

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
 )  
TRUEBALLOT, INC., ) OTA NO. 18113964  
 )  
 ) APPELLANT. )  
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TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Friday, October 21, 2022

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Electronic Proceedings,  
taken in the State of California, commencing  
at 9:33 a.m. and concluding at 12:21 p.m. on  
Friday, October 21, 2022, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW KWEE

Panel Members: ALJ JOSHUA LAMBERT  
ALJ JOSHUA ALDRICH

For the Appellant: JOHN SEIBEL  
BETTY WILLIAMS  
MICHAEL PEARSON

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
JOSEPH BONIWELL  
SCOTT CLAREMON  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-10 were received at page 11.)  
(Department's Exhibits A-K were received at page 11.)

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APPELLANT'S WITNESSES:

<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
John Seibel	41	none	86

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California; Friday, October 21, 2022

9:33 a.m.

JUDGE KWEE: We are opening the record in the appeal of TrueBallot Incorporated. This matter is being heard before the Office of Tax Appeals. Our OTA Case Number is 18113964, and today's date is Friday, October 21st, 2022. The time is approximately 9:33 a.m., and this hearing was -- is being conducted electronically with the agreement of the parties.

So today's hearing is being heard by a panel of three Administrative Law Judges. My name is Andrew Kwee, and I'll be the lead Administrative Law Judge. Judge Josh Lambert and Judge Josh Aldrich -- two Joshes -- are the other members of this panel, and they will be participating as equal participants. After the hearing today, all of us will meet and decide the case, and we'll produce a written opinion as equal participants in this process. Although I will be conducting the appeal as the lead judge, any member of this panel may ask questions at any time to ensure that we have all the information necessary to decide this appeal.

Would the parties for the record please state their names and who they represent, and I'll start with the representatives for CDTFAs.

1 MR. BONIWELL: Hello. This is Joseph Boniwell  
2 with CDTFA.

3 MR. BACCHUS: Chad Bacchus with CDTFA's Legal  
4 Division.

5 MR. PARKER: And Jason Parker, Chief of  
6 Headquarters Operations Bureau with CDTFA.

7 JUDGE KWEE: Okay. Thank you.

8 And for Appellant, would you please state your  
9 names and who you represent for the record.

10 MS. WILLIAMS: Betty Williams with the Law Office  
11 of Williams & Associates for Appellant TrueBallot Inc.

12 MR. PEARSON: Michael Pearson with Williams &  
13 Associate representing TrueBallot.

14 JUDGE KWEE: Okay. And Mr. Pearson, when you  
15 were speaking, it was a little hard to catch you. I'm not  
16 sure if maybe you could just speak facing the microphone  
17 in the future. But, yeah, for now I did catch what you  
18 were saying. I was just letting you know it was a little  
19 soft there.

20 And I believe we also have a witness present,  
21 John Seibel.

22 MS. WILLIAMS: That is right. John Seibel is  
23 here today as well.

24 JUDGE KWEE: Okay. Great.

25 So there are just a couple of preliminary matters

1 that I want to go over before we get started. The first  
2 item was that we had sent a revised Notice of Panel. And  
3 so what had happened is because we originally noticed this  
4 for yesterday the 20th, and then because of the timing  
5 issues, we had rolled this over to the 21st at the request  
6 of the parties to potentially allow additional time. One  
7 of the judges was no longer available, that was Judge  
8 Keith Long. So, basically, Judge Aldrich stepped in for  
9 Judge Keith Long as the third member of this panel.

10 So the parties should have received that notice.  
11 It's called a Revised Notice of Panel. I'd just like to  
12 double check that there are no objections for -- based on  
13 the panel change. I'll start with CDTFA.

14 Do you have any objections to the panel change?

15 MR. BONIWELL: This is Joseph Boniwell for CDTFA,  
16 and we have no objections.

17 JUDGE KWEE: Okay. Then I'll turn to Appellant.  
18 Does Appellant have any objections to the panel change?

19 MS. WILLIAMS: This is Betty Williams for  
20 Appellant. I have no objections, and I thank the Judge  
21 for stepping in today.

22 JUDGE KWEE: Okay.

23 And the second item, so as far as the exhibits, I  
24 noticed Exhibit 10 there was individually numbered pages  
25 and there was a page 3 of 9 and there was a page 5 of 9

1 that were numbered, but did not see a page 4 of 9. And  
2 just want to double check that you weren't missing a page,  
3 or if that was an intentional omission. It was page 4 of  
4 9 of Exhibit 10 that I wasn't able to see.

5 MS. WILLIAMS: Page 4 was actually a cover sheet  
6 page. So in the original it said Exhibit A, so it's kind  
7 of an immaterial page. I don't know why it wasn't  
8 included. I don't know how that got -- I mean, on our  
9 original file it appears it was included. If -- if you  
10 would agree, I could resubmit a copy of this to the  
11 parties so that you have the complete exhibit. But it  
12 doesn't have anything material on it.

13 JUDGE KWEE: Okay. So the document that I had  
14 sent out that was attached to the minutes and orders, that  
15 was the most recent submission. And if there is nothing  
16 important on page 5 of 9, then we would just strike that  
17 accept the Exhibit 10 as submitted most recently, if  
18 that's fine with the parties.

19 MS. WILLIAMS: Excuse me. You said you're  
20 missing page 5 of 9?

21 JUDGE KWEE: Oh, I'm sorry. We're missing page 4  
22 of 9. The next one is --

23 MS. WILLIAMS: 4 of 9 is not material. No.

24 JUDGE KWEE: Okay. So then we will admit the --  
25 when we get there -- the version of Exhibit 10 that goes



1 from page 3 of 9 to page 5 of 9 without page 4 of 9  
2 because page 4 of 9 is not relevant on that. So we'll  
3 just go off the copy that was provided to the parties with  
4 the minutes and orders then.

5 The other item was I believe there had been some  
6 communications with staff about the time estimates, and  
7 I'm not sure, Ms. Williams, if you had follow-up  
8 questions, or if we are good with the time estimates?

9 MS. WILLIAMS: We're good. I have the gift of  
10 lack of brevity at times, and I knew that we needed more  
11 time for this hearing. I underestimated my opening  
12 comments time, but I do need closer to 40 or 45 minutes.  
13 So I do appreciate that accommodation. I still think this  
14 will all end in less than the five hours we asked for,  
15 even with the Judges' questions, without a problem.

16 JUDGE KWEE: Okay. Great.

17 And then another item was at the prehearing  
18 conference we had discussed the possibility of written  
19 closing arguments. And now that we have the full day, I'm  
20 not sure we -- if you're still asking for that  
21 opportunity, or is that something that you still would  
22 like?

23 MS. WILLIAMS: Well, I still would like the  
24 opportunity.

25 JUDGE KWEE: Okay. Then I will follow up before

1 we conclude the hearing just to find out if there are new  
2 issues that will require written closing arguments. So I  
3 will hold that item off until later.

4 MS. WILLIAMS: Thank you.

5 JUDGE KWEE: And so just a recap, so we have the  
6 one witness, John Seibel, and there was no objection from  
7 CDTFa to hearing testimony from him today. Is that  
8 correct, CDTFa?

9 MR. BONIWELL: This is Joseph Boniwell. That's  
10 correct.

11 JUDGE KWEE: Okay. And the exhibit packages were  
12 submitted with the minutes and orders, and they're  
13 summarized therein. And I understand that neither party  
14 has any objections to the exhibits that were provided in  
15 the minutes and orders with the caveat that Exhibit 1,  
16 page 4 of 9 is struck.

17 Is that correct for CDTFa? No objections.

18 MR. BONIWELL: This is Joseph Boniwell. We have  
19 no objections.

20 JUDGE KWEE: Okay.

21 And for Appellant, is that also correct you have  
22 no objections to CDTFa's A through K?

23 MS. WILLIAMS: No objections.

24 JUDGE KWEE: Okay. So Exhibits A through K for  
25 CDTFa and Exhibits 1 through 10 for Appellant as

1 summarized in the minutes and orders are admitted into  
2 evidence.

3 (Appellant's Exhibits 1-10 were received  
4 in evidence by the Administrative Law Judge.)

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

7 And as far as the time of the issues that we're  
8 discussing, those two issues are also summarized in the  
9 minutes and orders and listed on the agenda.

10 CDTFA, do you have any concerns with the issue  
11 statement that we had discussed?

12 MR. BONIWELL: This is Joseph Boniwell. We don't  
13 have any concerns. Thank you.

14 JUDGE KWEE: Okay.

15 And for Appellant, did you have any concerns with  
16 that issue statement as discussed?

17 MS. WILLIAMS: This is Betty Williams. No, I do  
18 not.

19 JUDGE KWEE: Okay. Great.

20 So then just to recap for the time estimates, we  
21 have 45 minutes for Appellant's opening presentation  
22 followed by 45 minutes for witness testimony. And I  
23 understand that CDTFA had indicated intent to waive  
24 cross-examination. Following that, we'll have 30 minutes  
25 for CDTFA's opening presentation and then 20 minutes for

1 Appellant's closing remarks -- excuse me -- and then ten  
2 minutes for CDTFA's closing remarks. Is that revised  
3 estimate -- does that sound correct for the parties? I  
4 guess I'll start with the Appellant.

5 Does that sound correct to you.

6 MS. WILLIAMS: Yes, it does.

7 JUDGE KWEE: Okay. And, Appellant, is that also  
8 the same for you? Actually to CDTFA. Sorry.

9 MR. BONIWELL: This is Joe Boniwell. That's fine  
10 for us. Thank you.

11 JUDGE KWEE: Okay. Great. So then I believe  
12 we're ready to get started. Are there any final questions  
13 before I turn it over to Appellant for their opening  
14 presentation? Okay. I do not hear questions from either  
15 party.

16 So, Ms. Williams, I will turn it over to you.  
17 You have 45 minutes for your opening presentation. You  
18 may proceed.

19 MS. WILLIAMS: Thank you, Judge Kwee.

20

21 PRESENTATION

22 MS. WILLIAMS: At the end of the hearing today, I  
23 am going to ask that you issue an opinion reversing the  
24 Department's supplemental decision and recommendation and  
25 hold that TrueBallot is a service provider, and that the

1 ballots at issue we are going to discuss today are the  
2 transfer of tangible personal property incidental to the  
3 performance of a service pursuant to Sales and Use Tax  
4 Regulation 1501 for service enterprises generally.

5           You've all read the briefs, so you know that  
6 TrueBallot is in the business of providing election  
7 administration services. The primary dispute we're having  
8 is the interpretation of the relevant Sales and Use Tax  
9 Regulation 1501 and the application of the facts in this  
10 case to that regulation. This is, of course, a case of  
11 first impression before the OTA since there is no case law  
12 or even an annotation on point for election administration  
13 service providers.

14           So in our briefs we drew analogies to annotations  
15 where we could, and we discussed similar service  
16 industries. And oftentimes annotations will give a  
17 conclusion without providing the reason for the  
18 conclusion. So really what we have is the true object of  
19 the contract test from Regulation 1501. The words of the  
20 regulation as written and what the Department has  
21 interpreted from the regulation do not match. So it bears  
22 reading the relevant portion from Regulation 1501  
23 regarding the true object test in this case.

24           Please, you know, over the course of today and  
25 the coming days when you're thinking about your opinion

1 and before you issue it, think about the facts of this  
2 case and the literal words of the regulation which says,  
3 "The basic distinction in determining whether a regular  
4 transaction involves a sale of tangible personal property  
5 or the transfer of tangible personal property is  
6 incidental to the performance of a service is one of the  
7 true object of the contract, that is, the real object  
8 sought by the buyer, the service per se or the property  
9 produced by the service. If the true object of the  
10 contract is the service per se, the transaction is not  
11 subject to tax even though some tangible personal property  
12 is transferred," which seems pretty clear. What did the  
13 buyer want?

14 Note here in particular. The regulation says the  
15 distinction between the sale of TPP and the transfer of  
16 TPP incidental to the performance of a service. The  
17 Department has changed incidental to merely incidental  
18 throughout its decision and recommendation -- supplemental  
19 decision and recommendation and even in its brief to the  
20 OTA, which really takes on a new meaning. It places an  
21 inaccurate deemphasis on what the regulation is really  
22 saying regarding TPP transferred with the -- with the  
23 providing of the service. It's the way the Department  
24 rewrites the regulation, the regulation could be  
25 interpreted to say if there's a transfer TPP only if such

1 a de minimis value, then it can be a nontaxable service.

2 In fact, the Department uses merely incidental to  
3 the performance of a service instead of incidental every  
4 time it references or cites the rule in its D&R and in its  
5 brief to the OTA, and 8 out of 10 times in the  
6 supplemental D&R. Then in the supplemental D&R the  
7 Department even changes the next sentence of the  
8 regulation, again, mischaracterizing what is clearly  
9 written. The regulation says, quote, "If the true object  
10 of the contract is the service per se, the transaction is  
11 not subject to tax even though some tangible personal  
12 property is transferred."

13 The Department cites the regulation as saying,  
14 quote, "If the true object of the contract is the service  
15 per se, the transaction is not subject to tax even though  
16 some tangible personal property is incidentally  
17 transferred." Again, this is minimizing language, and  
18 that's not the way the regulation is written nor how it  
19 should be interpreted. The Department further elaborates  
20 and concludes that TrueBallot was the retailer because the  
21 TPP provided was, quote, "Essential to the service, not  
22 merely incidental because TrueBallot could not perform the  
23 service without the TPP," end quote.

24 This conclusion is clearly wrong. Initially I  
25 was thinking, well, because for the audit years TrueBallot

1 regularly conducted elections without printing ballots.  
2 Electronic ballots were used or clients could have printed  
3 ballots -- had them printed elsewhere and then retained  
4 TrueBallot's services for the audit and to provide the  
5 election results. But even if the Department was correct  
6 that TrueBallot couldn't perform the service without the  
7 TPP, the legal standard is not whether TPP is, quote,  
8 "Essential to the service."

9           Nowhere in Regulation 1501 is the phrase,  
10 "essential to the service," or even the word "essential"  
11 written. Nor is the notion that if some threshold amount  
12 of TPP is needed to do the job, then the service cannot be  
13 the true object of the contract. The standard had never  
14 been whether there's a causal link between the TPP and the  
15 service. In fact, the Regulation 1501 gives two examples  
16 of services that require TPP for the performance of the  
17 service, which are nevertheless deemed not taxable because  
18 in the two examples, the true object of the contract was  
19 the service, not the TPP transferred with the service.

20           So the only question -- the only question to  
21 remember is the true object of the contract, and that can  
22 be easy to lose sight of. The first example in the reg is  
23 firm which performs business advisory, recordkeeping,  
24 payroll, and tax services for small businesses and  
25 furnishes forms, binders, and other property to its



1 clients as an incident to the rendition of its services.  
2 It is the consumer and not the retailer of such tangible  
3 personal property.

4 The true object of the contract between the firm  
5 and its clients is the performance of a service and the  
6 furnishing of tangible personal property according to the  
7 regulation. That's all a direct quote. The service  
8 TrueBallot provides is similar to the business advisory  
9 recordkeeping service. In both cases, while paper forms  
10 may be provided to customers, the real object sought by  
11 the buyer is the performance of reliable professional  
12 services, not the TPP involved. Regulation 1501 is clear  
13 with its precise words that the test is with what the  
14 buyer wanted. Did they want a service or did they want an  
15 object?

16 One can imagine the recordkeeping, payroll, and  
17 tax services could not have occurred in the example in the  
18 reg without first cutting payroll checks, paying bills,  
19 and preparing tax returns. But none of those items were  
20 relevant to determining the true object of the buyer, and  
21 that is the test. Here, TrueBallot and two of its  
22 longstanding clients say that the buyers wanted election  
23 services, not the TPP. The fact that forms, binders, and  
24 other property were produced by the recordkeeping and  
25 payroll company in the regulation example did not change

1 the fact that the services were found to be the true  
2 object in that example.

3 And that should be the same conclusion here, that  
4 any paper ballots that may have been used in TrueBallot's  
5 services do not change the fact that the true object of  
6 the buyer is contracting election administration services.  
7 TrueBallot is the consumer and not a retailer, just like  
8 the example in the reg. So the test is a true object  
9 sought by the contract, not whether it seemed to the  
10 Department that paper ballots were essential to the  
11 service provided by, which in fact they were not. Ballots  
12 could and were provided to voters for voting in various  
13 formats, including intangibly by telephone, electronically  
14 online, and in person by touch screen. Ballots were not  
15 entirely submitted on paper.

16 So that fact also proves the object of the buyer  
17 cannot be paper ballots or TPP if the services are  
18 provided without TPP. And even when ballots were  
19 provided -- were printed on paper, they were not always  
20 printed by TrueBallot. In fact, they regularly were not.  
21 During the audit years, TrueBallot outsourced all printing  
22 if the ballots did not have to be unique for each voter.  
23 Only those unique ballots were printed in TrueBallot  
24 offices. But regardless of how the ballots were marked by  
25 the voters, whether on paper or electronically, TrueBallot

1 provided the same scope of services for each election  
2 after the ballots were marked.

3           If the true ballot of the contract was to  
4 purchase ballots, then the work stopped there, but it  
5 didn't. The election administration, TrueBallot's  
6 services, and the real object, value, and purpose of  
7 contract had only just begun. They still had counting,  
8 auditing, and election results to validate, which could  
9 take days in some -- in the case of some elections. The  
10 Department claims, and I quote from the supplemental D&R,  
11 "Even if the true object of the contract is the service  
12 per se, tax applies to any charges made for the transfer  
13 for TPP where the transfer is not merely -- there's that  
14 misquote again -- incidental to the services provided,  
15 such as customer survey cards, envelopes, and pens  
16 furnished to a client's customers in connection with  
17 customer satisfaction surveys. This is true because TPP  
18 is considered significant in relation to the services  
19 provided," end quote.

20           And the Department cites the annotation for that  
21 customer surveys card. It's 515.0005.075. Now I read  
22 that annotation, and there's no such conclusion. The  
23 annotation correctly cites the regulation, but it  
24 certainly does not say TPP is ever taxable due to being  
25 considered, quote, "significant in relation to the service

1 provided," end quote. The annotation describes background  
2 facts of the taxpayer who is sending surveys out to his  
3 clients' customers soliciting customer satisfaction  
4 responses, including a return envelope and a pen with the  
5 customer's logo printed on the pen that the taxpayer  
6 manufactured, and which the recipient got to keep.

7 The annotation described when sales tax applies  
8 and does not apply to sales. Specifically, sales tax does  
9 not apply to the out of the state deliveries, and it does  
10 apply to the deliveries of printed materials and pens  
11 shipped to the clients' customers in California, except  
12 for no tax on the separately stated postage and shipping.  
13 The annotation does not offer any explanation as to why  
14 printed materials and pens shipped to the customers in  
15 California are taxable. And it certainly does not say it  
16 is because TPP is considered, quote, "significant in  
17 relation to the service provided," end quote, as the  
18 Department concluded in its supplemental D&R.

19 In fact, the annotation does not use any of those  
20 words or variation of the words, significant, important,  
21 relation, necessary, or merely. However, it is clear that  
22 the seller in the annotation is offering more than survey  
23 results in the way of TPP. The seller is making pens with  
24 the customers' logo. He's not outsourcing. The pens are  
25 referenced nine times in the annotation. The pens and

1 marketing materials are not at all related to the  
2 collection of the contracted survey results. The  
3 additional materials beyond the survey TPP is unrelated to  
4 the survey. So perhaps that's why those were deemed  
5 taxable. We don't know.

6 But we know another reason that the sales were  
7 not deemed taxable for the survey results because the  
8 annotation states, and I quote, "The transfer of original  
9 unique report which is specifically collected, created,  
10 compiled, and customized for the specific client on a  
11 custom basis is incidental to the providing of a  
12 nontaxable service. The taxpayer is the customer" --  
13 excuse me -- "the taxpayer is the consumer of any such  
14 property transferred. Clearly, the customer service  
15 survey results couldn't be provided without the completed  
16 surveys."

17 So the taxable TPP in this annotation is not  
18 similar to TrueBallot. TrueBallot does not print  
19 marketing material and does not manufacture pens, coffee  
20 cups or ball caps, or anything tangible with its clients'  
21 logos. TrueBallot designs a balloting process with  
22 ballots unique for each voter to ensure that they are  
23 voting only for the issues they are allowed to vote on.  
24 They vote for no more and no less than required. They  
25 don't vote more than one time. That votes are properly

1 weighted when required, audited and verified.

2           And the ballots have unique bar codes to  
3 differentiate one from the another. They are not  
4 identical anonymous surveys, and they are never to market  
5 itself. So, again, TrueBallot outsourced all printing  
6 where ballots were not unique, like identical surveys. So  
7 like the nontaxable report in the annotation, TrueBallot  
8 combines the results of the data collected from the unique  
9 customized ballots. Then after TrueBallot finishes its  
10 work, the data becomes a final product, which reports out  
11 the results of that particular election like a unique  
12 customized survey result. There's only one final and  
13 unique election result the buyer could possibly be paying  
14 for. TrueBallot is the consumer of any paper or TPP  
15 involved in the election administration services, just  
16 like the taxpayer in the annotation was the consumer of  
17 the materials for the survey report. And the taxpayer in  
18 the example in the regulation was not the retailer of TPP  
19 transferred as part of the bookkeeping, payroll, and tax  
20 services.

21           Now, numerous services are provided under the  
22 contract of election and ballot administration.  
23 Mr. Seibel meets with clients to determine the scope of  
24 each election, and together with the other principal and  
25 their staff, they design an election process and

1 methodology to ensure a process where only eligible voters  
2 are able to vote and verifies that TrueBallot's patented  
3 system of voter authentication, ballot delivery,  
4 tabulation, and auditing is properly used, ultimately  
5 culminating in a certified election result.

6 So their end product is a certified election  
7 result. In the rare event that an election is challenged,  
8 TrueBallot provides supporting data and testimony  
9 affirming the legitimacy of the election process and the  
10 election results. It is that experience patented process  
11 and ability to verify the results for which customers hire  
12 TrueBallot. TrueBallot does not sell any products. They  
13 don't sell ballot boxes or voting privacy booths. They  
14 don't sell election supplies or ballots. They don't sell  
15 their software. They don't license their systems.

16 TrueBallot's election administration system is  
17 highly complex. They have various technologies used to  
18 structure the election, collect the data into their  
19 database, transfer votes electronically, aggregate votes,  
20 sometimes by poll sight, distribute weighted ballots in  
21 elections where one ballot might be worth more than  
22 another ballot, for example, for a variety of reasons.  
23 The principals of TrueBallot hold two U.S. patents for the  
24 design of election systems.

25 One of TrueBallot's principals is a software

1 engineer and a database engineer. The other is a lawyer.  
2 Their staff includes other computer programmers and  
3 election officials. During the years at issue, TrueBallot  
4 offered four voting systems that it developed, web vote,  
5 tele vote, touch vote, and scan vote. Regardless of  
6 whether the voter is voting on paper, by telephone, on the  
7 internet, or touch screen, a database is first created  
8 electronically through software developed by TrueBallot  
9 called Ballot Builder, which would allow TrueBallot to  
10 input the relevant data, such as, you know, various  
11 positions being voted on, yay or nay, like offices -- like  
12 offices of the president, names of candidates or  
13 responses, and a number of candidates a person could vote  
14 on, like vote for two in this election district.

15 The list of voters is imported into the database  
16 for the mail ballots and certain on-sight ballots where  
17 each voter is assigned a unique voter ID code. Although  
18 paper ballots are never mandatory to be included in  
19 TrueBallot's contract, prior to 2015 TrueBallot would  
20 often, but not always, print ballots in its offices. But  
21 it has never printed envelopes, biographies, or other  
22 documents. They've never even printed the ballot  
23 instructions, and has only printed ballots that required  
24 variable data input.

25 When they printed ballots in the office, they



1 would buy the paper from a commercial printer who would  
2 first perforate and print the instructions on one side of  
3 the page. The commercial printer would bill TrueBallot,  
4 including tax, which TrueBallot would pass through to its  
5 client without any markup. Although, there was one  
6 commercial printer, Gowans, they did stop charging sales  
7 tax on their invoices for a period of time. They caught  
8 their error, and they resumed charging tax.

9           Anyway, TrueBallot then printed the ballots on  
10 the other side with all the variable data they had  
11 assembled through Ballot Builder and their other programs  
12 for the election. TrueBallot then forwarded the fully  
13 printed ballots to the mail house for folding, inserting,  
14 and mailing. TrueBallot only printed the ballots it had  
15 to print before it developed the technology to transfer  
16 the large and complex data without error to commercial  
17 printers.

18           So ultimately TrueBallot perfected the system and  
19 then stopped all original ballot printing in its offices.  
20 But even before that time, printing was simply never part  
21 of their core business, so it was not significant to turn  
22 this over entirely to outside printers since about 2015.  
23 What was significant though in this analysis, was the fact  
24 that TrueBallot did not lose customers because it stopped  
25 printing ballots in its offices.

1           Which is just further proof if the object of the  
2           buyer was to retain TrueBallot services for printing  
3           ballots, once they stopped printing ballots, those  
4           customers would have looked elsewhere. But they didn't.  
5           They didn't lose customers when TrueBallot stopped  
6           printing ballots. Sometimes TrueBallot had nothing to do  
7           with the ballots or the voting process. The customers  
8           would have the ballots printed by their own printers, and  
9           they would even run the ballot distribution and the  
10          collection process, but hire TrueBallot to then perform  
11          the crucial work of scanning the ballots, reading the  
12          ballots, counting them, auditing them, breaking down the  
13          results by poll sight, certifying the results and the  
14          count.

15                 So, again, TrueBallot is being hired to provide a  
16          service, not to print ballots. TrueBallot is entirely  
17          accurate with the results that can be audited. That is  
18          their business. After the votes are submitted, they have  
19          to be tabulated. In the case of mail ballots, they are  
20          not mass printed papers but unique ballots for each voter.  
21          So TrueBallot uses its automated system to validate each  
22          mail ballot envelope before it's accepted for further  
23          processing.

24                 They developed a system called election manager  
25          as their online election tracking numbering information

1 system. And then another system called Ballot Admin,  
2 which has programs to track undeliverable ballots, add  
3 voters, receive ballots, and other functions. You guys  
4 are never going to think about your ballots the same way  
5 ever again. You're going to look at your ballots at this  
6 election cycle. I did. Like, where is my scan number.  
7 Look at the perforation.

8           Once the ballots are validated and confirmed,  
9 they're scanned with yet another program TrueBallot  
10 developed for image acquisition. Then the ballot data is  
11 passed by the rules to ensure voters didn't vote for too  
12 many or too few candidates required. Then another program  
13 developed by TrueBallot called True Review is used also  
14 for auditing the ballots for which they have a patent.  
15 And then finally the verified results are produced.

16           So once the election is complete, the customers  
17 have no use for the paper or the electronic ballots. On  
18 the rare occasion when a recount is requested, even if  
19 paper ballots were used in the election, no paper ballots  
20 are used in a recount. Instead, TrueBallot's patented  
21 auditing processes use the data electronically read from  
22 the voted ballots to perform a publicly viewable audit  
23 recount.

24           Now, there is a federal law from the 1950s that  
25 requires retention of physical ballots being maintained by

1 union clients for one year. But those paper ballots are  
2 still not used in recounts, and TrueBallot does not handle  
3 storage. So regardless, any retention is still not  
4 relevant to the object for which TrueBallot is hired to  
5 provide election service, which, if I recall, that is the  
6 test for the regulation.

7 TrueBallot is so well regarded for its services  
8 that on multiple occasions federal investigators of the  
9 U.S. Department of labor have independently used  
10 TrueBallot's systems for its auditing recount system to  
11 verify the accuracy of certain labor union elections.  
12 TrueBallot has also been retained to verify accuracy in  
13 the public-sector system. This is indicative of  
14 Mr. Seibel and TrueBallot's expertise and value in their  
15 election administration services. TrueBallot's contracts  
16 are also evidence that the TrueBallot -- that the true  
17 object of the buyer is the service, per se, based on the  
18 precise words of their contracts.

19 Exhibit 1 is a copy of TrueBallot's balloting  
20 agreement for a customer that needed physical ballots to  
21 be printed for mailing. Now, this contract like all of  
22 TrueBallot's other contracts is for services and states  
23 specifically the customer is contracting for, quote,  
24 "Election and ballot administration," end quote. Election  
25 administration services is expressly stated as the object

1 of the transaction.

2 The contract describes the services TrueBallot  
3 will provide in creating the ballot, tracking and  
4 reporting the status of ballots, configuring and running a  
5 computer network capable of registering return ballots,  
6 and checking ballots against an eligibility list provided  
7 by the customer, registering the voters and tabulating  
8 ballots.

9 Also include in TrueBallot's fee, stated as  
10 \$78,000 in the example, is the electronic data entry,  
11 retrieval of the returned ballots from the post office,  
12 tabulation of eligible voters, reports of results  
13 tabulation, certification reports, and audit services.  
14 The numerous other items listed -- are listed and provided  
15 at cost. A vote is defined as something that can either  
16 be a tangible paper form or an electronic response using  
17 tele vote or touch vote. The format is not relevant to  
18 the purpose of the contract.

19 In nearly three pages of the agreement prior to  
20 the break down of prices, the details are entirely about  
21 the services. There's no discussion about tangible  
22 personal property. If this were a contract for ballots, I  
23 would expect to see language regarding artwork, font size,  
24 font style, paper weight, handling, maybe storage. But it  
25 merely says TrueBallot shall provide ballot stock and

1 envelopes for the use with the scan vote system.

2           The ballots are referred to as a cost item along  
3 with other costs such as printing, mailing, and travel.  
4 Nowhere in the agreement does it state the contract is for  
5 the sale of ballots. The contract pledges to safeguard  
6 the data provided to it and affirms it will not divulge  
7 any information without expressed permission from the  
8 customer or valid legal process. You know, in that  
9 guarantee of confidentiality in voting service is crucial.  
10 This language of a contract is consistent with the  
11 services contract involving confidential and crucial  
12 information or data, not a contract for providing paper  
13 ballots.

14           The Exhibit 2 is an invoice with details of an  
15 election that totals about \$84,060, and it breaks down.  
16 Again, it starts with the TrueBallot fee of \$5,000 for an  
17 election ballot where 6,000 ballots were used. TrueBallot  
18 did print variable data on one side of those ballots at  
19 about five to six cents per ballot on sight for \$344.88.  
20 That is not -- well, it's about 4 percent of the total  
21 contract price. And they've got -- you know, they printed  
22 one duplicate ballot for \$6.92. They've got their  
23 reimbursed expenses for travel, printing by Gowans  
24 Printing Company that includes some envelopes and things.  
25 For those 6,000 and envelopes, it was \$2,700.

1           These and other invoices are evidence of the  
2           activities undertaken by TrueBallot as a service provider  
3           and the value associated with the expertise, software,  
4           procedures, and services necessary to TrueBallot's  
5           customers who ultimately want authenticated election  
6           results.

7           Exhibit 9 includes letters from two of  
8           TrueBallot's clients for whom TrueBallot provided services  
9           before the audit years, during the audit years, and they  
10          are still providing services today, this year. The first  
11          letter is from Paul Dole, National President of American  
12          Maritime Officers. TrueBallot performed their election  
13          administration services in 2008, '09, '10, '13, '14, '18,  
14          and in 2022. This letter is dated December of 2018.

15          Mr. Dole confirms they hired TrueBallot and  
16          describes TrueBallot's duties to include supervising the  
17          printing and mailing of ballots to their members,  
18          supervising the ballot collection, and tallying procedures  
19          consistent with their union rules, providing election data  
20          and taking all other steps needed to ensure a fair and  
21          impartial election.

22          The second letter is from Kevin Harper, District  
23          Manager of the American Federation of Governmental  
24          Employees. Mr. Harper says they have hired TrueBallot on  
25          multiple occasions to conduct mail ballot elections and

1 on-site convention elections for both the district and  
2 various local unions. He said TrueBallot attends to all  
3 aspects of the election and administers the election after  
4 mailing.

5 He says TrueBallot provides a, quote, "Suite of  
6 services that are necessary for us to run an election that  
7 stands up to scrutiny by our members, our executive board,  
8 and other governmental and non-governmental oversight  
9 agencies. Mr. Harper sums it up by saying, quote, "We  
10 hire TrueBallot to provide an entire election  
11 administration process that culminates with a verifiable  
12 result," end quote.

13 This particular client is a great example of why  
14 clients hire TrueBallot because they also have what is  
15 called a convention election. That's where candidates are  
16 nominated live at a gathering a few hours before the  
17 election, and the client needs weighted ballots on command  
18 with multiple denominations, and a count has to occur at  
19 the close of the election.

20 So yes, you know, printing with variable data may  
21 occur on-site, but that's not the object. The object of  
22 the client is the design of a fast and accurate and legal  
23 election process that produces results the client and its  
24 members can trust. Now, both Mr. Dole and Mr. Harper said  
25 in their letters they would welcome a call if the



1 Department had further questions, quoting Mr. Harper, "In  
2 terms of the services that we have contracted from  
3 TrueBallot."

4 In the Department's brief to the OTA, the  
5 Department is astonishingly dismissive of the two letters  
6 stating, quote, "The letters provide no new information  
7 concerning Appellant's sales and do not alter the  
8 Department's position," end quote. The test is the  
9 objective, the true object of the buyer. The buyer has  
10 just told the Department the answer to the test question.  
11 The Department continues that its position will not change  
12 because TrueBallot could not provide the service without  
13 critical election materials to its customers.

14 Well, first as stated, TrueBallot could  
15 absolutely conduct its work without TPP by using  
16 electronic or telephonic ballots or printed ballots  
17 provided entirely by a third party, as it often did.  
18 Secondly, the critical part is the software, the analysis,  
19 the vote count, audit, confidentiality, verification, not  
20 any underlying paper. But still more importantly, it's  
21 not the test. If it were, countless other services would  
22 be taxable.

23 Think just for a moment about a payroll provider  
24 or a CPA who prepares a tax return. Your tax preparer may  
25 give you a questionnaire to fill out with questions about

1 whether you're married or have children? Did you buy or  
2 sell property during the year? Did you make charitable  
3 donations? Do you have offshore accounts? The CPA  
4 analyzes that and other information and probably uses  
5 software to create a bottom-line tax liability or refund,  
6 which the tax preparer signs verifying that it's correct,  
7 which is the true object of the buyer.

8 It could be filed electronically or on paper.  
9 And CPP usually has got some TPP involved in all of this  
10 process and probably gives something like a tax return to  
11 a client, maybe in a folder or, you know, a binder. This  
12 is, you know -- and you might keep a copy of it because  
13 the return might get contested, maybe not. But it's very  
14 similar to the election administration. You're not  
15 retaining the CPA for the tax return to hold in your hand,  
16 it's for that tax preparation services.

17 And I've been, you know, involved in audits where  
18 the tax -- one tax return for one is more than 1,000  
19 pages, and the boxes the preparer relied on were dozens  
20 and dozens. I mean, they take up rooms to create the  
21 thing. But that's still not why you're hiring the CPA.  
22 It's for the service.

23 So the service could not be done without the TPP  
24 involved. But, again, the Department is focusing on the  
25 analyses of whether it can be done without TPP, which is

1 not the question in the reg. So please remember the true  
2 test of the object of the buyer entering the contract. Is  
3 he paying to receive something tangible, or is he paying  
4 to receive a service.

5 So after concluding and finding taxable TPP for  
6 audit Issue 2, the Department then separated each contract  
7 into two categories and made two assessments. The  
8 Department first scheduled all of TrueBallot's invoice  
9 charges that it felt were part of the sale of TPP, such as  
10 the printing of ballots, print stock, outside printing,  
11 duplicate ballot charges, and charges of undeliverable  
12 items for audit Item 1.

13 And then it additionally reviewed the separately  
14 stated TrueBallot service fee charged by TrueBallot to its  
15 customers and decided that some portion of the fees must  
16 have been part of sales of TPP, and then applied the same  
17 percentage from audit Item 1 to audit Item 2 as a second  
18 amount of tax due. The Department's theory is that since  
19 there was no markup on the taxable portion of TPP in audit  
20 Item 1, there must be an increase to value -- in value to  
21 audit Item 2.

22 This is not the appropriate test for whether a  
23 service is taxable and is not supported in the law, and we  
24 fail to see any logic to apply this large percentage to  
25 the service fee. The Department did cite logic as its

1 source. The Department seems to think that since the  
2 registration, tabulation, and analysis was applied to data  
3 extracted from the ballots. There had to be a markup for  
4 those services and then decided 50 percent was the  
5 percentage to attribute to the taxable portion of the  
6 service fee.

7 In the analysis, the Department includes  
8 processing and counting the ballots as a taxable service,  
9 even though those services, along with other services,  
10 such as analyzing, verifying, and issuing the verified  
11 results all are conducted after the ballots are produced  
12 and assuming arguendo sold.

13 The Department stated TrueBallot's fees included  
14 things such as inputting ballot information, importing the  
15 voter mailing list, assigning a voting method. But then  
16 it forced a connection between the service and the vendor  
17 by invoking logic, quote, "It seems logical that the  
18 services also included communicating with printers and  
19 other TPP vendors, accounting functions pertaining to the  
20 purchase and sale of TPP, and arranging for the storage of  
21 the ballots, and perhaps other services," end quote.

22 And, quote, "On the basis of the evidence and in  
23 the absence of a cogent argument and persuasive evidence  
24 to establish a more accurate measure of the service fees  
25 that were part of the sale of TPP," end quote. The

1 Department upheld the quote, "Notion of unreported taxable  
2 service fees," end quote.

3 So without any evidence but through logic and  
4 creating its own list of potential services not set out in  
5 TrueBallot's itemized statements or detailed contracts,  
6 the Department claims that to be a sufficient list to deem  
7 a 50 percent tax on the service fee. This is beyond the  
8 audit authority of the Department. Without comparisons or  
9 markup or other analysis that TrueBallot's sales prices  
10 were unreasonable, this is an unsupported assessment of  
11 additional tax. The plain language of the D&R admits a  
12 more accurate percentage exists and that the high  
13 percentage assessed by the Department is punitive.

14 The Department said TrueBallot did not offer a  
15 reasonable alternative accounting method. I don't know.  
16 Would 1 or 2 percent be acceptable? TrueBallot did not  
17 markup the cost of items they purchased and passed through  
18 to customers because that was not their business model.  
19 They had their education, experience, and background in  
20 labor organization, engineering, elections, and the law.  
21 They were not interested in making a profit on power cords  
22 or paper or printing a duplicate ballot.

23 They're proud of their patents, their balloting  
24 system, and their valuable services they provide in  
25 complex elections using the systems they created like

1 Ballot Builder, Election Manager, Image Acquisition, True  
2 Review and others. They are not looking to profit on the  
3 printing. It just simply was not the focus. Every aspect  
4 of their business and fee schedule makes it clear the  
5 ballots are incidental to the services provided in  
6 election administration.

7 TrueBallot disagrees with the logic of the  
8 Department. However, if the ballots are deemed taxable,  
9 TPP then the services that would be taxable are extremely  
10 small because only those services directly related to the  
11 protection of the sale of ballots could constitute taxable  
12 services, not the services related to the accumulation of  
13 the final election result or services provided in the  
14 event of a challenge. All of those services surely relate  
15 to the activities specifically collected, created,  
16 compiled and customized for a specific client on a custom  
17 basis are for the providing of a nontaxable service, like  
18 the example in the customer service -- survey reported in  
19 the annotation.

20 But just as the Department added words to the  
21 regulation in audit Item 1, the Department added enough  
22 communication with printers, accounting functions, and  
23 arranging for storage of ballots and perhaps other  
24 services to establish a 50 percent tax on the TrueBallot  
25 service fee in audit Item 2. The Department is wrong on

1 the add-on service assumptions. The entire communications  
2 that occur when placing an order for mail ballots with the  
3 printer is relaying the most basic of information taking  
4 only a couple of minutes.

5 Similarly, adding the printer's invoice to the  
6 TrueBallot bill did not require notable time on the  
7 accounting functions. TrueBallot does not make  
8 arrangements for the storage of ballots, and there are  
9 perhaps no other services. The Department's theory to add  
10 any taxable measure as audit Item 2 should be rejected due  
11 to lack of legal authority and factual basis.

12 Alternatively, the theory should be rejected because the  
13 contracts at issue are service agreements, not contracts  
14 for the sale of goods.

15 It is remarkable that since at least 2014 when  
16 the audit started, that no one at the Department carefully  
17 read the language of Regulation 1501 or considered the  
18 examples in the regulation and compared the work of  
19 TrueBallot to those examples as applied to the words of  
20 the regulation, and considered or asked why a customer  
21 would hire TrueBallot and not go to a commercial ballot --  
22 commercial printer for ballots if that's all they really  
23 wanted.

24 TrueBallot has been performing these services for  
25 27 years and has never provided generalized printing, nor

1 has it ever printed material that it did not contain  
2 variable data or for an election, it did not fully run.  
3 If the true object. If the true object was to purchase  
4 ballots, customers would not need the countless other  
5 services from TrueBallot and its patented processes. But  
6 they aren't buying ballots. They're paying for a service  
7 because they want and need TrueBallot's services for  
8 legally correct, confidential, and verified results.

9 It's as if the Department saw some TPP and  
10 started working on how to calculate the tax. They added  
11 small words to the regulation that could have a big impact  
12 if applied literally. They added conclusions to  
13 annotations and made assumptions about TrueBallot's  
14 actions and practices that are simply wrong. It was true  
15 during the audit years beginning in 2009 just as it is  
16 today that the true object of TrueBallot's customers is  
17 not TPP but the service per se. The fact that TrueBallot  
18 stopped printing ballots in its office 7 or 8 years ago,  
19 but business continues with many of the same customers it  
20 had, even during the audit years, is proof.

21 And that concludes my opening statement. So we  
22 can move to Mr. Seibel's testimony.

23 JUDGE KWEE: Okay. Before we move to the  
24 testimony, I'm not sure if the panel wanted to ask any  
25 questions about the arguments, or if we're okay with them



1 moving to testimony. Okay. So I don't think the panel  
2 members have questions at this time.

3 So then I will ask Mr. Seibel if you could raise  
4 your hand? I would like to swear you in before you  
5 proceed with your testimony.

6

7

JOHN SEIBEL,

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

11

12 JUDGE KWEE: Okay. Thank you.

13 You may proceed, Ms. Williams.

14 MS. WILLIAMS: Thank you.

15

16 DIRECT EXAMINATION

17 BY MS. WILLIAMS:

18 Q Mr. Seibel, how long have you been in the  
19 election administration services business?

20 A 27 years.

21 Q Is that all with TrueBallot?

22 A All of it. I'm one of the founders.

23 Q Okay. And what did you do before that?

24 A I was a practicing attorney. I'm a -- I was a  
25 trial lawyer up until about 2003-ish. It did take me a

1 little while to transfer out of that. But I'm admitted to  
2 practice in Maryland and D.C. My Maryland license is not  
3 in good standing at this point, but I'm admitted. I'm  
4 admitted to the D.C. circuit. I'm a member of the federal  
5 trial bar. I've tried cases in Maryland, Virginia, D.C. I  
6 handled appeals in Maryland and D.C. And as I said, I  
7 don't -- I'm not doing it anymore since about 2003. I'm  
8 still admitted to the bar.

9 Q Thank you. During the past 27 years, how many  
10 elections has TrueBallot serviced?

11 A Rough math is probably somewhere in the 3,000  
12 range. We run somewhere between 100, 150 elections a  
13 year.

14 Q Okay. And you've had other election experience,  
15 though, aside from TrueBallot; is that right?

16 A Well, yeah. I mean, my election experience is  
17 mostly as a result of my having run so many elections.  
18 But, yeah, I've done other things other than run my  
19 elections for TrueBallot. Sure.

20 Q Well, were you on the national advisory board of  
21 the, like, the voting integrity project for example?

22 A Yeah. I -- I do things like that. Yes, I was on  
23 the advisory board, something called the voting integrity  
24 project, which was about, you know, advocating. It was an  
25 advocacy group for the integrity of public sector

1 elections. And, you know, I've written articles. I've  
2 done CLE, continuing legal education seminars. I've done  
3 seminars for Indian tribes on tribal governance. I've --  
4 I've been interviewed by news organizations and, you know,  
5 various sort of other post-election projects.

6 Q Okay. Thank you. Do you consider yourself an  
7 expert in the administration election field?

8 A Not to get cocky, but I am not an expert in this  
9 field.

10 Q Have you ever testified in that capacity?

11 A I have.

12 Q For elections you ran?

13 A For elections I ran, for elections other people  
14 ran. I -- I have voted for things that are not  
15 necessarily for elections. I testified as an expert in  
16 Florida when they went to a touch screen voting system  
17 probably in -- probably 2003, 2004-ish area. But I am an  
18 election expert.

19 Q Okay. Thank you. And then how often on average  
20 do you meet with investigators who are from the U.S.  
21 Department of Labor for contested elections, regardless of  
22 whether you ran the election or not?

23 A Well, the Department of Labor will only -- only  
24 will come to talk to me for elections that we've run --

25 Q Okay.

1           A    -- or somebody has made a complaint.  And it's  
2           probably, you know, it depends on how feisty people are,  
3           but, you know, 2, 3, 4 times a year maybe, 5 times a year.  
4           It depends.  I had one a couple of weeks ago.

5           Q    Okay.  And then what about attorneys or others  
6           for nonlabor related cases?

7           A    Periodically.  I don't do it as much these days  
8           because I've got way too much work to do.  I had  
9           TrueBallot.  But, you know, occasionally I will get  
10          solicited for my expertise either for a labor election or  
11          a non-labor election.  People there -- occasionally,  
12          people want me -- want to get me involved in some other  
13          project that they want to -- that they think of.  And I --  
14          so, you know, I talk to them.

15          Q    Okay.  What is special about you or TrueBallot  
16          that would make a labor organization hire you?

17          A    Again, without sounding, you know, cocky about  
18          this, we really know what we're doing.  There is nobody in  
19          this business that knows more about how to run a labor  
20          election than we do.  There just isn't.  I mean, let me  
21          just add to that.  You know, I'm an attorney.  So I know  
22          what the Department of Labor wants.  I know what they  
23          expect.  I know what the regulations say.  I know, you  
24          know, I know all the fundamentals.

25                 We know all of the fundamentals at TrueBallot,

1 and it's not -- it's not just useful in this context, but  
2 all the concepts are transferable to any other election in  
3 any other -- in any other capacity. So, you know, it's  
4 the same stuff for tribal elections. It's the same stuff  
5 for other association -- professional association  
6 elections, like, the American bar association. You know,  
7 we -- this is what we do.

8 Q Okay. Can you give us some specific examples  
9 from the 2009, 2013 range of the kinds of elections you  
10 ran?

11 A I laugh because -- I mean, we've done everything.  
12 You know, you got to start -- I've done about 3,000  
13 elections. Now, I'm not sure which of these necessarily,  
14 you know, go in that timeframe. But, man, we have run  
15 elections. We have run elections in the middle of a  
16 factory shop floor in an auto plant. We've run elections  
17 in the parking lot of steel mills. We've run elections at  
18 the city dump. We've run election where we had multiple  
19 people going to multiple states over multiple days and  
20 then finally converging for, you know, for a voting  
21 extravaganza on the last day and an election count. We've  
22 done elections where --

23 Q Okay. Mr. --

24 A Go ahead. I'm sorry. Go ahead.

25 Q No, no. You go ahead.

1           A    We've done elections that started at 3:00 a.m.  
2           that went for 24 hours. We've done elections where mail  
3           ballots with absentee -- I mean, on-site ballots with  
4           absentee, or whether we sent everybody a mail ballot and  
5           they could come vote on-site, or they could come vote  
6           online, or they could come to a convention. We've done  
7           elections that are all electronic, but we don't -- there  
8           is no paper at all, and even the notifications are sent  
9           electronically.

10                 We've done elections at virtual conventions where  
11           we have to do -- you know, we don't even know who is  
12           running until it starts then we do a multiple ballot-type  
13           weighted election all online where we have to send  
14           notifications via email. You know, we've done elections  
15           in U.S., and we've done them in Canada, and we've done  
16           them in Japan and Italy. We've done private sector  
17           elections and public sector elections and governmental --  
18           quasi-governmental elections and tribal elections.

19                 We've done ballots that had over 1,000 candidates  
20           on them where we had to change the actual configuration of  
21           the ballot every time we did a new round of voting, and  
22           they did multiple rounds of voting every day for a week.  
23           We've done one sided, two-sided, multiple pages. We've  
24           done rank choice voting if anybody knows what that is.  
25           We've done rank choice voting. We've done approval

1 voting.

2           You know, we are so amazingly flexible that what  
3 the reason that -- you know, this whole thing is -- and  
4 people -- we're so flexible that we can do virtually  
5 anything. You got an election and you need somebody. You  
6 need to hire somebody to run an election, we're -- we're  
7 the guys.

8           Q    Okay. And does your customers know about your  
9 involvement in running their election?

10          A    Boy do they ever. Yes. You know, when a new  
11 customer comes in, somebody has got to figure out what it  
12 is that we're doing. So new customer comes in. You got  
13 to figure out, okay, what's the shape of this election?  
14 What's the medium we're using? Are we doing this as a  
15 paper election? Is it on-site? Is it a mail ballot? If  
16 it's on-site what are we doing? How many sites? It's all  
17 of this stuff.

18                You've got to figure out what it is you're doing,  
19 and I'm that guy that figures out, you know, what is the  
20 shape of the election and have to figure out, okay, how  
21 are we going to do this? What tools are in our tool set?  
22 Or if they're not in our tool set now, what would we have  
23 to do? What kind of development would we have to do in  
24 order to make our tool set work? You know, what the dates  
25 are, and what -- you know, nomination meetings?

1           You know, how complex is the ballot? How many  
2 ballot types you got? How much stuff is on them? You  
3 know, what -- it's -- it's all of this stuff. So I'm the  
4 guy that sort of loses out, you know, what we're going to  
5 do and how we're going to structure, because you got to  
6 structure. And then I coordinate the required personnel.

7           So, like for instance, I don't -- you know, I  
8 have people that go to the election sites and do the  
9 elections. I'm the guy that coordinates who is going  
10 where. What do we need? Do we not need temps? Do we not  
11 need temps? And I coordinate all of this stuff. And, you  
12 know, that's -- that's -- yeah, so do the clients know  
13 what I do? Yeah, they know what I do.

14           Q    Okay. So then when you -- you do give them,  
15 like, some kind of ballot that they approve of it when you  
16 got to --

17           A    Well, you know, before we go there, what I got to  
18 do first is after I figure out what the shape of the  
19 election is, I got to give them a proposal that says  
20 here's what we're going to do and here's how much it's  
21 going to cost you. And they say, yeah, that's what we  
22 want, and they accept the proposal. We have a contract,  
23 and then yeah. And then -- then we start doing whatever  
24 it is we're going to do.

25           I'm sorry. Go ahead.



1           Q    But is that like a physical ballot you hand them,  
2           or what is it?  Is it like a --

3           A    No.  You know, here's what happens.  So we have a  
4           contract, and it says here's what we're going to do.  
5           Eventually whoever it is has nominations.  What we have to  
6           do is we have to take those nominations and we have to  
7           structure the election.  The concept of structuring the  
8           election is, okay, who gets what on their ballot.  How  
9           many variations on the ballot are there?  Do we have  
10          multiple ballot types?

11                    If so, you know, we have to structure data in  
12          what's on -- what is collection of things that a voter has  
13          to vote on, what we call a position.  Which positions are  
14          going on how many ballot types?  And then we start laying  
15          that out.

16          Q    But this is electronic or on paper?

17          A    Electronic.  All of it.

18          Q    So, ultimately, whether it's simple or complex,  
19          they're getting a PDF?

20          A    They're getting a PDF.  They're not getting a  
21          piece of paper.  They're getting a PDF.  And we say, "You  
22          like this?  Approve that."  And they either approve it, or  
23          they tell us to change it.

24          Q    And I'm sorry.  I digress a little bit.  Before  
25          we get to that contract -- I apologize.  I need to go back

1 a second.

2 A Sure.

3 Q In our Exhibits to the OTA for this, we have  
4 Exhibits 3 through 6 where we provided some records in  
5 showing, like, the registration of TrueBallot with the  
6 National Education Association --

7 A Yeah. Yeah.

8 Q -- and three online profiles with buzzfile.com,  
9 Philadelphia Department of Finance, cylex.us.com. How  
10 does TrueBallot hold itself out to the public? I wanted  
11 to make a point about that.

12 A We are an election administration company. We  
13 provide election services. That's all we do. We've never  
14 done anything else.

15 Q Okay. And then in your -- in the contracts to  
16 your clients, what does the agreement say the buyer is  
17 buying?

18 A Election services.

19 Q Okay. And is there any chance that your clients  
20 think they're buying ballots?

21 A Not a chance. It's just not -- you know, that's  
22 just not what we're doing.

23 Q Are there people in the industry who do just  
24 print the ballots?

25 A Oh, yeah. There's a company up in Seattle that

1 does that. There's a company in -- I think they are in  
2 Phoenix that does that. And there are various -- and some  
3 of the other -- a couple of other companies that do that,  
4 and then they provide also election supplies, pencils and  
5 stuff like that.

6 Q Do they also administrator the election?

7 A As far as I know, no. None of them do. What  
8 they do is they put -- they supply ballot printing  
9 services, mostly for public sector. So if you're a county  
10 and you need your ballot, you know, you need a certain  
11 printed, usually for a certain kind of election service.  
12 So for instance, there's a company called ES&S, Election  
13 Services and Software. And they're the big ones. Or  
14 you've heard of Dominion, you know. They need their  
15 ballots printed to a certain spec, and that's what those  
16 companies do. They print to a certain spec or a certain  
17 other election system, but those are -- the counties that  
18 are running those elections, not those -- not the company.

19 Q Got it. And then does TrueBallot sell any  
20 property, any TPP, anything?

21 A We don't sell anything. We don't sell hats. We  
22 don't sell coffee cups. Much we don't sell -- you cannot  
23 call us up and buy something from us. We don't sell  
24 anything.

25 Q Has anybody ever asked you to just print the

1 ballots only and not provide services?

2 A Nope. And not only haven't we, but we wouldn't  
3 do that anyway. That's not what we do.

4 Q Does your customer really care who prints the  
5 ballots?

6 A Could not care less.

7 Q Okay. And then do you spend a lot of time  
8 communicating with the commercial printers?

9 A When I have a -- I'm doing this today, and this  
10 is the way it's always been. Yeah. When I send -- when I  
11 communicate with the commercial printer, I say, "Here's  
12 what I want. Here's how many of them I want, and here's  
13 what -- you know, and here's when I need them by." That's  
14 it. And I give them the stuff to print. It's literally I  
15 have a form, you know, it's like a form letter. It  
16 literally takes me three minutes, four minutes, and that's  
17 it.

18 Q Okay. So now I'm looking to the -- asking you  
19 about the sample that you provided with -- which you  
20 provide to them. It's always done. You provide samples  
21 to them for approval always electronically.

22 A Yeah.

23 Q Has a client ever asked you to tabulate ballots  
24 that were printed by other -- somebody else entirely?  
25 Like, they handled it. You didn't have anything to do

1 with the ballot.

2 A Well, there's two ways to answer that, and both  
3 ways is yes. The first way is client has us lay out a  
4 ballot, give them a PDF. They have the PDF printed. You  
5 know, they'll have, you know, thousands of ballots  
6 printed. And then what we do because -- because we  
7 structured it, initially, to provide them with that  
8 electronic sample that they get printed, it's real easy  
9 for us to count it. And so, yeah. And then occasionally,  
10 not often. But occasionally somebody will say, oh, I have  
11 all these ballots printed. I want you to count them. And  
12 we can do that in certain instances, assuming that the  
13 ballot meets, you know, a minimum quality standard that we  
14 can process their form. Yeah, we can do that.

15 Q Okay. And was there a time that TrueBallot  
16 produced ballots in its offices?

17 A Yeah, there was.

18 Q What kind of ballots did you produce?

19 A The only kind we ever produced -- that we ever  
20 produced in our office -- I got to take a step back here  
21 and just tell you we don't like doing it. We never liked  
22 doing it, but we had to for a period of time. And the  
23 only ones we ever produced in our offices are mail  
24 ballots. And the reason that we have to produce the mail  
25 ballots in our offices is because, you know, they are --

1 each ballot is printed for the client. So yeah, we did.  
2 We printed ballots in our offices in certain instances for  
3 mail ballots and mail ballots only.

4 Q Okay. When that happened, how did it work? You  
5 first -- how did that work? You got paper from the  
6 commercial printer? Or how did that --

7 A Yeah.

8 Q Break that down.

9 A Let me give you the run down. So what happens  
10 is, what we do is we lay out -- we lay out a ballot for  
11 the client. We give them the PDF. They say, yeah, that's  
12 good. And we give them -- we give them the PD -- well,  
13 actually, we give them a word file for the instructions so  
14 that they can change and give it back to us as final. We  
15 give them a word file for an envelope. We give that to  
16 them. They make changes and give it back to us.

17 And then what we do is we send the word file for  
18 the instructions and the envelopes to a printer. We say I  
19 need this many of these, and the printer will then print  
20 a -- you know, as many copies as we want of the  
21 instructions. And they put a perf -- perforation at about  
22 three and seven-eighths -- yeah, three and seven-eighths  
23 up from the bottom of the form, which is crucial.

24 And then what we would do is the voter -- the  
25 client then gives us a voter list, and we import the voter

1 data and then we marry it up with the ballot so that we  
2 are producing a single ballot for each person. And that  
3 single ballot has on it a unique barcoded on the stub,  
4 which is the bottom of the ballot. There's an exhibit  
5 that you have that shows it where there's stub. And at  
6 the bottom of the ballot, there's a couple of barcodes.  
7 Those are unique for us.

8 And then what's above the perf, the ballot  
9 itself, is dependent on who it is that the ballot is being  
10 printed for. So depending on who that person is that is  
11 getting the ballot, what is above it may change. And all  
12 we do is at that point, we've loaded everything up. All  
13 of the stuff that has to go before that is all done  
14 electronically. And what we do is we get a report writer.  
15 And we say, "Hey, report writer, you got 5,000, you know,  
16 records here, hit the print button and let it rock." And  
17 it just, you know, it just spits out the ballots.

18 Q Okay. I want to back you up a little bit though.

19 A Yup.

20 Q So you're paying for the paper -- the perf paper  
21 with the instructions on it from the printer?

22 A Correct.

23 Q So that's what you get. So you're getting  
24 something from the printer that you've -- have you paid  
25 tax on that?

1 A Oh, yeah. Always.

2 Q So this is not a new --

3 A You know, except for the one -- the few instances  
4 where Gowans forgot to charge us for it. Yeah.

5 Q Right. Right. But --

6 A Because we just bill it to the client.

7 Q But that's not a new object. That's not a new  
8 object; right?

9 A No. No. What we're doing is we're printing on  
10 the other side of that object.

11 Q Okay. So you're printing on the other side of  
12 that thing that has already had tax paid on it, and you're  
13 passing that cost through to your client?

14 A Correct.

15 Q Okay. And let's see here. Let's see here. Have  
16 you had the equipment for folding and inserting mail or  
17 anything of that stuff?

18 A We don't do -- we've never done, we never want  
19 to, and we never had any -- we don't do any of that stuff.

20 Q Okay. And how did -- why do you charge what you  
21 charge for the little bit of printing you do, that small  
22 amount that you charge?

23 A Because, you know, toner costs us money. We're  
24 using these little, you know, regular little laser  
25 printers. So toner costs us money. And I got to have



1 somebody, you know, I got to have somebody feed the  
2 printer and stack the output. So, I mean, essentially  
3 that's what we're charging for.

4 Q Okay. So between the time that you -- so kind of  
5 what happens between the time that you're having to print  
6 in your office and you finally got it figured out that you  
7 didn't have to. You could start having it all outsourced.  
8 What happened? Were you trying and failing? What  
9 happened? You gave me some examples when we talked.

10 A Well, I mean, it's -- it's -- you know, it's a  
11 tail, you know. Early on we always wanted to not print in  
12 our office. And the first time we tried to do that was  
13 probably around the year 2000, and we tried using an  
14 outside printer because a client made us. And we sent  
15 these huge PRN files up to get printed, ask they printed  
16 them.

17 And the problem was that they read really badly.  
18 They were so inconsistent that it took us, I mean, weeks  
19 of auditing this election to make it right. And so that  
20 was a failure. And then we tried doing it again a couple  
21 of years later when, you know, the new digital printers  
22 were coming out, and they were these smaller digital  
23 printing operations. And we tried to doing that, but the  
24 printer that we used something happened in the middle of  
25 the process, and they ended up printing about 4 or 500

1 ballots twice.

2 So there are people that got, you know, two  
3 ballots. It didn't kill us, but boy does that look bad.  
4 And so we had to sort of figure out another way to do it.  
5 Then I figured out a way to do it where I could print  
6 individual ballots to PDF, but it was way too slow for our  
7 commercial printer. Then my New England guy actually  
8 ended up taking his laptop down to Good Copy and taking  
9 those instructions and, you know, bringing them to Good  
10 Copy and plugging his laptop in and let the Good Copy guy  
11 feed the printer and stack the output.

12 And then finally in about 2015, I figured out how  
13 to print multi-page PDF files, which all of a sudden, my  
14 printer could use. And they weren't -- it wasn't going to  
15 be a ridiculous time-consuming process for them. And so  
16 ever since that time, from the day I figured out how to do  
17 that, we have never printed in-house. And don't want to  
18 ever again.

19 Q Okay. So once you stopped printing in your  
20 office, did you lose clients because of this?

21 A Not a one.

22 Q Okay. And let's see here. What's important  
23 about observing the election process?

24 A Well, in fact, I'm gonna -- I'm gonna circle back  
25 around to the commercial printer here in a minute because

1 it's really import on the observation aspect. So in every  
2 labor union election the operative law is Labor Management  
3 and Reporting and Disclosure Act. And there is an  
4 observation requirement for everything. And, you know,  
5 which is -- which only makes sense because you've got  
6 paranoid people who want to know that their election is  
7 not -- you know, is being run correctly.

8 So there's an observation requirement for  
9 everything. And it's really difficult when we were  
10 printing in the office. Not a lot of people do it, but it  
11 was really difficult when somebody wanted to observe the  
12 printing when it was in the office. The Department of  
13 Labor would do it every once in a while, and they hated it  
14 too.

15 Q Okay. So when you get the ballots back -- if  
16 they're paper ballot -- or not, I mean, what happens?  
17 Like, so what's all the stuff that happens afterwards. I  
18 want to understand all the processing. What happens when  
19 you get the stuff back. So whether you sent them out or  
20 not or, you know, that process?

21 A All right. So there are -- there are two ways to  
22 do that. You know, when you say get the ballots back,  
23 we're either getting them back through the mail. In which  
24 case they're going back to a secure post office, and we're  
25 not getting them back. They end up in a secure post

1 office. Or we're getting them back as a result of either  
2 it's a convention, and they're just bringing ballot boxes  
3 to us, or we're doing a multi-site election where we are  
4 not running the site. They're just bringing them to us.  
5 So let's do the really easy one, which is --

6 Q We're trying to -- John, excuse me. I'm just  
7 watching our clock. I want to get into whether the strict  
8 procedures about the opening, the imagining, the reading  
9 and the auditing, all of that.

10 A Okay. So mail ballots, we go pick them up.  
11 We've got to receive them in. There's a bar code showing  
12 through a window. It's a really strict procedure because  
13 otherwise people -- people mess things up, and they get  
14 them out. You know, it's really -- it's really bad when  
15 they don't follow the protocols. So we pick them up. We  
16 receive them. It's a protocol. It's strict.

17 Then we have to open them, and it's a protocol.  
18 And it's strict. And we open them. People have to  
19 separate secret ballot envelopes from these stubs, which  
20 used to be at the bottom of the ballot. Then we  
21 eventually end up with ballots. And in either case it's  
22 the same thing. So now we have ballots, and they're out  
23 of envelopes, and they're in front of us. We take those  
24 ballots. We have to image them, which we use our program  
25 for.

1           Again, a really strict protocol because we have  
2 to be able to not only image the program, but we got to  
3 know where it is after we've imaged it. So we image it.  
4 Then there's an electronic process beyond that that goes  
5 and processes that image, take the data off of it,  
6 electronically check the data against the rules. How many  
7 did they vote for? How many could they vote for? Now, it  
8 starts giving us some results.

9           And when we do that, then we have to audit the  
10 first probably -- I don't know, 40, 50, 60 ballots so that  
11 everybody can see. And when I say audit, it's up on a  
12 screen or a wall so people who are observing can see that  
13 there is a ballot up there, and there are little colored  
14 annotations on those ballots that let them know that  
15 ballot was counted correctly. So we audit a bunch of  
16 ballots, and then we can continue to image, process, and  
17 report out on the ballots.

18           Q    Okay. And so that happens when there's not paper  
19 ballots. When it's electronic you do all those steps?

20           A    No. I mean, when it's an electronic ballot we  
21 would have done all the steps beforehand, you know, all of  
22 the interactivity is done. You don't -- all you -- with a  
23 fully electronic ballot, as they're voting on the web, you  
24 can get results pretty quick. I mean, we're talking about  
25 minutes.

1           Q    So if -- is it the same amount of work that you  
2 do if it's paper ballot or electronic medium?

3           A    It's hard to answer. It's different work. You  
4 know with an electronic ballot, there's a sort of more  
5 babysitting to do with it during the process. And we send  
6 out, you know, multiple notifications electronically when  
7 we do that. There's -- it's different work, and it's hard  
8 to say it's more or less. It's just different.

9           Q    Is the post layout process basically the same for  
10 scanning ballots, reading, checking the rules, all that?

11          A    Well, I mean, when you're talking about paper,  
12 yeah. It's always the same. And when you're talking  
13 about the web, well, all of the stuff is done  
14 interactively by the clients. So you have -- I mean, by  
15 the voter. So you've already got the records. You've  
16 already got the votes, the tally records, when the client  
17 hits the button that says, yeah, cast my vote. So it --

18          Q    Okay. What --

19          A    But ultimately you end up with the same data,  
20 which is I got cast vote records, tally records, and here  
21 is what they are and here is what they say.

22          Q    Got it. Okay. And what is verified or certified  
23 election?

24          A    You know, it's really -- there is no federal  
25 certification process. So it's really the certification

1 that we give them is our marker. And what it really says  
2 is -- and, you know, this is sort of trial lawyer stuff.  
3 We're putting our stamp of approval on it. If you have a  
4 problem with it, bring it. And we are prepared to defend  
5 this election and, you know, you're going to have this  
6 over -- this election overturned, you're gonna have to go  
7 through us.

8 Q And do you charge more for -- based on the medium  
9 involved in the -- regardless of the medium involved?

10 A No. No. No. We really don't. I mean, it --  
11 here's the thing. You know, if you give me a really  
12 complex paper ballot election, I might charge you a little  
13 bit more if it's going to be on two sides, or it's two  
14 pages or something like that. But, no, we don't -- we  
15 don't really differentiate.

16 Q Is that because it's the design part that's more  
17 complicated?

18 A You know, it -- we're getting -- I hate to say it  
19 like this but, you know, it's a service. We're giving you  
20 a service. And, you know, it's not based necessarily  
21 strictly on the amount of, you know, hours that are spent  
22 doing X, Y, or Z. It's about the result. I'm doing this  
23 thing for you and, you know, and we have -- we've spent a  
24 lot of time and effort on the software necessary to do  
25 this. So, no, we don't -- you know, we'd like to have a

1 simple cost slash, you know, charging formula that we  
2 charge our clients. And so no, we don't -- we just don't  
3 try to break it down at all.

4 Q It sounds complicated?

5 A Well, it's a complicated process, but I don't  
6 want to make it complicated for the client, you know. I  
7 just want the client to be able to say, "Okay, here's what  
8 we need to get done. Can you do it," and us go, "Yeah, we  
9 can do it."

10 Q How many ballots would you estimate you printed  
11 during the audit period?

12 A I have no idea. And the reason I have no idea is  
13 because it's just not important. We don't track it. We  
14 don't care, you know. It's just irrelevant.

15 Q Okay. When you have to reprint a ballot do  
16 you -- is that -- do you have to fold in certain stuff  
17 those ballots?

18 A Oh, sure. But you know, I mean, you're talking  
19 about a really -- a very tiny task. I mean, the one thing  
20 that you've got just shows a single reprint. You know,  
21 most elections don't have but a handful of them, and we  
22 kind of have to do those in the office because it's an  
23 automated process. So it has to come -- you know, get  
24 downloaded. It's got to get logged electronically. It  
25 has to get output. And then, yeah, we've got to stuff it,



1     you know, stuff it and mail it.  But it's, you know, it's  
2     all the other stuff that happens before that, and it's not  
3     that much stuff.

4           Q     Is the logging part of like the legality of an  
5     election, the making sure somebody is not voting twice  
6     or --

7           A     That's it.  You got it.

8           Q     I'm guessing.  I mean, you think about elections  
9     in our country and, you know, history of elections and  
10    confidentiality of voting.  I mean, we're not talking  
11    about any of that, but I'm assuming there's some  
12    importance to all of that?

13          A     Well, sure.  And, you know, most elections are  
14    what you would call a secret ballot election, which means  
15    I can't know how you voted either.  Nobody can know how  
16    you voted.  And that's kind of the cool thing about our  
17    system is that it does all this stuff where we're  
18    providing all the security in terms of, you know, the  
19    voter authentication and making sure that voters only vote  
20    once.  And at the same time, we're giving you voter  
21    secrecy.

22          Q     Right.  Okay.  So now if there's a challenge you  
23    don't -- you don't open the ballot box.

24          A     No.

25          Q     You don't look at the physical ballots?  You do

1 it through --

2 A No. If there's a challenge, normally, what  
3 happens -- and I got to tell you. After you've seen one  
4 of our elections and you see how we count them and how  
5 transparent the system is, we -- there are not a lot of  
6 people that challenge them. It's kind of like, you know  
7 the answer. I know the answer. I know you know, and you  
8 know I know. So on those rare occasions when somebody  
9 actually challenges them, no, the audit -- what we do is  
10 we'll do an audit. And if you want a recount, you know,  
11 we just start the audit from the beginning, and we go to  
12 the end. It doesn't take that long.

13 Q Okay. Then I have one question. On one of  
14 the -- let's see. On one of the exhibits we had that  
15 showed an itemized list of accounting it said it had an  
16 estimated charge for printing of candidate statements.  
17 And it said -- and I'll quote. It said, "Can be handled  
18 by TrueBallot or by organization. Cannot estimate cost  
19 without a detailed knowledge of specifications." What  
20 does that mean handle by TrueBallot? And I'm referencing  
21 Exhibit 1 on page 4.

22 A It means you give me what you want to get  
23 printed. I'll send it over to my printer, and I'll get  
24 you an estimate as to how much it's going to cost because  
25 we're not doing it.

1           Q    Okay.  I just want to clarify that you're not  
2   printing anything.

3           A    We don't print any of that stuff.

4           MS. WILLIAMS:  I don't have any further  
5   questions.

6           JUDGE KWEE:  Okay.

7           This is Judge Kwee.  I believe CDTFA had  
8   indicated an intent to waive questions.

9           Is that just to confirm, Mr. Boniwell?

10          MR. BONIWELL:  Yes.  This is Joe Boniwell.  We  
11   don't have any questions.  Thank you.

12          JUDGE KWEE:  Okay.

13          I believe the Panel might have questions for the  
14   witness, and I did have a couple of clarification  
15   questions.  So, Mr. Seibel, so the first one we had  
16   mentioned -- you had mentioned like there's various  
17   methods that your company TrueBallot handles voting, for  
18   example, on the phone, you know, internet, or by mail.  
19   And just to confirm for the transactions that are being  
20   disputed, my understanding was those involved 43  
21   transactions, which were all done by mail.  Is that also  
22   your understanding?

23          MR. SEIBEL:  I think so.  You know, I'm not --  
24   you know, I'm not really sure because, you know, they --  
25   they've -- I'm not really sure, but I believe that is

1 correct.

2 JUDGE KWEE: Okay. And so when you were  
3 discussing the various services that you provided in  
4 connection with the balloting, just to be clear, does  
5 that -- was that the same during the liability period,  
6 2009 to 2013? Or has there been changes over the course  
7 of what you were describing and the liability period at  
8 issue?

9 MR. SEIBEL: You know, essentially, it's the  
10 same. You know, like everything else since 2013, we've  
11 gotten a little bit -- we've gotten better at some of the  
12 stuff that we do. But basically, fundamentally, yeah.  
13 It's the same -- it's the same things that we've always  
14 done.

15 JUDGE KWEE: Okay. And as far as the exhibits,  
16 are you familiar with the ten exhibits that were submitted  
17 on behalf of Appellant?

18 MR. SEIBEL: I am, but I don't have them in front  
19 of me.

20 JUDGE KWEE: Okay. So I did have a question and  
21 if you can't answer it, that's fine. But I'll just ask  
22 the question and we can go from there. So the first  
23 question was Exhibit 1. That was a sample ballot  
24 agreement.

25 MR. SEIBEL: Yeah. Yeah.

1 JUDGE KWEE: And I just wanted to ask, is -- from  
2 your understanding is that a representative copy of what a  
3 mail balloting agreement would look like during the time  
4 period?

5 MR. SEIBEL: What a mail ballot would look like?  
6 I believe Exhibit 1 is an example of a ballot. Am I  
7 wrong?

8 JUDGE KWEE: I --

9 MS. WILLIAMS: It's -- it's an example of I  
10 balloting agreement for somebody who needed the physical  
11 ballots.

12 MR. SEIBEL: Yes. Then that would be -- that  
13 would be a typical -- a typical contract. Sure.

14 MS. WILLIAMS: For mail -- for somebody who  
15 needed physical ballots printed?

16 MR. SEIBEL: Yeah. If that's what it is, that's  
17 what it is.

18 MS. WILLIAMS: Yeah.

19 JUDGE KWEE: Okay. I guess my question was just  
20 whether or not, like, they changed -- there's a lot of  
21 variation or they are very similar to each other during  
22 that time period?

23 MR. SEIBEL: Well, the contracts are all very  
24 similar to each other. It's just a question of what are  
25 we doing, you know? You know, specifically what are we

1       doing? The contract is very similar, which you're hiring  
2       us for election services. Here's the kind of election  
3       you're running, and here's what it's going to cost you.

4               JUDGE KWEE: Okay. Perfect. And then one other  
5       question about Exhibit 10. The Exhibit 10 that was  
6       listed, from my understanding was an invoice from  
7       TrueBallot, and the invoice number is 297 to the customer  
8       for the services and administration provided. And then  
9       there was also an invoice of a copy of an invoice to  
10      TrueBallot from a printer or a supplier of cost that  
11      TrueBallot incurred. Are you familiar with that, or do  
12      you know what I'm --

13              MR. SEIBEL: I've seen it. I'm not looking at  
14      it, but, yeah, I've seen it.

15              JUDGE KWEE: Okay. And just, generally, my  
16      question was whether that type of invoice and cost, if  
17      that was, like, representative of how this works and the  
18      charges worked or other transactions in the allotted  
19      period.

20              MR. SEIBEL: Yeah. Pretty representative of  
21      those kinds -- of the mail-ballot type transactions. You  
22      know you got to understand that's one aspect of what we  
23      do. So in a mail-ballot type of election, yeah, that  
24      would be typical. It would not be typical if we were  
25      doing a convention where there are a lot of those things

1 you wouldn't see at all, and you'd see a lot more travel  
2 and a lot more other stuff. And it's not the same as you  
3 would see in an election with poll sites that TrueBallot  
4 doesn't control, and it's not the same as you would see in  
5 a fully electronic election.

6 JUDGE KWEE: Okay. Great. I understand. So  
7 this is specifically for the mail-in ballot arrangement.  
8 Thank you.

9 MR. SEIBEL: Correct. Correct.

10 JUDGE KWEE: Okay. And just to make sure I  
11 understood. When you were talking about prior to 2015,  
12 TrueBallot printed the ballots in-house, but then you were  
13 also mentioning that it was printed on perforated paper,  
14 from my understanding, that was preprinted by a  
15 third-party printer or is -- am I meshing concepts here?

16 MR. SEIBEL: Now let me -- let me back you up  
17 here. So what happens is, is that ballot that you see,  
18 there's a ballot that's one of the exhibits. That's the  
19 part that we printed, that TrueBallot printed in its  
20 office. But what it is printed on is a piece of paper  
21 that came from Gowans Printing or other paper. And on the  
22 reverse side of that ballot are instructions that Gowans  
23 or our printer printed, and that piece of paper was also  
24 perfed.

25 So what it is, is, yeah, we printed -- we printed

1 the -- the, you know, the boxes and the address and that  
2 stuff, but we printed it on a thing that we had already  
3 purchased from our printer and paid sales tax on it. So  
4 all it is, all you're looking at there is the, you know,  
5 basically the toner that gets laid on a piece of paper  
6 that we had already purchased from Gowans.

7 JUDGE KWEE: Okay. So that helps then. So if  
8 I'm, for example, looking at the cost on the invoice,  
9 sample invoice 297 where it say, for example, laser  
10 printing ballots quantity 5,748. And that is printing on  
11 the ballot that you had received from Gowans or from  
12 someone else?

13 MR. SEIBEL: Yeah.

14 JUDGE KWEE: Okay. I got it.

15 MR. SEIBEL: That's right.

16 JUDGE KWEE: And --

17 MR. SEIBEL: And what that is, that's basically  
18 just the charge for the, you know, for the toner and the,  
19 you know, the toner and the labor. And then, you know, to  
20 put that stuff on that paper we'd already purchased. Go  
21 ahead. I'm sorry.

22 JUDGE KWEE: Okay. And the, for example, the  
23 envelope stock quantity 6,000 is that different? Is that  
24 printed also or is that just envelopes?

25 MR. SEIBEL: Well, you know, depending on which



1 elections we're talking about and which years. Here's the  
2 thing. We have three envelopes. One of the -- you know,  
3 one of them is a regular number 10 window envelope, stock  
4 envelope. Another is a number 9 double window envelope,  
5 and one is a what we call a secret ballot envelope. And  
6 what we were doing is -- there came a point at which we  
7 just started ordering these two other envelopes because  
8 they're always the same these number 9s and the number 8s.  
9 Particularly the number 8s because they just say secret  
10 ballot envelope on them.

11 So rather than order them every time from the  
12 printer, we would just start ordering, you know, 100,000  
13 at time, and it's cheaper for everybody. And then we  
14 would just, you know, bill the client the cost. And so we  
15 get them 100,000 at a time. It costs up \$4,000. We sell  
16 them to you for \$0.04 apiece.

17 JUDGE KWEE: Okay. Thank you. That helps my  
18 understanding of the exhibits. And, oh, one other  
19 question. So during the opening presentation, I think  
20 there was a reference to doing touch votes too.

21 MR. SEIBEL: Yeah.

22 JUDGE KWEE: Is that something that happened in  
23 2009 to 2013, or is that something that came on later?

24 MR. SEIBEL: I'm -- I'm -- so if you -- I'm going  
25 to digress for a second. One of our -- one of our

1 programs is called touch vote. It actually is a touch  
2 screen voting platform that we developed fairly early --  
3 very early on. It has morphed into a dual platform, which  
4 is -- which is what we call ballot on command. It's still  
5 called touch vote, but it's ballot on command.

6 I got to tell you. Touch screen voting is just  
7 awful. It just -- I think, you know, in 27 years we may  
8 have used it used it maybe four times. It's horrible.  
9 It's inefficient. It's, you know -- the reason that  
10 states shouldn't use touch screens is because they're  
11 so -- yeah. We -- we do. We have, but very, very rarely.  
12 It's an awful medium.

13 JUDGE KWEE: Al right. Thank you. I think that  
14 was everything that I had written down as a question.

15 I will turn it over to Judge Aldrich. Do you  
16 have any questions?

17 JUDGE ALDRICH: Hi. This is Judge Aldrich. I  
18 have a couple of questions for Mr. Seibel. So  
19 Ms. Williams provided several examples of the different  
20 kinds of ballot formats that TrueBallot provided during  
21 the liability period, for example, the telephonic paper,  
22 et cetera. So typically, would TrueBallot's clients make  
23 a binary choice between one of the electronic formats or  
24 physical formats or --

25 MR. SEIBEL: Yeah.

1           JUDGE ALDRICH: -- were there mixed elections for  
2 both?

3           MR. SEIBEL: Yeah. You know what, that's a  
4 really great question too. That's one of the -- again,  
5 that's one of the really cool things. I -- I still get  
6 excited talking about this stuff. One of the really cool  
7 things about what we do -- and I don't mean to try to sell  
8 you guys, because that's not what I'm doing. But one of  
9 the really cool things that we do, is we're able to do --  
10 simultaneously, we can use multiple platforms.

11           So we can do elections where you want to use  
12 telephone and -- you want to use telephone, you -- we can  
13 use any medium you want simultaneously, and we can gang  
14 them all up to use, you know, some, all, you know  
15 portions. So if you wanted to do a thing where you want  
16 to send a ballot to somebody that says, okay, you can  
17 either send this ballot in and we'll -- you know, a piece  
18 of paper, or you can go to the internet, and you can use  
19 this pin number and we'll -- and go vote. Yeah, we'll do  
20 that or go to the telephone and vote.

21           The telephone, by the way, has really tanked as a  
22 medium in the past couple years. Nobody uses that anymore  
23 because it's just -- it's just not that good. So -- but,  
24 yeah. We can -- we can do all that stuff. Or you say,  
25 you know, well, I want to do a mail ballot, but I want to

1 have people come in and vote on-site, and I don't want to  
2 get confused. Yeah, we can do that. In fact --

3 JUDGE ALDRICH: Just --

4 MR. SEIBEL: -- I'm do that -- I'm doing that  
5 Saturday. Go ahead.

6 JUDGE ALDRICH: I guess my focus is more the  
7 liability period not what your --

8 MR. SEIBEL: During the liability period, all of  
9 that stuff was operable.

10 JUDGE ALDRICH: Okay.

11 MR. SEIBEL: You can do anything you want, mix  
12 and match. Whatever it is you need to do, we're doing it.

13 JUDGE ALDRICH: Okay. And, generally, did they  
14 do that, or was it more of a binary situation to --

15 MR. SEIBEL: No. It's rarely -- well, I  
16 shouldn't say it's rarely a binary system. It's really  
17 hard to track whether it's a -- you know, what's binary  
18 and what's not. I would say regularly it's not binary.

19 JUDGE ALDRICH: Okay.

20 MR. SEIBEL: You know, if you ask me what the  
21 percentage was, I don't know, man. You know, I don't  
22 know. But I -- but that's the cool thing is it's not  
23 important to us whether it's binary or not.

24 JUDGE ALDRICH: Okay. And, Mr. Seibel,  
25 Ms. Williams alluded to a federal law relating to the

1 retention of ballots --

2 MR. SEIBEL: Yeah.

3 JUDGE ALDRICH: -- in the context of labor  
4 unions. And I believe you subsequently referenced it.  
5 And to your knowledge was there a similar law that  
6 obligated certain clients to use tangible or physical  
7 ballots during the liability period?

8 MR. SEIBEL: Well, the LMRDA doesn't require that  
9 you use a tangible physical ballot, but it does require  
10 that all records be retained for a year. And the answer  
11 to your question is, you know, we do -- there was a time  
12 particularly during the liability period, there was a time  
13 we were doing a significant number of tribal elections.  
14 And every tribe has its own set of election ordinances.

15 So, you know -- and most of those tribes -- I'm  
16 going to say all of those tribes because I can't think of  
17 an example differently -- but all of those tribes required  
18 a paper ballot. The question is whether or not they  
19 reproduced that paper on-site, whether they did the  
20 on-site, or whether it was a mail ballot, and we produced  
21 the ballot in the office.

22 JUDGE ALDRICH: Thank you. That's all the  
23 questions that I had. So I'm going to hand it back over  
24 to Judge Kwee.

25 JUDGE KWEE: Just a quick question because I

1 think Judge Aldrich is talking about retaining the result,  
2 I guess, the documentation all year.

3 MR. SEIBEL: Right. Right. Right. Yeah. I'm  
4 sorry. My bad. The answer is whether you retain the  
5 ballots or not, there's no election where you retain the  
6 ballots, and they're not sealed. Every election -- I  
7 don't care what group it is. Every election that you do,  
8 the ballots are sealed in a box, because that's what they  
9 have to be in order to maintain legitimacy of the  
10 election. So -- but, you know, whether or not they have  
11 to is dependent on, you know, whatever tribal --  
12 particular tribal ordinance is involved when you're  
13 talking about tribes or associations. But the tribes have  
14 their own laws.

15 So, you know, that is a law. Whether they have  
16 to do that or not, you know, you'd have to look at the  
17 individual tribal ordinance. But I will tell you, there  
18 is no election that you -- that I've ever done where we  
19 have not sealed the ballots at the end because that is  
20 what you have to do to keep them protected.

21 JUDGE KWEE: Okay. So who -- was TrueBallot  
22 responsible for holding the ballots then for that period  
23 or --

24 MR. SEIBEL: We -- in 27 years, we have  
25 retained -- we at TrueBallot has retained the ballots

1 exactly one time, and I didn't want to do it then either.

2 JUDGE KWEE: Okay. Thank you.

3 I'll turn it over to Judge Lambert.

4 Judge Lambert, do you have any questions.

5 JUDGE LAMBERT: Hi. This is Judge Lambert. I  
6 have a couple of questions. You're talking about the  
7 votes -- the ballots are sealed, and are they ever  
8 destroyed, or they could be kept for a certain amount of  
9 time, maybe audited, and when are they destroyed, or are  
10 they destroyed, or how does that work?

11 MR. SEIBEL: Well, you know, because we're --  
12 because we, TrueBallot, don't retain them. You know, I  
13 don't know what other people necessarily do, except with  
14 the accounting. And the federal law requires that you  
15 retain them for a year. I know that there are people out  
16 there that, you know, they are there. They keep them  
17 forever. But -- and a lot of people -- it really depends  
18 on whether or not they go into their space and they say,  
19 "Yeah, let's get rid of this stuff," because it just sits  
20 in a storage room.

21 Nobody ever actually looks at them. Except the  
22 only time anybody will ever open that box -- and  
23 particularly in a labor election -- is if the Department  
24 of Labor comes in and takes that box from you and says,  
25 you know, we're -- we are commandeering your election

1 records. But other than that, they're in the box.  
2 They're sealed. They stay that way.

3 JUDGE LAMBERT: And after a year it's, you know,  
4 that's all they need is to keep --

5 MR. SEIBEL: That's all they need.

6 JUDGE LAMBERT: And they can do whatever they  
7 want after that?

8 MR. SEIBEL: Yeah. They can trash them. Nobody  
9 ever does anything, you know, other than to trash them at  
10 that point. It's just like, you know, yeah. Nobody --  
11 nobody does anything with them. But, you know, it's like  
12 they don't hire us for that part of it. They hire us to  
13 run their election. So I don't really know, you know,  
14 what they do with it, but I can't think of any reason in  
15 the world why you would have any use for any of that stuff  
16 after a year.

17 JUDGE LAMBERT: Okay. Thanks. And I'm wondering  
18 if in the contract or if there's anything about when the  
19 ballots have some sort of inaccuracy or whatever, and I  
20 know it -- during your testimony you were stating that,  
21 you know, the services provided are that you're getting  
22 probably accurate results, I would think, and trustworthy  
23 service. And what happens if there's a recount, or is  
24 there anything in the contract that if there's some sort  
25 of inaccurate result?



1           I guess I'm trying to differentiate between an  
2 accurate vote on a ballot, you know, versus, you know, the  
3 TPP itself because maybe, you know, they were -- they're  
4 trying to get an accurate vote. They don't want an  
5 inaccurate vote. So maybe that's part of the service  
6 that's provided. And what happens if there's some kind of  
7 audit or recount, or could there be -- in general, not  
8 just with your company, but a breach of contract, and  
9 there could be a lawsuit. Or what happens? How does that  
10 process work.

11           MR. SEIBEL: Well, I'm glad you asked. First of  
12 all, there's a limitation in our contract. I don't know  
13 if there's one in the one that you -- that you're looking  
14 at. But there's a limitation in our contract that says  
15 we're liable for our fees, and we're not liable for --  
16 because we've got a limitation of liability in there. But  
17 the second part of that is, you know, when you say is  
18 there inaccurate, well, that's why we have an auditing  
19 mechanism.

20           And, you know, there's a -- our auditing  
21 mechanism is so visual, and it's so -- it's so quick that  
22 there is no such thing in our elections as inaccurate  
23 result, not when we're done. So for instance -- and let  
24 me just describe it to you very briefly. You're sitting  
25 in a room. There's a screen with a big projected image on

1 it. It's got an image of a ballot on it, and the ballot  
2 is the picture of that ballot. It's black and white.

3 Then on top of that image of the ballot there are  
4 colored annotations, and they are on top of the ballot in  
5 the places where you see marks where people have voted.  
6 And if it's a green mark, it says -- it's the computer  
7 saying, "I think the vote here, and I think it's good with  
8 the rules, so I'm counting it."

9 And if it's a red mark, where it's going to be a  
10 red mark there and somewhere else which says the computer  
11 is saying, "I think there are two marks here, and I think  
12 you can only vote for one. So I'm not counting it." And  
13 so it's letting you know, or there is nothing there. And  
14 in our auditing mechanism -- and this is, you know, part  
15 of our patent. This is actually the guts of our patent.

16 If you're somebody who says, "Well, I'm not sure  
17 if this result is accurate," I go okay. So we start at  
18 the beginning, and we say sit right there. And if there  
19 are 1,000 ballots there, and we can go through those 1,000  
20 ballots and show all 1,000 of them to you with the  
21 annotations on top so that you know that they're accurate.  
22 And we can do that all in about 30 to 45 minutes.

23 So that, you know, your question, while a really  
24 good one, there is no such thing in our elections as an  
25 inaccurate result by the time we get done.

1 JUDGE LAMBERT: Thank you.

2 MR. SEIBEL: Again, that's why people hire us.  
3 That's why people hire us is because when we get done, you  
4 know. As I said earlier, you know. I know. I know you  
5 know, and you know I know. I'm sorry. Go ahead. I -- I  
6 get -- I kind of get excited about this stuff, and I'm  
7 really sorry.

8 JUDGE LAMBERT: No. Thanks. I appreciate it.  
9 And I think the argument being made by, you know,  
10 Appellant is kind of that you're communicating a vote. So  
11 it's similar to -- and it's not kept afterwards  
12 necessarily or needed. So it's kind of similar to the  
13 manuscript example in 1501. It's not keeping original  
14 artwork you keep for the property.

15 So I'm wondering, you know, you're describing the  
16 services provided by the company and perhaps maybe the  
17 amount of service, whether it's a lot or a little, maybe  
18 is important under that argument because, you know, if you  
19 are voting, you're just passing a scrap of paper or  
20 raising your hand in a meeting or it's electronic. Maybe  
21 that's the most important thing according to what you're  
22 say. You're communicating this vote. So maybe I wonder  
23 if the services, the extent of it, how important is that  
24 in terms of this argument?

25 Maybe Ms. Williams could answer, but I'm just

1 wondering if we're just communicating the vote under that  
2 argument, then are we looking at the amount of services or  
3 just is argument basically that you could vote in all  
4 these different ways. So as long as you're communicating  
5 that vote and it's -- nothing is kept afterward or needed  
6 after the vote is done, you know, whatever services you  
7 provide, the extent of it is not necessarily as important  
8 as just the communication itself or the transfer of the  
9 ballot?

10 MS. WILLIAMS: Well, the test, Your Honor, is the  
11 Regulation 1501 is what is the true object of the buyer?  
12 Is the true object the tangible personal property or the  
13 service per se, even if some tangible personal property is  
14 transferred with the service? And if the true object is  
15 the service per se, then it is not taxable even though  
16 some tangible personal property is transferred.

17 And so the argument is that the object of the  
18 customer is the election result, the whole soup to nuts  
19 process. At the end of the day, they want a validated,  
20 certified election result. And so the fact that there may  
21 be TPP involved is not relevant to the true purpose of  
22 what the -- what the buyer wanted. No different than, you  
23 know, hiring a lawyer to draft a will or a property deed  
24 or CPA doing a tax return, you know, the ballots are  
25 incidental to the services provided that the true buyer

1 wants.

2 MR. SEIBEL: And I -- I'm going to concur with  
3 that. And I'm going to shorten it by saying what they are  
4 buying from us are the certified results of the process.  
5 That's why they are hiring us, and that's why they -- and  
6 that's what they're paying for.

7 MS. WILLIAMS: Yeah.

8 JUDGE LAMBERT: Right. Again, I was just  
9 wondering if this applies in general to any company that  
10 would be providing a similar service like to take the  
11 votes, you know. So, I mean, if you're -- in this case  
12 you're not, you know, leasing a voting machine. It's  
13 just --

14 MR. SEIBEL: No.

15 JUDGE LAMBERT: -- being hired to collect the  
16 votes. So maybe it would -- like in general, your  
17 argument would apply generally, not necessarily in terms  
18 of the extent of the services of these companies, but  
19 you're always being hired to collect votes, basically.  
20 And that's -- that's the true object. It's not --

21 MR. SEIBEL: We're being hired to run a process.  
22 I'm sorry. I interrupted you, but we're being hired to  
23 run a process. That's what it is. The process involves  
24 collecting votes, but it's a whole process. That's why  
25 they're hiring us is for that process. Collecting the

1 votes is just part of that process.

2 JUDGE LAMBERT: Okay. Okay. Thanks. That's all  
3 the questions that I have I believe. So thank you.

4 MR. SEIBEL: Sorry to interrupt you.

5 JUDGE KWEE: Okay. Ms. Williams, did you have  
6 any follow-up questions for the witness before we conclude  
7 with the witness testimony for this portion of the  
8 hearing?

9 MS. WILLIAMS: Two questions. Thank you.

10

11

REDIRECT EXAMINATION

12 BY MS. WILLIAMS:

13 Q Mr. Seibel, Judge Kwee had asked a question about  
14 the balloting agreement, and I want to clarify. In the  
15 beginning of the balloting agreement, you don't have a  
16 separate balloting agreement that's for if they're voting  
17 by mail, or by tele vote, or touch vote. All my questions  
18 have to do with the audit period. So like this ballot  
19 says a vote -- it talks about a vote meaning being  
20 electronic response or, you know, it can be paper or -- I  
21 just want to clarify. You generally have the same  
22 contract and then you get into the specifics later in the  
23 document; is that right?

24 A Correct. That is correct. It is, you know,  
25 you're hiring us to do something. Now, we're going to

1 tell you what we're going to do.

2 MS. WILLIAMS: Okay. And clarifying an answer on  
3 Judge Lambert, you referenced federal law requirement  
4 retaining one law -- one year of ballots. That's just for  
5 labor unions, not all elections?

6 MR. SEIBEL: Correct. That's the labor --

7 MS. WILLIAMS: Okay. Thank you.

8 MR. SEIBEL: That's the labor Management  
9 Reporting and Disclosure Act.

10 MS. WILLIAMS: Got it.

11 Those were my only two follow-up questions.  
12 Thank you, Judge Kwee.

13 JUDGE KWEE: At this point I'd like to call a  
14 recess just to give our stenographer a break here before I  
15 turn it over to CDTFA for their opening presentation. So  
16 right now it's about 11:23. Could we come back at 11:40?  
17 And in the meantime, leave your Webex connected. Just you  
18 can mute your mic and turnoff your video. And I will  
19 resume the call at 11:40. So okay.

20 We're going off the record. Thank you.

21 (There is a pause in the proceedings.)

22 JUDGE KWEE: Okay. So then at this point, I  
23 believe we have CDTFA's opening presentation. You have 30  
24 minutes for your presentation. You may proceed.

25 MR. BONIWELL: Great. Thank you.

1 PRESENTATION

2 MR. BONIWELL: So as we're well aware, Appellant  
3 here provides election and ballot administration for  
4 various organizations. These include labor unions, tribal  
5 organizations, religious organizations, homeowners'  
6 associations, and other entities. And these are detailed  
7 in Exhibit A, page 2, lines 22 through 25. It opened its  
8 first office in California in 2006, and it didn't register  
9 with the Department for a seller's permit because it  
10 believed it was not engaged in the retail sale of tangible  
11 personal property.

12 The Department subsequently audited Appellant for  
13 the period of January 1st, 2009 through June 30th, 2013,  
14 and it issued Appellant a timely Notice of Determination  
15 on October 31st, 2013, for approximately \$39,000 in tax,  
16 plus accrued interest. And this was measured by about  
17 \$268,000 in unreported sales of tangible personal  
18 property, \$258,000 in unreported taxable charges for  
19 services that were a part of the sale of unreported  
20 taxable sales, and \$75,000 in unclaimed tax-paid purchases  
21 resold deductions.

22 Subsequent to the Appeals Bureau's decision, the  
23 Department conducted two audits, which reduced audit  
24 Item 1 to about \$241,000, audit Item 2 to \$234,000, and  
25 slightly increased audit Item 3. Also, the failure to



1 file a penalty that was imposed by the Department was  
2 relieved for good cause pursuant to the Appeals Bureau's  
3 decision.

4 As stated in the prehearing conference order,  
5 there are two issues on appeal. First, whether Appellant  
6 made taxable sales of tangible personal property and  
7 second, whether Appellant's service charges are includable  
8 in Appellant's gross receipts as part of the sale of  
9 tangible personal property. In barring no adjustments to  
10 Items 1 and 2, the calculation of tax-paid purchases  
11 resold is undisputed.

12 With regard to Issue 1, the Department maintains  
13 its position that Appellant made taxable sales of tangible  
14 personal property during the audit period. California  
15 imposes tax on a retailer's retail sales of tangible  
16 personal property measured by the retailer's gross  
17 receipts unless the sales are specifically exempt or  
18 excluded from tax. And gross receipts are the total  
19 amount of the sale price without any deduction for labor,  
20 service costs, or other expenses, and include any services  
21 that are part of the sale.

22 And the term "sale" include a transfer for  
23 consideration of the title or possession of tangible  
24 personal property which has been produced, fabricated, or  
25 printed to the special order of customers. All of a

1 retailer's gross receipts are presumed subject to tax,  
2 unless the retailer can prove otherwise, and the retailer  
3 bears the burden of establishing its entitlement to an  
4 exemption or exclusion.

5 Now, generally, the total amount for which  
6 property is sold includes any services that are part of  
7 the sale. However, pursuant to Regulation 1501, the  
8 providing of a service that is not part of a sale of  
9 tangible personal property is not subject to sales tax.  
10 In such a case, the person rendering the service is the  
11 consumer, not the retailer of any tangible personal  
12 property that the person uses incidentally in rendering  
13 the service. And the basic distinction in determining  
14 whether a particular transaction involves the sale of  
15 tangible personal property or the transfer of tangible  
16 personal property incidental to the performance of a  
17 service is that true object of the contract test, as  
18 Appellant's representative spoke to.

19 That is the real object sought by the buyer, the  
20 service per se, or the property produced by the service.  
21 Essentially, if the transfer of tangible personal property  
22 is merely incidental to the service, then the transaction  
23 is a service and not a sale of tangible personal property,  
24 even though some tangible personal property is  
25 transferred. If the transfer of tangible personal

1 property is more than incidental, then it's a sale of  
2 tangible personal property.

3 In this legal standard, including the analysis of  
4 whether the transfer of tangible personal property is  
5 merely incidental to the service, is consistent with how  
6 Regulation 1501 has been interpreted by California courts,  
7 specifically, in Simplicity Pattern Company versus State  
8 Board of Equalization and A&M Records versus State Board  
9 of Equalization. Here, the Department is maintaining its  
10 position that Appellant made retail sales of tangible  
11 personal property to its clients, and that the charges for  
12 these sales were correctly included in the taxable  
13 measure.

14 There is no dispute that the clients contracted  
15 with the Appellant for a legally certified ballot and  
16 election. However, in furtherance of those contracts  
17 requiring a physical ballot, like all the contracts at  
18 issue in this appeal, Appellant sold tangible personal  
19 property to its clients in the form of ballots, election  
20 materials, and related items. And these taxable sales are  
21 summarized on worksheet R2-12A in Department's Exhibit E.

22 And the decision, it conducted a detailed  
23 reconciliation of the Department's audit to Appellant's  
24 supporting documentation. And it removed many items from  
25 the measure of taxable sales based on Appellant's

1 demonstration that charges were related to nontaxable sale  
2 or otherwise nontaxable sales. So without further  
3 evidence concerning the remaining charges, there's no  
4 basis to further adjust Appellant's liability.

5 If the Office of Tax Appeals finds that Appellant  
6 did transfer tangible personal property to its clients,  
7 Appellant argues, pursuant to Regulation 1501, that the  
8 true object of its clients in engaging Appellant was is  
9 its election administration services and not the tangible  
10 personal property that the clients consumed or otherwise  
11 acquired. However, the contention that Appellant is only  
12 providing election administration services and that the  
13 tangible personal property Appellant transferred under its  
14 contracts is incidental to the revision of services does  
15 not fit the facts.

16 Appellant held itself out as an expert in  
17 election administration, and its clients purchased its  
18 services to achieve that result. But the evidence also  
19 established that Appellant sold tangible personal property  
20 to its clients, and that Appellant could not have helped  
21 its clients achieve their common goal of a proper and  
22 binding -- a legally binding election without the clients  
23 and their voters consuming the tangible personal property.

24 So the ballots, election materials, and related  
25 items, these were all required to enable Appellant to

1 perform the desired service, and they were not incidental  
2 to the performance of the service. So based on the  
3 foregoing, Appellant made retail sales of tangible  
4 personal property to its clients, and the charges related  
5 to those sales were correctly included in the taxable  
6 measure.

7 Appellant's arguments today insinuate that the  
8 ballots have no independent value or function beyond their  
9 use by Appellant in administering elections, and that the  
10 ballots weren't a significant reason why clients  
11 contracted with Appellant. However, this position is also  
12 not consistent with the facts that demonstrate the  
13 critical value of the ballots to Appellant's clients.

14 First, the physical ballots are the predominant  
15 reason a custom will contract with Appellant to administer  
16 an election using scan ballots. Because without the  
17 physical ballots Appellant cannot administer the election  
18 and provide a certified result. Second, after Appellant  
19 mailed the ballots to its client's members, the members  
20 had complete control over whether they voted using the  
21 ballot, who they voted for, if they decided to recycle the  
22 ballot or keep it and frame it and hang it on their wall.  
23 The physical ballot was the only way these members could  
24 participate in the election.

25 And a final point here, the ballots have value to

1 the clients after the election. Following the tabulation  
2 of votes, Appellant's contracts provide that the ballots  
3 are scanned and provided to the client along with other  
4 reports and data on a CD-ROM. This is the Department's  
5 Exhibit G on page 5. And in certain instances, as we've  
6 discussed at length today, physical ballots are retained.

7 In fact, Mr. Seibel explained that in essentially  
8 every single mail ballot contract the client retains the  
9 ballot. I think he said there was only one client who  
10 didn't retain the ballots in the 27 years that he's been  
11 doing this. But, you know, specifically with regard to  
12 the labor law that was discussed in its January 3rd, 2017,  
13 submission to the Department, the Department's Exhibit J,  
14 Appellant explained that, quote, "Ballots are retained for  
15 one year in labor cases because federal law requires that  
16 they be retained for one year. In labor cases the ballots  
17 must be sealed and accessible during the one year period.  
18 Similarly, tribal ordinances often have some type of  
19 record retention requirement and, therefore, ballots are  
20 similarly sealed and inaccessible," end quote. And this  
21 is on Exhibit J, page 4 of 44.

22 And Mr. Seibel testified today that the majority,  
23 if not all, tribal ordinances require ballot retention.  
24 And at the appeals conference, Appellant stated that  
25 approximately 75 percent of its work is for labor unions,

1 and 10 to 15 percent of its work is for Native American  
2 Tribal organization. And this is in the Department's  
3 Exhibit A, page 2 lines, 22 through 23. So this means  
4 that, you know, overall potentially 80 to 95 percent of  
5 Appellant's clients are required to retain sealed physical  
6 ballots for a period of time after those election.

7 And in those instances, Appellant's clients are  
8 in part specifically bargaining for physical ballots that  
9 they are legally required to maintain. So based on these  
10 examples, it's simply not accurate that the ballots are  
11 only used by Appellant and otherwise have no independent  
12 function or value to the clients. And it's not accurate  
13 that the clients weren't bargaining for the ballots at the  
14 time that they opted to choose a scanned vote election.

15 So regardless of whether the client retains the  
16 ballots following an election, Appellant made retail sales  
17 of tangible personal property, and the charges related to  
18 these items are properly included in the taxable measure.  
19 So with regard to service charges, Appellant has asserted  
20 that there's no legal justification for assessing tax on  
21 Appellant's sales of services, and that the Department's  
22 assessment is very random and arbitrary.

23 Now, generally the total amount for which  
24 property is sold, includes any services that are part of  
25 the sale. Where a retailer sells both property and a

1 service in a single transaction, tax applies to the entire  
2 gross receipts from that sale, unless the service portion  
3 of the transaction is specifically exempt or otherwise  
4 excluded from tax. And services that are part of the sale  
5 generally include any services the seller must perform to  
6 produce and sell the property, or for which the purchaser  
7 must pay as a condition of the purchase for functional use  
8 of the property, even where such services might not appear  
9 to directly relate to production or sale costs.

10 And another way to determine whether services are  
11 part of the sale of tangible personal property is to  
12 determine from the contracts or invoices whether the  
13 service charges are optional or mandatory. So if a  
14 purchaser cannot acquire the property without also  
15 obtaining the services, then the services are considered  
16 part of the sale of tangible personal property.

17 Here, at least some of the services were part of  
18 the sale of the ballots and printed matter, like  
19 registration and tabulation of the ballots. Additionally,  
20 Appellant explained its services as inputting the data,  
21 like the names of candidates, rules for which they seek  
22 election, how many candidates each voter may vote for,  
23 importing the voter list, assigning each voter a method of  
24 voting, generating the PDF form -- that would be the  
25 template for the ballot -- and then printing the ballot



1 forms, excluding the laser printing that was done  
2 in-house. And these are detailed Exhibit J on page 36.

3 And in its opening brief, Appellant also explains  
4 the ordering process for mail ballots with outside  
5 printers where that is relevant. And that's on page 14 of  
6 the opening briefs. So for these paper ballot elections,  
7 these services are part of the sale of the ballots because  
8 they were required for Appellant to produce the ballots.  
9 There's no evidence that Appellant's clients could obtain  
10 ballots without these services. And, in fact, Appellant  
11 has repeatedly stated in its submissions that it has never  
12 sold ballots for an election that it not administrator.

13 And, you know, with regard to services connected  
14 to the ballots that occurred the time -- after votes have  
15 been returned to Appellant, you know, the preparation of  
16 reports and services around validating the votes, those  
17 were all transmitted to the clients in a tangible form of  
18 a CD-ROM also. So, you know, these services were also  
19 connected to the sale of tangible personal property.

20 So as such, a potential client cannot acquire the  
21 tangible personal property from Appellant without also  
22 obtaining and being charged for the related services. So  
23 on the basis of this evidence, some of the services  
24 included in Appellant's service fee were performed in  
25 connection with its sales of tangible personal property.

1 You know, most notably the services performed in  
2 connection with the actual printing of materials.

3 Now, concerning the Department's methodology, the  
4 Department calculated what it determined to be the taxable  
5 portion of the fees by first calculating a per quarter  
6 ratio of audited taxable charges to billed charges less  
7 fees. In addition to the audited taxable charges, billed  
8 charges less fees included mailing house expenses, postal  
9 fees, temporary and other labor charges, and other  
10 reimbursed expenses. The Department then multiplied pro  
11 rata fees billed by that ratio to calculate the taxable  
12 portion of the fees of the audit period, which was then  
13 established as the measure of unreported taxable service  
14 fees. And you can see the application of the Department's  
15 method on worksheet R2-12 B in Exhibit E.

16 Appellant has not presented persuasive evidence  
17 demonstrating that the Department's determination that  
18 approximately 50 percent of its fees are taxable is  
19 unreasonable. And there's no evidence demonstrating that  
20 further adjustments should be made to the measure of the  
21 service fees that were part of the sale of tangible  
22 personal property.

23 So based on the foregoing, Appellant made taxable  
24 sales of tangible personal property when it transferred  
25 for consideration ballots, election materials, and related

1 items to its clients pursuant to its contracts with its  
2 clients. And a portion of Appellant's service charges are  
3 included in Appellant's gross receipts as part of the sale  
4 of tangible personal property because the services were  
5 performed in connection with Appellant's sales of tangible  
6 personal property.

7 So on this basis, no further adjustments to the  
8 audit items are warranted, and Appellant's appeal should  
9 be denied. Thank you.

10 JUDGE KWEE: Hi. This is Judge Kwee. I just had  
11 a quick question and clarification about your presentation  
12 and specifically your Exhibit E, which is the second  
13 reaudit working papers. That was the August 19th, 2016,  
14 second reaudit, and I just want to be clear. CDTFA,  
15 you're not contending that, like, the charges that were  
16 listed on the invoice, for example, a hotel, gas, driving,  
17 meals, you're not contending that those are taxable;  
18 right? Those are, from my understanding, listed as  
19 nontaxable items on your Schedule 12B-2. Is that a  
20 correct understanding of that exhibit?

21 MR. BONIWELL: Yes. That's my understanding of  
22 the exhibit. I would also ask our audit representative to  
23 confirm.

24 I don't know, Jason, if you want to confirm that?

25 JUDGE KWEE: I'm having a hard time hearing you,

1 Mr. Boniwell. But my understanding is that you're asking  
2 Jason Parker to respond to the question?

3 MR. BONIWELL: Sorry. No. I said, yes, that  
4 that is my understanding that those charges are not  
5 included in taxable -- as taxable charges.

6 JUDGE KWEE: Okay.

7 MR. PARKER: And this is Jason Parker. I would  
8 agree with him.

9 JUDGE KWEE: Okay.

10 MR. BONIWELL: Thanks, Jason.

11 JUDGE KWEE: Okay. Thank you.

12 I will turn over to the Panel members.

13 Judge Aldrich, did you have any questions for  
14 CDTFA.

15 JUDGE ALDRICH: This is Judge Aldrich. I don't  
16 have any questions for CDTFA. Thank you.

17 JUDGE KWEE: Okay.

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

20 JUDGE LAMBERT: This is Judge Lambert. I had a  
21 question. Just to try to summarize, it sounded like you  
22 were saying that the ballots have some value because  
23 they're kept afterwards. They are required to be sealed  
24 or kept for a year. And maybe, you know, perhaps they're  
25 like an official record or something. But when you're

1 discussing the true object test, you were stating it was  
2 described in Regulation 1501 as, you know, what is the  
3 true object.

4 And -- but also mentioning how 1501 looks at  
5 whether the TPP is more than incidental. So I was just  
6 wondering is the true object test -- are you stating a  
7 true object test means what -- what is more important to  
8 the customer? Are they seeking the service or the TPP?  
9 What is more important over all, or are we looking at  
10 whether the sale of TPP is more -- whether the TPP is more  
11 than incidental?

12 You know, an incidental I could see it being  
13 whether it is something of more than little importance.  
14 So is it whether balancing what's more important between  
15 the service and TPP, or are we looking at whether the TPP  
16 is something that's more than just a little important?

17 MR. BONIWELL: Yeah. I think, you know, it's a  
18 good question because 1501 is, you know, is an interesting  
19 regulation. I mean, our position here is that -- and with  
20 regard to 1501 is -- is that whether or not, you know, the  
21 way -- the way to determine whether or not the primary  
22 interest of the buyer is the service of the tangible  
23 per -- or the tangible personal property is to consider  
24 the importance or necessity of the tangible personal  
25 property in executing the service.

1           So here our position is that, you know, the  
2           tangible personal property is so important because it was  
3           required to enable the performance of the service that it  
4           has to be the primary object of the contract.

5           JUDGE LAMBERT: So you're stating that we're  
6           looking at what's the primary objective of the contract  
7           and not necessarily what's more than incidental because  
8           you described both during your presentation?

9           MR. BONIWELL: Right. Well, I think one leads to  
10          an insinuation of the other, right, to the extent that the  
11          tangible personal property is necessary for the execution  
12          of the service, then perhaps while the service may also be  
13          sought, the tangible personal property is necessary for  
14          the execution of that service. So maybe there's some room  
15          for both of those things to be important parts of the  
16          contract, but the fact that the tangible personal property  
17          is not incidental under interpretations of 1501 means that  
18          it's a taxable transfer of tangible personal property.

19          JUDGE LAMBERT: Okay. Thank you. That's all I  
20          have. Thank you.

21          JUDGE KWEE: Okay. I think the Panel is finished  
22          with questions for CDTFA. So at this point we can turn it  
23          back to Appellant's representative for the closing  
24          arguments.

25          Ms. Williams, I believe you're muted, if you are

1 trying to speak.

2 MS. WILLIAMS: Thank you.

3

4 CLOSING STATEMENT

5 MS. WILLIAMS: I think that what we -- the  
6 testimony we -- or the response we just heard from Mr.  
7 Boniwell, respectfully, is in response to Judge Lambert's  
8 question is exactly the problem we've had with this case  
9 from the beginning. The regulation is very precise with  
10 the words. So I just will repeatedly ask you, please just  
11 read the regulation. It's short. It's very clear.

12 It doesn't say that there's room to kind of, you  
13 know, consider both or consider the value of the --  
14 whether the TPP is necessary for the performance of the  
15 service. It does not talk about that. It says what was  
16 the true object of the buyer. It's very specific. It  
17 doesn't talk about leading to the insinuation of the  
18 other. None of that is in there. These are -- these are  
19 kind of a made up conclusion or made up rule.

20 So at any rate, TrueBallot has never in 27 years  
21 of service administering -- we heard an approximate 3,000  
22 elections -- regardless of how people have voted, they've  
23 never been hired to just print ballots for an election  
24 that they did not administer, tabulate, validate, and do  
25 all of those other things that are part of culminating in

1       that final product of a validated election.

2               Ask that is -- they are consuming TPP and  
3       providing that service. It is the service that they are  
4       being hired to perform. We spent a lot of time discussing  
5       irrelevant activities. There's no legal authority for  
6       this -- the requirement of the TPP in executing the  
7       service. When you see these -- these quoted languages,  
8       there's not a law that is attached to that, you know, that  
9       we're hearing. There's not a legal authority attached to  
10      that. I've looked. It's not there. That significance  
11      language, it's just not there.

12              But for that TPP you could not have had the  
13      service. That's going to be the case in many kinds of  
14      services. But in California the services just aren't  
15      taxed. There's never been a standard of a causal link  
16      between TPP and the service provided. So this is a  
17      complete disregard for what the regulation is saying.  
18      There are other annotations that give examples like  
19      TrueBallot's ultimate verified election results that  
20      defeat this methodology, and they do follow the  
21      regulation.

22              There's the second example in the regulation  
23      which Judge Lambert also referred to. The original  
24      manuscript which is like the unique report in the  
25      annotation for the customer survey, and like the unique



1 ballot result. These are not, you know, mass  
2 reproductions of a book or mass reproductions of ballot  
3 results or survey results.

4 There's another annotation 515.0060 where they  
5 are producing evaluations of an existing training program,  
6 and they are issuing oral and written recommendations for  
7 improvements and alterations, and those things are tax  
8 exempt. There's another example in annotation 515.0050  
9 where that annotation reiterates the precise language of  
10 the regulation.

11 Mr. Boniwell is using that merely incidental  
12 language again in his closing remarks. And it doesn't say  
13 merely. It does not place a value on that. It's  
14 incidental. And this annotation reiterates it correctly  
15 and it distinguishes between a customer paying for  
16 somebody writing a resume and says tax doesn't apply  
17 because that -- that they are creating a resume for this  
18 person, not printing out, you know, 100 copies to go  
19 distribute.

20 And it says, "This is particularly true in review  
21 of your statement that if the customer desires to have the  
22 resume printed elsewhere, you charge them the same  
23 amount." So they are looking at the consideration of how  
24 it might be, you know, maybe printed differently, even  
25 though the underlying document or the creation of that

1 document, the service of that creation of that document  
2 service, it was the service. It wasn't taxed.

3 Well, let's look at law firms. If you have a  
4 deed, you hire somebody to draft a deed to transfer  
5 property, you might hire a law firm to do that. And that  
6 deed might get filed with the county recorder and it might  
7 eventually get entered into evidence with the court of  
8 law. And on the deed a seller is going to be identified.  
9 The buyer is identified, like a voter is going to identify  
10 the candidate that's being chosen.

11 And, you know, TrueBallot has to know the  
12 relevant laws and ordinances in creating the ballot, just  
13 like the lawyers have to know the relevant laws, you know,  
14 in drafting that deed. And the purpose of the deed, and  
15 the purpose of the representation in drafting the deed is  
16 to transfer the property, not to just have that piece of  
17 paper. Even though I've got deeds at my house in my safe,  
18 you know, I've got things. Those -- that's the same thing  
19 where TrueBallot is drafting deeds that are used to  
20 communicate the intent of the voter.

21 You know, you are communicating on a deed the  
22 transfer of property, but the ballot itself is not the  
23 true purpose of the transaction. The election can't occur  
24 without some form of ballot. And in this case during the  
25 audit period, those ballots may have been in paper form,

1 but it doesn't matter the format. That's -- it's a  
2 communication to get to the end result. A trust can't be  
3 executed without a trust or signing.

4 You know, a lawsuit can't get filed without a  
5 complaint. You know, a deed can't be recorded with the  
6 county without a physical piece of paper without a deed,  
7 but it's still not why you're hiring a law firm. It's not  
8 for that piece of paper. It's for the service, that  
9 crucial document that you're creating. You're hired for  
10 your expertise and your knowledge of what you know how to  
11 do.

12 On page 7 of the Department's Decision and  
13 Recommendation it references that annotation on the law  
14 firms, 515.0100. It says, and I quote, "Law firms provide  
15 copies to documents to clients as a courtesy. The copies  
16 are reasonably characterized as incidental to the law  
17 firm's performance of legal services, unlike the present  
18 case where materials were essential to petitioner's  
19 performance of the services."

20 So, again, you can't record a deed without a  
21 deed. The annotation does not say copies are provided to  
22 clients as a courtesy. And that was a quote they were  
23 sighting. It doesn't talk about documents being provided  
24 to the clients at all in the annotation. It references  
25 copies being printed for clients in connection to the

1 lawyers doing their legal work.

2 The Department says, "Unlike in the present case  
3 where materials were essential to TrueBallot's performance  
4 of the services." But that's precisely what this  
5 annotation is addressing for the lawyers, the need for the  
6 duplicate copies, particularly in litigation. And the  
7 annotation says -- and I'm reading directly from the  
8 primary paragraph, "I believe that when the reproduction  
9 of documents and other printed matter is done for clients  
10 in connection with the conduct of litigation or the  
11 rendition of professional legal services, we are not  
12 required to regard the law firm as a retailer, even though  
13 a specific or separate charge may be made to the client  
14 for copies of reproductions.

15 "Some types of litigation may require a great  
16 many copies of complaints and other pleadings or  
17 documents, and it's not always known at any given time how  
18 many copies will be required before the litigation or  
19 other form of professional legal service finally  
20 terminates. As you know some litigations goes on for long  
21 periods of time. Any copies of documents may be needed  
22 sometimes years after the original preparation of the  
23 documents."

24 I think that's -- I think you can draw the  
25 analogy with TrueBallot's services that it's providing in

1 any retention or any amount of paper that could be  
2 involved. It's still not -- not the reason that they're  
3 being hired, and it's not part of the test. It's the --  
4 even though some tangible personal property may be  
5 transferred with the purpose of the per se of the contract  
6 of the services.

7 Annotation 515.0032 is an annotation that  
8 confirms that the original report issued by a consulting  
9 firm that includes details of the results of technical  
10 findings is not subject to tax. It says, "Consulting  
11 firms are generally engaged in a service enterprise and  
12 are the consumers of the property which they use  
13 incidentally when rendering the service."

14 The services here go well beyond the physical  
15 ballot, and it's consistent with the way TrueBallot holds  
16 itself to the public as a service provider as an election  
17 administration services. It's consistent with the  
18 language of its service contract. It's consistent with  
19 what customers perceive it is expecting. And as attested  
20 to by two long-standing clients that contracted with  
21 TrueBallot's for its services, not only before and during  
22 the time when TrueBallot did, in fact, print some of those  
23 ballots for their use, but even now when TrueBallot is not  
24 printing ballots, they are still paying TrueBallot for the  
25 services that they need in the election administration.

1           Those clients and many others continue to use  
2 TrueBallot for their election services, not for any goods.  
3 So if the panel somehow disagrees and still thinks that  
4 TrueBallot is selling ballots, we will ask that you  
5 significantly reduce the punitive and admittedly in the  
6 briefs overstated assessment that we feel is arbitrarily  
7 applied with that 50 percent.

8           The printing of the ballots is not a difficult  
9 duty. It's a very, very small part of the services  
10 provided. And it does not contain any of the complexities  
11 of the other services provided in the TrueBallot  
12 contracts. Clearly, the analyzing of the ballots,  
13 assuring the authenticity of each voter, correct -- making  
14 sure the correct weight of each ballot, counting the  
15 ballots, analyzing, and providing those election results  
16 and audit results -- auditing the results if, you know,  
17 recount is necessary, all of that is not necessary at all  
18 to producing, or if there's a sale of ballots. And the  
19 bulk of all that work is done after the ballots are  
20 allegedly sold. Certainly, tracking and traveling and all  
21 of those things happen after the ballots are sold, if they  
22 have been deemed to have been sold.

23           We still maintain that the true object is the  
24 election services. So, you know, I ask you to please  
25 remember the precise words of Regulation 1501. I went

1 back to it several times as I went through this in  
2 preparing for today. You know, if the Department is  
3 saying something, and you're thinking, gosh, that sounds  
4 logical. And it does. You know, it does sound logical  
5 when you think about what they're saying. Gosh, you got  
6 to have these ballots to do this work. That sounds  
7 logical.

8 But ask yourself, but is that the test? If you  
9 read the regulation, that's not the test. And anything  
10 that they're citing, look at what they are citing and read  
11 that. Does that really say that? Because that's not what  
12 I found when I went back and read the annotation or, you  
13 know, what they were citing. It's not what it said. It's  
14 not answering the question of what was the purpose of the  
15 buyer.

16 So I ask you to, you know, we respectfully  
17 request that you issue an opinion reversing the  
18 Department's supplemental decision and recommendation and  
19 hold that TrueBallot is a service provider, that the  
20 ballots at issue are the transfer of tangible personal  
21 property incidental to the performance of a service  
22 pursuant to sales and use tax Regulation 1501.

23 Thank you. That's all I can do not to say vote  
24 for TrueBallot.

25 JUDGE KWEE: Okay. Thank you. At this point we

1 have ten minutes left for CDTFA's final arguments. So  
2 I'll turn it to Mr. Boniwell.

3 MR. BONIWELL: Sorry. I was just going to say I  
4 have a couple of comments.

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CLOSING STATEMENT

7 MR. BONIWELL: First, I want to clarify again  
8 that the consideration of whether a transfer of tangible  
9 personal property is, you know, quote, "merely  
10 incidental," end quote, is not something that -- that I  
11 made up. It's a legal standard that's used by California  
12 courts. Like in A&M Records, you know, the Court was  
13 specifically looking at the use of master tapes used in  
14 the production of records. And they found that the master  
15 tapes were used in the production of records and tapes,  
16 and so they were not used only for, like, their  
17 intellectual or artistic content.

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And then the Court further found that the  
tangible personal property at issue was not merely  
incidental to the performance of the service. That's the  
Court's analysis. This is how the Courts have applied  
1501. The Court even said that the plaintiffs have to  
have the master tapes produced by the contracts or the  
contracts were worthless. It was the master tapes, which  
were essential in the ultimate production of the records



1 and the tapes through which the plaintiffs made their  
2 revenues.

3 So, you know, here the true object in the scan  
4 vote elections, it was the physical ballot. Otherwise the  
5 clients would have opted for an electronic election.  
6 Without physical ballots, the clients' contract with  
7 Appellant were worthless.

8 And that's all we have. Thank you.

9 MS. WILLIAMS: Can I respond to that just for  
10 clarity?

11 JUDGE KWEE: Oh, yes. Certainly.

12 MS. WILLIAMS: Mr. Boniwell, are you saying  
13 that -- because what I was referencing, the merely  
14 incidentals when you were specifically citing the reg. I  
15 don't recall A&M being cited in any of the underlying  
16 briefs.

17 JUDGE KWEE: Just to clarify that the parties  
18 don't ask questions of each other. So you could  
19 present --

20 MS. WILLIAMS: Okay. I see. Okay. Because I --  
21 all right. I apologize. Sorry.

22 I am -- then I'll just --- I guess that's my  
23 comment is that the merely incidental language came  
24 directly from the citation and reference to Regulation  
25 1501. So I don't recall seeing any A&M. I'll look

1 through that again, but I'm real sure that wasn't in the  
2 briefs or the D&R.

3 Thank you.

4 JUDGE KWEE: Okay.

5 And before I conclude, I guess that brings us to  
6 the question of the request to submit closing arguments or  
7 additional closing arguments by written submission. Are  
8 you still making that request, Ms. Williams?

9 MS. WILLIAMS: You know, I would like to and  
10 specifically on -- I know it's painful. It's been a very  
11 long time, but I would like to.

12 JUDGE KWEE: Okay.

13 MS. WILLIAMS: You could limit my pages or the  
14 length of time if you'd like. I don't mind that.

15 JUDGE KWEE: I would like to limit it to respond  
16 to items that were addressed, you know, during the  
17 presentation.

18 MS. WILLIAMS: That's fine.

19 JUDGE KWEE: I don't want to open it up to new  
20 issues or new items.

21 MS. WILLIAMS: Okay.

22 JUDGE KWEE: And is -- if I put a deadline of  
23 30 days, is that sufficient?

24 MS. WILLIAMS: More than enough.

25 JUDGE KWEE: Okay.

1           And, CDTFA, are you requesting an opportunity to  
2           respond to that, or are you fine with their additional  
3           submission that they're going to make?

4           MR. BONIWELL: Yes. Yeah. We would request, you  
5           know, the same 30 days to respond from the date of receipt  
6           of Appellant's written arguments. And if we decide not to  
7           respond, we will timely inform the Office of Tax Appeals  
8           so that you can, you know, close the record.

9           JUDGE KWEE: Okay. So the first step then we'll  
10          have 30 days for Appellant's response, and your response  
11          also would be limited to anything -- any new items -- or  
12          not new items because we're not raising new item, but any  
13          items raised in the additional submission by Appellant.  
14          But the first step would be to receive the additional  
15          submission from Appellant, and then I will send out -- OTA  
16          will send out a copy to CDTFA to determine whether to  
17          waive a response or to respond. And then following that,  
18          absent any additional request, we'll close the record, and  
19          the decision will be issued 100 days from the close of the  
20          additional briefing period.

21                 Are there any questions about that process?

22           MS. WILLIAMS: None from me. Thank you.

23           JUDGE KWEE: Okay.

24           MR. BONIWELL: No. Thank you.

25           JUDGE KWEE: Okay. And I will summarize that

1 briefing -- additional briefing period in a post-hearing  
2 order. That will probably be not sent out until next week  
3 because my support staff isn't here today, so probably  
4 around Tuesday of next week.

5 Then I would thank everyone to -- thank everyone  
6 for coming in today, and we will be looking forward to the  
7 additional submission from the parties.

8 This hearing is now adjourned. That was -- yeah.  
9 So thank you everyone for coming in.

10 It is Friday, October 21st, 2022, the Appeal of  
11 TrueBallot, Inc., is now concluded for today. The record  
12 is being held open for additional submissions by the  
13 parties.

14 (Proceedings adjourned at 12:21 p.m.)

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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 29th day of November, 2022.

\_\_\_\_\_  
ERNALYN M. ALONZO  
HEARING REPORTER