

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,           )  
   )  
FIRST SOLAR, INC.,                           ) OTA NO. 21088511  
   )  
                    APPELLANT.                )  
   )  
   )

## TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, June 13, 2023

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings, taken at  
400 R Street, Sacramento, California, 91401,  
commencing at 1:10 p.m. and concluding  
at 3:16 p.m. on Tuesday, June 13, 2023,  
reported by Ernalyn M. Alonzo, Hearing Reporter,  
in and for the State of California.

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APPEARANCES:

Panel Lead:	ALJ OVSEP AKOPCHIKYAN
Panel Members:	ALJ KENNY GAST ALJ TOMMY LEUNG
For the Appellant:	ROBERT GARVEY DR. MARVIN KESHNER ROCCHINA OSESTERLING-POST
For the Respondent:	STATE OF CALIFORNIA FRANCHISE TAX BOARD  NATHAN HILL JASON RILEY

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-4 were received at page 8.)

(Department's Exhibits A-F were received at page 6.)

OPENING STATEMENT

PAGE

By Mr. Garvey

10

By Mr. Hall

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APPELLANT'S  
WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

Dr. Keshner  
(further)

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CLOSING STATEMENT

PAGE

By Mr. Garvey

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1 Sacramento, California; Tuesday, June 13, 2023

2 1:10 p.m.

3  
4 JUDGE AKOPCHIKYAN: We are going on the record in  
5 the Appeal of First Solar, Inc. The OTA Case Number is  
6 21088511. Today is Tuesday, June 13th, 2023, and the time  
7 is approximately 1:10 p.m. We are holding this appeal in  
8 person at OTA's hearing room in Sacramento, California.

9 This is appeal is being heard by a panel of three  
10 Administrative Law Judges. My name is Ovsep Akopchikyan,  
11 and I'm the lead judge for purposes of conducting this  
12 hearing. Judges Kenny Gast and Tommy Leung are the other  
13 members of this panel. All three judges are equal  
14 decision makers, and may ask questions to make sure we  
15 have all the information we need to decide this appeal.

16 Now for introductions. Will the parties please  
17 identify yourselves by stating your name for the record,  
18 beginning with Appellant.

19 MR. GARVEY: May it please the Panel, my name is  
20 Robert Garvey, last name spelled G-a-r, V as in Victor,  
21 e-y. And I will be acting as representative on behalf of  
22 Appellant, First Solar, Inc. I have two other individuals  
23 seated with me, and I'll allow them to introduce  
24 themselves.

25 MS. OESTERLING-POST: Hello. My name is Rocchina

1 Oesterling-Post. I'm the VP of tax at First Solar.

2 DR. KESHNER: Hi my name is Marvin Keshner. I  
3 was the initial founder of Optisolar, and the CTO. And  
4 that's Marvin Keshner. I'm a witness.

5 JUDGE AKOPCHIKYAN: Thank you, Mr. Keshner.

6 For the Franchise Tax Board.

7 MR. HALL: Good afternoon. This is Nathan Hall  
8 on behalf of the Respondent.

9 MR. RILEY: Jason Riley on behalf of Franchise  
10 Tax Board.

11 JUDGE AKOPCHIKYAN: Thank you all.

12 As discussed, and agreed upon by the parties at  
13 the second prehearing conference on May 23rd, 2023, and as  
14 noted in my second prehearing conference minutes and  
15 orders, the issue on appeal is whether Appellant has  
16 accomplished error in FTB's denial of a research and  
17 development credit for the 2013 tax year.

18 With respect to the evidentiary record, FTB has  
19 submitted Exhibits A through F during the briefing  
20 process. Appellant did not object to the admissibility of  
21 these exhibits. Therefore, all of FTB's exhibits, that's  
22 Exhibits A through F, are entered into the record.

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

25 Turning to Appellant's exhibits, Appellant

1 submitted Exhibits 1 through 4 during the briefing  
2 process. FTB did not object to the admissibility of those  
3 exhibits at the prehearing conference. There are two  
4 exhibits that were not addressed at the prehearing  
5 conference. One is Exhibit 5, which was submitted on  
6 March 6, 2023, and which appears to be a copy of  
7 Section 2B of First Solar's protest that was filed with  
8 FTB on July 31, 2019.

9 And then we have Exhibit 6, which is dated  
10 June 9th, 2023, but which this Panel received yesterday.  
11 Exhibit 6 is the financial statement work papers for the  
12 California research credit. Appellant asserts that FTB  
13 has a copy of this exhibit -- has had a copy of this  
14 exhibit and, in fact, has referenced this information in  
15 the exhibit in FTB's opening brief.

16 Does FTB have any objection to the admissibility  
17 of Exhibit 5 or Exhibit 6?

18 MR. HALL: Thank you, Judge. The parties met  
19 prior to the hearing just now and agreed that there will  
20 be no additional exhibits in this hearing, and I would  
21 turn to Mr. Garvey to confirm as well.

22 MR. GARVEY: Correct. We're going to go ahead  
23 and withdraw 5 and 6. I apologize for any inconvenience.  
24 We are prepared to proceed with Exhibits 1 through 4.

25 JUDGE AKOPCHIKYAN: Okay. So Exhibits 1

1 through 4 -- Appellant's Exhibits 1 through 4 are entered  
2 into the record.

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

5 JUDGE AKOPCHIKYAN: Okay. Appellant has also  
6 identified one witness, Dr. Marvin Keshner, to testify in  
7 today's hearing. Appellant has identified Dr. Keshner as  
8 the chief scientist and cofounder of Optisolar. We will  
9 swear in Dr. Keshner for his testimony shortly.

10 As agreed, the hearing will begin with  
11 Appellant's presentation. Appellant will have a total of  
12 50 minutes for his presentation, which includes the  
13 testimony of Dr. Keshner and any arguments in your  
14 rebuttal. FTB will also have 50 minutes for its  
15 presentation and cross-examination of Dr. Keshner.

16 Any questions before I swear in Dr. Keshner for  
17 his testimony?

18 MR. GARVEY: Yeah. One question and one request.  
19 Appellant and Respondent's counsel met beforehand, and we  
20 would like to request 30 minutes each for Dr. Keshner's  
21 testimony if that could be allowed?

22 JUDGE AKOPCHIKYAN: We have no other hearing  
23 after today -- after this hearing, so I'm okay with, in  
24 this case, giving you guys the additional time. So that  
25 would make it 60 minutes each instead of 50?



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MR. GARVEY: Correct.

JUDGE AKOPCHIKYAN: Got it. Okay.

So Dr. Keshner, any questions?

MR. HALL: Excuse me, Judge. We do just have one very brief housekeeping matter --

JUDGE AKOPCHIKYAN: Of course.

MR. HALL: -- that I wanted to clarify, and I've spoken with Appellant's counsel about this. The total amount at issue as shown in Respondent's opening brief is roughly \$2,278,464. Of that amount, Appellants do not dispute the disallowance of \$332,090, which are attributable to the Tetrasun credits. So the remaining credits at issue are the credits claimed to have been generated by Optisolar in the amount of \$2,208,925.

JUDGE AKOPCHIKYAN: Okay. Thank you, Mr. Hall.

Dr. Keshner, would you please raise your right hand.

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

JUDGE AKOPCHIKYAN: Thank you, Dr. Keshner.

Mr. Garvey, please proceed with your presentation when you are ready.

1 MR. GARVEY: I'm ready to proceed.

2

3 PRESENTATION

4 MR. GARVEY: May it please the Panel, the issue  
5 before you today is whether Appellant taxpayer has  
6 established error in Respondent's denial of a research and  
7 development credit for the 2013 tax year.

8 Today Appellant will present evidence and  
9 testimony that Appellant is confident will allow you to  
10 conclude that Respondent clearly erred in denying  
11 Appellant's claimed California research credit. The  
12 evidence and testimony presented here today will leave you  
13 with no reasonable doubt that Appellant provided records  
14 that were sufficient to establish the claimed credit.

15 The evidence presented today will also show that  
16 Respondent knew or should have known that all or  
17 substantially all of the qualified research expenses, for  
18 which Appellant is claiming its entitlement to a research  
19 credit, were good and valid qualified research expenses.  
20 In fact, the evidence and testimony you will hear today  
21 strongly suggests that First Solar more likely under  
22 claimed its California research credit rather than over  
23 claimed its California research credit.

24 Before I get to all that however, I'd like to  
25 provide some background that I believe will help frame the

1 issue at hand. The named Appellant taxpayer in this case  
2 is First Solar, but I will spend very little time talking  
3 about First Solar. I will spend most of my time talking  
4 about another company, Optisolar, which First Solar  
5 acquired in 2009.

6 Optisolar reported generating California research  
7 credits on its California franchise tax returns for tax  
8 years 2006 through a short period ending April 2009, but  
9 was unable to utilize any those credits as it was in a  
10 loss position for those years. As a result of the  
11 acquisition, Optisolar generated an unutilized credits  
12 carry over and became part and available to First Solar.  
13 First Solar reported the Optisolar California research  
14 credit carry forward carry overs on its California  
15 franchise tax returns beginning in 2009. Respondent FTB  
16 first requested documentation to substantiate First  
17 Solar's entitlement to the Optisolar California research  
18 credit carry overs in 2017, 11 years after the credits  
19 were first generated and 8 years after Optisolar had  
20 ceased to exist as an independent company.

21 Little background on Optisolar as well.  
22 Optisolar was founded as a startup company in 2005 in the  
23 hopes of revolutionizing thin-film solar panel  
24 manufacturing by developing and commercializing a  
25 breakthrough process outlined in a research paper

1 published by the National Renewable Energy Lab. This  
2 paper was coauthored by Dr. Marvin Keshner. Dr. Keshner  
3 cofounded and served as chief technology officer of  
4 Optisolar.

5 We will call Dr. Keshner to testify before you in  
6 just a short while. As you listen to Dr. Keshner's  
7 testimony, I ask that you keep in mind that he is one of  
8 the PhD research scientists working at Optisolar whose  
9 wages were disallowed as qualified research expense by  
10 Respondent.

11 I finish with the background, and now I'm going  
12 to walk you through some of the many documents provided to  
13 Respondent to substantiate its entitlement to the  
14 Optisolar California research credit carry overs. The  
15 first thing I would like to point to is labeled as  
16 Exhibit 2, I believe. Let me make sure I got that right.  
17 Taxpayer's Exhibit 2, I should say. Taxpayer's Exhibit 2,  
18 these are certified audited financial statements of  
19 Optisolar.

20 I'm going to point your attention or direct your  
21 attention to page 3 of Exhibit 2. And the first thing I  
22 would like you to note is at the top in parens under  
23 Optisolar, Inc., and subsidiaries, you'll see a  
24 development stage company. That just shows as taxpayer  
25 has asserted. This was a start-up company. It didn't

1 have any salable products at this point. It was trying to  
2 develop or discover a new method of making solar panels.

3 I'm also going to note that the statements cover  
4 from inception, founding on December 9, 2005, all the way  
5 through calendar year end of 12/08. That period  
6 represents approximately 92 percent of the qualified  
7 research expenses at issue in this case. The vast, vast  
8 majority are covered in this period. The remaining 8  
9 percent are simply qualified research expenses that were  
10 incurred from April 1 -- or January 1, '09, until  
11 April '09 when Optisolar was acquired by First Solar.

12 What I want to draw your attention to is the top  
13 line where it says expenses. And there is a separate line  
14 item on the certified audited financial statements that  
15 reads, "Research and Development." And it provides  
16 numbers as you go across -- and I will use rounding  
17 here -- of about 20-and-a-half million in '08,  
18 12.6 million in '07, and a total of 36 million for the  
19 entire period December 9, 2005, until calendar year '08.  
20 What you are seeing here is a determination or agreement  
21 by the company's auditor that it had \$36 million in  
22 research expense for financial statement purposes.

23 I next want to direct your attention, if I could,  
24 to taxpayer's supplemental brief. And on page 4 of that  
25 supplemental brief there is a table, and in the last

1 column of that table covers California research expenses.  
2 It has amounts from 2005 to 2008 of \$30,061,509. I'm  
3 bringing these numbers forward for comparison purposes.  
4 On its financial statements, the taxpayer had a separate  
5 line item that was \$36 million in research and development  
6 expense.

7 It claimed only \$30 million of research and  
8 development expense for California research credit  
9 purposes. That is about 83 percent or right around  
10 83 percent of what is certified in the audited financial  
11 statements. Now, Optisolar was a private company and  
12 attempting to get certified audited financial statements a  
13 decade or so after they were produced for a private  
14 company can present a challenge. This is not something  
15 unlike with public companies where they are readily  
16 available on the internet.

17 But the taxpayers sought them out and got them  
18 for purposes of its audit for purposes of substantiating  
19 and showing evidence of research and development cost.  
20 And taxpayer believed when it found that, that it had hit  
21 the jackpot. The reason the taxpayer believed that it had  
22 hit the jackpot is there's an IRS directive ASC 730. It's  
23 attached, I believe it is an exhibit for both the  
24 Appellant and the Respondent.

25 And, basically, what that directive says is that

1 the IRS can accept, actually, must perspectivevely accept  
2 the amounts reported on the certified audited financial  
3 statements as QREs for purposes of Section 41. We  
4 suggested they be accepted for purposes of Section 41 in  
5 this case, and the FTB refused. The FTB noted that the  
6 directive in question is only mandatory for periods after  
7 the directive was released, which was in 2017.

8 However, there's nothing that would stop FTB from  
9 using this methodology in this case. They can do that  
10 optionally. The IRS does that all the time. FTB in its  
11 brief, where it refuses to follow the ASC 730 directive,  
12 notes that it is not the law. Well, of course, a  
13 directive is not the law. Directives are drafted by  
14 administrative agencies, and they interpret the law.

15 In this case directive ASC 730 interpreters IRC  
16 Section 41, the research credit statute, by essentially  
17 treating research and development expenses as reported,  
18 per certified audited financial statements, to be deemed  
19 to have met the requirements of Section 41-D. The IRC  
20 directive is mandatory as I mentioned perspectivevely, but  
21 again there's nothing that prevents the Respondent from  
22 applying it in this case or, at a minimum, acknowledging  
23 that the fact that Appellant had \$36 million in research  
24 and development expenses per its certified audited  
25 financial statements is a very strong indicator that

1 Appellant should have had a comparable or of similar  
2 amount for research credit purposes.

3 Respondent has provided no explanation to  
4 Appellant as to why it does not put any weight on this  
5 evidence. The fact is that the IRS uses this procedure  
6 all the time, and it is a longstanding practice well  
7 preceding the adoption of ASC 730 as a mandatory directive  
8 going forward. In fact, we think this procedure was  
9 likely applied in the case of an IRS audit of exactly the  
10 same QREs from Optisolar that happened in 2014 or at least  
11 that's when NOPs were issued.

12 The IRS audited the 2011 year for First Solar.  
13 In that year, First Solar reflected credits for federal  
14 purposes based on the same QREs as FTB is proposing to  
15 deny in its entirety here. The IRS passed on any  
16 adjustment in 2011. The FTB has suggested there was a  
17 cursory review, maybe they didn't see it. It is very  
18 difficult to prove the negative, but I'll offer it to you  
19 that this was a \$400 million acquisition. The most  
20 prominent thing of which happened from a tax perspective  
21 was that millions of dollars of credits showed up from  
22 whole cloth on the IRS return and were there in 2011.

23 The IRS had no problem or issue with that at all.  
24 There was no adjustment from an IRS perspective to that  
25 credit. The same QREs which the IRS allowed in whole have



1       been denied in whole. This will not be the first big  
2       conflict between the interpretation of taxpayer's research  
3       between the FTB and other parties. In fact, the IRS is  
4       the second one that I've given you. The certified audited  
5       financial statements were looked at by a third party.  
6       That third party concluded and certified that there was  
7       \$36 million of R&D expense.

8               The IRS's decision not to audit in detail may  
9       actually be, and I think more likely is, because Optisolar  
10      appears to have perhaps under claimed its credit.  
11      Although the financial statement R&D definition is not  
12      exactly the same as this definition you have under  
13      Section 41 for research tax credit purposes, they're  
14      pretty close. The directive tells us that they're close  
15      enough that the IRS would say with some adjustments you  
16      can simply adopt the research and development credit  
17      amount as for financial statement purposes, as the  
18      Section 41 amount.

19             We did not know why the Franchise Tax Board has  
20      refused to do that in this case or even given any credence  
21      or weight to that. I will note that in addition to the  
22      financial statements, taxpayer also provided account by  
23      account, transaction by transaction detail supporting the  
24      research credit, which can be tied back to the financial  
25      statement. If the Franchise Tax Board had any legitimate

1 concern about differences between what has been reported  
2 for financial statement purposes and what's appropriate to  
3 report for tax purposes, that could be easily resolved by  
4 going through that detail and making adjustments.

5 The Franchise Tax Board has not offered to make  
6 those adjustments or to work with taxpayer. Instead in  
7 its brief, Franchise Tax Board says, "We cannot accept  
8 this because you did not give us a certification statement  
9 related to that, and a certification statement is a  
10 requirement of the law."

11 That is actually misleading if not completely  
12 wrong. If you were to turn to Exhibit B, which is the  
13 Franchise Tax Board exhibit containing the IRS's statement  
14 on ASC 740. Question 8 reads, "For the benefit of the  
15 directive to apply, must a taxpayer attach the  
16 certification statement and the additional required  
17 appendixes to the taxpayer's filed federal income tax  
18 return?"

19 The answer to that is no. The taxpayer is not  
20 required to attach a certified -- certification statement  
21 and additional required appendixes to the return.  
22 Following on, Question 10, "For the benefits of the  
23 directive to apply, when must the taxpayer provide a  
24 completed certification statement and the additional  
25 required appendixes?"

1           Answer, "If the taxpayer filed the directive in  
2     computing the QREs per the return, taxpayer must provide  
3     the certification statement and additionally required  
4     appendixes upon exams request."

5           In this case, there was no request for  
6     certification. There was just a flat-out denial that we  
7     will not accept that, well, because you can't make us,  
8     because it is not mandatory for the year in question. But  
9     again I point out, it would be a great option in this case  
10    where we're dealing with things that are ten years later,  
11    and we have contemporaneous audit work and work papers to  
12    support the number. I'm not sure you get much better  
13    evidence than that, but we have a significant amount of  
14    additional evidence, including patent applications.

15          If you go to taxpayer's opening or supplemental  
16    brief, taxpayer listed 15 applications in its brief to  
17    demonstrate to the Franchise Tax Board that there was  
18    significant research going on. And I would think from a  
19    common-sense standpoint the Franchise Tax Board might  
20    recognize or know that applying for patents is something  
21    that suggests that significant research might be going on.  
22    Taxpayer listed 15 patent applications that were made.  
23    And at the end of the day, the only response that taxpayer  
24    received on the patents -- and I'm going to find it here  
25    because it'll be more powerful if I can read it to you.

1           "Of the 15 applications" -- this is from  
2       Respondent's opening brief. "Of the 15 applications  
3       listed by Appellant, only eight of them resulted in the  
4       issuance of patents."

5           Now we filed 15 applications for an entity that  
6       the Respondent means did no research. I will submit to  
7       the Panel the fact that 15 patent applications were  
8       submitted strongly indicates research was happening  
9       whether they were granted or not. I will further  
10      respectfully submit to the Panel that getting 8 of the  
11      15 -- getting a patent on 8 of the 15 suggest very  
12      strongly that research was going on.

13          FTB did not recognize QREs on the 15, didn't  
14      recognize QREs on the 8. Instead it noted that only 3 of  
15      the 8 -- and this is in Footnote 12 of FTB's opening  
16      brief. Only 3 of the 8 contained names of people who were  
17      listed in wage detail that FTB had. That's a level of  
18      detail that was available for 2006. It was not always  
19      available for other years, but in 2006 the taxpayer  
20      provided FTB with a list of names and wages.

21          And in Footnote 4 -- sorry -- Footnote 12, the  
22      FTB notes the employees on Appellants whose wages are  
23      claimed by Appellants include Marvin Keshner, Erik Vaaler,  
24      and George Clifford. Marvin Keshner is seated right here.  
25      He'll testify in a little bit. You'll hear more about

1 Erik Vaaler and George Clifford as well in a little bit.

2 But I submit to the Panel, if a taxpayer can  
3 produce a patent that was granted to show that the  
4 inventor is listed as one of the employees of Optisolar  
5 show that Optisolar was the assignee of the patent and  
6 then ties to specific wage detail, here is how much a  
7 person made in that year, and the FTB does not allow that  
8 as a credit, is there anything that we could have provided  
9 that would have substantiated the credit to the  
10 satisfaction of FTB? Patents, wages tied together do not  
11 satisfy FTB.

12 Opposing counsel brought up in the beginning  
13 Tetrasun. I'll bring it up now by way of contrast.  
14 Tetrasun was another acquisition that the company did.  
15 It's a more recent acquisition in 2013. The audit  
16 verification work papers that FTB has attached as  
17 Exhibit F. In the audit work -- verification work papers,  
18 the auditor notes that Tetrasun was a research and  
19 development company, but allows none of the research  
20 credit, none of the \$332.

21 We conceded that \$332 because we didn't have  
22 certified audited financial statements. We conceded that  
23 \$332 because our research, unlike for Optisolar, didn't  
24 turn up a bunch of patents. Undoubtedly, Tetrasun had  
25 some research. It is, according to the FTB, a research

1 and development company. There is some measure of it.  
2 But we accepted a very high bar and said we don't think we  
3 get quite high enough, we'll concede that. I'll be honest  
4 with you our expectation is that FTB would agree with the  
5 Optisolar facts. We're in a much better position. They  
6 have not. They've disallowed them entirely.

7 I'm going to conclude my opening remarks now.  
8 I'm ready to call Dr. Keshner if this is the appropriate  
9 time to do that.

10 JUDGE AKOPCHIKYAN: Go ahead. Thank you,  
11 Mr. Garvey.

12 MR. GARVEY: May I begin with Dr. Keshner's  
13 testimony then?

14 JUDGE AKOPCHIKYAN: You may.

15

16 DIRECT EXAMINATION

17 BY MR. GARVEY:

18 Q Good afternoon, Dr. Keshner, and thank you for  
19 being here. Would you please introduce yourself and share  
20 a little bit about your educational and professional  
21 background?

22 A Yeah. I'm -- I'm Marvin Keshner. I have a  
23 bachelors, masters, and a PhD from MIT in Electrical  
24 Engineering in Solid State Physics. I was with Hewlett  
25 Packard for 26 years. Towards the end of that, I managed

1 a quarter of HP's research labs in Palo Alto. And at  
2 Hewlett Packard managers are technical. They're not just  
3 doing bookkeeping and stuff like that. They're designing  
4 projects, verifying projects.

5 At my time at Hewlett Packard, even as a manager,  
6 I filed several patents. We won one patent case for  
7 \$64 million. The part of -- so I switched over -- jumped  
8 over on the business side, became the CTO for a quarter of  
9 HP's business, about 12-and-a-half-billion dollars in  
10 hand-held and personal computers. Part of that job is to  
11 look for new business opportunities. HP had tremendous  
12 skill in high-volume manufacturing with our ink jet and  
13 laser jet and other products.

14 So I was looking for something that was kind of  
15 a -- an industry that had promise but was very immature at  
16 the time. And I looked at a bunch of different things.  
17 Solar caught my eye. At that time, solar panels were  
18 \$7.50 a watt. Completely not competitive. Much more of a  
19 hobbyist kind of thing. I developed a business plan for  
20 Hewlett Packard to get that price down below \$2 a watt  
21 where it would be competitive with natural gas and coal  
22 fired utilities.

23 I presented that to HP. The executive committee  
24 was concerned that at that time our core businesses were  
25 weak and that we really didn't have the bandwidth to start

1 a brand-new venture at which I respected. But I was  
2 hooked. At -- just before that time thinking that oh,  
3 this looks too good to be true, I asked people at NREL to  
4 review the business plan for us. And with a bunch of  
5 skepticism at the beginning, I went and gave a  
6 presentation and said, please, show me why this is wrong.  
7 Show me where the holes are.

8 And what they said instead is, oh, my god. We've  
9 missed this completely. Please do a study for us. That's  
10 the paper that was referenced, that NREL in 2004. Again,  
11 Hewlett Packard said no. I was hooked. I left Hewlett  
12 Packard, raised -- put together a technical team  
13 consisting of myself, Erik Vaaler, PhD former professor at  
14 MIT, Don Rice, Chemistry PhD from Rice University, and  
15 Rajiv Aria, also PhD, formally had worked in thin-film  
16 solar panels.

17 I put together the team. We got funding out of  
18 some people in Calgary who had made a lot of money in oil  
19 and gas. Started out the solar just before Christmas in  
20 2005. By June of 2006, we were still a very small team,  
21 like 8 or 10 people. By the end of 2006, we were -- I  
22 don't really remember exactly -- 20. By the end of 2007  
23 we were 80 people. So a lot of the people who filed these  
24 patents actually weren't employees yet in 2006. They were  
25 employees in 2007 and in 2008.



1           We were going great guns. We -- we -- the  
2       science was we were -- we had a new process for putting  
3       down the silicon that gave us better quality. We were  
4       inventing a new process for manufacturing in high volume  
5       on big glass sheets instead of little semiconductors. And  
6       we invented a whole new back coating to protect the -- the  
7       thin films and provide insulation so people could handle  
8       without getting electrical shocks. So we had several  
9       major development pieces. Very challenging.

10           At the end of 2009, we had not yet gotten the  
11       product or the manufacturing process to the point where we  
12       could sell commercial panels. We were still doing testing  
13       in the field. We were still finding failures. All of  
14       that was still a work in progress. And just for  
15       comparison, First Solar, which also developed the thin  
16       film process with a different material, cadmium telluride,  
17       took ten years before they really had viable commercial  
18       products. We were only in year three.

19           MR. GARVEY: Dr. Keshner --

20           JUDGE LEUNG: Mr. Garvey, can you hold for just  
21       one second. This is Judge Leung.

22           MR. GARVEY: Yes.

23           JUDGE LEUNG: I don't mean to interrupt you,  
24       Dr. Keshner, but you mentioned a lot of names on which you  
25       just said. And for the purposes the transcript, would you

1 mind repeating those names and spelling them out for us?

2 DR. KESHNER: Yeah. So the original core team,  
3 four people, were myself, Marvin Keshner, Erik Vaaler,  
4 V-a-a-l-e-r, Rajiv Aria, R-a-j-i-v, last name A-r-y --I'm  
5 not sure.

6 MR. GARVEY: Phonetically is fine.

7 DR. KESHNER: Aria. Yeah. I think it's A-r-y --  
8 I'm not sure. And then Don Rice, R-i-c-e.

9 JUDGE LEUNG: Okay. And then you mentioned  
10 something NREL, NREL that you were --

11 DR. KESHNER: NREL, the National Renewable Energy  
12 Laboratory in Golden, Colorado.

13 JUDGE LEUNG: And you mentioned a material that  
14 you were trying to develop some sort of ride?

15 DR. KESHNER: Yes. So we were making thin-film  
16 silicon solar panels. First Solar makes thin film cadmium  
17 telluride solar panels.

18 JUDGE LEUNG: Telluride. How is that spelled?

19 DR. KESHNER: I'm sorry. I would have to look  
20 that up.

21 JUDGE LEUNG: Okay.

22 MS. OESTERLING-POST: I know how it's spelled.

23 DR. KESHNER: Please.

24 JUDGE LEUNG: Thank you.

25 MS. OESTERLING-POST: T-e-l-l-u-r-i-d-e.

1 JUDGE LEUNG: Wonderful. Thank you.

2 MS. OESTERLING-POST: You're welcome.

3 JUDGE LEUNG: Please proceed, Mr. Garvey. Thank  
4 you.

5 BY MR. GARVEY:

6 Q Thank you very much. And after that answer, I  
7 can't believe I'm going to say to you, Dr. Keshner, but  
8 you didn't completely answer my question. I asked for  
9 your educational and professional background, and did you  
10 include your educational at all?

11 A Yeah. I have three degrees from MIT.

12 Q Yeah. There we go.

13 A Bachelor, masters, PhD Solid State Physics and  
14 Electrical Engineering.

15 Q And during what time period? I know you covered  
16 a lot there, but I want to get it in the record. During  
17 what time period were you employed by Optisolar?

18 A We started the company just before Christmas in  
19 2005. And we -- we were about to go IPO. Financial  
20 markets collapsed. Our investors couldn't carry us for  
21 another year, so we were forced to sell in 2009, and we  
22 had to stop all activities. We were laying off people in  
23 the spring of 2009.

24 JUDGE AKOPCHIKYAN: Mr. Garvey, is your mic on?

25 MR. GARVEY: The light is not on. Let me check.

1 My mic is not.

2 JUDGE AKOPCHIKYAN: Okay. Is it on now?

3 MR. GARVEY: Yeah.

4 DR. KESHNER: I think he would like it to be on.

5 MR. GARVEY: Oh, he would like my mic to be on.

6 JUDGE AKOPCHIKYAN: Yes, please.

7 MR. GARVEY: Oh, sorry.

8 JUDGE AKOPCHIKYAN: Okay.

9 MR. GARVEY: I went before without it. I thought  
10 I was giving you background. You actually wanted to hear  
11 from me. This is --

12 JUDGE AKOPCHIKYAN: Yeah. I want you speaking  
13 into the --

14 MR. GARVEY: This is unusual. My wife has never  
15 done that before.

16 BY MR. GARVEY:

17 Q Would it be accurate to describe you as a PhD  
18 research scientist, Dr. Keshner?

19 A Absolutely. I have over 20 patents over, you  
20 know, my career. Many of which, you know, long ago  
21 expired. Even in the recent 10 years I think there are  
22 probably something like 10 patents.

23 Q Were there other PhD research scientists employed  
24 at Optisolar?

25 A Yeah. Erik Vaaler is a PhD research scientist.

1 Don Rice, Rajiv Aria. I can -- Gotume Gonguly [sic]. I'm  
2 trying to go through the -- it would be easier if I had  
3 the list in my hands.

4 Q That's perfectly fine.

5 A Person working on our sputtering system, Shahed  
6 Perada [sic] was a recent -- was a PhD. Person working on  
7 our back coat, Andrew Liu [sic] was a PhD. Fay Wang who  
8 was working with him and with Don Rice was a PhD. You  
9 know, we had a team of about 90 people total in Optisolar.  
10 Ten were on the business side. 80 were doing either  
11 process development, material development, or equipment  
12 development for this prototype manufacturing line and  
13 probably more than a third of them were PhDs.

14 Q Very helpful. Can you tell me about what type of  
15 activities you specifically were engaged in during your  
16 employment at Optisolar?

17 A Yeah. As you probably understand, startups are  
18 everyone does everything. So, you know, initially not  
19 only did I create our IT infrastructure and our phone  
20 system and our computer back up, but also, I designed our  
21 silicon deposition system, the system with the silicon is  
22 put onto these large glass panels. Erik and I designed  
23 several pieces of equipment. He's a mechanical engineer.  
24 He did more of the design. I did more of the process work  
25 of what the design has to do.

1 Don Rice did a lot of the back coat, but a key  
2 part of the back coat is that it has to withstand 2,500  
3 volts in order so people can't get an electric shock from  
4 a solar panel. So the electrical engineering part of that  
5 was something that I designed. The test equipment for  
6 actually measuring when that failed was something novel.  
7 Usually, when that failed it would, you know, explode  
8 because 2,500 volts can create a lot of current, and we've  
9 developed a way to test and find little defects without  
10 destroying the film. So I -- I was -- the chief technical  
11 officer had a hand in pretty much every part.

12 Q As part of your response, Dr. Keshner, you used  
13 the name Erik. I believe you're referring to Erik spelled  
14 E-r-i-k, Vaaler, spelled V-a-a-l-e-r. You covered him  
15 before?

16 A Correct.

17 Q Can you tell me what type of activities Erik  
18 Vaaler was involved in at Optisolar?

19 A So Erik is a PhD mechanical engineer from  
20 Berkeley and MIT. He played basketball for Cal. He is a  
21 world-class machine designer. That's what he does.  
22 That's his career. When we hired him out of MIT for  
23 Hewlett Packard, he was not willing to -- to work for  
24 Hewlett Packard full time.

25 He said I still want to be a machine designer. I

1       want to be a consultant around the country. I will work  
2       for you half time. Is that good enough? And we said  
3       absolutely. Someone of that quality, that's good enough.

4           Q    Are you familiar with the name George Clifford?

5           A    Yes. Worked for me at Hewlett Packard.

6           Q    And what type of -- did he work at all at  
7       Optisolar?

8           A    Yes. George was not a PhD. George was a  
9       mechanical engineer, master's degree. Part of what it  
10      takes to make a big solar panel is you don't want 100 amps  
11      at half a volt. What you want to do is scribe the panel  
12      into a bunch of strips and then series interconnect the  
13      strips. So instead, you get smaller amps at a higher  
14      voltage. He was designing the laser scribe system that  
15      did those scribe lines to separate. And First Solar has a  
16      similar process for their thin films.

17          Q    Was he designing it because one currently wasn't  
18      available? Why not just purchase one, Dr. Keshner?

19          A    No one made those things, especially, for big  
20      glass panels. So, you know, we're doing 100 scribes on  
21      something that's a meter by half a meter that has to have  
22      tolerance to put those things in exactly the right place  
23      across a huge distance. No one made that.

24          Q    Was the scribe the only piece of, kind of, custom  
25      made bespoke machinery you had to make, or were there

1       other things like that?

2               A     So there was almost no machinery we could buy.  
3       We could buy vacuum pumps, standard.   We could buy power  
4       supplies.   We could buy some of the communications gear,  
5       the data communications that let the machines talk to each  
6       other.   But the semiconductor industry which had developed  
7       lots of equipment, everything was for 12-inch wafers.  
8       We're doing big sheets of glass.

9               Also, we didn't need the precision that they  
10      required.   You know, they're doing micron stuff.   Well,  
11      actually today they're today they're doing nanometer  
12      stuff, but at that time they were doing some micron stuff.  
13      Our tolerances were much broader than that.   We didn't  
14      need that for solar panels.   What we needed was very low  
15      cost.   We didn't want to pay \$5 million for a piece of  
16      equipment.   We couldn't afford it.

17              So we developed the way to move the glass through  
18      the line.   You know, we're -- semiconductor wafers are  
19      always done this way horizontally, we needed the glass to  
20      be vertical.   If the glass wasn't vertical, it would bow.  
21      If it bowed it wouldn't get coated uniformly.   So we  
22      created material handling to move the glass along the  
23      line.   We created the entire silicon deposition system.

24              Our first prototype line was in a building that  
25      was -- I don't know -- 80 feet long and 40 feet wide.   And



1 the line snaked through the building -- through half the  
2 building with three legs so that each leg was about  
3 50 feet long. The silicon deposition system by itself,  
4 vacuum chamber after vacuum chamber after vacuum chamber,  
5 was 35-feet long. None of that existed in the  
6 semiconductor industry.

7 Q When you say "line" just to clarify, what does  
8 that mean? What are you referring to by "the line"?

9 A So this was a prototype manufacturing line that  
10 could turn out panels that would achieve their  
11 performance, which was 32 Watts, that would achieve high  
12 quality that is a consistent performance that would be  
13 reliable in the field and would be produced at about one  
14 every minute and a half so that we could amortize the  
15 capital cost and not have that add too much cost to the  
16 cost of the panels.

17 Now, when we shut down the company, we were only  
18 at about 25 Watts. We couldn't get to 30. Once in a  
19 while it got to 32, but we're still chasing down all of  
20 the -- what's keeping us from getting to the target that  
21 we should be getting? We put them in the field. We were  
22 finding that the edges were starting to delaminate from  
23 the back, and we were chasing that down. Some of it was  
24 particles. Some of it was fingerprints.

25 Some of it was surface that we had taken all the

1 silicon off was too smooth. We had to rough it up a bit  
2 to get good adherence. So we're -- we had a list of -- of  
3 guesses that we were chasing down. And we had that  
4 throughout the line. We had -- we had, you know, I  
5 probably have a spread sheet with 30 items from -- from  
6 2008 that we were still chasing.

7 Q 30 issues or uncertainties --

8 A 30 issues --

9 Q -- that were unresolved --

10 A 30 issues that we had not found the root cause.

11 Q Did you -- did you ever get them all resolved?  
12 How does this end?

13 A No. No. It didn't end. We were not yet making  
14 panels that we could sell commercially. We were making  
15 panels. We were putting them in the field. We were  
16 testing them. We were finding faults, and we were chasing  
17 down what's wrong. What are we doing wrong?

18 Q I'm going to shift gears a little bit on you,  
19 Dr. Keshner. In my opening remarks I shared with the  
20 Panel numbers from Optisolar's certified audited financial  
21 statements. And those financial statements showed the  
22 bulk of the R&D expense. And here I'm talking about R&D  
23 for financial statement purposes.

24 In 2007 and 2008 can you talk in particular about  
25 what was going on at Optisolar during those years, 2007,

1       2008?

2           A     Okay.  So I'm not exactly sure where the  
3     calendar --

4           Q     Do the best you can --

5           A     -- dates from --

6           Q     -- and talk it out as you need to.

7           A     Okay.  So we formed the company at the end of  
8     2005.  Had, you know, 8 or 10 people by the summer of  
9     2006.  By the end of 2007, we were up to about 90 people,  
10    about 80 of whom were in -- in the development.  We first  
11    built a single chamber for the silicon system to see if we  
12    can get the uniformity that we needed.  If we couldn't get  
13    that, it was game over.  We were going to fold up the  
14    company.  That was a necessary milestone.  We got it.

15                We then built a bigger silicon system so we could  
16    develop the process.  We built it as close to what would  
17    be in a production line as possible because if you bake  
18    your cookies in one oven and then your production is in a  
19    different oven, then you haven't really found all the  
20    issues.  So we made it as much like what was going to be  
21    in production as we could, but with the flexibility to  
22    change all the process perimeters, change the gases,  
23    change the power, change the rate at which it moved.  All  
24    the things that an R&D team needs.

25                Now, could we have bought that?  No.  Again,

1 nothing -- no one was working on glass panels like this.  
2 By the middle of '07 we were starting to build our first  
3 prototype production line. That took us about five  
4 months. By sometime at the end of '07 beginning of '08,  
5 we built a second line. And the second line was not the  
6 same as the first. Some of the stages in the second line  
7 that we knew were not working well, we changed.

8 So, for example, you're required to take all of  
9 the silicon off the edges of the glass because otherwise  
10 someone could touch the edge and get a shock. That's  
11 required by the standards of solar panels. We were doing  
12 that with sandblasting, which was an established  
13 technique, and it was a disaster. Not only -- not only  
14 was it not reliable, but the sand was just -- even though  
15 we were vacuuming it, you can't -- you can vacuum  
16 99 percent. You can vacuum 99.99 percent, but when you're  
17 spraying sand at this huge velocity you've got sand all  
18 over the floor, and it was getting into everything.

19 So in the second line we used the laser ablation,  
20 not the kind that are used for scribes, but a big laser  
21 beam that would just heat up and burn off all of the  
22 silicon from the edges. And, unfortunately, what we found  
23 out six months later is that wasn't good enough either.  
24 It was too smooth, and the back coat wasn't sticking well  
25 to that. So we -- we were, you know, I mean, you know, my

1       entire career at HP is R&D, and we have two -- two models.

2               One is, you know, you're climbing the hill and  
3       you're getting closer and closer and closer and your list  
4       of issues is getting smaller and smaller. And the other  
5       model is you're draining the swamp, and you don't know how  
6       far you have to go and you don't know what's down there.  
7       We were -- we had some of each.

8               Q     Thank you, Dr. Keshner. I have additional  
9       questions for you, but I'm going to pause just for a  
10      second to check a point of order with the Panel.

11              MR. GARVEY: I'd requested 30 minutes. FTB,  
12      obviously, is getting 30 minutes as well. I believe I'm  
13      at about minute 20 right now.

14              JUDGE AKOPCHIKYAN: You have 15 minutes left.

15              MR. GARVEY: Oh, wow. Very good. Am I allowed  
16      to reserve time for redirect?

17              JUDGE AKOPCHIKYAN: Sure.

18              MR. GARVEY: Okay. I'm going to go ahead and  
19      reserve time for redirect. I'll turn the witness over to  
20      the Panel and to the Respondent.

21              JUDGE AKOPCHIKYAN: Okay. Mr. Hall, does the  
22      Franchise Tax Board have any questions for Dr. Keshner?

23              MR. HALL: Yes, we do. Just a couple. One  
24      moment.

25      ///

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Q Dr. Keshner, thank you for coming today. You've had a PhD for many years; correct?

Q And do you still write down your calculations or records in regard to your research?

Q Understood. In any form, but just to clarify, you still take notes and maintain records of -- of that -- of your activity -- of your --

Q Sure.

Q And at some point, did Mr. Garvey or someone representing First Solar ever ask you to provide those design documents records or other notes related to the

1 activity of Optisolar during 2006 to 2009?

2 A I haven't been asked for them. I have some.  
3 It's a long time, ago, and not much of that is relevant to  
4 my current work. So maybe on some of my back up files.

5 Q But you've never provided any of these notes to  
6 the Franchise Tax Board to your knowledge?

7 A I was never asked.

8 Q You mentioned that there was a team of about 90  
9 people and roughly 80 of those were doing some type of  
10 development activity. Are you aware of anywhere in the  
11 record of this case where that would be supported?

12 A So I -- I don't know what records are available.  
13 I saw one document that had a list of about 30 people that  
14 were R&D people, of which I remember the names of maybe  
15 25. But I never saw a list of the 90 that would have been  
16 the whole company at the end of, you know, 2008.

17 Q But in any event, neither of those lists are  
18 contained in exhibits and evidence in this case?

19 A I don't know what's in evidence.

20 Q Okay. Thank you.

21 MR. HALL: We have no more questions for the  
22 witness.

23 JUDGE AKOPCHIKYAN: Thank you, Mr. Hall.

24 Mr. Garvey?

25 MR. GARVEY: Oh, okay.

## REDIRECT EXAMINATION

BY MR. GARVEY:

Q Dr. Keshner, do you recall when we first reviewed documents, the date approximately, to determine whether you might be able to give valuable testimony? The first time you and I covered documents Ms. Oesterling would have been on the call. I don't know if you remember. When was that call?

A    A week or two ago.

Q It was a week or two ago. I bring it up just because the timing is important in terms of getting those documents into evidence.

MR. GARVEY: I have nothing further for this witness.

JUDGE AKOPCHIKYAN: Thank you, Mr. Garvey.

DR. KESHNER: Keshner. I'd be happy to provide them if -- if that's required.

MR. GARVEY: If FTB would like us to provide documents, we're confident that Dr. Keshner will be able to come up with some documents and pictures of things that would further support and substantiate taxpayer's position. We think it's pretty well supported and substantiated right now, but if the FTB would like more, we can provide more.

DR. KESHNER: But I want to be careful. I don't



1     have lists of employees. I have design documents. I have  
2     research documents. I don't have lists of employees.  
3     That would be the other side of the company.

4             MR. HALL: With respect to, Mr. Garvey, if it  
5     pleases the OTA to accept new evidence at this point in  
6     time that -- that's obviously up to the Panel. But as far  
7     as Respondent is concerned, I mean, this audit was  
8     performed several years ago. We've been through a  
9     two-year protest. I've been through a two-year protest  
10    with Mr. Garvey here. We've gone through the briefing  
11    stage and appeal. So we're not really -- Respondent's not  
12    inclined to accept documents at this point. However, if  
13    it pleases the Panel, then you know.

14            JUDGE AKOPCHIKYAN: I mean, the time to submit  
15    evidence in this case is over. But I will confer with the  
16    Panel to see if that's something --

17            MR. HALL: And -- and just to clarify, Judge, we  
18    have asked for research documentation on many occasions,  
19    and we've been told on many occasions that there is none.  
20    So --

21            JUDGE AKOPCHIKYAN: Thank you, Mr. Hall.

22            MR. GARVEY: If I could, I will go ahead and use  
23    my time just on the note here on redirect.

24            JUDGE AKOPCHIKYAN: I'm sorry. You want to  
25    ask --

1           MR. GARVEY: I did have remaining time. So I was  
2 gonna -- I had said I would surrender it but --

3           JUDGE AKOPCHIKYAN: Okay. You want to ask  
4 questions --

5           MR. GARVEY: -- but just I want to ask a  
6 question --

7           JUDGE AKOPCHIKYAN: -- of Dr. Keshner?

8           MR. GARVEY: I've been prompted by Respondent.

9           JUDGE AKOPCHIKYAN: Okay.

10

11                               FURTHER REDIRECT EXAMINATION

12 BY MR. GARVEY:

13           Q    Could you describe the design type documents you  
14 have, and what they would show? What types of things, if  
15 we were allowed to submit additional evidence, do you have  
16 in your position, Dr. Keshner?

17           A    The right answer is I'd have to look. I have to  
18 go through my back up files and see what's still there.  
19 One document that you might -- [INDISCERNIBLE] --

20                    So I'll repeat that. I'd have to go through my  
21 back up files and see what's there. It's been a long  
22 time. One of the very difficult things in the silicon  
23 deposition system is there are two pieces of glass running  
24 by a bunch of rods. Those rods have electric field on  
25 them. They also have holes in them for the gas to flow.

1 One of the difficulties in designing that system -- which  
2 is a brand-new system. It's -- it's an innovation in  
3 silicon deposition that has never before done.

4 One of the challenges is you've got to get that  
5 gas extremely uniform. All those holes have to produce  
6 the same amount of gas. Not so easy when you're  
7 introducing the gas up here, and it's got to get all the  
8 way down there and still be the same rate. And they have  
9 to have the same electric field. If -- if the solar panel  
10 is not uniform, it's moving in this direction, so you can  
11 average somewhat non-uniformities 'cause it's like a car  
12 wash. So even if it's more at the beginning, less at the  
13 end, every part of the glass goes through the same thing.

14 But vertically, it's got to be completely  
15 uniform. So one of the design documents that I worked on  
16 for months was how to get both of the electric field and  
17 the gas flow to be uniformed, and that was very tricky.  
18 We worked very hard on that. Another issue -- so I might  
19 have the issues list. I doubt it. Not the sort of thing  
20 that has lasting value and, you know, it was a little hard  
21 on us when the -- we had to fold the company.

22 We were -- our hearts and souls were in that  
23 company. It wasn't our choice to sell it. So something  
24 like that were okay, bygones be bygones. There was no --  
25 there was no lasting scientific value to keeping those

1 'cause they were questions, not answers.

2 Q Thank you for your response, Dr. Keshner.

3 MR. GARVEY: I now really no longer have further  
4 questions for this witness?

5 JUDGE AKOPCHIKYAN: Thank you, Mr. Garvey. I'm  
6 going to turn it over to my Panel members to see if they  
7 have any questions for Dr. Keshner.

8 Judge Gast, any questions?

9 JUDGE GAST: This is Judge Gast. Excuse me.  
10 This is Judge Gast. I do not have any questions. Thank  
11 you.

12 JUDGE AKOPCHIKYAN: Thank you.

13 Judge Leung, any questions?

14 JUDGE LEUNG: Yes. Thank you.

15 Dr. Keshner, you had mentioned earlier -- I think  
16 at the very beginning -- that when there was some patents  
17 being filed by folks who are not yet become employees  
18 until sometime in 2007, 2008. So when those patents were  
19 filed, what -- what positions did these people have?

20 DR. KESHNER: Yeah. So, for example, take Andrew  
21 Liu and Fay Wang, they were developing the -- the acrylic  
22 back coat that protected the back surface of the panel.  
23 We were -- they were members of the technical team, full  
24 time employees. We, of course, waited until they had good  
25 results, or at least good preliminary results, so we could

1 file a thorough patent that covered all of the important  
2 issues.

3 That patent was filed -- I don't know -- probably  
4 around '08 sometime. Several of the patents that were  
5 filed in '08, you know, it takes the patent office a  
6 couple of years before they process the patents. And if  
7 you're not still in business, at the time when they issue  
8 their first office action and you can't respond, then the  
9 patent gets dropped. So some of the applications were  
10 just simply dropped because no one was there to respond.

11 JUDGE LEUNG: So when the patents were filed,  
12 anybody who was filing them was an employee already for  
13 Optisolar?

14 DR. KESHNER: Correct.

15 JUDGE LEUNG: Okay. Tell me about your typical  
16 day at Optisolar? What did you do?

17 DR. KESHNER: So it's a little tricky. We had  
18 moved to Sonoma, California. Our offices were in Hayward,  
19 California. So I was working a day or two from home and  
20 three days, long days, in the office staying overnight in  
21 a hotel that was nearby. So I would check in with every  
22 team. What's going on? What's working? What's not  
23 working? Where are you stuck? What do you think is going  
24 to get you unstuck?

25 And then at the same time I had personal

1 responsibility for the silicon deposition system for the  
2 gas flow for the power, distribution of power. And I  
3 would be working on improving that. We were working on  
4 the RF design for the silicon dep system right up until  
5 the end of '08 when we knew we had to stop.

6 JUDGE LEUNG: So it would be safe to say that  
7 your time is divvied up half-and-half between the silicon  
8 deposition phase of your work versus the oversight of your  
9 company?

10 DR. KESHNER: No, I wouldn't say that. I would  
11 say that my time was always troubleshooting technical  
12 issues. And in a startup, it's like if you need to wash  
13 the dishes you wash the dishes. So it's whatever it took,  
14 whatever was really the critical issue at the moment,  
15 that's what I'd be working on. So when we ran into  
16 trouble on the back coat, it was failing, and we couldn't  
17 detect what was causing it fail.

18 I invented a new technique for -- for taking a  
19 high voltage probe that was currently limited and  
20 carefully moving it across the back coat until you get an  
21 indication that there was a weak spot. So we could then  
22 go look at that weak spot without blowing it up and not  
23 being able to determine what had caused it. So that's  
24 just an example of trouble shooting and problem solving.

25 JUDGE LEUNG: Okay. Thank you. All done. Thank

1       you.

2               JUDGE AKOPCHIKYAN:   Thank you.

3               I have a few questions, Dr. Keshner.   What other  
4       activities did Optisolar have in addition to the  
5       development activities you described?

6               DR. KESHNER:   Yeah.   We had a small business  
7       team, and I don't remember exact numbers, 10 or 12,  
8       something like that.   And what they were doing is they  
9       were pioneering what became utility scale solar, of which  
10      First Solar has continued to this day.   We were working  
11      with PG&E to develop large-scale solar farms, and we were  
12      optioning land down in Southern California and in Ontario,  
13      Canada, that were suitable sites for solar farms that we  
14      could -- where we could build solar farms as soon as we  
15      had working panels.

16              We were completely vertically integrated so that  
17      when PG&E would walk through our plant we could say to  
18      them, guys we've got a solution for the design of the  
19      solar panels, the manufacturing of the solar panels, the  
20      installation of the solar panels.   We can provide you a  
21      complete solution, and they -- they wrote us a power  
22      purchase agreement.   If you can, we will pay this much for  
23      solar power.   If you can build this, we will buy it.

24              Now we didn't get that far, but First Solar did.  
25      And like the Topaz Solar Farm, they built it.   I mean, we

1 started it. They finished it. 550 megawatts down in  
2 Central, California, I believe now owned by Warren Buffet.

3 JUDGE AKOPCHIKYAN: And what equipment did you  
4 use for those solar farms? Were the panels made by  
5 Optisolar or --

6 DR. KESHNER: So I want to be careful. We were  
7 planning to use panels made by Optisolar. We hadn't yet  
8 gotten to panels that we could commercially release. So  
9 we were installing panels in places like Ontario as test  
10 sites to see what the failures would be.

11 JUDGE AKOPCHIKYAN: So the panels that you were  
12 designing were being tested in Canada?

13 DR. KESHNER: Some of them. Some of them were  
14 being tested in California.

15 JUDGE AKOPCHIKYAN: And who were involved with  
16 those different testing sites?

17 DR. KESHNER: Our installation team. We -- we  
18 flew them out.

19 JUDGE AKOPCHIKYAN: And you never personally  
20 visited those locations to inspect?

21 DR. KESHNER: In California, yes. In Ontario,  
22 no.

23 JUDGE AKOPCHIKYAN: What about any of the  
24 scientists involved?

25 DR. KESHNER: So Dave Taggert, who led the



1 installation design and team, who later went onto -- to be  
2 the founder of Iron -- what is it? -- Ironridge, a company  
3 that makes racking for rooftop solar panels. He's now a  
4 very wealthy guy. He was the point person on the  
5 installation side, not me. So we were developing an  
6 installation technique that was a much lower cost than the  
7 ones currently available, but that was his primary  
8 responsibility, not mine.

9 JUDGE AKOPCHIKYAN: Okay. I don't have any  
10 questions at this time. I'm going to go ahead and turn it  
11 over to the Franchise Tax Board for their presentation.

12 Mr. Hall, please proceed when you're ready.

13 MR. HALL: Thank you.

14  
15 PRESENTATION

16 MR. HALL: As you've just heard, this case  
17 involves a portion of Appellant's California research  
18 credit claimed for the 2013 taxable year. Respondent has  
19 allowed a significant amount of research credit claim by  
20 Appellant in 2013. However, with respect to the  
21 disallowed portion at issue in this appeal, Appellant has  
22 failed to satisfy the recordkeeping requirement and failed  
23 to substantiate the credits claimed.

24 In fact Appellant has plainly conceded it could  
25 not substantiate the research activity. For example

1 during audit, Appellant provided credit expense  
2 information, but stated with respect to research activity,  
3 quote, "We went back through our records and are not able  
4 to find additional documentation to substantiate the R&D  
5 qualified activities performed by Tetrasun and Optisolar  
6 for the periods requested", unquote. Under the  
7 precedential opinions of Appeal of Pino and Appeal of  
8 Swat-Fame, this should end the inquiry.

9 Appellant maintains, nonetheless, that it is  
10 entitled to the claimed credits for various other reasons.  
11 These reasons are without merit. Appellant asserts that  
12 Respondent should rely on Optisolar's audited financial  
13 statements as summary proof of entitlement to the claimed  
14 research credits. To this point, Appellant relies on a  
15 federal directive referred to as the ASC 730 directive.  
16 The ASC 730 directive allows auditors to accept adjusted  
17 or modified financial statements to establish qualified  
18 research expenses for purposes of the research credit.

19 While California generally conforms to Internal  
20 Revenue Code Section 41 and related federal guidance, the  
21 directive is inapplicable to this case for several  
22 reasons. First and foremost, the directive is expressly  
23 inapplicable to any tax returns filed prior to  
24 September 11th, 2017. As shown on page 2 of Appellant's  
25 Exhibits 2, the financial statement offered by Appellant

1 was produced in May of 2009 and relates to tax returns  
2 filed around the same time. The tax year at issue here is  
3 2013, and was filed well before 2017. Therefore the  
4 directive is inapplicable on its face.

5 Additionally, the directive is not a  
6 pronouncement of law and does not replace or alter the  
7 federal recordkeeping rules. The directive merely  
8 provides auditors with an administrative solution to  
9 accept certain expenses as qualifying research expenses  
10 once a taxpayer has demonstrated qualified activity, in  
11 addition to meeting other requirements of the directive.

12 Even if the directive could apply, which it does  
13 not, Appellant has not satisfied its requirements. For  
14 example, the directive requires taxpayers to adjust their  
15 audited financial statements to include only qualifying  
16 expenses and provide a signed certification under penalty  
17 of perjury that it has followed the directive in preparing  
18 such financial statements. There's no evidence that  
19 Appellant's made the appropriate adjustments to their  
20 financial statements, nor have they certified doing so.

21 More saliently, it would have been impossible for  
22 Appellant to have prepared the financial statement in  
23 question in accordance with the directive as the directive  
24 did not exist until 2017, nearly a decade after the  
25 financial statement was produced. Appellant's counsel

1       noted that Respondent never asked for the certification.  
2       However, as pointed out just now, it would have been  
3       futile for that request as the financial statement was  
4       produced over a decade -- or around a decade prior to the  
5       directive.

6               Finally, the directive requires taxpayers to  
7       retain and make available upon request the underlying  
8       documentation supporting specific adjustments on the ASC  
9       730 financial statement. This documentation has not been  
10      provided, nor is there any indication that this  
11      documentation is available. Appellant's reliance on the  
12      directive is misplaced.

13             Appellants maintain that their research credit  
14      carry forward was allowed following a federal audit and  
15      that Respondent should follow this result. However,  
16      Respondent's policy to follow a federal determination is  
17      limited to instances to where the taxpayer shows that the  
18      IRS actually audited the specific item and made an  
19      on-point determination regarding such item. There is no  
20      evidence of an on-point federal determination regarding  
21      Appellants 2013 research credit or research credit or  
22      carry overs in this case.

23             The IRS audit papers provide by Appellant are  
24      shown in Respondent's Exhibit A. As shown in that  
25      exhibit, there is no evidence of an audit of Appellant's

1 research credit or credit carry overs. Additionally, the  
2 IRS audit year was 2011, not 2013, the year at issue in  
3 this case. And there's no evidence that Optisolar credits  
4 were utilized for federal purposes in 2011.

5 Finally, even if the IRS had audited Appellant's  
6 research credit, Respondent is not necessarily bound by  
7 that determination if it is shown to be incorrect.

8 Appellant's claim that the IRS audited the taxpayer  
9 research credit is not supported by the evidence.

10 Appellant maintains that it has established entitlement to  
11 the research credit based on certain patents. To  
12 establish qualified activity, taxpayers must satisfy four  
13 tests. These tests are known respectively as the business  
14 component test, the technological in nature test, the  
15 Section 140 -- excuse me -- the text 174 test, and the  
16 process of experimentation test.

17 Under the applicable regulations, the issuance of  
18 a patent to a taxpayer can establish that the taxpayer's  
19 activity satisfied the technological in nature test as  
20 well as the business component test. However, the patent  
21 safe harbor does not establish that the taxpayer's  
22 expenses satisfy the Section 174 test as well as the  
23 process of experimentation test, which requires that  
24 substantially all of the taxpayer's claimed activity  
25 constitute elements of a process of experimentation; here,

1 substantially all means, at least 80 percent.

2 In addition, only issued patents qualify under  
3 the safe harbor. As pointed earlier by Appellant's  
4 counsel, only 3 of the 15 patent applications listed on  
5 Appellant's opening brief resulted in issued patents,  
6 which include a named inventor listed by Appellant as  
7 having qualified wages. Appellants maintain that  
8 receiving 8 patents very strongly indicates that research  
9 was going on. Appellant is partly correct. This is  
10 precisely why the patent safe harbor exists. Respondent  
11 does not deny this. However, the statute does not allow  
12 for the issuance of a patent to satisfy all of the test  
13 for qualified activity.

14 Appellants have failed to establish, for example,  
15 the Section 174 and the process of experimentation test  
16 with respect to these patents. Respondent reminds the  
17 Panel that Appellant has failed to produce a single  
18 document as evidence of underlying qualified activity.  
19 Research documents typically support testimony to  
20 establish the several requirements of the research credit,  
21 including but not limited to the requirement that  
22 80 percent of the taxpayer's claimed activity constitute  
23 elements of a process of experimentation.

24 In appeal of Pino, the Office of Tax Appeals  
25 recognized the recordkeeping requirements under the

1 applicable treasury regulation providing that a taxpayer  
2 claiming a credit understand Section 41 must retain  
3 records in sufficiently usable form and detail to  
4 substantiate that the expenditures claimed are eligible  
5 for the credit.

6 This regulation also specifically references the  
7 document retention regulation in Section 1.6001-1, which  
8 requires taxpayers to maintain records substantiating any  
9 amount of credit claimed on a return, quote, "For as long  
10 as the records may become material to the administration  
11 of any internal revenue law."

12 Records substantiating qualified activity  
13 generally include research documentation demonstrating  
14 that a taxpayer engaged in qualified research.  
15 Unsupported statements are insufficient to satisfy a  
16 taxpayer's burden. For example, in Appeal of Pino, the  
17 Office of Tax Appeals analyzed a credit study provided by  
18 a taxpayer. With respect to the statements made in the  
19 study, the Office of Tax Appeals observed that, quote,  
20 "Merely stating the existence of an evaluative process  
21 does not show that the taxpayer actually engaged in that  
22 process, or that if the process occurred it was a  
23 qualified process of experimentation under the law",  
24 unquote.

25 Similarly here, without record of the activity,

1 merely stating that an evaluative process took place does  
2 not demonstrate that the taxpayer actually engaged in such  
3 process, that such process was a qualified process of  
4 experimentation or that at least 80 percent of the claimed  
5 activity related to such qualified process. Without  
6 documentation neither Respondent nor this Panel has any  
7 way to evaluate Dr. Keshner's testimony. This highlights  
8 the difficulty and the necessity for contemporaneous  
9 documentation mandated by the applicable federal  
10 regulations.

11 During his testimony, Dr. Keshner provided one  
12 anecdotal example of uncertainty for work purportedly  
13 performed more than a decade ago. This testimony however,  
14 fails to establish that 80 percent of all his and the  
15 other 80 employees' activities constituted a process of  
16 experimentation over the three-year period the credits  
17 were claimed to have been generated. Dr. Keshner  
18 testified that in his role as an executive at that startup  
19 company, he had many -- he wore many hats, had many  
20 different roles, performing IT, computer back up. He also  
21 testified that he spent time checking in with the various  
22 teams and performing oversight.

23 Under the treasury regulations, executives are  
24 presumed not to qualify -- executive's activities are  
25 presumed not to qualify as they are specifically



1 excluded -- and they're specifically excluded under ASC  
2 730. Appellant has not established that 80 percent of  
3 Dr. Keshner's claimed activity constituted qualified  
4 research.

5 As mentioned, a moment ago again, Dr. Keshner  
6 testified that there were roughly 80 employees performing  
7 process material and equipment development. However,  
8 there's nothing in the record or in Dr. Keshner's  
9 testimony that would support a finding that 80 employees  
10 performed qualified activity for 80 percent of the time  
11 that they were claimed to have qualified wages.

12 Appellants claimed millions of dollars in  
13 qualified research and corresponding research credit and  
14 have failed to produce a single document supporting the  
15 claimed activity. Under Section 41, research expenses and  
16 research activities must be substantiated separately. In  
17 other words, showing that research experiences were  
18 incurred does not establish that qualified research took  
19 place. The credit at issue is not awarded for taxpayer's  
20 broadly showing that they have performed research. It  
21 requires, quote, "Qualified research as specifically  
22 defined under the statute."

23 As held by the Board as well as the Office of Tax  
24 Appeals time and again, a taxpayer's difficulty in  
25 providing documentation to substantiate its entitlement to

1 a credit does not relieve the taxpayer of its burden of  
2 proof. Tax credits are a matter of legislative grace and  
3 statutes granting tax credits are construed strictly  
4 against the taxpayer with any doubts resolved in the  
5 government's favor.

6 In order to be entitled to a tax credit, a  
7 taxpayer must demonstrate that it has satisfied the  
8 statutory requirements for claiming the credit. Appellant  
9 here has failed to demonstrate entitlement to the credits  
10 at issue.

11 Thank you, and I'm available for any questions.

12 JUDGE AKOPCHIKYAN: Thank you, Mr. Hall.

13 Judge Gast, do you have any questions for  
14 Franchise Tax Board?

15 JUDGE GAST: I just have one question. Is it  
16 your position that testimony alone without any supported  
17 documentation qualifies as -- cannot qualify as qualified  
18 research?

19 MR. HALL: That's correct. And we are unaware --  
20 in light of the recordkeeping requirements in the statute,  
21 and we're also unaware of any case in which a court has  
22 found that the research credit is available without any  
23 documentation.

24 JUDGE GAST: Thank you. No further questions.

25 JUDGE AKOPCHIKYAN: Thank you.

1 Judge Leung, any questions for the Franchise Tax  
2 Board.

3 JUDGE LEUNG: I do, but I'm going to hold them  
4 until after Mr. Garvey finishes his closing remarks to  
5 answer some of my questions. So I'll just hold off.  
6 Thank you.

7 JUDGE AKOPCHIKYAN: Thank you, Judge Leung.  
8 I also don't have any questions at this time.  
9 So.

10 I'm going to go ahead and turn it over to  
11 Mr. Garvey for your rebuttal statement. You have  
12 approximately 10 minutes.

13

14 CLOSING STATEMENT

15 MR. GARVEY: So the issue in this appeal is  
16 whether FTB erred in determining that taxpayer didn't have  
17 sufficient evidence to prove any qualified research  
18 expenses. We have shown you a certified financial  
19 statement that say \$36 million. We have shown you that  
20 the IRS interrupts those financial statements, those  
21 taxpayers with a research and development credit line on  
22 their financial statements as being very close, if not the  
23 same as the research credit.

24 In fact, it must necessarily be less because an  
25 administrative agency, the IRS, could not expand the

1 benefit of a research credit beyond what the law makers,  
2 Congress, allowed. They could only develop a policy of  
3 automatically allowing credits if they knew or were highly  
4 confident those numbers were less than what the taxpayer  
5 was entitled to. It's one of the reasons I started by  
6 saying it is more likely that Optisolar under claimed its  
7 California research credit than over claimed.

8 It is certain that First Solar is getting less  
9 credit than it is entitled to because as I told you, the  
10 taxpayer has tried to be very reasonable and conceded the  
11 Tetrasun credit, a company that did nothing but research  
12 and development. Why did the taxpayer do that? Because  
13 we truly didn't have records with regard to Tetrasun.  
14 When it comes to Optisolar we have all kinds of records.  
15 We have the certified financial statements. We have the  
16 patents, and perhaps most important, work papers that tie  
17 back to the certified financial statement that give  
18 transaction by transaction, account by account detail,  
19 that quite frankly, about as a low level of information as  
20 you're going to get when you have the passage of time you  
21 have here.

22 FTB sites to Swat-Fame and Pino. Those cases are  
23 in no way comparable to the case here. I'll demonstrate  
24 that by telling you how they would do under the directive  
25 ASC 730 directive. That directive first requires that you

1 have research and development as a separate line item on  
2 your financial statements. Pino was a seller of produce.  
3 There will be no research and development line in that  
4 industry. It just doesn't exist. So the presumption, if  
5 I applied ASC 730 in that case, would be zero.

6 Swat-Fame was a manufacturer of apparel. In that  
7 industry there will be no separate line for research and  
8 development. So the assumption we would operate from is  
9 that it would be zero. Developing or inventing new solar  
10 panel manufacturing technology, a company that's involved  
11 in that will have a separate research and development  
12 line, particularly as I showed you if it's a development  
13 company. It doesn't yet have a working product. It is  
14 trying to develop one.

15 This company that FTB has determined had no  
16 research was primarily engaged in research. We know that.  
17 Not only from the testimony provided by Dr. Keshner, but  
18 from the public record, from articles that have been  
19 provided to FTB. Now, did we have individuals who could  
20 come testify exactly what happened when FTB showed up a  
21 decade after? No. And hardly any companies will. You  
22 can especially expect that to be the case here.

23 The company is acquired in 2009. The taxpayer  
24 receives work papers, account by account, transaction by  
25 transaction detail. The taxpayer can tie that back to its

1 certified financial statements. I will tell you right  
2 now, in any audit that I've been involved with, and there  
3 have been a lot, that is more than enough to sustain the  
4 research credit claim in itself. But this taxpayer  
5 brought more. This taxpayer brought patents. It didn't  
6 matter though, because the FTB would say even if you have  
7 a patent and you can tie it to an individual's wages and  
8 you can show me that that individual is a PhD research  
9 scientist, I'm not going to allow because there's another  
10 requirement.

11 That other requirement, whether these were 174  
12 expenses, is not seriously in doubt. There's absolutely  
13 no question they were. But FTB will say unless you force  
14 me somehow to do this, I simply will not accept what you  
15 want. The issue is whether FTB made an error. And what  
16 FTB is telling you today is that pretty much everyone  
17 except FTB made an error. If FTB is right, the financial  
18 statements for this company are wrong. They completely  
19 contradict each other. They are completely inconsistent  
20 with one other.

21 If the FTB is right, the U.S. Patent and  
22 Trademark Office is wrong. It found that somebody  
23 discovered and developed new processes, new products and  
24 issued eight patents. That couldn't possibly happen  
25 without research. They must have gotten it wrong. If the

1       FTB is right, the IRS must be wrong. They looked at the  
2       same credit and made no adjustment whatsoever. Everything  
3       around this is wrong except FTB according to their view.

4               It's a very puzzling and interesting argument to  
5       me, but it's not the real problem. And the most puzzling  
6       thing to me quite frankly, is FTB's insistence on an all  
7       or none approach with regard to this research credit.  
8       There are cost centers they can see that are pure research  
9       cost centers. There were individuals with wages that they  
10      can see that are PhD level research scientists. Did they  
11      allow the wages? Did they allow cost centers? No. None.  
12      Not a dollar.

13             But one thing that this Panel has got to be sure  
14      is an error as this company had zero research and  
15      development. We could argue about the numbers. That  
16      would be possible. Taxpayer begged to do that. Taxpayer  
17      wanted to do that. Taxpayer tried to sit down and go  
18      through with things. Taxpayer suggested perhaps this  
19      could be settled in some reasonable fashion. FTB's  
20      position from beginning to end was no, this is going to be  
21      all or none. And we say none. Unless you can force me  
22      somehow.

23             Well, Panel, I can't force that. You can. You  
24      have a decision. Which one is more likely an error?  
25      Optisolar had absolutely zero in research credit expenses

1 and is entitled to zero credit, or is it more likely that  
2 the number they put on their return is correct? The  
3 answer is very easy for me. In making your decision, I  
4 want you to be mindful of something though. The VP of  
5 tax, Rocchina Oesterling, sits right next to me.

6 If you were to decide that FTB was correct, her  
7 company would be subject to a large corporate  
8 understatement.

9 JUDGE AKOPCHIKYAN: Mr. Garvey, sorry to  
10 interrupt you. Can you speak a little louder. They're  
11 having trouble hearing you.

12 MR. GARVEY: I need to get closer to the  
13 microphone, Judge. Thank you so much.

14 If you decide that FTB is correct, First Solar  
15 would be subject to a large corporate understatement  
16 penalty. Now, here's a company that had certified  
17 financials, audited financial statements supporting its  
18 position. Here's a company that had full work papers  
19 transaction by transaction, account by account detail  
20 supporting its position. It pointed to patents, and it  
21 had an IRS audit that had happened four years previously  
22 where it appeared the credit was accepted.

23 I will be honest with you. It would be highly  
24 strange and unusual for such a taxpayer to continue to  
25 hold additional information even if it was available.



1 Even if they had the designs and drawings that Dr. Keshner  
2 may have, why would you possibly retain it? This was a  
3 decided issue by the time FTB showed up. And the  
4 information that FTB received was very substantive.

5 In fact, it's really the only information I can  
6 think of where FTB has an administrative policy that says  
7 you can simply accept this, adjust it as the amount for  
8 the research credit. The IRS has that policy to prevent  
9 taxpayers from being in a ridiculous situation like this.  
10 The audited financial statements are a very reliable  
11 source of information. The IRS explains in the directive  
12 that there are sequences to auditors if they get them  
13 wrong. They are to be believed. \$36 million is to be  
14 believed in this case. Less than \$36 million was claimed  
15 on taxpayer's QRE.

16 This should be an easy decision. Again, taxpayer  
17 had no QREs, no research credit at all, and taxpayer  
18 correctly reported research credit as supported by  
19 underlying work papers and all the other documents that I  
20 just went through, that should be a very easy decision for  
21 this panel to make. I look forward to hearing what you  
22 decide.

23 JUDGE AKOPCHIKYAN: Thank you, Mr. Garvey.

24 I'm going to go ahead and turn it over to my  
25 Panel members for final questions for either party.

1 Judge Gast, any questions?

2 JUDGE GAST: This is Judge Gast. I do not have  
3 any questions. Thank you.

4 JUDGE AKOPCHIKYAN: Thank you.

5 Judge Leung, any questions?

6 JUDGE LEUNG: Yes. My questions are going to be  
7 for both parties. So I have basically two questions. The  
8 first one and -- regarding the numbers for financial  
9 reporting versus IRC versus Rev & Tax Code purposes. Am I  
10 right in assuming the definition of QRE for financial  
11 reporting is broad and the definition for QREs for the IRC  
12 Section 41, which in turn is broader than the definition  
13 of QRE for Rev & Tax Code purposes?

14 Mr. Garvey?

15 MR. GARVEY: It is both broader and more narrow.  
16 It depends on which area you're in. There's a work paper  
17 that shows the type of adjustments that might be made to  
18 move from one to the other. And FTB's brief lists the  
19 type of adjustments that might be made from -- to move  
20 from one to the other. We do not believe there would be  
21 any significant adjustment under Optisolar's facts.

22 But what I'm telling you is it really would vary  
23 because on the taxpayer's facts. We don't believe there  
24 will be a significant adjustment in Optisolar's facts. We  
25 would have loved to explore that though. We invited that

1 exploration. We're disappointed there was not an  
2 opportunity to make that happen.

3 JUDGE LEUNG: Okay. Thank you.

4 Mr. Hall, do you agree.

5 MR. HALL: I agree?

6 JUDGE AKOPCHIKYAN: With Mr. Garvey?

7 MR. HALL: Yes. Respondent agrees with the  
8 statement that the QREs for financial reporting would be  
9 different than those for under the Rev & Tax Code. In  
10 certain areas they -- they may be bigger or smaller as  
11 mentioned. And I believe in Respondent's opening brief we  
12 pointed Part IV. The directive requires the taxpayer to  
13 certify that his adjusted financial statements according  
14 to Appendixes B, C, and D.

15 So the financial -- so the ASC 730 directive sets  
16 out some of the differences in where taxpayers need to  
17 adjust their financial statements in order to comply with  
18 the Revenue & Taxation Code.

19 JUDGE LEUNG: Thank you, Mr. Hall. I'm glad you  
20 mentioned the word certification because that's my next  
21 question.

22 There's a lot that's been said about  
23 certification in this case, and I am curious as to, if  
24 that certification is produced, would that put this case  
25 to rest? And what exactly is the certification you're

1 looking for, and who is it coming from, Mr. Hall?

2 MR. HALL: So the discussion that as far as  
3 Respondent's concerned with the respect to the  
4 certification is that if we could apply the directive,  
5 there are certain requirements, including the  
6 certification, that would be necessary in order for the  
7 taxing agency to accept the financial statement. But as  
8 we pointed out earlier, the directive applies to returns  
9 filed after September 11, 2017.

10 So the directive does not apply in this case.  
11 The discussion regarding certification was really to  
12 buttress the point that even if we could apply this  
13 directive, taxpayers haven't met the requirements of it.

14 JUDGE LEUNG: What is the certification that  
15 you're looking for? Who is it from? The CPAs or some  
16 state agency or certify the expenses? What is it -- who  
17 is from?

18 MR. HALL: From the taxpayer.

19 JUDGE LEUNG: So the taxpayer's CFO, CEO, CTO,  
20 whatever alphabet soup you want, that they swear on the  
21 document, that would satisfy the ASC 730?

22 MR. HALL: I'd have to look at the directive.

23 MR. GARVEY: I'll take a stab at it.

24 JUDGE LEUNG: Well, you'll get a chance.

25 Mr. Hall is --

1           MR. HALL: No, I'm finished. Yeah. I'd have to  
2 look at the directive closer. My understanding is that  
3 the directive would direct who specifically would sign  
4 that certification, but I can't tell you offhand.

5           JUDGE LEUNG: Okay. Mr. Garvey, you're chance.

6           MR. GARVEY: Thank you. So the directive  
7 formalized what the IRS had done for a very, very long  
8 time and made it mandatory going forward. For the years  
9 prior to the directive being mandatory to the years that  
10 the directive doesn't apply, there's no requirement for  
11 certification at all. There's just the FTB doing what the  
12 IRS and, quite frankly, and the FTB do as a matter of  
13 routine all the time.

14           They recognize that companies that have  
15 significant research and development on their audited  
16 financial statements must necessarily have significant  
17 research and development expenses for Section 41 purposes,  
18 unless the financial statements are just completely wrong.  
19 And that must be the assertion here. We don't believe the  
20 financial statements at all. There is a line item that  
21 really didn't even happen and couldn't be proved.

22           What the directive allows parties to do is  
23 leverage the substantial amount of effort and work that  
24 goes into certifying research and development for  
25 financial statement purposes and use it for tax purposes.

1 The reason to have such a policy is quite frankly to avoid  
2 things like this. And it's particularly important in a  
3 case like this where there has been a huge passage of  
4 time. You have to pull people in who haven't worked in  
5 the company for 15 years to testify. That doesn't make  
6 any sense.

7 If we know that the financial statement number is  
8 going to be pretty close to the R&D number, and to answer  
9 your question from earlier, it must necessarily, at least  
10 as adjusted, generally be lower. Read the directive, and  
11 it will instruct that you can actually have numbers in  
12 addition to your financial statement. It -- it just --  
13 there's nothing -- I guess the bottom line is FTB keeps  
14 saying even if we could apply the directive, we don't have  
15 a certification statement. Both of those statements -- we  
16 can't because we don't have a certification statement --  
17 both of those are incorrect.

18 The methodology in the directive can absolutely  
19 be applied here, and they could be much more confident  
20 than you generally will with a directive because you  
21 generally would only need those financial statements. I  
22 will not go through the list of other things that FTB has  
23 in this case, but they are very significant. They have  
24 way more than the IRS requires in that. That is a policy  
25 mandatory forward with the certification statement.

1           For the years we're talking about that policy  
2           doesn't apply, which means no certification statement is  
3           required. But there's no reason at all the FTB can't use  
4           that methodology. I will say it again. It is a  
5           methodology that is the longstanding practice of the IRS  
6           and was used way before the directive came out. The  
7           directive merely formalized that policy.

8           JUDGE LEUNG: Thank you, Mr. Garvey. One final  
9           question. When IRS conducted its I think examination of  
10          the taxpayer, did it receive or ask for a certification?

11          MR. GARVEY: For the years in question, the  
12          certification wasn't around. The IRS is a great question  
13          and I'll illuminate. The IRS audited the tax year 2011.  
14          On the 2011 IRS return, federal return, the IRS would have  
15          seen millions of dollars of Optisolar credit carrying  
16          forward. So same issue -- same issue presented itself  
17          federally and for California purposes.

18          There was no certification requirement as applied  
19          to 2011. But I believe, consistent with what I did  
20          previous, that the IRS probably did enough work to realize  
21          this was a development stage research company. It had  
22          certified audited financials. Those would have been much  
23          more readily available at that time, and it chose to  
24          accept the credit without further inquiry. That would be  
25          quite honestly in the IRS's advantage in this case because

1 I have about a 17 percent haircut moving from what's on  
2 the financial statements to what's being claimed for R&D  
3 purposes, and that's a pretty generous haircut between  
4 those two.

5 That is why we think the likely answer is that  
6 Optisolar under claimed its credit. I don't think it  
7 really cared so much about its credit. It was trying to  
8 develop and get a product. It wasn't making any money.  
9 It couldn't utilize the credits. I think somebody went  
10 and claimed the credits, but I don't think they were  
11 digging or trying to find things. The work papers  
12 actually make that really clear. What is picked up is  
13 just R&D cost centers.

14 I guess I will add to my list. Another thing  
15 that FTB thinks others got wrong, erred on, they think the  
16 cost centers that Optisolar setup have the wrong expenses  
17 in them. Because if those expenses are in the right cost  
18 centers, there's no way we can deny all the research  
19 credit.

20 Does that -- I wandered a little bit. Does that  
21 answer your question? Is there any follow up on that?

22 JUDGE LEUNG: No follow up, Mr. Garvey. Thank  
23 you.

24 MR. KESHNER: [INDISCERNIBLE]

25 MR. GARVEY: If it pleases the Panel.



1 DR. KESHNER: Is that okay?

2 JUDGE LEUNG: Yeah. Sure, Doctor.

3 DR. KESHNER: This is a long time ago. My heart  
4 was in it. I'm a little offended. Forgive me for being a  
5 little offended. Yes, in June of the first year I setup  
6 the phones. I setup the IT because you can't do R&D  
7 without phones, and you can't do R&D without computers. I  
8 was not an executive. I was a technical troubleshooter  
9 for the company. We had no executives. We were 90  
10 people. Executives, you know, manage finances and  
11 stockholders and whatever.

12 Everybody was working on either getting that  
13 product, getting that manufacturing, getting the testing  
14 done. Everyone was working on that. No one in R&D --  
15 I've been in R&D since, you know, my degrees, 50 years.  
16 No one in R&D anymore keeps a diary. No one keeps  
17 notebooks. The patent office doesn't require notebooks.  
18 They don't care what's in your notebook. Whoever gets to  
19 the patent office first gets the patent.

20 What people do now is they work on computers and  
21 they have files. I don't have the files of all of my  
22 engineers and scientist. But what I do have is that when  
23 one of the big four accountants came and prepared our  
24 financial statements, they interviewed the people in the  
25 company and said what do you work on? And when they put

1 the salary or the expenses in the category of R&D, it was  
2 after extensive interviews.

3 That is what is in their documentation, and  
4 that's what underlies their decision to put those expenses  
5 on the R&D line. And I think that should be acceptable  
6 for our purposes now.

7 JUDGE LEUNG: Thank you.

8 JUDGE AKOPCHIKYAN: Mr. Garvey, throughout your  
9 rebuttal you mentioned the work papers. Is that Exhibit 6  
10 that was -- is no longer -- I mean --

11 MR. GARVEY: That -- that is --

12 JUDGE AKOPCHIKYAN: -- permitted?

13 MR. GARVEY: -- correct. Taxpayer had gone ahead  
14 and submitted that as Exhibit 6. Let me give the Panel  
15 some background so you'll kind of understand that. That  
16 is something FTB has had for quite some time. I didn't  
17 have a lot to add to Exhibit 6 'cause I have no firsthand  
18 knowledge of what was going on. So I couldn't testify to  
19 that.

20 I was not sure whether Dr. Keshner should testify  
21 to that. But he and I looked at the work papers together  
22 to see if it would make a good witness, and I found this  
23 out I think about a day before a witness list was due. We  
24 went through the work papers together. And among the many  
25 things that Dr. Keshner was able to do was look at the

1 detailed wage listing that we had given to the Franchise  
2 Tax Board and say, oh, yeah. I know all these people.  
3 They're in our research department. This one has a PhD.

4 He was able to do a lot of that here. I don't  
5 think quite honestly, if he'd been able to do that  
6 earlier -- and I'm being frank here -- for FTB, it  
7 wouldn't have made any difference because we had inventors  
8 listed on patents assigned to Optisolar. And we had the  
9 wage detail. And that wasn't allowed. There was no  
10 burden that could be carried here, quite frankly, by any  
11 evidence.

12 The fortunate thing for taxpayer is the evidence  
13 that was provided was overwhelming. It is clearly more  
14 than sufficient to remove any reasonable doubt that this  
15 taxpayer had zero qualified research. That is a laughable  
16 assertion, and our job is to prove that assertion is  
17 incorrect. That assertion was incorrect.

18 JUDGE AKOPCHIKYAN: Just to be clear, the thing  
19 that you've submitted to the Franchise Tax Board, I think  
20 we discussed this at the prehearing conference, we don't  
21 have a copy of. Like, I don't have a copy of the work  
22 papers.

23 MR. GARVEY: You do not have a copy of Exhibit 6?  
24 Is that what you're saying?

25 JUDGE AKOPCHIKYAN: Yeah. It's not in the

1 record.

2 MR. GARVEY: Yeah. I -- I understand.

3 JUDGE AKOPCHIKYAN: Yeah.

4 MR. GARVEY: I understand it's not in the --

5 JUDGE AKOPCHIKYAN: To make sure we're on the  
6 same page.

7 MR. GARVEY: Yeah. Yeah.

8 JUDGE AKOPCHIKYAN: Okay.

9 MR. GARVEY: It is -- it is not -- not in the  
10 record. Franchise Tax Board, when we talked earlier,  
11 indicated they were going to oppose that. And since we  
12 felt like we had enough evidence and I believe we do  
13 without it, we were comfortable with it not going into the  
14 record. I will tell you this though. Franchise Tax Board  
15 acknowledges in their brief that they had an account-level  
16 trial balance. We state in our brief that we gave them  
17 account-level detail. So both parties acknowledge that  
18 such information was exchanged, that they are in  
19 possession of it.

20 JUDGE AKOPCHIKYAN: I have one final question  
21 about the directive. My understanding of the directive is  
22 that it establishes for the IRS the amount of qualified  
23 research expenses, but it does not establish that the  
24 research itself is qualified research under the Internal  
25 Revenue Code. What is your position on that?

1           MR. GARVEY: If it is -- the qualified research  
2 expenses -- and I'm not necessarily getting the  
3 distinction. So --

4           JUDGE AKOPCHIKYAN: Okay.

5           MR. GARVEY: -- I'll give my response, and then  
6 you tell me what I am missing.

7           JUDGE AKOPCHIKYAN: Okay.

8           MR. GARVEY: Qualified research expenses is a  
9 term of art under Section 41. Those are expenses on which  
10 a credit can be claimed. And I -- I do believe the  
11 directive is saying you can accept this subject to  
12 adjustments, you know, financial statement, some minor  
13 adjustments as qualified research expense.

14          JUDGE AKOPCHIKYAN: If I read that section of the  
15 IRS's frequently asked questions --

16          MR. GARVEY: Yes.

17          JUDGE AKOPCHIKYAN: -- on the directive maybe  
18 this might be helpful. So page 2, Question 2, "Does this  
19 directive treat the research activities under ASC 730 as  
20 qualified research activities under IRC 41 and the IRC  
21 174?

22          Answer, "No. The directive does not determine  
23 whether ASC 730 research activities are qualified  
24 research, commonly referred to as qualified research  
25 activities under IRC 41 and 174. If the IRS determines

1       that a taxpayer has satisfied all of the requirements of  
2       the directive, then the directive provides the  
3       administrative solution to accept the ASC 730 R&D  
4       statement as evidence of the QRE for the credit year."

5               MR. GARVEY: Very helpful. That -- that helps  
6       explain it to me.

7               So if you start with the general methodology by  
8       which we arrive at QREs, we have to determine if they are  
9       qualified activities. This is a burdensome process.  
10       There can be a four-part test. We may have to apply that  
11       on a cost center by cost center basis, a  
12       project-by-project basis, or an individual-by-individual  
13       basis. What the IRS is doing here is saying you don't  
14       have to go ahead and make that determination.

15               Because we are confident that the financial  
16       statement amounts will be at or below the amount that the  
17       taxpayer is entitled to, you can just kind of treat that  
18       as the amount without making that determination. So  
19       essentially, it's a substitute for having to go through  
20       the four-part test and all that kind of stuff. It is --  
21       it is a substitute but the numbers are treated the same.

22               But that makes perfect sense now that you read it  
23       to me. Does my response make sense to you?

24               JUDGE AKOPCHIKYAN: Just to summarize your  
25       response, you're saying the directive would eliminate the

1       need for a taxpayer to establish the four-part test?

2               MR. GARVEY:   Correct.

3               JUDGE AKOPCHIKYAN:   Okay.

4               DR. KESHNER:   But our accounting firm established  
5       the four-part test.

6               MR. GARVEY:   The research credit claim in this  
7       case was reviewed by the party that put together the  
8       certified financial statements.  They saw the haircuts  
9       that were being made to those certified financial  
10      statements R&D amounts to get to the research credit  
11      amount, and they indicated they were comfortable.  I would  
12      not say there was a determination on the four-part test.  
13      It's the right idea but perhaps a little bit of an over  
14      statement.

15              FTB has seen this as well in the work papers that  
16      we provided them.  The third-party audit firm says we  
17      reviewed this.  We understand the differences between the  
18      financial statements and the amount that was claimed for  
19      research credit, and we think that is the correct amount.  
20      And that makes perfect sense.  It's essentially the  
21      adjustment that FTB is concerned maybe wouldn't -- hasn't  
22      been made.  We've told them there was that adjustment.  We  
23      showed them the adjustment.  If they wanted additional  
24      adjustments, we would have entertained them.

25              We just got -- these records are insufficient and

1     you can't make us file the certified statement if I'm  
2     going to be frank -- I mean, the ASC 730 directive if I'm  
3     going to be frank about it. But yeah, the auditor  
4     reviewed the credit and determined it was materially  
5     correct.

6             JUDGE AKOPCHIKYAN: I'll hand it over to the  
7     Franchise Tax Board to respond, if you have any response.

8             MR. HALL: The directive does not treat  
9     activities as being necessarily qualified. But at the end  
10    of the day, what Appellant is asking here is for a holding  
11    under this directive would be essentially to require the  
12    FTB to accept or comply with this directive that doesn't  
13    apply on its face. And they haven't shown that they've  
14    met the requirements of -- it's simply unsupported. So --

15            JUDGE AKOPCHIKYAN: Go ahead, Mr. Garvey.

16            MR. GARVEY: I think that's a complete  
17    misstatement of what taxpayer is saying. Realize the  
18    FTB's position here is that there was no qualified  
19    research expense. I'm not trying to compel them to accept  
20    any particular number, the number that was reported. What  
21    I'm saying is the certified financial statements in this  
22    directive make abundantly clear that the FTB erred in  
23    saying zero.

24            It wasn't zero. It wasn't close to zero. I  
25    believe it was real close to what we reported. I actually



1 believe it was under claimed for the reasons I have  
2 already discussed. I'm not trying to compel the FTB to  
3 follow a directive. It doesn't have to. I'm just saying  
4 if it arrives at zero when the administrative agency in  
5 charge of administering the credit will accept the  
6 financial statement number, I think it's pretty darn clear  
7 that that zero must be wrong just based on that evidence.

8 But it's the supplemental evidence after that,  
9 the work papers, the patents, what happened in the IRS  
10 audit, the testimony of Dr. Keshner, they take this so far  
11 behind -- beyond the ASC 730. I would ask this Panel to  
12 use the research and development expenses as determined on  
13 the financial statements simply as a data point. And I  
14 wanted this Panel to know that would be good enough for  
15 the IRS today if the same audit happened, and it would be  
16 good enough for the State of California today if the same  
17 audit had happened because California has indicated it  
18 will conform to ASC 730.

19 So we wouldn't have this issue if exactly the  
20 same facts were presented today. In fact, taxpayer  
21 Optisolar would have way more proof and substantiation  
22 than it needed to sustain the credit if the same thing  
23 happened today. There's been no change in the law. It's  
24 crazy that we're saying it's zero in the past. It's  
25 100 percent after the directive. No change in the law.

1 It's just completely inconsistent. Zero to neither credit  
2 entirely determination is very clearly an error. It is an  
3 error way beyond a reasonable doubt.

4 JUDGE AKOPCHIKYAN: Mr. Garvey, quick question.  
5 Who do you think has the burden on appeal to establish the  
6 credit amount of expenses? I mean, you're saying it's not  
7 zero but you -- so you're saying it's maybe -- it seems  
8 like you're suggesting it's somewhere in the middle, but I  
9 mean, at least you're saying it's --

10 MR. GARVEY: I -- I don't think anyone had  
11 burden. I think we ended up in an unfortunate place  
12 because FTB would only say zero and not say why, despite  
13 taxpayer's repeated attempts to try to meet, to try to  
14 settle, to say what can we do, what makes you  
15 uncomfortable. You have the certified financial  
16 statements. You have the patents. Tell me where the  
17 weakness is.

18 And what I got in response -- and I'm just being  
19 candid here -- is can't force us to follow the directive.  
20 We're not going to give it to you on the patents. Even  
21 though you did all this, we're not going to acknowledge  
22 anything. There was -- there was nothing I could do that  
23 would get us a dollar or have the FTB acknowledge there  
24 might be a good dollar there. If that had happened, I  
25 would say the burden is on the taxpayer to say here, FTB

1 specifically erred by removing this item or that item.

2 And that's exactly what the taxpayer should do.  
3 The taxpayer should say you disallowed this, and this is  
4 an error. You disallowed this, and that is error. FTB  
5 disallowed everything. When I look at the credit, when  
6 the Optisolar's accounting firm looked at it  
7 contemporaneous, it looked it materially correct to them.  
8 They didn't say there were any issues.

9 I honestly don't see issues that I could bring to  
10 your attention. My honest assessment is taxpayer likely  
11 under claimed its credit. I mean it's ironic, but that's  
12 my honest assessment. So I don't think anyone has the  
13 burden other than to say, you know, if you disallowed  
14 everything that's wrong, I could, I guess, try to go item  
15 by item and explain why it should be allowed, but that  
16 would get in circles because FTB would say the  
17 documentation is not good enough for everything. It is.  
18 It clearly is.

19 It would be in the ordinary course for the IRS.  
20 I hope it is good enough for this Panel based on the  
21 evidence present today. I understand your question on the  
22 burden. I would have loved to have had three suspicious  
23 things removed, and we could talk about those three  
24 suspicious things, questionable things. I think we could  
25 have had a really meaningful discussion around that. I

1 would have loved even more to have had that discussion  
2 with FTB and not be here today.

3 JUDGE AKOPCHIKYAN: Thank you, Mr. Garvey. I'm  
4 going to give the Franchise Tax Board an opportunity to  
5 respond.

6 MR. HALL: Yes. Thank you, Judge.

7 What I'm gathering here -- now I'll just sort of  
8 get a little bit ahead is that you're asking about proving  
9 up expenses. I think that maybe, you know, my  
10 understanding -- Respondent's understanding is that  
11 activities have to be proven before you can get to  
12 expenses. And, for example, in the Suder Case which apply  
13 the Cohan Rule, if we're getting at that, in the research  
14 credit context, in order to apply Cohan, the taxpayer must  
15 first establish that qualified activity took place.

16 Now, the Panel may note that this research credit  
17 case is sort of unusual. It's not like other research  
18 credit cases where, for example, normally the parties are  
19 disputing whether certain -- uncertainty exists, or  
20 whether with respect to a particular project there are  
21 sufficient documentation or evidence of a process of  
22 experimentation.

23 Here we haven't even been able to have that  
24 dispute because we don't have that information. And  
25 that's where for Respondent it's a nonstarter. We simply

1 don't have the research documentation. The taxpayer has  
2 not met their burden.

3 And again with respect to the ASC 730, there are  
4 carve outs as stated in the directive, contract expenses,  
5 executive wages. So again, we would just reiterate  
6 proving up, even if you were to prove up expenses, that  
7 doesn't demonstrate qualified activity.

8 JUDGE AKOPCHIKYAN: Thank you, Mr. Hall. Any  
9 final remarks, Mr. Garvey or -- go ahead, Dr. Keshner.

10 DR. KESHNER: You're asking for documentation  
11 that existed at the time would have been on our back up  
12 servers is long gone. So you're creating a burden of  
13 proof that is impossible to meet. I could bring in 40  
14 people and have them each testify as to what they did at  
15 the time, and we could recreate what was going on and  
16 prove that there was research going on, that there was  
17 experimentation going on.

18 Is that the burden of proof that's required? Or  
19 is it sufficient that at the time contemporaneously our  
20 accounting firm, one of the big four, you know -- we  
21 didn't cheat on the accounting. We got the best of the  
22 best -- interviewed all the people and asked them what  
23 they did in order to make their determination of what was  
24 legitimately by the tax code allowed as an R&D credit. I  
25 think that should stand.

1           MR. GARVEY: If Mr. Garvey is allowed one last  
2 comment, he'll go ahead and say it now.

3           There is greater and better substantiation around  
4 this credit than there is in the ordinary course for  
5 things that are contemporaneous. There's no question  
6 about that. The challenge due to the passage of time is  
7 if somebody asked, well, what was this person doing or  
8 that person doing? You can't do it. You have to go to  
9 extreme measures because the folks that work there are all  
10 retired. The company, when this is first asserted, hadn't  
11 been around in nearly a decade. You ultimately have to  
12 drag people like Dr. Keshner away from their home to  
13 attend hearings like this.

14           The ASC 730 directive exist to avoid that. It's  
15 an administrative convenience to act as a substitute for  
16 this detail substantiation. There is again, nothing that  
17 would prevent the Franchise Tax Board from adopting that  
18 as their methodology for this audit. They should feel  
19 great about it because they have a whole bunch of other  
20 documentation on top of it, and the IRS today would  
21 consider that enough in and of itself.

22           In fact, the IRS for the year in question, as a  
23 matter of informal policy, would have considered the  
24 financial statements by themselves sufficient. The burden  
25 to produce documentation here is wildly higher than is

1 reasonable and that one usually sees. And the reason I  
2 think that's happening is the FTB appreciates it can take  
3 advantage of that passage of time.

4 If you go to the Exhibit F for the FTB, that'll  
5 be their audit section work notes, you'll see that First  
6 Solar is doing today many of the exact same things that  
7 Optisolar was doing, and you'll see that FTB accepted that  
8 credit. In fact, they even note some patent applications  
9 were filed and the engineers are in California. They  
10 don't, as they did in this case, say well, not all the  
11 patents were granted. They don't mention granted. Only  
12 eight of them were granted and only three of them we have  
13 wages for.

14 They simply observe as they should that a number  
15 of applications were filed, and that's pretty darn  
16 persuasive. Now, why would the two treated differently?  
17 Because in the case of First Solar, a larger company  
18 closer in time, when you go and ask for the additional  
19 detail, they're gonna have it. In the case of a smaller  
20 company that hasn't been in existence for a decade, where  
21 you're asking for records from 11 years ago, when the  
22 taxpayer produces wage detail and shows the PhD scientist  
23 that sits in front of you on that wage detail and shows  
24 his patent and that's not accepted, there really is no  
25 height that won't be accepted.

1           The burden that was setup was really high. And  
2       I'll be honest with you, I think it's because the FTB  
3       realizes that with the passage of time we could always ask  
4       for one more thing. The only thing taxpayer possibly  
5       could do, as Dr. Keshner said is we can bring 40 people in  
6       here. He knows them, and they could all testify that this  
7       absolutely was happening. This is not a practical way.

8           I have enjoyed my time with the Panel today, but  
9       I don't think the Panel wants to do this on a regular  
10      basis. We've got to look at the facts certified financial  
11      statements, patents, IRS actions, testimony of  
12      Dr. Keshner, and we got to say what really happened here?  
13      I think from today's evidence I think from today's  
14      testimony I certainly hope it is pretty clear to the Panel  
15      what happened here.

16           JUDGE AKOPCHIKYAN: Thank you, Mr. Garvey.

17           Does any party have any questions before we  
18      conclude for today?

19           MR. GARVEY: I have one question. And honestly,  
20      we can go ahead and try to do it. I guess I'm still  
21      confused. The certification is in the briefs. We didn't  
22      get a certification from the FTB. If you would like me to  
23      try and go get that certification after the fact, I can do  
24      that. I think we probably can get certified. It's going  
25      to be strange because the company went out of the business



1 in 2009, and I think people are going to wonder why I'm  
2 seeking certifications.

3 But I think we probably could have somebody  
4 review those work papers and say yeah, that looks good.  
5 I'll certify this. I think we can also make the  
6 adjustments that FTB is requesting be made. I would just  
7 ask when the credit amount goes up that we're allowed to  
8 benefit from a larger credit as well.

9 JUDGE AKOPCHIKYAN: What adjustments are you  
10 referring to?

11 MR. GARVEY: The adjustments that the ASC 730  
12 directive causes to be made between financial statement  
13 R&D to tax R&D. I -- I would love -- I would love to that  
14 exercise. I believe we'd end up with more credit than we  
15 claimed in the first place. FTB doesn't want to do that  
16 exercise, and that's why they didn't ask. That's why I  
17 believe they will refuse that invitation now.

18 JUDGE AKOPCHIKYAN: I mean, the role on appeal,  
19 just to clarify, is not what Franchise Tax Board is  
20 willing to do with you. It's what evidence has been  
21 submitted to the panel and for us to make your decision.

22 MR. GARVEY: I'm just trying to derive at a  
23 last-minute settlement. You can't blame a guy for trying.

24 JUDGE AKOPCHIKYAN: Thank you, Mr. Garvey.

25 I think we're ready to conclude this hearing.

1       This case is submitted on June 13th, 2023, and the record  
2       is now closed.

3               I want to thank the parties for their  
4       presentations today and Dr. Keshner for coming out and  
5       giving his testimony. The Judges will meet and decide  
6       this appeal based on the arguments and evidence presented  
7       to the Office of Tax Appeals. We will issue our decision  
8       no later than 100 days from today.

9               This concludes the last hearing for today, and we  
10       will start again tomorrow morning at 9:00 a.m.

11              Thank you.

12              (Proceedings adjourned at 3:16 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  
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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 28th day  
of June, 2023.

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