12 include as relevant here, trucks, trailers, mobile
13 shipping containers, and other equipment used for
14 transporting tangible personal property.

15 California Code of Regulation Title 18 Section
16 1661, herein after referred to as Regulation 1661, states
17 that, "Only equipment for use in transporting persons and
18 property for substantial distances qualifies as MTE.
19 Equipment is considered capable of traveling substantial
20 distances if it is able to travel at highway speeds." And
21 that's Business Tax Law Guide Annotation 335.0009.

22 With respect to the leases of MTE, the sale to
23 the lessor is the retail sale, and the lessor is the
24 consumer of the equipment. And that's Regulation 1661
25 Subdivision (b)1.

1 And the lease of MTV -- MTE for use in the
2 transportation of persons or property is not a sale;
3 rather, such a lease is use of the MTE by the lessor. And
4 that's Revenue and Tax Code Sections 6606 Subdivision
5 (g)4, 6010 Subdivision (e)4.

6 Thus, either sales tax applies upon the sale of
7 MTE to the lessor, or use tax applies as a result of the
8 lessor's use of MTE in this state. Again, Regulation 1661
9 Subdivision (b)1. Here, Appellant has conceded that it
10 made an election to pay tax on the lease receipts.

11 So, Appellant's Frac Tanks and Weir Tanks are MTE
12 because they satisfy the requirements of Revenue Taxation
13 Code Section 6023 and Regulation 1661 because, one, they
14 are used for transportation of persons or property because
15 the equipment transports itself on itself own axle and
16 tires, and two, they're transported over substantial
17 distances at highway speeds.

18 First, we note the leases at issue here are all
19 out-of-state leases. So they were large tanks first used
20 in California, then they're transported to job sites in
21 Arizona, Colorado, Idaho, Nevada, and Wyoming. And you
22 can see that at Exhibit D Worksheet 12B.4.

23 And Appellant markets these large tanks on their
24 website as being, quote, easily moved using a tractor or
25 truck, end quote. That's Exhibit H at page one.

1 So this equipment has been transported out of
2 state, most likely on interstate highways, and they were
3 towed, again, using their own axles and wheels; thus it
4 seems somewhat absurd to argue that the equipment cannot
5 be transported over substantial distances at highway
6 speeds.

7 In any event, Appellant's argument has seemed to
8 equate highway speeds with high-speed interstate travel,
9 which is not a requirement under Regulation 1661.

10 California Vehicle Code Section 360 defines a
11 highway as, quote, a way or place of whatever nature,
12 publicly maintained, and open to the use of public for the
13 purpose of vehicular travel, end quote -- which includes
14 streets, both commercial and residential and alleyway --
15 alleyways. And that's California Vehicle Code Sections
16 110, 360, and 515.

17 There is no dispute that the Frac Tanks and Weir
18 Tanks are able to travel at highway speeds. You've seen
19 it in Appellant's website, where they've talked about
20 being able to deliver it for out-of-state leases.

21 So, even if one were to equate highway speeds
22 with interstate highway travel, Appellant regularly
23 transports these tanks out of state through such means,
24 and thus the Frac Tanks and Weir Tanks are capable of
25 transporting themselves on their own wheels and axles for

1 substantial distances at highway speeds.

2 Appellant's equipment meets first requirement of
3 Revenue and Taxation Code Section 6023 because, as we just
4 stated, the equate -- the equipment is basically a trailer
5 towed by a truck that is transported on its own axles and
6 wheels. As it transports itself, there is no requirement
7 that it also transport additional property.

8 As the decision correctly identified, under the
9 definition of MTE, it is sufficient to find that the
10 property transported substantial distances consists of the
11 driver of the equipment and the equipment itself. See
12 Exhibit A at page 10 citing Annotation 335.0087.

13 The Department has maintained a long-standing
14 interpretation of including mobile generators, mobile
15 boiler units, mobile air compressors, and mobile cranes as
16 MTE. Just like the mobile boilers units discussed in
17 Annotation 335.047, Appellant's large tanks are pieces of
18 equipment that are used at a job site and transported on
19 their own wheels and axles.

20 The fact that the -- that the tanks are used at
21 the job site as storage for liquids, and other tangible
22 personal property, does not change this analysis at all.
23 There is simply no requirement that the tanks be full
24 during transport.

25 Like any other piece of wheeled equipment used at

1 a job site that is capable of being towed at highway
2 speeds -- again, a mobile boiler unit, a mobile generator,
3 a wheeled crane -- Appellant's Frac and Weir Tanks
4 constitute MTE because they can transport the tank itself
5 while traveling at highway speeds. And that's Regulation
6 1661 Subdivision (a)(1). Also see Annotation 335.0072.

7 Since the Frac and Weir Tanks are MTE and
8 comprise a hundred percent of the sample used to calculate
9 the liability for out-of-state leases, no adjustment is
10 warranted to the measure of unreported out-of-state
11 leases; furthermore, no adjustment is warranted to the
12 measure of disallowed claimed bad debt deductions on
13 transactions involving Frac and Weir Tanks.

14 As to the second audit item, again, Appellant has
15 stated that its tanks alone constitute 80 percent of
16 Appellant's rental inventory. So the small amount of
17 boxes is 20 percent or less.

18 In any event, we'll now discuss Appellant's
19 second category of equipment, its affixed storage boxes
20 and tanks.

21 Appellant has specifically conceded that its
22 boxes, which consist of the Dewatering Box, the Roll-Off
23 Box, and the Vacuum Box, are all capable of being
24 transported while carrying debris or property within them.
25 See Appellant's brief at page six, and also, they have

1 stated that here today.

2 These are boxes hoisted onto a truck bed or
3 chassis and affixed using straps; thus there is no
4 question that these are used in transporting property
5 substantial distances at highway speeds and thus qualify
6 as MTE.

7 Appellant argues that its boxes and tanks are not
8 MTE because they are not permanently affixed to the
9 chassis or trailer; however, permanent affixation is not a
10 requirement for this type of equipment that can be used to
11 transport other items when attached to a truck or trailer.

12 In Annotation 335.015 we concluded that a debris
13 box which can be attached to and removed from a truck
14 chassis -- i.e., it's not permanently attached to the
15 truck -- essentially becomes the body of the dump truck
16 when attached to the truck to transport debris for
17 disposal. See Exhibit A1 page 2 citing Annotation
18 335.005.

19 As discussed in this Annotation, the debris boxes
20 are, quote, reusable cargo shipping containers, end quote.
21 A specifically identified example of MTE under Section
22 6023. There is no requirement that a reusable shipping
23 container, or a similar item like a debris box, be
24 permanently attached to a truck or chassis to become a
25 component thereof. And, in fact, by definition, they're

1 not.

2 There appears to be no factual distinction
3 between a debris box and Appellant's small boxes, in the
4 manner that they are used, such that a different
5 conclusion should be reached for the small boxes leased by
6 Appellant.

7 Like the debris boxes, the small tanks are --
8 sorry. The small boxes can be filled with waste and
9 attached to a truck or trailer using hoists and straps; at
10 which point, they transport property at highway speeds as,
11 essentially, a component of the truck or trailer.
12 Accordingly, these boxes also constitute MTE, and no bad
13 deduction could be taken on the lease of these items.

14 Finally, Appellant's smaller tanks, consisting of
15 10k Tanks and Poly Tanks, are also transported using truck
16 beds via hoists, straps, and via roll-off style truck
17 trailers. See Appellant's Appeal brief at page six.

18 Appellant argues that these smaller tanks cannot
19 be transported while carrying property within them due to
20 their structural design.

21 Again, even if these items cannot do so fully
22 filled with liquid, we're not sure that they're actually
23 incapable of holding any property at highway speeds as
24 they don't have those same limitations as its large tanks
25 with the weight bearing on the single axle wheels.

1 However, if the panel were to conclude, based on
2 the testimony provided here today, that the 10k Tanks and
3 Poly Tanks could not transport property at highway speeds,
4 the Department would concede that they are not MTE, as
5 they would not be comparable to reusable cargo containers
6 or debris boxes.

7 However, again, the 10k and Poly Tanks make up a
8 very small portion of Appellant's rental inventory. They,
9 along with the Dewatering Box, Roll-Off Box, Vacuum Box,
10 are combined at only 20 percent. And the Department does
11 not have any evidence establishing which of these items
12 was in fact taken for bad debt deductions.

13 In conclusion, Appellant leased tanks and boxes
14 that are used for transporting property at highway speeds
15 for substantial distances, many times across state lines,
16 which qualifies such equipment as MTE.

17 For the foregoing reason, no adjustment is
18 warranted to the audited measure of tax, and as such we
19 would ask that Appellant's appeal be denied.

20 Thank you.

21 ADMINISTRATIVE LAW JUDGE KWEE: This is Judge
22 Kwee. Thank you.

23 And just a quick clarification, if I'm
24 understanding your presentation correctly -- so the
25 difference between the small -- your -- your position on

1 the small tanks versus the large tanks is, because the
2 large tanks have the two wheels in the back, that makes
3 them capable of transporting, I guess, the tank, which is
4 the -- which makes it MTE. But then the -- the small
5 tanks, because they don't have wheels -- you're
6 distinguishing it on that basis of whether it has --

7 I'm sorry. I'm not to -- I'm not close enough to
8 the mic.

9 The distinction is whether or not it has wheels
10 to transport itself?

11 MS. DANIELS: Yes. Exactly.

12 ADMINISTRATIVE LAW JUDGE KWEE: Okay. I
13 understand that then. Thank you.

14 I'll turn it to Judge Brown.

15 Judge Brown, do you have any questions for CDTFA?

16 ADMINISTRATIVE LAW JUDGE BROWN: I believe I
17 don't have any questions at this time. Thank you.

18 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

19 And, Judge Lambert, do you have any questions for
20 CDTFA?

21 ADMINISTRATIVE LAW JUDGE LAMBERT: Hi. Yeah. I
22 had a question, or maybe you could just help clarify.

23 Just looking at the plain language of the
24 Regulation 1661 about mobile transportation equipment. It
25 seems it's describing examples that -- well, they -- that

1 don't just transport the property themselves, but actually
2 have property within them while they're being transported.

3 And -- the word "transport", you know -- the
4 definition is, "Moving something from one place to the
5 other." And, when I read it, it's stating it's
6 transportation equipment. I don't see that as necessarily
7 stating that equipment is the thing being transported, but
8 the equipment is being used for transport.

9 And looking at the plain language of that, how
10 does that relate to CDTFA's arguments that are looking at
11 annotations whereas this is just a Reg.? I mean, this is
12 a Reg., which I think would have more weight.

13 MR. CLAREMON: I -- I think the starting point is
14 that this is a trailer. It's something that's towed by a
15 truck. So I think it is just, at the outset, something
16 that meets the definition of the statute under 6023.

17 And, again, this has been the, you know -- it's a
18 trailer that transports the truck that's on top of it.
19 Similar to when a mobile boiler unit or a mobile generator
20 or a crane -- a crane, you know, a mobile crane, are MTE,
21 there's no question those things are MTE. There's no
22 question those things aren't transporting anything other
23 than the equipment that's on top of the chassis or on top
24 of the, in this case, the wheels and axles.

25 So it has been the long-standing interpretation

1 of that definition that a trailer can transport -- be
2 something that transports what's on top of it, not
3 something in addition.

4 And, again, we understand this is a box. And so
5 there's kind of this impression that it needs to be filled
6 while -- while it's being transported. But, at the same
7 time, it is just a piece of equipment like any of those
8 other things that, I think there's no question, constitute
9 MTE.

10 And it's -- and I think some of the evidence
11 we've seen shows that these are -- there's quite
12 elaborate a set up of these -- this equipment at a job
13 site. So, you know, this is sophisticated equipment
14 that's necessary at the job site.

15 ADMINISTRATIVE LAW JUDGE LAMBERT: Thanks. And
16 just one more question.

17 I think the parties were discussing backup
18 letters to annotations a lot. And maybe if, you know --
19 or you could comment on the weight that we give backup
20 letters as -- in relation to an annotation.

21 MR. CLAREMON: The annotation is the guidance
22 that's been issued by the Department. So the backup
23 letter, which may be helpful for analysis or context, is
24 not something that should be relied upon as -- as a -- to
25 the extent that an annotation is.

1 ADMINISTRATIVE LAW JUDGE LAMBERT: Can it be used
2 as kind of an -- to provide guidance as to the reasoning
3 behind the annotation?

4 MR. CLAREMON: It -- it can't be relied upon as
5 authority. If it's not in the annotation, it is not the
6 position -- it is not the stated position of the Legal
7 Department that's been annotated.

8 ADMINISTRATIVE LAW JUDGE LAMBERT: Okay. Thanks.
9 That's all the questions I have. Thank you, very
10 much.

11 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Then,
12 with -- CDTFA, if your presentation is concluded and
13 there's no further questions, I believe we are ready to
14 move on to closing remarks.

15 So at this point, I would turn it over to
16 Appellant -- Mr. Vinatieri for -- you have ten minutes for
17 closing remarks.

18 MR. VINATIERI: Judge -- Judge Kwee, actually,
19 we have rebuttal time at this point.

20 ADMINISTRATIVE LAW JUDGE KWEE: Oh. I'm sorry.
21 You have ten minutes for rebuttal and then closing remarks
22 for each party. You're right. I will scratch that.

23 And I'll turn it over to you for your ten minutes
24 of rebuttal time.

25 Thank you.

1 MR. VINATIERI: Thank you.

2 REBUTTAL

3 BY MR. VINATIERI, Attorney for Appellant:

4 So what we have here, we got into it, we have an
5 annotation house of cards. All right?

6 The DNR cites 16 different annotations. Counsel
7 just cited, I think, seven annotations. We got into
8 backup letters of annotations. And here's the problem:
9 There's a whole body of "annotation law" -- annotation law
10 that has evolved over the years regarding MTE.

11 And I think we just heard the words
12 "long-standing interpretation". All right? So -- but I
13 don't have to remind the panel -- I don't need to remind
14 CDTFA that annotations are not -- say it again -- are not
15 the law.

16 And we all know what the California Supreme Court
17 said in the Yamaha case -- that they made it very clear.
18 Annotations are not to be relied upon. And that's black
19 and white.

20 And yet what has happened here? What has
21 happened today on MTE annotations? Clearly, the basis of
22 the Department's position is on annotations. And I call
23 it "law", and I'm saying that quote/unquote because it's
24 not the law according to the Supreme Court.

25 So if an MTE proposition is not in the statute --

1 and I think Judge Lambert just asked the question -- it's
2 not in the statute, nor is it in the Regulation, it can't
3 be relied upon, let alone the backup letter that goes into
4 the annotation -- which, by the way, at least in my
5 experience over the many years, has actually sometimes
6 said more than what's in the annotation because the
7 annotation itself is somebody else's interpretation of
8 what that backup letter says.

9 Hearsay on hearsay. And that's the problem with
10 annotations.

11 So let me just -- with that as background, I'm
12 going to try to get through this as quickly as possible.

13 Here's the bottom line: Neither the statute, nor
14 the Regulation, provides that a container is MTE, if it
15 can transport itself. Go look at the plain language.
16 It's not there. It comes out of an annotation.

17 Neither the statute, nor the Regulation, provides
18 that equipment with axles or wheels is MTE. And even
19 under the Department's own annotations, which, once again,
20 aren't law, the mere presence of axles and wheels does not
21 establish that the equipment is MPE -- MTE.

22 And, historically, the Department has only used
23 the "transport itself" rationale where the equipment is
24 self-propelled. Now, that's under their own annotation.

25 I'm doing rebuttal. I don't believe any of this

1 stuff. All right? I just want to be clear. This is
2 rebuttal.

3 So, here, the tanks aren't MTE because they can't
4 transport themselves substantial distances.

5 Exhibit 16, it can do nothing unless it's
6 attached to some type of transport. It's incapable. And
7 these tanks -- Judge Kwee, you asked -- they are not
8 component parts are -- of the truck trailers. And I think
9 they concede that.

10 So the problem is that, under these annotations,
11 where a unit is considered MTE -- where it does not
12 transport materials or persons other than itself and its
13 driver.

14 So now we're kind of boot-strapping something in
15 annotation law that's happened over the years; and
16 nobody's challenged it, Members. No one's challenged it.

17 This is the first time that we're aware that --
18 even in front of the Board of Equalization, when the Board
19 of Equalization hearing -- was hearing cases, and
20 certainly in front of OTA -- no ones ever challenged this
21 stuff.

22 That's what this is all about today. There's an
23 exception where the unit is self-propelled, or it's a
24 component part that's permanently attached to a
25 self-propelled vehicle. That's another annotation on an

1 annotation.

2 So that's on the tanks -- that's -- that's where
3 it's a -- it's a house of cards.

4 Go to the boxes. Lets talk about the boxes, very
5 briefly, which are a very small part of this.

6 Boxes aren't component parts to the truck trailer
7 because they're not permanently attached. And they're not
8 leased with the truck/trailer. Only the boxes themselves
9 are leased, not the -- the vehicle that propels. All
10 right? It's only the box.

11 And the boxes do not meet the permanent
12 attachment test because this test requires that the item
13 never be leased -- detached from the chassis or the truck.

14 Another annotation test, everyone.

15 So here, even using their annotation, it's
16 uncontested that the boxes are leased and used unattached
17 from the chassis or the truck. They're not. And the
18 definition of what constitutes a component part of mobile
19 transportation, once again, it's not to be broadly
20 construed. In fact, it shouldn't be construed hardly at
21 all because the annotations do not have the force and
22 effect of law.

23 And Annotation 335.0015, which was just brought
24 up, is not analogous to the facts here. And, in fact, in
25 that situation, it talks about, "Tax counsel was reluctant

1 to hold that debris boxes loaded onto trash trucks were
2 identical in use and purpose to reusable cargo shipping
3 containers."

4 Reusable cargo shipping containers -- I think the
5 annotation is wrong because a reusable cargo shipping
6 container is that which you see at the port of Alameda or
7 the port Los Angeles or the port of Long Beach. And those
8 are containers that were specially carved out when the
9 Reg. -- excuse me -- the -- the law was actually
10 written -- the statute was written.

11 I've been involved in lots of containers, cargo
12 containers, and that's what they were talking about, not
13 some other amorphous situation.

14 So let me just cut to the chase here. The
15 reusable cargo shipping containers are not component
16 parts, they are not permanently attached, and the boxes --
17 they can't be MTE.

18 So bottom line, what's happened here, is the
19 Department has exceeded its authority. It goes beyond the
20 plain meaning and, I think, the plain language -- that
21 word was put out there -- of the statute and the
22 Regulation and certainly goes beyond the legislative
23 intent of our statute and our Regulation.

24 So, I would strongly encourage the panel to look
25 at this annotation issue.

1 And, once again, I called it a "house of cards"
2 because, if you look at this DNR, you'll see it's peppered
3 throughout. And the basis of this DNR, to a very, very
4 great extent, is based upon annotations that do not have
5 the force and effect of law under *Yamaha v. the State*
6 *Board of Equalization*.

7 ADMINISTRATIVE LAW JUDGE KWEE: Thank you.

8 Did that conclude your rebuttal time?

9 MR. VINATIERI: It does.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

11 So normally -- well, I guess I'll start with
12 questions from the panel.

13 Judge Brown, did you have any questions?

14 ADMINISTRATIVE LAW JUDGE BROWN: I don't have any
15 questions right now. Thank you.

16 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

17 And, Judge Lambert, did you have any questions?

18 ADMINISTRATIVE LAW JUDGE LAMBERT: I have no
19 questions. Thanks.

20 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

21 So normally I would -- for closing presentations,
22 I would do the Appellant followed by the tax agency, but
23 since you just had your rebuttal, it might make more sense
24 for the tax agency to have their closing followed by the
25 Appellant to have their closing.

1 Is that fine for the parties?

2 MR. VINATIERI: Yes.

3 ADMINISTRATIVE LAW JUDGE KWEE: CDTFA, are you
4 okay going first on your closing presentation?

5 MR. CLAREMON: Yes.

6 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

7 Then I will turn it over to you. You have ten
8 minutes for closing remarks.

9

10 CLOSING ARGUMENT

11 BY MR. CLAREMON, Attorney for Respondent:

12 Thank you.

13 I don't think we need general closing remarks. I
14 think Ms. Daniels has stated our position. I am just
15 going to respond to a few the -- the comments that were
16 made in rebuttal.

17 First, looking at these tanks, the Regulation
18 here, 1661 -- it includes trailers, it includes tangible
19 personal property that becomes the component parts
20 thereof.

21 So this -- the long-standing interpretation
22 reflected by the Board's, and now the Department's,
23 annotations is consistent with the plain language of the
24 Regulation, which includes trailers and the components --
25 and TPP that becomes the component parts thereof.

1 And here we have the component part -- the TPP
2 that becomes the component part is a box. In other
3 instances it becomes a mobile generator -- it's a mobile
4 generator or a mobile air compressor, but it is consistent
5 with the Regulation.

6 I do point out that Appellant has said that the
7 only time we've allowed something to move itself is when
8 it is self-propelled. That is incorrect.

9 Annotation 335.0072 regarding portable air
10 compressors, says that "they are mounted on trailers" and
11 then -- and they are -- they constitute MTE when they are
12 capable of being removed at highway speeds.

13 With regard to the boxes, Annotation 335.0015 is
14 directly on point. We are not, in any of these instances,
15 relying on the backup letters to these annotations. I
16 believe the discussion of tax counsel is in the backup
17 letter that Appellant just brought up.

18 This is exactly on point with the debris boxes
19 discussed in that annotation. And, again, that Annotation
20 is based on the plain language of 6023, which specifically
21 talks about reusable cargo shipping containers.

22 Finally, with regard to the reliance that you'd
23 put on annotations, the Yamaha case does not say that they
24 are not to be relied on. The Yamaha case distinguishes
25 between quasi-legislative and interpretive actions by an

1 administrative agency, stating that the Board in that
2 case, now the Department and it's staff, have accumulated
3 a substantial body of experience and informed judgement in
4 the administration of the business tax law, to which the
5 courts and litigants may properly resort for guidance.

6 Some of that experience and informed judgement
7 takes the forms of annotations published in the Business
8 Tax Law Guide. And then it talks about how the level of
9 deference given to annotations is based on the various
10 factors. But Yamaha certainly does not say that even a
11 court cannot rely on annotations.

12 And that's all we have.

13 ADMINISTRATIVE LAW JUDGE KWEE: This is -- this
14 is Judge Kwee. Thank you.

15 And so I think the parties had cited several
16 annotations and the backup letters. But I don't believe
17 either party has submitted a backup letter of -- to OTA
18 for consideration. And I'm not sure that the backup
19 letters are available on -- on your website.

20 I'm not sure if it would be helpful if we had the
21 backup letters since there's a discussion about that or --
22 but, then again, you're arguing that the backup letters
23 shouldn't be considered.

24 So I guess I would just point out that we don't
25 actually have the backup letters in -- with us. So --

1 okay.

2 Then I will -- I guess, actually, Judge Brown, do
3 you have any questions for CDTFA?

4 ADMINISTRATIVE LAW JUDGE BROWN: No, I don't at
5 this time. Thank you.

6 ADMINISTRATIVE LAW JUDGE KWEE: Judge Lambert, do
7 you have any questions for CDTFA?

8 ADMINISTRATIVE LAW JUDGE LAMBERT: I have no
9 questions. Thanks.

10 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

11 Then at this point, I will turn it over to
12 Appellant for their closing remarks. You have ten minutes
13 now.

14 MR. VINATIERI: Thank you.

15 Point of order -- do we need to move into
16 evidence our documentary evidence, as well as
17 Mr. Whitney's testimony?

18 ADMINISTRATIVE LAW JUDGE KWEE: This is Judge
19 Kwee.

20 I believe at the start of the hearing, I admitted
21 Appellant's Exhibits 1 through 17 and CDTFA Exhibits A
22 through J with the caveat that we would come back to
23 discuss K, their video link, at the conclusion of the
24 hearing.

25 Is that your question?

1 MR. VINATIERI: Well, I wanted to make sure we
2 moved into evidence that you had evidence in front of you
3 of Mr. Whitney's testimony and the documentation because
4 this is going to come down to evidence.

5 ADMINISTRATIVE LAW JUDGE KWEE: Yes. That's
6 correct. Those items are admitted, and we did hear the
7 testimony. And that is considered evidence that we can
8 consider today.

9 Thank you.

10
11 CLOSING ARGUMENT

12 BY MR. VINATIERI, Attorney for Appellant:

13 Thank you. So, Members, thank you for your
14 attention on this.

15 It's been a -- it's an interesting case, but it's
16 also been a very frustrating matter for Mr. Whitney and
17 some other people who aren't here.

18 It's been in -- the process has been seven to
19 eight years going through all this. And in the meantime,
20 they've had subsequent audits, and a cloud hanging over
21 the company in terms of, "what should we be doing?", et
22 cetera.

23 So the Appeals Bureau, in its decision -- and I
24 keep raising it here -- has acknowledged the structural
25 design and legal limitations that prohibit the

1 transportation of persons or property. It's in here.

2 Nonetheless, contrary to its own guidance that
3 MTE be construed narrowly -- and the Bureau itself has
4 broadly applied the MTE rules here. And let me just give
5 you a quote: Page 11, "We acknowledge petitioner's
6 argument that the structural design and axle limitation of
7 some equipment makes transporting property in accord with
8 the practical containment purpose of the tanks and boxes
9 unlikely, or even improbable; however, the statute and
10 Regulation do not identify the number of persons or the
11 amount of property that be transported at highway speeds,
12 only that the equipment be capable of doing so."

13 "Capable of doing so" -- this erroneous position
14 began with an initial misstep taken by the Sales Tax
15 Department early on in during the audit. And instead of
16 requesting legal guidance from legal, the auditors
17 obtained legal advice from Department's Audit and
18 Information Section. That, of course, is the February 13,
19 2015, memorandum which is Exhibit 5.

20 But then the Appeals Bureau exacerbated the error
21 by taking the unreasonable, non-commonsensical, and --
22 here we go -- suppositional position that any residue a
23 hypothetical, quote, dirty, close quote, tank could
24 establish that the tank is for use in transporting
25 property.

1 So if the tank is dirty, then apparently the
2 dirty stuff in it must be property, and therefore, you can
3 be using it for transportation. Quote, the fact that
4 there is a penalty for tanks and boxes returned dirty
5 strongly suggests that the tanks and boxes are capable of
6 being transported back to petitioner with property,
7 whether liquid or solid waste material, however minimal,
8 still inside.

9 Flat out supposition. As it says, "strongly
10 suggests" -- no facts in evidence.

11 Then -- the Appeals Bureau then admitted that its
12 interpretation, quote, strains the statutory application,
13 regulatory interpretation of the MTE provisions nearly to
14 the breaking point, close quote.

15 And, as I said earlier, we submit this
16 interpretation -- it doesn't break, it absolutely shatters
17 the statutory application.

18 As we've said, although it strains the statutory
19 application or regulatory interpretation to the breaking
20 point, quote/unquote. Nevertheless, the tanks and boxes
21 are equipment for use, i.e., can be used in transporting
22 property, even if the property consists of itself,
23 substantial distances because the equipment can travel, or
24 be towed, at highway speeds.

25 Once again, here, page 11 -- so the equipment can

1 be used in transporting itself?

2 This reminds me of Alice in Wonder Land. You
3 know, what's up is not up. What's down is not down.
4 What's not in, what's not out?

5 It's -- it's -- it's sophistry.

6 Such an admission renders this interpretation
7 utterly unreasonable, without any factual basis on its
8 face, and you must reject it.

9 So we ask that the OTA reign in the Department
10 and apply a reasonable, common sense standard. We
11 provided both documentary and oral substantial evidence to
12 establish this record.

13 And in this case, we ask here, for what I see to
14 be the first time on MTE and annotations of that -- you
15 have an opportunity, members of the panel -- no. You,
16 actually, have a duty to reasonably interpret with the
17 facts that are now in evidence, not supposition, and apply
18 those facts to the law -- go back to the law -- to
19 maintain the integrity and trust of the administrative tax
20 process.

21 We ask -- we ask very sincerely -- we ask that
22 you hold the Adler equipment -- I'm pointing over here. A
23 picture is worth a thousand words -- is not mobile
24 transportation. It's not transportation equipment.

25 Thank you.

1 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

2 And for CDTFA, did you want to go back to the
3 topic of Exhibit K, the video link? Have you decided how
4 you want to handle that?

5 MS. DANIELS: We don't see a need to enter
6 Exhibit K given the testimony and exhibits that have been
7 presented here today.

8 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

9 And I do have one question. You had mentioned
10 Annotation 335.0072, and we don't have the backup letter
11 for that. And it's not available on -- on your website.
12 But is it possible for you to submit a copy of that backup
13 letter for our consideration?

14 MS. DANIELS: We'll find it somewhere.

15 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

16 And my understanding is that would be legal
17 research. So it wouldn't be something that we admit as an
18 Exhibit. It would just be something that we would
19 consider after you submit it.

20 So if I could provide 15 days for you to submit
21 that, would that be fine?

22 MS. DANIELS: Absolutely. We'll get it to you
23 much faster than that.

24 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Thank you.

25 And Appellant, do you have any objections or

1 concerns to us considering the backup -- for us requesting
2 the backup letter for that annotation?

3 MR. VINATIERI: No. It's fine, as long as we get
4 a copy.

5 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Yeah.

6 So if CDTFA could provide a copy to Appellant and
7 to OTA, that'd be great.

8 And so I -- I will hold the record -- do I need
9 to hold -- I don't think I need to hold the record open
10 since we're just -- actually, since it's triggers a
11 hundred-day deadline, I am going to hold the record open
12 for us to receive that additional annotation.

13 And, Appellant, if you have any -- would you
14 like -- would you like an opportunity to comment on that
15 Regulation before we close the record?

16 MR. VINATIERI: In terms of that letter?

17 ADMINISTRATIVE LAW JUDGE KWEE: The backup letter
18 to the Annotation 335.0072, yes.

19 MR. VINATIERI: Well, I think you know how I feel
20 about annotations, but we'll reserve the right, if we
21 could.

22 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

23 So then I will also -- I will -- after I receive
24 a copy from CDTFA, I'll give you an opportunity to provide
25 comment, if you wish.

1 So the record will be held open for the receipt
2 of the backup letter, followed by a comment period for
3 Appellant. It will be 15 days and 15 days, if that's
4 okay.

5 MR. VINATIERI: Yes, that works.

6 ADMINISTRATIVE LAW JUDGE KWEE: Okay. Great.

7 So then, with that said, I believe we're ready to
8 conclude.

9 Judge Brown, do you have anything further before
10 we conclude?

11 ADMINISTRATIVE LAW JUDGE BROWN: I do not. Thank
12 you.

13 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

14 And, Judge Lambert, do you have anything further
15 before we conclude?

16 ADMINISTRATIVE LAW JUDGE LAMBERT: Nothing
17 further. Thanks.

18 ADMINISTRATIVE LAW JUDGE KWEE: Okay.

19 Thank you everyone for coming in.

20 Today's hearing is adjourned.

21 That also concludes the hearings for today. I
22 believe the next hearings are coming -- won't be until the
23 31st of May. They will be online virtual hearings.

24 With that said, we will be holding the record
25 open. And following the closure of the record, our

1 opinion should be coming a 100-days following the closure
2 of the record.

3 Thank you, everyone, for coming in.

4 MR. VINATIERI: Thank you.

5 MS. DANIELS: Thank you.

6 MR. CLAREMON: Thank you.

7 (Proceedings concluded at 11:36 a.m.)

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1
2 REPORTER'S CERTIFICATION
3

4 I, the undersigned, a Registered
5 Professional Reporter of the State of California, do
6 hereby certify:

7 That the foregoing proceedings were taken before
8 me at the time and place herein set forth; that any
9 witnesses in the foregoing proceedings, prior to
10 testifying, were duly sworn; that a record of the
11 proceedings was made by me using machine shorthand, which
12 was thereafter transcribed under my direction; that the
13 foregoing transcript is a true record of the testimony
14 given.

15 Further, that if the foregoing pertains to the
16 original transcript of a deposition in a federal case,
17 before completion of the proceedings, review of the
18 transcript was was not requested.

19 I further certify I am neither financially
20 interested in the action nor a relative or employee of any
21 attorney or party to this action.

22 IN WITNESS WHEREOF, I have this date subscribed
23 my name.

24 Dated: June 16, 2022

Sarah Tuman

25 _____
Sarah Tuman, RPR, Hearing Reporter

<hr/> (<hr/>	1661 29:23 61:16, 24 62:8,13 63:9 65:6 69:24 79:18	31st 89:23	<hr/> 7 <hr/>
(a)(1) 65:6	17 14:15,17,19,23 46:16,18 51:25 55:25 82:21	32 4:10	73 4:14
(b)1 61:25 62:9	18 61:15	335.0009 61:21	79 4:23
(e)4 62:5	18,000 60:6	335.0015 76:23 80:13	<hr/> 8 <hr/>
(g)4 62:5	18011850 2:6 5:9	335.005 66:18	8 56:10
<hr/> 1 <hr/>	18k 49:14 52:6	335.0072 65:6 80:9 87:10 88:18	80 20:25 21:22 22:11 45:21,22 46:4 48:20 60:16 65:15
1 14:15,16,23 82:21	1979 33:11	335.0087 64:12	80/20 49:25 50:9, 13,19
1-17 4:18 15:2	<hr/> 2 <hr/>	335.015 66:12	83 4:24
10 24:25 25:1 44:2 64:12	2 66:17	335.047 64:17	<hr/> 9 <hr/>
10,000 60:6	20 20:25 21:22,23 22:11 24:22 48:18,22,23 50:14 59:12 65:17 68:10	360 63:10,16	94551 32:20
10,000-gallon 46:2	2000 33:9,21	<hr/> 4 <hr/>	9:32 2:18 5:3,11
100 60:19	2006 33:22	40 26:15 28:3 40:16	<hr/> A <hr/>
100-days 90:1	2008 33:23	400 2:17	A-J 4:19 15:4
10:20 44:8	2012 60:22	44 4:10	a.m. 2:18,19 5:3, 11 90:7
10:35 44:9	2015 84:19	45 40:16	A1 66:17
10k 45:2,11 60:11 67:15 68:2,7	2022 2:19 5:2,10	<hr/> 5 <hr/>	absolutely 20:5 57:9 58:13 85:16 87:22
11 40:16 54:9,11 56:22 84:5 85:25	21,000 36:17	5 84:19	absurd 63:4
110 63:16	21,000-gallon 46:2 60:6	50 35:15	accept 9:9,15 11:24 49:21
11:36 2:19 90:7	21k 37:24 39:24 40:15 46:23 49:14 52:6 60:4	515 63:16	accepted 57:14
12 10:7,14	24 35:14	5700 32:19	access 42:22
12B 49:16	25 2:19 5:2 24:23 26:14	59 4:6	accidental 54:22
12B.2 49:17 60:20	25th 5:10	<hr/> 6 <hr/>	accord 84:7
12B.4 62:22	28 4:5	6010 62:5	accordance 11:18
12D 49:20 50:5	<hr/> 3 <hr/>	6023 29:17 61:11 62:13 64:3 66:22 70:16 80:20	account 33:12
13 8:6 84:18	30,000 40:15	6406 19:8	
15 4:18,19 11:5 14:16 24:20 44:2, 4 87:20 89:3		6606 62:4	
15-days 13:21			
16 14:17,19 55:19 73:6 75:5			

- accounting** 32:22 33:3,8,16, 21 34:7,21
- accounts** 34:8,9
- accumulated** 81:2
- accurate** 17:22 19:11
- accurately** 34:23
- acknowledge** 84:5
- acknowledged** 56:16,17 83:24
- acquired** 33:23 60:22
- acquisition** 33:25
- actions** 80:25
- active** 35:1
- Activity** 60:21
- actual** 9:5 31:5, 16,23,25 53:19
- addition** 34:18,21 37:2 40:25 71:3
- additional** 7:9 15:7 22:21 64:7 88:12
- address** 15:12 24:3 32:17,19 61:6,9
- addressed** 16:24
- addressing** 24:4
- adjourned** 89:20
- adjustment** 65:9, 11 68:17
- Adler** 2:6 5:8 28:12,14 31:19 32:17 33:18,19,23 34:5,12 35:2,13, 14 39:22,23 42:3 54:10 55:21 86:22
- Adler's** 45:1,17, 21
- administration** 3:11 33:16 81:4
- administrative** 5:5,15 6:7,13,18, 23 7:4,15,21 8:1, 4,9,15,25 10:1,19 11:4,20 12:2,5,8, 17 13:6,12,17,19 14:1,14,21 15:3,5, 6 16:1,9,23 17:15, 23 18:7,11,18,21, 24 19:4,12,14,17, 22 20:2,6 21:6 22:14 23:4,6,9,19, 21,24 24:12,17 25:19 26:3,6,12, 18,25 27:6,16,19, 22 28:1 29:3 32:11 38:7 43:20, 25 44:3,7,11,15 46:8,17,24 47:3,9, 11,23 48:8,16,25 50:2,7,15,24 51:4, 13,15,18,20 52:23 53:2 58:4,14,21 59:3,5,8,10 68:21 69:12,16,18,21 71:15 72:1,8,11, 20 78:7,10,14,16, 18,20 79:3,6 81:1, 13 82:4,6,8,10,18 83:5 86:19 87:1,8, 15,24 88:5,17,22 89:6,11,13,16,18
- admissibility** 14:24
- admission** 86:6
- admit** 10:3 11:22 13:2 14:22 87:17
- admitted** 25:16 53:16 54:7 57:4 82:20 83:6 85:11
- advice** 84:17
- affixation** 66:9
- affixed** 52:18,19 60:13 61:1,9 65:19 66:3,8
- afoul** 42:19
- agency** 6:3 51:3 78:22,24 81:1
- agenda** 15:9
- agree** 15:25 17:12 20:15,17,18 21:19 23:2
- agreed** 30:25
- ahead** 27:8 37:13, 16
- air** 64:15 80:4,9
- Alameda** 77:6
- Alice** 86:2
- ALJ** 3:3,5 6:20
- alleged** 28:21
- alleyway** 63:14
- alleyways** 63:15
- allocate** 21:10 49:5
- allocating** 50:18
- allocation** 21:16, 20
- allowed** 80:7
- allowing** 41:15 50:14
- Alright** 32:6
- amorphous** 77:13
- amount** 40:6,17, 20,23 65:16 84:11
- analogous** 76:24
- analysis** 64:22 71:23
- Andrew** 3:3 5:15
- Angeles** 77:7
- angels** 22:6
- annotated** 72:7
- annotation** 61:21 64:12,17 65:6 66:12,17,19 71:20,21,25 72:3, 5 73:5,9 74:4,6,7, 16,24 75:15,25 76:1,14,15,23 77:5,25 80:9,13, 19 87:10 88:2,12, 18
- annotations** 70:11 71:18 73:6, 7,8,14,18,21,22 74:10,19 75:10 76:21 78:4 79:23 80:15,23 81:7,9, 11,16 86:14 88:20
- annual** 34:16
- apparently** 85:1
- appeal** 2:5 5:7,22 9:13 67:17 68:19
- Appeals** 2:1 5:9 31:11 56:15,23 57:4 83:23 84:20 85:11
- appearance** 31:18
- APPEARANCES** 3:1
- appears** 67:2
- Appellant** 2:7 3:7 6:8,10,12 7:13,17 8:10 11:6 14:10, 15,23 16:2 17:16 23:12 24:1 26:23 27:15 28:8,11,20 32:10 44:4 50:16 58:25 59:2,7,22 62:9,23 63:22 65:14,21 66:7 67:6,18 68:13 72:16 73:3 78:22, 25 80:6,17 82:12 83:12 87:25 88:6, 13 89:3
- appellant's** 4:8, 18 8:6 9:21 15:2, 15,22 20:11 25:1 60:16,21,25 61:5, 6 62:11 63:7,19 64:2,17 65:3,16, 18,25 67:3,14,17

- 68:8,19 82:21
- applicability** 19:7
- application** 57:6, 9 85:12,17,19
- applied** 56:21 84:4
- applies** 15:13,14, 21 62:6,7
- apply** 18:1 86:10, 17
- appropriately** 34:23
- approximately** 5:11 44:8 46:3 48:21
- areas** 17:5 34:11, 18,19,21
- argue** 63:4
- argues** 66:7 67:18
- arguing** 58:15,17 81:22
- argument** 4:21 63:7 79:10 83:11 84:6
- arguments** 60:25 70:10
- Arizona** 62:21
- aspect** 58:18
- aspects** 34:17
- asset** 36:12,20 60:21
- assets** 34:24 41:18 60:22
- assuming** 25:10
- attached** 22:1 38:17 39:7 58:10 66:11,13,14,16,24 67:9 75:6,24 76:7 77:16
- attachment** 76:12
- attention** 83:14
- Attorney** 28:8 59:17 73:3 79:11 83:12
- audit** 59:24 60:18 65:14 84:15,17
- audited** 68:18
- auditor** 33:4,5
- auditors** 84:16
- audits** 83:20
- authority** 72:5 77:19
- availability** 9:23
- average** 35:23
- aware** 75:17
- axle** 47:8 55:23 60:7 62:15 67:25 84:6
- axles** 40:5,23 61:8 63:3,25 64:5,19 70:24 74:18,20
-
- B**
-
- back** 10:20,21 11:5 14:2,24 26:9 28:16 29:1 36:12, 16 38:3,15 39:20 40:2,5,8,14 42:14 43:6,11,12 44:8, 16 47:2 48:2,4 52:14,16 53:3 55:16 57:18 69:2 82:22 85:6 86:18 87:2
- backed** 38:18
- background** 32:24 74:11
- backing** 38:13
- backup** 71:17,19, 22 73:8 74:3,8 80:15,16 81:16, 17,18,21,22,25 87:10,12 88:1,2, 17 89:2
- bad** 23:12,16,22 36:22 49:19 50:9, 19 60:1 65:12 67:12 68:12
- baffles** 45:13
- banking** 34:9
- based** 30:21 31:17 49:22 68:1 78:4 80:20 81:9
- basically** 8:22 21:3 53:22 57:24 64:4
- basis** 34:16 35:22 69:6 73:21 78:3 86:7
- Bay** 33:2,14
- Beach** 77:7
- bear** 51:8
- bearing** 67:25
- bed** 45:10,12 66:2
- beds** 67:16
- began** 84:14
- begin** 25:8
- beginning** 57:19
- begins** 38:23
- begun** 39:5
- behalf** 6:12 27:15 32:10
- belief** 22:2
- Bewley** 28:11
- big** 16:20
- Bill** 24:1,5,14
- bit** 15:20 42:10
- black** 39:7,19 73:18
- board** 40:18 75:18 78:6 81:1
- Board's** 79:22
- body** 66:15 73:9 81:3
- boiler** 64:15 65:2 70:19
- boilers** 64:16
- boot-strapping** 75:14
- bottom** 74:13 77:18
- box** 22:5 47:19,21, 24 48:1,3 60:12 65:22,23 66:13,23 67:3 68:9 71:4 76:10 80:2
- boxes** 20:12,24 21:1,14,18,23,24 22:8,23 30:25 31:20 46:13 47:13,14,17 48:18 49:4 50:8,12 52:9 56:11 58:8,9,18 60:11 61:1,9 65:17,19,22 66:2, 7,19 67:3,5,7,8,12 68:6,13 76:4,6,8, 11,16 77:1,16 80:13,18 84:8 85:4,5,20
- branch** 35:2,14
- break** 28:23 40:23 57:10 85:16
- breaking** 57:7 85:14,19
- briefing** 20:11 21:17 22:21 23:25 47:14
- briefly** 32:23 33:13 35:12 53:17 54:3,8 76:5
- briefs** 25:15
- broadly** 56:21 76:19 84:4
- brochures** 54:4
- broken** 22:4 50:8

- brought** 52:16
76:23 80:17
- Brown** 3:5 5:17
51:10,13 59:1,3
69:14,15,16
78:13,14 82:2,4
89:9,11
- BS** 33:16
- built** 55:17
- Bureau** 31:11
56:15,20,23 57:4
83:23 84:3,20
85:11
- business** 33:11,
15 34:2,4,23,25
35:6,13,14 53:23
61:21 81:4,7
- button** 8:21
-
- C**
-
- Cal** 33:1,13
- calculate** 60:18
65:8
- California** 2:2,17
3:10 5:2,12 15:14,
21 18:1 33:12
35:2,17 41:4,6,14
54:25 61:15 62:20
63:10,15 73:16
- call** 20:23 73:22
- called** 27:15
32:10 54:10 60:5
78:1
- capable** 41:25
45:3,6 61:19
63:24 65:1,23
69:3 80:12 84:12,
13 85:5
- capacities** 60:6
- cards** 73:5 76:3
78:1
- carefully** 38:18,
22
- cargo** 29:16 66:20
68:5 77:2,4,5,11,
15 80:21
- carry** 55:8,17
- carrying** 65:24
67:19
- carved** 77:8
- case** 5:9 28:17
50:17 59:21 60:3
70:24 73:17
80:23,24 81:2
83:15 86:13
- cases** 75:19
- catastrophic**
54:25
- categories** 20:17
21:8 45:25 48:10
60:3
- category** 52:7
60:10 65:19
- caveat** 82:22
- CDTFA** 6:5 7:23
9:3,17 10:25 11:7
14:4,8,18,23 16:7
17:9,11 20:10,16,
20 22:17,20
24:13,21 25:22
26:8,19 43:21
44:19 49:1 50:8
52:24 58:24
59:11,12 69:15,20
72:12 73:14 79:3
82:3,7,21 87:2
88:6,24
- CDTFA's** 8:6
14:10 15:24 30:20
70:10
- certified** 33:12
- cetera** 42:15
83:22
- challenged**
75:16,20
- change** 9:10,15
19:23 64:22
- changed** 10:5
- changing** 16:21
- channel** 5:13 9:22
20:3
- characteristics**
22:24 23:3
- chase** 77:14
- chassis** 66:3,9,
14,24 70:23
76:13,17
- check** 14:6,17
58:24
- chip** 43:2
- cited** 73:7 81:15
- cites** 73:6
- citing** 64:12 66:17
- claim** 24:1,5,14
- claimed** 60:1
65:12
- Claremon** 3:12
4:23 6:5 10:15
11:1 49:12 50:3
59:19 70:13 71:21
72:4 79:5,11 90:6
- clarification**
45:17,20 58:7
68:23
- clarify** 24:2 26:21
48:18 58:22 69:22
- clean** 40:3,13
42:20,21 48:6
- cleaned** 36:11
39:25 42:23 48:5
55:10
- cleaning** 38:2
39:1,4,6,10 40:10
42:10 54:17
- cleanliness**
42:15
- clear** 19:15 20:9
56:1,3 73:17 75:1
- clearance** 40:6
- close** 16:11 18:13,
14,19 29:15 34:10
35:11 57:7 69:7
84:23 85:14 88:15
- closed** 31:12
- Closed-top** 37:25
39:3,24 54:18
- closely** 35:3,5,19
- closes** 10:21
- closing** 4:21 25:2,
13,22 72:14,17,21
78:21,24,25 79:4,
8,10,13 82:12
83:11
- closure** 89:25
90:1
- cloud** 83:20
- co-panelists**
51:9
- coating** 54:18
- code** 32:20 61:11,
15 62:4,13 63:10,
15 64:3
- collectively** 46:3
- college** 33:1,2
- Colorado** 62:21
- combination**
45:22,24
- combined** 48:19
68:10
- commencing**
2:18
- comment** 48:23
71:19 88:14,25
89:2
- comments** 79:15
- commercial**
63:14
- Commission**
34:14
- common** 29:18
86:10

- commonly** 55:20
- company** 7:17
21:3 33:10 34:13,
17 39:4 83:21
- comparable** 68:5
- complete** 36:5,9
- compliance**
34:11,16,18
- comply** 42:17
- component**
29:13 39:13
58:11,17,19 66:25
67:11 75:8,24
76:6,18 77:15
79:19,25 80:1,2
- components**
79:24
- compressor** 80:4
- compressors**
64:15 80:10
- comprise** 65:8
- comprised** 60:17,
19
- concede** 68:4
75:9
- conceded** 62:9
65:21
- concern** 13:8
16:14 22:20
- concerns** 6:25
13:22 15:13 16:2,
4 24:13 25:5
26:19 29:4 88:1
- conclude** 15:1
27:2 51:3 53:3
68:1 78:8 89:8,10,
15
- concluded** 66:12
72:12 90:7
- concludes** 89:21
- concluding** 2:18
- conclusion** 67:5
68:13 82:23
- condition** 42:14
- conduct** 5:20
- conducted** 5:12
- conference**
11:11 16:25 24:20
- confirm** 17:7
- consequence**
18:5
- consideration**
81:18 87:13
- considered**
17:13 47:5 61:19
75:11 81:23 83:7
- consist** 34:6
65:22
- consistent** 79:23
80:4
- consisting** 67:14
- consists** 64:10
85:22
- consolidate**
26:13
- constitute** 17:25
22:1 65:4,15
67:12 71:8 80:11
- constitutes**
20:24 76:18
- construction**
37:8
- construed** 56:20
76:20 84:3
- consumer** 61:24
- contact** 35:11
- contained** 36:19
37:9
- container** 28:25
29:7 41:9,11,13
66:23 74:14 77:6
- containers** 29:17
41:15 61:13 66:20
68:5 77:3,4,8,11,
12,15 80:21
- containment**
30:2,13 31:22
36:10,17,21 56:11
60:4 84:8
- contamination**
54:15,19
- contemporaneo
us** 53:21
- contents** 39:11,
25 40:19 41:18
48:3,12 56:4
57:16
- context** 71:23
- continue** 26:23
48:4
- continuously**
30:12 36:7
- contracted** 39:8
- contrary** 56:19
84:2
- controller** 7:16,
20,22 28:14 32:21
33:9,24 34:6
- controls** 34:16
41:7
- Cool** 18:7
- cooperate** 51:2
- coordinate** 36:11
- coordinates** 39:9
- copy** 87:12 88:4,
6,24
- cord** 39:13
- corporate** 7:20,
22 28:13 32:21
33:9 34:5
- correct** 7:18,24,
25 8:7,8 11:15
13:16,17 14:12,13
16:18 17:13,14
23:17,18 26:11,25
42:1,2,8,9 43:9,
12,16,17 45:10
47:25 52:20
58:11,13 83:6
- correctly** 17:12
56:9 59:12 61:4
64:8 68:24
- counsel** 6:9 28:11
73:6 76:25 80:16
- couple** 15:7 17:4
19:1 37:18 40:12
46:10 53:17 54:8
- court** 55:13 60:10
73:16,24 81:11
- Courtney** 3:11
6:4 11:11 59:18
- courts** 81:5
- COVID** 28:16
- crane** 65:3 70:20
- cranes** 64:15
- credentials** 32:25
- credible** 53:10
- credit** 19:7
- critical** 29:9 57:22
- cross** 4:9 26:10,
22 44:20
- cross-exam**
25:10
- CROSS-
EXAMINATION**
44:24
- cross-examine**
27:1
- curious** 46:20
- current** 34:5
- custom** 53:23
- customer** 34:9
35:24 36:1,2,6,9,
12,14 37:22
38:13,23 39:1,9
43:16 47:18 48:4,
7,15
- customer's**
28:24 31:22 37:12
42:8

customers 30:14
35:19 36:15 37:2

cut 77:14

D

damage 42:19
56:6

dance 22:6

dangerous 40:21

Daniels 3:11 4:6
6:4 7:3,25 8:3,8
9:20 11:15 14:20
15:25 17:14 22:22
23:5,8 24:16
26:21 27:4,25
43:23 44:2,21,25
46:5 59:14,17,19
69:11 79:14 87:5,
14,22 90:5

date 5:10

David 4:10 6:16
7:12 8:2 27:14
28:13 32:9,19
51:11

days 11:1,5 35:22
87:20 89:3

deadline 88:11

deal 16:20

debris 65:24
66:12,16,19,23
67:3,7 68:6 77:1
80:18

debt 23:12,16,22
49:19 50:9,19
60:1 65:12 68:12

decide 5:22 17:3
23:1

decided 87:3

deciding 22:24

decision 5:19
20:10,16,20 24:3
31:9 54:1 56:16
64:8 83:23

deduction 23:13,
17,22 50:10,19
67:13

deductions
49:19 60:1 65:12
68:12

deference 81:9

defines 29:14,19
61:11 63:10

definition 29:13
64:9 66:25 70:4,
16 71:1 76:18

degree 33:14

deleted 10:5

deliver 63:20

delivered 37:22
48:2

denied 68:19

department 3:10
28:22 30:15 31:7,
16 41:6 61:4
64:13 68:4,10
71:22 72:7 74:22
77:19 81:2 84:15
86:9

department's
4:19 73:22 74:19
79:22 84:17

depending 24:6
43:1 47:20 49:24
50:11

describe 35:12

describing 69:25

design 56:17
67:20 83:25 84:6

designed 30:1,6
31:20 41:23
54:12,15

detached 76:13

determination
49:6 50:1 53:12

determine 10:22
14:3 22:21 49:3,8

determined
17:10 18:2 21:8
49:11 50:12

Dewatering
60:12 65:22 68:9

dice 22:9

difference 68:25

difficult 18:20

diligence 34:1

DIRECT 4:9 32:14

direction 50:20

directly 80:14

dirty 56:25 57:1
84:23 85:1,2,4

disallowed 59:25
65:12

discuss 8:22
65:18 82:23

discussed 49:22
54:5 64:16 66:19
80:19

discussing 71:17

discussion 80:16
81:21

dispatch 35:3

disposal 52:15
66:17

disposed 47:20
48:3,15

dispute 17:5,8,20
19:6 21:9,15
23:13 59:24 63:17

distance 5:25
42:1

distances 29:11,
21 58:16 61:18,20
62:17 63:5 64:1,
10 66:5 68:15
75:4 85:23

distinction 67:2
69:9

distinguishes
80:24

distinguishing
69:6

DNR 31:9 56:22
57:8 73:6 78:2,3

document 53:19

documentary
53:21 54:2 82:16
86:11

documentation
57:13 83:3

double 14:6,17
54:20

download 9:24
11:9,23

downloaded
11:23 12:18,24

drip 41:5,10

driver 64:11 75:13

drivers 35:3

dry 41:5,10

due 67:19

duly 27:16

dump 66:15

dumped 41:13

dumping 36:3

duty 86:16

E

earlier 36:21 49:2
85:15

early 84:15

easily 49:11 62:24

East 33:1,14

educational
32:24

effect 76:22 78:5

- elaborate** 71:12
election 17:18
62:10
element 29:9,13
31:3 57:22
eligible 23:15,16
else's 74:7
email 6:19
emphasis 33:16
emptied 36:11
37:23 42:23,25
48:5
empty 36:1 40:3,
7,14 43:8,12
45:12 48:6
emptying 38:2
39:6
encourage 77:24
end 39:5 55:16
62:25 63:13 66:20
engaged 53:8
ensure 5:21 39:14
54:21
enter 87:5
entities 33:24
entitled 23:12
entity 39:8
environmental
37:6 54:15,21
55:6
envisioning
25:25
EPA 36:25 37:6
epoxy 54:18
equal 5:19
Equalization
75:18,19 78:6
equate 63:8,21
64:4
equipment 15:15,
22 16:6 17:10
20:11,12,18,19,23
25:14 28:18,20,
21,25 29:8,15,20,
24 30:1,5,7,8,16,
17,18,22 31:1
35:9,11,19,21,24,
25 36:1,2,5,10,16
41:19,22 42:3,7
43:14 45:14 46:21
52:4 54:12 56:12
57:15,20,23 58:1
59:22,23 61:13,
17,19,24 62:15
63:1,4 64:2,4,11,
18,25 65:19 66:10
68:16 69:24 70:6,
7,8,23 71:7,12,13
74:18,21,23 84:7,
12 85:21,23,25
86:22,24
equipment's
43:7
erroneous 31:8
84:13
error 84:20
essence 41:8
essentially 66:15
67:11
establish 57:1
74:21 84:24 86:12
establishing
68:11
estimate 49:22
50:14
estimates 26:13
evaluated 36:7
evaluation 33:25
event 61:4 63:7
65:18
everyone's 7:10
53:8
evidence 9:8
10:3,18 12:13,15
13:9,16 14:23
15:3,5 25:16 31:6,
13,16,19 53:10,
11,16,21,25 54:2,
7 57:11,14 68:11
71:10 82:16 83:2,
4,7 85:10 86:11,
17
evolved 73:10
exacerbated
84:20
examination
32:14 50:4
examined 32:12
examples 29:14,
19,22 37:20 69:25
exceeded 77:19
exception 75:23
Exchange 34:14
excuse 52:12
77:9
exhaustion 24:11
Exhibit 8:6,7
14:17 15:2,4
41:21 46:16 51:25
54:9,11 55:19,25
56:10,12 60:20
62:22,25 64:12
66:17 75:5 84:19
87:3,6,18
exhibits 4:18,19
14:6,7,10,15,16,
22 22:4 28:19
53:15 57:13 82:21
87:6
expect 42:13
experience 74:5
81:3,6
extent 17:9,24
18:2 21:8 25:10
71:25 78:4
extraneous 57:5
-
- F**
-
- face** 86:8
facilitate 54:15
facility 40:15
47:19
fact 30:21 54:11
55:8 56:2 58:2
60:17 61:8 64:20
66:25 68:12
76:20,24 85:3
factor 29:18
factors 81:10
facts 31:5,13,16,
19,23,25 32:2
57:11 76:24 85:10
86:17,18
factual 67:2 86:7
fair 15:19 16:24
17:18 41:20
familiar 34:8
faster 87:23
February 84:18
federal 41:1
FEE 3:11
feel 18:22 88:19
feels 5:23
feet 40:16
fell 49:25
file 9:6,9,18 24:7
filled 36:7 67:8,22
71:5
final 25:24
Finally 67:14
80:22
financial 34:10
find 18:4 31:9
64:9 87:14
fine 11:25 17:3
44:1 50:9 79:1
87:21 88:3
finish 25:12 26:2
53:6

finishes 26:2
firms 33:3
first-hand 53:10
Flat 85:9
fleet 46:4 48:22,24
52:7 60:16
fluids 36:3,22,25
37:6 38:23 39:2,
15,21 40:17,23
48:13,14
focus 15:19 17:6
31:15,23
follow-up 51:23
52:24
force 76:21 78:5
foregoing 68:17
forgetting 55:12
forms 81:7
found 17:24 52:3
Frac 37:25 45:20,
21,23 46:1 60:4,
17,23 61:6 62:11
63:17,24 65:3,7,
13
Freudian 52:13
Friday 6:20
front 53:13,19
56:5 75:18,20
83:2
frustrating 83:16
full 64:23
fully 67:21
functioning 34:3
functions 34:7

G

general 22:10
34:10 79:13
generally 15:12
60:2

generated 60:21
generator 65:2
70:19 80:3,4
generators 64:14
generically 46:1
gentleman 38:1
give 32:23 53:18
71:19 84:4 88:24
glad 53:8
good 5:6 6:11
14:5 18:25 19:3,5,
16 28:9,15 29:5
59:18
govern 41:2
governed 34:13
graduated 33:1,
13,15
great 7:4 23:8
24:17 32:6 38:11
78:4 88:7 89:6
ground 52:17
Group 33:5
guess 15:23
16:24 17:3,6 21:7
48:20 49:1,10
50:16 51:11 58:7
69:3 78:11 81:24
82:2
guidance 56:19
71:21 72:2 81:5
84:2,16
Guide 61:21 81:8

H

hand 27:12
handful 35:22
handle 49:12 87:4
hanging 83:20
happened 73:20,
21 75:15 77:18

happy 11:17
haul 36:12
hailed 36:1
Hayward 33:2
hazardous 30:2,
13 36:23 41:2,15
54:16,24
head 19:23 22:7
hear 16:11 18:13
19:13 29:2 32:5
38:10 51:1 83:6
heard 5:8,14 15:8
18:25 19:15 45:19
55:23 60:15 73:11
hearing 2:21
5:11,14,18,20,21
8:13 10:16,21
11:13,17 14:3
15:1 75:19 82:20,
24 89:20
hearings 89:21,
22,23
hearsay 74:9
heavy 38:22
held 89:1
helpful 71:23
81:20
helping 34:22
helps 58:22
high 40:16 41:14
high-speed 63:8
highway 55:14
61:20 62:17 63:5,
8,11,18,21,22
64:1 65:1,5 66:5
67:10,23 68:3,14
80:12 84:11 85:24
highways 40:22
55:9 63:2
historically 74:22
hit 53:18

hoisted 66:2
hoists 67:9,16
hold 10:23 77:1
86:22 88:8,9,11
holding 12:19
67:23 89:24
hooking 39:10
hose 39:17,19
house 73:5 76:3
78:1
hundred 65:8
hundred-day
88:11
hypothetical
31:13 56:25 84:23
hypotheticals
31:8

I

i.e. 66:14 85:21
Idaho 62:21
identical 77:2
identified 61:4
64:8 66:21
identifies 29:18
identify 84:10
imagine 55:15
immense 55:20
impacted 15:18
impaired 35:10
implies 31:12
important 40:11
56:8 60:2,15
impression 71:5
improbable 84:9
improperly 55:24
incapable 29:10
67:23 75:6

include 24:24
25:20 61:12

includes 63:13
79:18,24

including 31:6,13
64:14

income 34:20

incorrect 80:8

industries 37:2

information 5:22
11:14 49:19 84:18

informed 81:3,6

infrastructure
37:7

initial 84:14

injuries 56:6

inquire 50:23

inquiry 17:6

inside 39:12,24
45:15 47:21 54:18
85:8

inspecting 35:9

instability 55:18

instances 80:3,
14

integration 34:1

integrity 86:19

intend 8:19

intended 31:20
41:23

intent 77:23

intention 30:23

interact 35:3

interesting 83:15

internal 45:13

international
33:3

interpret 86:16

interpretation
57:5,6,8 64:14
70:25 73:12 74:7
79:21 85:12,13,
16,19 86:6

interpretive
80:25

interrupted 12:7
13:13 23:20,23
55:4

interruption 27:9

interruptions
20:7

interstate 63:2,8,
22

intimately 33:24
34:2,22

inventory 45:18,
21 65:16 68:8

involved 33:25
34:2,22 35:5
77:11

involving 65:13

irrelevant 61:2

issue 9:3 11:21
12:1 15:9,11,14,
16,20,24 16:3
18:3,9 19:25
20:18 21:5,24
23:11 24:10 28:18
29:24 49:20
59:21,23 60:3
61:2,5 62:18
77:25

issued 24:3 71:22

issues 15:7

item 65:14 66:23
76:12

items 17:7 22:18
51:24 59:24 66:11
67:13,21 68:11
83:6

J

Jason 3:12 6:5
59:19

job 43:8,11 60:8
62:20 64:18,21
65:1 71:12,14

Joe 6:11 28:10

joined 33:2,5,8,9,
20 59:19

JOSEPH 3:7

Josh 5:16 6:21,25

JOSHUA 3:5

judge 5:5,20 6:7,
13,18,21,23,25
7:1,4,15,21 8:1,4,
9,15,25 10:1,19
11:4,20 12:2,5,8,
17 13:6,12,17,19
14:1,14,21 15:3,5,
6 16:1,9,23 17:15,
23 18:7,11,18,21,
24 19:4,12,14,15,
17,22 20:2,6 21:6
22:14 23:4,6,9,19,
21,24 24:12,17
25:19 26:3,6,12,
18,25 27:6,16,19,
22 28:1 29:3
32:11 38:7 43:20,
25 44:3,7,11,15
46:8,9,17,24 47:3,
9,11,23 48:8,16,
25 50:2,7,15,24
51:4,10,13,15,16,
18,20,23 52:23
53:2 58:4,6,14,21
59:1,3,5,6,8,10
68:21 69:12,14,
15,16,18,19,21
71:15 72:1,8,11,
18,20 74:1 75:7
78:7,10,13,14,16,
17,18,20 79:3,6
81:13,14 82:2,4,6,
8,10,18 83:5 87:1,
8,15,24 88:5,17,
22 89:6,9,11,13,

14,16,18

judgement 81:3,6

judges 5:15,17

jump 19:19

jumps 20:4

jurisdiction 24:2

K

Kaiser 33:6

key 29:12

kind 16:21 18:12
22:4 39:20 71:5
72:2 75:14

Kwee 3:3 5:5,15
6:7,13,18 7:4,15,
21 8:1,4,9,15,25
10:1,19 11:4,20
12:2,5,8,17 13:6,
12,17,19 14:1,14,
21 15:6 16:1,23
17:15,23 18:7,24
19:4,12,14 20:2,6
21:6 22:14 23:4,6,
9,19,21,24 24:12,
17 25:19 26:3,6,
12,18,25 27:6,19,
22 28:1 29:3 38:7
43:20,25 44:3,7,
11,15 46:8,9,17,
24 47:3,9,11,23
48:8,16,25 50:2,7,
15,24 51:4,15,20,
23 52:23 53:2
58:4,6,14,21 59:5,
10 68:21,22
69:12,18 72:11,
18,20 75:7 78:7,
10,16,20 79:3,6
81:13,14 82:6,10,
18,19 83:5 87:1,8,
15,24 88:5,17,22
89:6,13,18

L

lacks 24:2

Lambert 3:5 5:16
6:22,25 7:1 16:9
18:11,18,21
19:15,17,22
51:16,18 59:6,8
69:19,21 71:15
72:1,8 74:1 78:17,
18 82:6,8 89:14,
16

Land 86:2

language 69:23
70:9 74:15 77:20
79:23 80:20

laptop 8:11,12

large 20:12 35:16
46:13 47:6,7,12
48:9,19 60:4,7,17,
19 61:7 62:19,23
64:17 67:24 69:1,
2

larger 20:16

largest 33:3

Las 32:20

Lassleben 28:11

lastly 56:10

law 5:5,15 6:7,13,
18,23 7:4,15,21
8:1,4,9,15,25
10:1,19 11:4,20
12:2,5,8,17 13:6,
12,17,19 14:1,14,
21 15:3,5,6 16:1,
9,23 17:15,23
18:7,11,18,21,24
19:4,12,14,17,22
20:2,6 21:6 22:14
23:4,6,9,19,21,24
24:12,17 25:19
26:3,6,12,18,25
27:6,16,19,22
28:1 29:3 32:11
38:7 43:20,25
44:3,7,11,15 46:8,
17,24 47:3,9,11,
23 48:8,16,25
50:2,7,15,24 51:4,
13,15,18,20 52:23
53:2 54:25 58:4,
14,21 59:3,5,8,10
61:21 68:21
69:12,16,18,21
71:15 72:1,8,11,
20 73:9,15,23,24
74:20 75:15 76:22
77:9 78:5,7,10,14,
16,18,20 79:3,6
81:4,8,13 82:4,6,
8,10,18 83:5
86:18 87:1,8,15,
24 88:5,17,22
89:6,11,13,16,18

layman's 41:9

lead 3:3 6:20,22

leaks 54:22

lease 62:1,3,10
67:13

leased 28:20
59:22 60:23 67:5
68:13 76:8,9,13,
16

leases 15:15,17,
22 16:19 49:14
59:25 60:19 61:3,
22 62:18,19 63:20
65:9,11

leave 17:1

ledger 34:10

left 5:16 33:7

legal 56:17 72:6
83:25 84:16,17
87:16

legally 30:7 56:13
57:16

legislative 77:22

legislature 30:23

lessor 61:23 62:3,
7

lessor's 62:8

let alone 74:3

Lets 76:4

letter 71:23 74:3,8
80:17 81:17
87:10,13 88:2,16,
17 89:2

letters 71:18,20
73:8 80:15 81:16,
19,21,22,25

level 81:8

liability 20:25
48:18,20,23 65:9

lieu 10:22 11:7

lift 18:14 46:19
56:3,4

lifting 56:5

light 58:1

limitation 84:6

limitations 56:17
67:24 83:25

limiting 18:9

lines 68:15

link 8:7 9:5,9,14,
16,20 10:3 11:22
12:21,23,24 13:3
82:23 87:3

liquid 41:12 67:22
85:7

liquids 64:21

list 49:20

listed 20:10,11
47:24 50:5 60:23

litigants 81:5

live 5:12 44:17

Livermore 32:20
35:1

livestream 5:6

LLC 2:6 28:12

loaded 77:1

location 35:1
36:13 37:12 38:19
43:6

locations 35:15

long 33:17 40:16
77:7 88:3

long-standing
64:13 70:25 73:12
79:21

looked 10:10
20:13

Los 77:7

lot 34:14 71:18

lots 77:11

loud 19:15 29:2

low 12:11

lowered 38:19,22

lumped 20:14

lynched 52:9,12

M

Madam 55:13

made 62:10 73:17
79:16

maintain 86:19

maintained 63:12
64:13

maintenance
37:5

major 21:5 55:3

majority 20:22,23
21:4 52:6

make 7:9 18:8
23:3 24:10 50:21
53:25 68:7 78:23
83:1

makes 9:2 69:2,4
84:7

making 21:12
35:10 49:5 53:12

man-way 39:5

man-ways 42:23

management
35:4,6

manager 33:8
manifold 39:11
manifolds 42:22
manner 30:14
 67:4
marketing 37:19
markets 62:23
material 85:7
materials 30:3,13
 36:6 41:15 43:1
 47:18,22 54:16,24
 75:12
matter 2:5 5:8
 29:12 32:2 58:2
 83:16
Mcgrath 7:17
 33:8,10,20,23
 34:4,12
meaning 41:10
 43:8 77:20
means 63:23
meantime 83:19
measure 65:10,
 12 68:18
Medical 33:5
meet 5:19 76:11
meets 64:2 70:16
members 3:5
 75:16 83:13 86:15
memorandum
 84:19
mentioned 7:7,11
 33:20 34:12 36:21
 47:14 48:17 87:9
mere 74:20
message 6:19
messages 12:9
met 28:12
mic 16:11 69:8
microphone 5:25

12:9 27:11
mics 18:12
Miller 28:11
minimal 85:7
minute 38:7 44:4
 51:8
minutes 24:20,
 22,23,25 25:1,23
 26:14,15 28:3
 44:2 59:12 72:16,
 21,23 79:8 82:12
missing 29:8,9
 31:3 57:20,22
misstep 84:14
mixtures 36:24
mobile 16:6
 28:21,23 29:15
 30:16,23 31:1
 43:8,12 57:20,23
 58:1 59:23 61:12
 64:14,15,16 65:2
 69:24 70:19,20
 76:18 80:3,4
 86:23
moment 39:12
monitoring 20:3
months 35:22,23
morning 6:11
 28:9 59:18
mounted 80:10
mouth 18:15
move 37:24
 41:18,23 58:23
 72:14 80:7 82:15
moved 28:24
 30:17 57:16 62:24
 83:2
movement 41:2
moving 10:11
 19:20 30:14 70:4
MP4 9:17
MPE 74:21

MTE 15:10,18
 16:15,22,25 17:1,
 11,25 18:2,5,9
 21:8,9,12,14 22:1
 23:14,15 28:21
 29:13,14,19 30:23
 49:4 50:12 56:20,
 21 57:6,20 58:2,
 11,18 59:23 61:5,
 8,11,18,22 62:1,3,
 7,8,11 64:9,16
 65:4,7 66:6,8,21
 67:12 68:4,16
 69:4 70:20,21
 71:9 73:10,21,25
 74:14,18,21 75:3,
 11 77:17 80:11
 84:3,4 85:13
 86:14

MTV 62:1
mud 38:24
muddy 38:24

N

names 6:2
narrate 30:11
narrow 17:6
narrowly 56:20
 84:3
Nasdaq 33:11
Natasha 6:20 7:1
nature 40:10
 47:21 63:11
necessarily
 11:16 70:6
needed 5:22
 11:22 35:20
Nevada 62:21
nobody's 75:16
non-
commonsensica
I 56:24 84:21
non-technical

54:4
nonetheless
 56:19 84:2
nonhazardous
 30:3,13 36:23
 45:4,7 54:16
Northern 35:2,17
Nos 15:2,4
note 60:2,15
 62:18
notes 37:18 59:12
notice 24:11
number 5:9 30:5,
 6 35:22 84:10
numbers 45:19
 49:22
numerous 40:25

O

Oakland 33:4
objection 7:2 8:2
 11:7 14:9,16
 16:25 50:18
objections 6:24
 7:3 13:23 14:18,
 20 50:17 87:25
obtained 84:17
occasion 35:8
offering 9:20
office 2:1 5:9 35:2
officer 32:22
 33:22
offices 35:15
oil 36:24 37:3,4
 38:24
one's 75:16
online 89:23
open 10:24 12:20
 63:12 88:9,11
 89:1,25

open-top 37:21
38:3,20 40:2
46:23 47:5 52:6
60:5

opened 42:23

opening 5:7
24:21 25:8,20
26:2,14 27:2,8,10,
24 28:3 53:3
57:19 59:13

operate 8:12

operations 34:3
35:2,16,18

opinion 24:6 90:1

opportunity
10:16 13:22 26:22
28:17 86:15
88:14,24

options 10:20

oral 86:11

order 7:8 24:18
25:3 26:20 42:17,
21 82:15

ordinary 53:22

OT 38:21

OTA 2:6 5:9 17:9
21:8,10 22:17
24:2 49:3 75:20
81:17 86:9 88:7

out-of-sale 59:25

out-of-state
15:15,17,22 16:19
19:7 49:14 60:18
61:2 62:19 63:20
65:9,10

outset 70:15

Overview 56:11

owned 9:23

P

paid 17:17,21 19:8

panel 3:3,5 5:14,

17,21 7:1 11:16
12:3,14 13:14
18:4 22:3 53:11,
13,25 58:24 68:1
73:13 77:24 78:12
86:15

parent 7:17

Parker 3:12 6:6
50:11 59:20

part 19:25 20:13
33:6 34:12 55:14
58:11 75:24 76:5,
18 80:1,2

participants 5:19

participate 5:21

parties 6:1,24
21:10,15,19 51:11
71:17 79:1 81:15

parts 58:17,20
75:8 76:6 77:16
79:19,25

party 8:5 15:13,23
25:1,24 27:23
36:8 52:24 72:22
81:17

Patricia 3:8 6:9
28:10

pause 44:18

pay 15:18 17:18
62:10

payable 34:8

paying 19:9 34:8

payments 34:9

penalty 53:20
85:4

people 24:11
83:17

peppered 78:2

percent 20:25
21:22,23 22:11
45:21,22 46:4
48:18,20,22,23
50:14 60:16,19
65:8,15,17 68:10

percentage
45:20

Perfect 8:25

period 89:2

perjury 53:20

permanent 66:9
76:11

Permanente
33:5,6

permanently
22:1 52:19 66:8,
14,24 75:24 76:7
77:16

permission 9:25

person 20:3

personal 17:10
61:14 64:22 79:19

persons 29:10,
20,25 30:6,8,9,18
31:2,21 41:22,24
42:1 53:23 54:13
56:14,18 57:18
61:17 62:2,14
75:12 84:1,10

perspective
41:16,17

pertinent 10:9,10

petitioner 85:6

petitioner's 84:5

photographs
10:9 14:19

photos 10:18

phrasing 15:11,
24,25 16:3

physical 35:15
36:13 41:16

physically 30:7
40:24 56:13 57:15

pick 48:6

picked 12:10

Pics 11:25

pictorial 55:25

picture 12:18
55:21 86:23

pictures 10:22,24
11:2,7,24 12:16,
20,25 13:15

piece 64:25 71:7

pieces 25:14
41:22 52:4 64:17

pin 22:7

place 6:22 34:25
36:2 38:18,23
63:11 70:4

plain 69:23 70:9
74:15 77:20 79:23
80:20

play 8:13,16

playable 9:6

playing 9:1 24:24

plenty 26:17

point 8:20 25:9
26:5,8 27:9 28:19
37:10 40:18 57:7
67:10 70:13
72:15,19 80:6,14,
18 81:24 82:11,15
85:14,20

pointing 86:22

points 42:22 56:5

Poly 21:11 23:1,2
45:2,11,13 46:2
60:11 67:15 68:3,
7

port 77:6,7

portable 80:9

portion 17:25
27:8 68:8

portrayed 8:23

Positas 32:20

position 30:15,20
31:5,8 32:17
56:25 58:8,9

68:25 72:6 73:22
79:14 84:13,22

positions 33:18

posted 46:21

poster 40:18

potential 19:6
20:16

potentially 11:8
14:8,11 24:7
47:24 50:22

pounds 40:15

pour 41:12

power 43:3

practical 84:8

pre-hearing
16:24

precept 53:24

prehearing 11:11
24:19

premature 24:8
51:6

presence 74:20

present 6:8 9:24
22:19 28:17 30:11
31:5 54:19

presentation 4:3
7:8 22:16 24:19,
21,22 25:4,7,20,
23 26:20,24 27:3,
10,24 28:3,7 53:4
59:13,16 68:24
72:12 79:4

presentations
7:6 78:21

presented 31:4,6
87:7

president 7:16,
19,21 28:13 32:21
33:21

pressure 39:14

pretty 16:10 18:15

prevent 54:14

prevents 54:19

previously 32:11

primarily 52:5

primary 59:21

principal 32:21
33:21

prior 43:5

problem 9:7
12:22 13:7 49:25
55:14 73:8 74:9
75:10

problematic 49:7

problems 27:4

proceed 28:2
29:5

proceedings
2:16 90:7

process 16:15
35:25 36:8 39:10
83:18 86:20

processes 34:24

produce 5:19

Product 56:10

products 54:10

professional
32:24

profiled 36:7

prohibit 56:18
83:25

project 36:10

propels 76:9

properly 81:5

properties 56:9

property 15:10,17
17:1,11,21 22:18,
19 29:11,21,25
30:6,8,9,19 31:2,
21 34:19 42:4
43:14 45:6,14
47:15,25 54:13

56:14,18 57:2,18,
25 58:16 60:3
61:5,14,18 62:2,
14 64:7,10,22
65:24 66:4 67:10,
19,23 68:3,14
70:1,2 79:19 84:1,
7,11,25 85:2,6,22

proposition
73:25

protection 54:21

provide 9:5,17
35:19 72:2 87:20
88:6,24

provided 9:5
20:19 68:2 86:11

providing 29:14

provisions 57:7
85:13

public 5:13 33:3,
12 34:15 56:7
63:12

publicly 33:10
34:13,17 63:12

published 81:7

pull 18:14

pulley 38:15

pulling 38:13

pumped 38:25
39:21

pumping 36:3
38:23

purchase 17:18

purchased 17:21

purpose 63:13
77:2 84:8

push 8:13,21

put 11:5 25:6
37:20 53:22 54:6
77:21 80:23

putting 24:11
34:24

Q

qualifies 17:10
59:22 61:18 68:16

qualify 66:5

quarterly 34:15

quasi-legislative
80:25

question 13:25
16:6 17:3 22:13
23:5 25:4 28:24
29:7 43:15,24
47:13 49:1 52:9
53:12 59:22 66:4
69:22 70:21,22
71:8,16 74:1
82:25 87:9

questions 7:7,9
8:20 15:7 17:4
23:10,22 26:9
27:23 32:1 43:19,
22 44:20,21 45:1
46:6,10 51:7,10,
14,16,19,21
52:22,25 53:9
56:1,2 58:25 59:1,
6,9 69:15,17,19
72:9,13 78:12,13,
15,17,19 82:3,7,9

quick 37:23 49:1
58:7 68:23

quickly 37:23
74:12

quote 28:21
29:16,20 31:12
57:7,17 62:24,25
63:11,13 66:20
84:5,23 85:3,12,
14

quote/unquote
73:23 85:20

R

R-E-C-R-A 55:7

raise 13:22 27:12
raised 24:1,10
 29:4
raising 24:14
 83:24
Ralston 6:20 7:1
random 21:12
ratio 50:9
rationale 74:23
re-audit 49:10,15
re-rented 36:13
reached 67:5
read 70:5
ready 6:15 38:9
 43:5 44:15 72:13
 89:7
rear 46:19 56:3
reason 21:7 68:17
reasonable 49:23
 53:23 86:10
reasoning 34:1
 72:2
reasons 40:12
rebuttal 4:12 25:1
 72:19,21,24 73:2
 74:25 75:2 78:8,
 23 79:16
receipt 89:1
receipts 62:10
receivable 34:9
receive 88:12,23
received 4:18,19
 15:2,4 53:7
recess 43:24 44:4
recollection
 11:10
Recommendation
 31:10
record 5:7 6:1
 9:8,12,19 10:24
 12:19 13:4 16:5,
 21 25:15 44:12,
 14,16 86:12 88:8,
 9,11,15 89:1,24,
 25 90:2
recording 5:6
records 50:4
RECRA 55:1,6,7
RECROSS 4:9
Recycling 55:7
red 38:14
redirect 4:9 25:11
refer 37:21 38:14
 42:18
referred 11:11
 37:25 41:5 61:16
referring 46:16,
 18 55:19
refiner 37:4
reflected 79:22
Reg 29:23 70:11,
 12 77:9
regard 80:13,22
regional 33:8
 35:4
regularly 63:22
Regulation 29:18
 30:22 61:15,16,24
 62:8,13 63:9 65:5
 69:24 74:2,14,17
 77:22,23 79:17,24
 80:5 84:10 88:15
regulations 41:1
regulatory 41:17
 57:6 85:13,19
reign 86:9
reimbursement
 17:21
reject 86:8
relate 16:18 42:13
 70:10
relation 71:20
relative 21:24,25
 24:10 32:2 53:24
relevant 53:10
 61:12
reliable 53:10
reliance 80:22
relied 71:24 72:4
 73:18 74:3 80:24
relies 31:7
reluctant 76:25
rely 53:12,24
 81:11
relying 80:15
remarks 25:2,22,
 24 72:14,17,21
 79:8,13 82:12
remediation 37:6
 55:6
remind 73:13
reminds 86:2
remove 39:9,11
 43:2 48:12
removed 9:11
 10:5 36:8 38:4
 39:15 40:1,4,7
 41:12 43:4 48:14
 66:13 80:12
removing 39:2
renders 86:6
rental 15:19 17:19
 35:23 60:16 65:16
 68:8
rentals 2:6 5:8
 19:10 28:12 32:18
 33:23
Rentcorp 7:18
 33:8,10,20
rephrase 15:14
replaced 6:21
Report 60:22,23
reported 2:20
 17:12
reporter 2:21
 12:7 13:13 23:20,
 23 55:4,13
reporting 34:10,
 15
represent 6:2
representatives
 6:3
representing 6:5
request 43:23
requesting 84:16
 88:1
require 49:9
required 22:21
requirement 63:9
 64:2,6,23 66:10,
 22
requirements
 34:15 41:1 42:20
 55:2 62:12
requires 76:12
research 87:17
reserve 88:20
residential 63:14
residue 56:25
 84:22
resort 81:5
respect 52:8
 61:22
respond 79:15
Respondent 3:10
 59:17 79:11
respondent's
 15:4
responsible
 34:19
restructuring
 26:19

result 62:7
resume 44:16
retail 61:23
return 26:7 36:12
returned 85:4
reusable 29:16
66:20,22 68:5
77:2,4,5,15 80:21
Revenue 61:11
62:4,12 64:3
review 13:20
revise 15:11
Rights 24:1,5,14
risk 37:8
Road 32:20
roadways 41:16
role 34:5
roll 38:6
roll-off 60:12
65:22 67:16 68:9
rollover 55:16
roof 56:5
roughly 35:23
RPR 2:20
rules 11:19 41:4
56:21 84:4
run 34:23 42:19
runs 35:14

S

Sacramento 2:17
5:2,12
safe 30:2 41:24
54:16
safeguarding
34:24
safely 57:16

safety 41:17
42:18
sale 61:22,23
62:2,6
sales 34:19 35:15
62:6 84:14
salespeople 35:4
sample 49:13
60:18,21 65:8
Sarah 2:20
satisfy 62:12
saved 9:8 11:18
Schedule 49:16,
19
Scott 3:12 6:5
59:19
scraped 41:11
scratch 72:22
screens 10:9,10
screenshots
10:13
seconds 10:7,14
19:1
Section 61:15
62:13 63:10 64:3
66:21 84:18
Sections 62:4
63:15
Securities 34:14
self-propelled
74:24 75:23,25
80:8
sense 9:2 18:8
23:3 30:17 78:23
86:10
sensitive 18:12,
15
separate 18:3
series 53:15 54:3
set 8:11 25:7
71:12

shatters 57:9,10
85:16
shipping 29:16
61:13 66:20,22
77:2,4,5,15 80:21
short 26:4 43:23
short-term 35:21
shortly 38:19
show 9:14 10:9,
12,13 30:4 37:21
38:2 39:12 54:11,
12 57:15
showing 38:4
40:9
shows 30:12
40:19 56:12 71:11
sic 23:16
sign 46:12,18
similar 10:17
52:11 66:23 70:19
similarity 31:18
similarly 48:5
simple 55:9
simply 64:23
sincerely 86:21
single 60:7 67:25
sit 27:20
site 28:24 30:14
31:22 35:24 36:1,
25 37:7,11,22
38:4,13 42:8 43:8,
12,16 48:4,7
52:15 64:18,21
65:1 71:13,14
sites 60:9 62:20
sits 21:2
sitting 6:17 42:7
situation 76:25
77:13
situations 47:18

size 55:20
slice 22:9
slight 40:5
slightly 15:11
slip 52:13
sloshes 55:15
slowly 38:21
39:11 40:7
slurry 36:23
small 20:12 40:17,
20,22 46:13,25
47:5 48:9,19
65:16 67:3,5,7,8
68:8,25 69:1,4
76:5
smaller 45:1
60:10,25 67:14,18
soft 29:2
solid 41:11 85:7
solids 36:3,22,25
39:14 43:2
solution 37:9
sophisticated
71:13
sophistry 86:5
sort 9:18,25 26:22
sound 5:24 29:1
Southern 35:17
speak 16:10
specially 77:8
specific 22:23
42:12
specifically
29:19 54:5 65:21
66:21 80:20
specifications
54:4,10
specifics 22:15
specs 54:12

speeds 61:20
62:17 63:6,8,18,
21 64:1 65:2,5
66:5 67:10,23
68:3,14 80:12
84:11 85:24

spent 40:9

split 50:13,18

spray 43:3

spread 20:16

staff 81:2

standard 41:5,8,
14 86:10

standards 42:13,
16,17

stark 57:2

start 5:6 6:2 7:6,
11 8:12 37:15
78:11 82:20

started 49:2

starting 70:13

state 2:2 3:10 6:1
16:18 19:8,10
32:17 33:1,14
41:1 49:8,9 60:23
62:8 63:2,23
68:15 78:5

stated 30:24
45:19 64:4 65:15
66:1 72:6 79:14

statement 47:25

statements 15:11

states 19:9 31:11
35:16 61:16

stating 70:5,7
81:1

stationary 30:14
31:22 37:11 42:7
43:15 48:11

statute 29:14,22
30:21 70:16 73:25
74:2,13,17 77:10,
21,23 84:9

statutory 57:5,9
85:12,17,18

stay 5:24

storage 30:2
54:16 60:11 61:1,
9 64:21 65:19

store 13:4

stored 10:4 37:1

straightforward
21:17

strains 85:12,18

straps 66:3 67:9,
16

strategic 34:1

strategy 34:3

streaming 5:13
44:17

Street 2:17

streets 63:14

strikes 16:19,20

strongly 77:24
85:5,9

structural 56:6,
17 67:20 83:24
84:6

stuff 36:22 55:8
75:1,21 85:2

style 67:16

Subdivision
61:25 62:4,5,9
65:6

subject 57:25

submit 10:12,22,
24 11:17 12:18,
20,24,25 13:2,11,
21 14:4 57:8
85:15 87:12,19,20

submitted 9:14
13:15,20 81:17

submitting 11:7,
8

subsequent
83:20

substances
36:18 41:6

substantial
29:11,21 42:1
53:25 58:16
61:18,19 62:16
63:5 64:1,10 66:5
68:15 75:4 81:3
85:23 86:11

sufficient 64:9

suggests 31:12
85:5,10

sum 43:7

support 31:5,8
34:25 39:9

supposition
31:7,17,24 57:3
85:9 86:17

suppositional
30:21 56:24 84:22

Supreme 73:16,
24

Suzanne 3:5 5:16

swallow 18:23
19:1

swear 27:8

switch 38:8

sworn 27:16
32:11,16 57:12

systems 34:24

T

takes 30:15 81:7

taking 6:22 84:21

talk 54:20 55:10
76:4

talked 42:10
51:24 54:23 55:1,
5,6 63:19

talking 25:13
77:12

talks 76:25 80:21
81:8

tangible 17:10
61:14 64:21 79:18

tank 2:6 5:8 21:11
22:5 23:1 28:12,
14 32:17 33:23
36:4,17,19 37:1,3,
5,20,22,24,25
38:2,3,16,21,22,
24,25 39:2,3,5,6,
13,14,15,22,25
40:2,7,10,12,13,
15,20 42:13,14,
19,20,21,22,24
43:1,4,5 45:2,11,
13,24 46:1,2,19
47:4,5,6,7,12 52:7
54:17,18 55:21
56:3,4,5 57:1
60:11 65:4 69:3
84:23,24 85:1

tanks 20:12,23,24
21:4,18,23 22:23
23:2 30:12,16,25
31:14,19 37:14,25
42:11 45:2,9,20,
21,23 46:3,13,23,
25 47:1 48:9,13,
19,20 49:4,8,15
50:1,8,13 52:5
54:19,24 55:15
56:11 58:8,15
60:4,5,7,8,17,19,
24 61:6,7 62:11,
19,23 63:17,18,
23,24 64:17,20,23
65:3,7,13,15,20
66:7 67:7,14,15,
18,24 68:2,3,7,13
69:1,2,5 75:3,7
76:2 79:17 84:8
85:4,5,20

taste 19:2

tax 2:1 3:10 5:9
6:3 15:12,14,21
17:12,17,18,20,21
18:1,5 19:8,9

- 34:19,20 59:25
61:21 62:4,6,7,10
68:18 76:25
78:22,24 80:16
81:4,8 84:14
86:19
- taxability** 16:8
- Taxation** 61:11
62:12 64:3
- taxes** 15:18
- Taxpayer** 24:1,5,
14
- taxpayer's** 24:20
- team** 29:4 37:19
- tech** 20:2
- technical** 54:3
- temporarily**
38:16 48:1 52:10,
14,18 58:10
- temporary** 30:2
- ten** 25:23 72:16,
21,23 79:7 82:12
- tentatively** 11:5
- term** 35:23
- terms** 15:12 16:8,
18 34:23 36:15
41:9 42:18 83:21
88:16
- test** 76:12,14
- testified** 32:12
- testify** 8:17 27:7
30:5
- testifying** 7:12
- testimony** 8:2,17
9:1 20:22 22:16
25:10,21 26:14
28:4 31:7 53:15,
20 57:13 68:2
82:17 83:3,7 87:6
- testing** 32:5
- that'd** 88:7
- theme** 25:18
- there'll** 26:7
- thereof** 66:25
79:20,25
- thing** 20:8 23:25
54:10 70:7
- thing's** 29:1
- things** 16:21
25:14 36:18
70:21,22 71:8
- third-party** 39:8
- thousand** 55:22
86:23
- time** 5:10 8:21
10:5,24 13:23
17:17 24:5,15,24
26:5,13 33:2 36:6
40:9 41:21 42:3
43:14 44:1,8 51:5,
14,19 53:14 59:4,
9 69:17 71:7
72:19,24 75:17
78:8 80:7 82:5
86:14
- times** 68:15
- tires** 55:22 60:8
62:16
- Title** 61:15
- titles** 20:19
- today** 6:6 11:13
66:1 68:2 73:21
75:22 83:8 87:7
89:21
- today's** 5:10,14,
18 89:20
- tongue** 38:14
- top** 38:20 70:18,23
71:2
- topic** 87:3
- touching** 37:8
- towed** 63:3 64:5
65:1 70:14 85:24
- toxic** 36:24 37:6
41:6 47:21
- TPP** 17:13 50:12
79:25 80:1
- tractor** 62:24
- tractor-trailer**
38:12,15,17 47:2
48:2 52:18
- traded** 33:10
34:13,17
- traditional** 34:21
- trailer** 60:13 61:10
64:4 66:9,11 67:9,
11 70:14,18 71:1
76:6
- trailers** 10:11
29:16 61:12 67:17
75:8 79:18,24
80:10
- transactions**
49:20 50:4 65:13
- TRANSCRIPT**
2:16
- transitioned** 39:3
- transport** 30:6,8
31:21 40:22 41:22
42:4 45:4 47:15,
24 48:10 54:13
56:14 57:18 58:16
60:8 64:7,24 65:4
66:11,16 67:10
68:3 69:10 70:1,3,
8 71:1 74:15,23
75:4,6,12
- transportable**
57:21
- transportation**
16:6 28:21 29:9,
12,15 31:3 56:18
57:23 58:1 59:23
62:2,14 69:24
70:6 76:19 84:1
85:3 86:24
- transported**
40:14 43:6,8,11
45:9,14 47:2,19
52:15 60:14 61:7,
10 62:16,20 63:1,
5 64:5,10,18
65:24 67:15,19
70:2,7 71:6 84:11
85:6
- transporting**
29:10,20,25 30:9,
18 31:2 41:25
45:6 54:23 57:2
61:14,17 63:25
66:4 68:14 69:3
70:22 84:7,24
85:21 86:1
- transports** 62:15
63:23 64:6 70:18
71:2
- trash** 77:1
- travel** 61:1,20
63:8,13,18,22
85:23
- traveling** 41:15
61:19 65:5
- treated** 56:9
- treatment** 37:7
- triggers** 88:10
- truck** 29:16 36:8
39:8,18,20,22,23
45:10,11 48:12,14
60:13 61:9 62:25
64:5 66:2,11,13,
15,16,24 67:9,11,
15,16 70:15,18
75:8 76:6,13,17
- truck/trailer** 76:8
- trucks** 61:1,12
77:1
- trust** 86:19
- tube** 39:7
- Tuman** 2:20
- turn** 11:6 25:22
27:23 37:4 43:21
44:19,20 51:9
53:3 58:23 59:11
69:14 72:15,23

79:7 82:11
turning 19:23
type 22:18,19
49:18 53:11 66:10
75:6
types 20:10,17,19
22:7 36:18,22,25
37:14 46:20
typical 34:7

U

U-SHAPE 38:14
ultimately 17:2
43:4
unattached
76:16
unavailable 6:21
uncontested
76:16
underlies 59:24
underreported
60:18
understand
14:16 17:5 24:4,8
42:6 58:15 69:13
71:4
understanding
7:16 8:10 9:4 14:9
15:16 17:7,11,16
19:9 22:22 23:13
47:15,16 49:13
58:9,12 68:24
87:16
understands
8:23
Understood 24:9
undisputed
17:17 18:1
unit 55:18 65:2
70:19 75:11,23
United 35:16
units 60:22 64:15,

16
unquote 29:21
unreasonable
56:24 84:21 86:7
unreported 59:24
61:2 65:10
uploaded 9:18
upside 41:13
utilize 37:3
utilized 52:17
60:8
utilizes 36:2
utterly 86:7

V

vacuum 36:8 39:7
48:12,14 60:12
65:23 68:9
valves 42:22
variation 25:17
vast 20:22,23 21:4
vehicle 63:10,15
75:25 76:9
vehicular 63:13
vendors 34:9
verbal 53:15,20
Verdugo 3:8 6:9
12:13 13:5,8,14,
18,24 28:10
versus 49:8 58:8
69:1
vessel 41:9
vice 7:16,19,21
28:13 32:21 33:21
video 8:5,6,7,10,
16,21,23 9:4,6,10,
18,21 10:2,6,7,13,
23 11:2,8,12,22,
23 12:4,13,19,20,
25 13:15,21 14:2,

4,7,11 24:25
25:21 30:11 37:13
38:8 41:21 42:24
47:4 52:11 82:23
87:3
videos 9:22 10:18
view 10:8 11:16
13:9,10,14
viewing 12:14,18
viewpoint 21:21
Vinatieri 3:7 4:5,
14,24 6:11,16 7:2,
14,19 8:14,19
11:10,25 12:3
14:13 16:4,9,13
17:22 18:4,17,20,
22 19:2,11,13,19,
25 20:5,21 21:21
23:18 24:9 25:3,6
26:1,4,11,17
27:21,24 28:2,5,8,
10 29:6 32:7,15
38:5 39:16 43:18
44:6,10 46:15
50:23 51:23 52:2,
22 53:3,5 55:5
58:13,19 72:16,18
73:1,3 78:9 79:2
82:14 83:1,12
88:3,16,19 89:5
90:4
virtual 89:23
volume 5:24
19:24

W

wait 22:15
walls 39:15 43:2
54:21
wanted 7:9 10:8,
12,13 17:7 24:2,9
50:21 53:16 83:1
warning 51:25
52:3
warranted 65:10,
11 68:18

washer 43:3
washing 39:14
waste 36:24 37:7
41:3 45:4,7 47:19
52:15 67:8 85:7
wastes 36:24
water 36:24 37:7,
8
website 62:24
63:19 81:19 87:11
Wednesday 2:19
5:2,10
weight 67:25
70:12 71:19
Weir 45:23 46:23
60:5,17,24 61:6
62:11 63:17,24
65:3,7,13
wheeled 46:22
52:5 64:25 65:3
wheels 47:8,10,
12 61:8 63:3,25
64:6,19 67:25
69:2,5,9 70:24
74:18,20
white 73:19
Whitney 4:10
6:16 7:12 8:2,22
21:2 22:12 25:9
26:1 27:11,14
28:13 30:4,11
32:1,3,4,9,16,19,
23 38:10 40:9
43:7,19 44:22
46:7,22 47:1,7,10,
17 48:1,11,22
50:25 51:12,24
52:3 53:1,8,9
54:5,20,23 55:10
57:12 83:16
Whitney's 31:6
82:17 83:3
winch 38:16
winched 48:1
52:12,14,16

witnesses 4:9
7:23
wondering 42:12
word 70:3 77:21
words 55:22
73:11 86:23
work 8:16 35:18
37:19 51:2
working 39:5,11
works 44:6 89:5
Worksheet 60:20
62:22
worth 55:21 86:23
written 5:19
24:19,25 77:10
wrong 77:5
Wyoming 62:21

Y

Yamaha 73:17
78:5 80:23,24
81:10
yard 35:7 40:8
42:15 43:12
years 33:4,7
73:10 74:5 75:15
83:19
Youtube 5:13 9:5,
9,22 10:3 11:22
12:11 13:3 16:11

Z

zip 32:20