

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
AS SWIPE, INC.,) OTA NO. 220410267
)
 APPELLANT.)
)
)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Friday, June 16, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Electronic Proceedings,
taken in the State of California, commencing
at 10:30 a.m. and concluding at 11:54 a.m.
on Friday, June 16, 2023, reported by
Ernalyn M. Alonzo, Hearing Reporter, in and
for the State of California.

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APPEARANCES:

Panel Lead: ALJ JOSHUA ALDRICH

Panel Members: ALJ TERESA STANLEY
ALJ KEITH LONG

For the Appellant: BRIAN SPIERS
LAURA WEISS

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

RANDY SUAZO
CHRISTOPHER BROOKS
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-18 were received at page 7.)

(Department's Exhibits A-K were received at page 7)

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

	<u>PAGE</u>
By Ms. Weiss	10
By Mr. Spiers	26
By Mr. Suazo	42

CLOSING STATEMENT

	<u>PAGE</u>
By Ms. Weiss	56
By Mr. Spiers	57

1
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California; Friday, June 16, 2023

10:30 a.m.

JUDGE ALDRICH: This is Judge Aldrich. We're opening the record in the Appeal of As Swipe, Incorporated, doing business as Lucky 13, before the Office of Tax Appeals. The OTA Case Number is 220410267. Today's date is Friday, June 16th, 2023, and it's approximately 10:30 a.m.

This hearing was noticed for a virtual hearing, and is being heard by a panel of three Administrative Law Judges. My name is Josh Aldrich. I'm the lead for purposes of conducting the hearing. I'm joined by Judges Teresa Stanley and Keith Long. During the hearing the Panel members may ask questions or otherwise participate to ensure that we have all the information needed to decide this appeal. After the conclusion of the hearing, we three will deliberate and decided the issues presented.

As a reminder, the Office of Tax Appeals is not a court. It is an independent appeals body. The panel does not engage in ex parte communications with either party. Our opinion will be based on the parties' arguments, the admitted evidence, and the relevant law. We have read the parties' submissions. We're looking forward to hearing your arguments today.

1 Who is present for the Appellant?

2 MS. WEISS: Could you repeat that?

3 JUDGE ALDRICH: Who is present for the Appellant
4 As Swipe, Incorporated?

5 MR. SPIERS: That will be myself. I'm Brian
6 Spiers, I'm the owner, and Laura Weiss who is a bookkeeper
7 who works on the audit appeal with me.

8 JUDGE ALDRICH: Thank you.

9 And who is present for CDTFA, beginning with the
10 hearing representative.

11 MR. SUAZO: Randy Suazo, Hearing Representative,
12 CDTFA.

13 MR. PARKER: Jason Parker, Chief of Headquarters
14 Operations Bureau with CDTFA.

15 MR. BROOKS: Christopher Brooks, Tax Counsel for
16 CDTFA.

17 JUDGE ALDRICH: Thank you.

18 So the issues to be decided are as follows:
19 Whether Appellant has shown that adjustments are warranted
20 to the audited taxable measure, one; and the second is
21 whether interest relief is warranted.

22 Regarding exhibits, pursuant to the May 30th,
23 2023, minutes and orders, CDTFA's Exhibits A through I
24 were admitted into the record without objection. Also,
25 Appellant's Exhibits 1 through 16 were admitted into the

1 record. But after the prehearing conference, Appellant
2 submitted -- timely submitted Exhibits 17 and 18.

3 Likewise, CDTFA timely submitted Exhibits J and K.

4 So the question is for Appellant or Mr. Spiers.
5 Do you have any objection to CDTFA's Exhibits J and K?

6 MR. SPIERS: No, I don't.

7 JUDGE ALDRICH: Okay. Similar question for
8 CDTFA. Do you have any objections to Exhibit 17 and 18?

9 MR. SUAZO: No objections.

10 JUDGE ALDRICH: All right. Hearing no
11 objections, we're going to admit Exhibit 17 and 18 also
12 into the record, as well as Exhibits J and K into the
13 record.

14 (Appellant's Exhibits 1-18 were received
15 in evidence by the Administrative Law Judge.)

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

18 JUDGE ALDRICH: Okay. Regarding witness
19 testimony, Mr. Spiers, I did not see any correspondence
20 indicating that you'd be testifying today. And before we
21 get started, I want to make sure that that's accurate. If
22 not -- so is that accurate, Mr. Spiers?

23 MR. SPIERS: No, we -- we -- okay. First of all,
24 this is a new format before me. I've never been here
25 before and neither has Laura, but the intent was that we

1 we're going to be both speaking today. Laura will handle
2 most of the appeal that we're presenting today and -- but
3 I'll also speak to my ownership role.

4 JUDGE ALDRICH: So speaking could be in the form
5 of an argument or testimony. We discussed this a little
6 bit during the prehearing conference, what the difference
7 is. Are you saying that you would like to testify?

8 MR. SPIERS: No.

9 MS. WEISS: I believe we're both just presenting
10 oral arguments.

11 MR. SPIERS: Yeah. We're just presenting the
12 oral arguments. Yes.

13 JUDGE ALDRICH: Okay. Thank you for the
14 clarification there. So there won't be any witness
15 testimony.

16 MR. SPIERS: Yeah. There's no witness testimony.
17 Correct.

18 JUDGE ALDRICH: Great. So I'm just going to give
19 you a recap of how the hearing will proceed. So after
20 this part, we'll begin with Appellant's opening
21 presentation, and we allotted 45 minutes for that. Like I
22 said, if you need to make some changes to that, you can
23 waive time, ask for more time. Next, we'll switch over to
24 CDTFA's combined opening and closing statement for
25 30 minutes, and the Panel will ask questions for about 5

1 to 10 minutes. And then Appellant will have the
2 opportunity to give closing remarks or rebuttal. Like I
3 said, these are made for calendaring purposes. If you
4 need additional time or wish to waive time, please let me
5 know.

6 Unless there's questions, we're going to proceed
7 with Appellant's opening statement.

8 Mr. Spiers, are you ready to begin?

9 MR. SPIERS: Yes, I am.

10 JUDGE ALDRICH: Okay.

11

12 OPENING STATEMENT

13 MR. SPIERS: As I just mentioned, this is --
14 first of all, I want to thank everybody for taking the
15 time to hear this.

16 It's been a long, long process. A lot of it
17 probably due to Covid. I think it took a lot longer than
18 any of us expected especially, Laura and I, but we
19 understand part of the reasons. I appreciate everybody
20 here and the opportunity to, you know, give our oral
21 arguments of why we still feel there should be adjustments
22 made based on this particular business and its particular
23 nuances.

24 Laura, who I engage with to help me after I got
25 my initial audit results, which were very, very high,

1 you'll see I've come down, will speak initially. And
2 she'll try to detail where we still feel there is room for
3 further adjustments. And following Laura's oral
4 arguments, I'm going to speak and discuss, you know, the
5 business model a little bit, my ownership role, and why
6 that is in this particular situation material to the
7 overall arguments we're making and the evaluation of this
8 business and the numbers that we've come up with.

9 So thanks again, and I'm going to now turn it
10 over to Laura.

11
12 PRESENTATION

13 MS. WEISS: Thank you. I appreciate everybody's
14 time today. As you know we're here to appeal the
15 outstanding balance of the sales tax audit of As Swipe,
16 Inc., which we will both refer to from here on out as "the
17 Lucky 13". I would like to begin our presentation by
18 giving a brief history of the business and the audit as it
19 helps to establish the context of the remaining disputed
20 requests for adjustment.

21 The Lucky 13 was a niche business, a neighborhood
22 dive bar known for fast, cheap, and strong drinks, free
23 BBQs every Saturday in the summer, free popcorn,
24 terrifying bathrooms, pool tables, picnic tables on the
25 patio, and an abundance of dogs, just to give a picture of

1 what this looked like.

2 The Appellant will give you a description of the
3 investment he made and the unique issues with the building
4 the Lucky 13 leased that will give context to why the
5 business never attempted to maximize profits, maintain its
6 operating equipment or leasehold assets, or bother to
7 upgrade to expensive POS hardware systems or credit card
8 equipment. When the Appellant received the preliminary
9 audit report from the CDTFA field auditor, Mr. Thomas
10 Chow, which I included as Exhibit 18, page 1, I was tasked
11 with reviewing the calculations in this report because of
12 what Mr. Spiers felt was an outstanding and erroneous
13 estimate of underreported sales.

14 I believe a brief review of the history of the
15 audit will emphasize the two outstanding disputed items.
16 You can see on line 24, Column E of Exhibit 18 that
17 Mr. Chow, using CDTFA's standard auditing protocols,
18 determined that the Lucky 13 had a \$1,792,154 in
19 underreported sales. During the initial audit period and
20 the appeal with the CDTFA, I addressed multiple issues
21 that were corrected.

22 Many of these can be viewed in Exhibit 4, pages
23 46 to 76, titled "Audit Chronology. And they include
24 failure to categorize liquor, beer, and wine correctly in
25 the analysis of invoices; failure to separate mixers from

1 the markup calculation; and incorrect reporting of premium
2 liquor prices likely due to communication issues. And
3 though these inaccuracies in the work of the auditor had
4 an impact on the assessed underreporting, the most
5 significant adjustments that we argued and appealed are
6 related to mathematical inaccuracies that are utilized
7 within the audit process.

8 In particular, there are multiple areas where the
9 CDTFA audit procedures require the utilization of gross
10 sales percentages or gross markup percentages instead of
11 utilizing gross cost percentages to calculate their
12 estimate of possible sales given the Lucky 13's purchases.
13 For example, following the preliminary audit, the
14 Department calculated the weighted markup percentage of
15 each liquor type, applied an estimated percentage of sales
16 to well, call, premium and cocktails made to calculate the
17 markup percentage, and then applied the percentage of
18 gross sales during happy hour and regular hours to
19 determine the respective weighted markup percentages.

20 The mathematical problem with this is twofold.
21 First, the percentage of well, call, and premium sales,
22 can be calculated based on actual purchase percentages per
23 the sample invoices provided, instead of an estimate. And
24 second, the percentage of sales for discounted hours with
25 the lower markup percentage is inherently skewed downward

1 because the gross sales are lower when there are
2 discounts. For example, a gin and tonic sold at \$4 for
3 happy hour and \$6 during regular priced hours, would
4 produce a 40 percent to 60 percent breakdown of happy hour
5 and regular hour sales.

6 However, the actual cost percentage of these
7 sales are equal 50/50 as they represent the sale of the
8 same item in two different pricing periods. Performing
9 the calculation as the CDTFA did, unnecessarily increase
10 the markup percentage and the estimate of the
11 underreported sales. I can provide additional examples if
12 necessary later, which I don't think is necessary. And
13 although these specific issues have been adjusted and
14 agreed upon in the earlier appeals process, I would like
15 to highlight that these corrections of the calculations so
16 far have created a \$1,324,092 reduction in the CDTFA's
17 original estimate.

18 Again, this is an estimate that was calculated
19 using standard auditing protocols and what the CDTFA
20 proposes to be industry norms. Once these inaccuracies
21 were discovered and presented, the CDTFA agreed and has
22 recalculated their estimated underreporting with a 74
23 percent reduction from their original work due to these
24 calculation errors.

25 As to the remaining two areas of dispute, which

1 we present during the field audit and the appeals process,
2 I have attached Exhibit 1, page 3, which explains that
3 today we are requesting that, at minimum, the cost
4 utilized in the weighted markup should be based on pricing
5 and costing during the audit period, not the 2018, which
6 is after the conclusion of the audit period; and two, the
7 pour size for the martini glass of 6.03 ounces that was
8 measured by Mr. Chow in the field and reported on the
9 CDTFA Form 1311 bar fact sheet, which is found in
10 Exhibit 8, page 103 to 104, should be utilized in the
11 markup calculations. This bar fact sheet was signed and
12 dated by the bar manager, Mr. Martin Kraenkel.

13 In regard to the first issue, CDTFA's utilization
14 of 2018 pricing and costing during the preliminary audit,
15 Mr. Chow agreed to and utilized the pricing as indicated
16 on the bar fact sheet. However, in Exhibit 9, page 105,
17 Mr. Chow notified us that he was switching the prices to
18 2018 prices instead of 2016 prices because he made an
19 error by using 2016 prices with 2018 costing in his work
20 papers. He indicates an example of one brand of liquor
21 using the 2016 prices with the 2016 invoices, the markup
22 would have been 112.33 percent. And with the 2018 pricing
23 and invoices, the markup would have been 129.31 percent.

24 He concludes that had he made an error using old
25 pricing and new costing. And instead of correcting the

1 working papers to utilize the cost and prices that
2 actually occurred during the audit period of
3 112.33 percent, he applied prices and costing outside the
4 audit period, thus, increasing the markup in just this one
5 brand by approximately 17 percent.

6 The matching principle, which is the standard
7 principle in accounting would be more closely represented
8 using the pricing and costing during the audit period, not
9 after. In the CDTFA letter dated September 23rd, 2022,
10 and listed on the CDTFA exhibit list as Exhibit I,
11 page 434, Mr. Parker states that review of a prior audit
12 performed on the Appellant's business covering the period
13 from April 1st, 2011, through March 31st, 2014, disclosed
14 that the prices were lower than the claimed prices for the
15 period from January 1st, 2015, through September 30th,
16 2017.

17 The pour sizes on the lower priced drinks are
18 2.1 ounces per serving. This is 0.71 ounces smaller than
19 2.89 ounce pour size used in the current audit's shelf
20 test for liquor. It is apparent that the Appellant
21 increased the pour size and accordingly, increased prices.
22 Based on this analysis, any reduction to the prices should
23 also include a reduction to the pour sizes used in the
24 audit.

25 Mr. Parker, like Mr. Chow, is agreeing in his

1 statement with the Appellant as to the prices between 2015
2 and September of 2017, which we're still arguing should be
3 used in the audit working papers. I believe Mr. Parker is
4 arguing that either the late 2014 or late 2017 price
5 increase was made solely due to a managerial decision to
6 increase drink sizes. If he's referring to the 2017 price
7 increase when he asserts the assumption that the Lucky 13
8 made a calculated decision to increase both their pour
9 size and their prices, he is claiming that the Lucky 13
10 calculated that it would be in their best interest to
11 decrease their profit margin.

12 In the previously referenced bar fact sheet,
13 Exhibit 8, page 104, question 15, the CDTFA asks, "Are
14 pour costs evaluated?" The check box for no is marked.
15 The Appellant was asked and answered this question. It
16 was not the policy of the Lucky 13 to evaluate pour cost.
17 Mr. -- I'm sorry. Mr. Kraenkel the bar manager, although
18 he might have directed the selling prices, this was done
19 by comparison to competitors, not by mathematical
20 calculation as Mr. Spiers will discuss later.

21 I would also like to mention that this morning I
22 found the Form 1311 bar fact sheet from the prior audit
23 and Mr. Kraenkel's written answer next to question 15, as
24 to whether the Lucky 13 evaluates pour costs, was not a
25 check in the yes or no box. He wrote a question mark next

1 to this question, indicating that he did not even
2 understand what it meant. This was the manager in charge
3 of prices. He did not understand what evaluating pour
4 cost even meant at the beginning of this audit period, and
5 at the end of period he marked no. I'm happy to upload a
6 copy of this bar fact sheet. The CDTFA already has copies
7 of it.

8 In addition, Mr. Parker makes an assumption that
9 the price increases were made at the Lucky 13 solely based
10 on product sizing and not because of general inflation,
11 increased insurance, minimum wage cost, utilities,
12 inventory costs, and most importantly competitor pricing.
13 If Mr. Parker is arguing that the Appellant should use the
14 pour test from 2011 to 2014 audit for the 2015 to 2017
15 audit, the working papers should also be using the costing
16 and pricing from the 2011 to 2014 period. We are merely
17 arguing that we should be consistent with the calculations
18 utilizing pour tests, pricing, and costing from the
19 current audit period.

20 In addition, we would like to emphasize that
21 Mr. Spiers and the Lucky 13 did not appeal any of the
22 decisions in the prior audit, including the pour size, as
23 we are arguing today. In fact, he was overwhelmed by the
24 complications of these working papers, the pour tests, the
25 weighted markup calculations, and the process itself. To

1 rely on that audit in any way would be erroneous when we
2 have proven that there can be upwards of a 74 percent
3 margin of error when the CDTFA follows their auditing
4 protocols.

5 Lastly, as Mr. Spiers will tell you later, he
6 suspects that the prior audit pour test does not match
7 with what he believes is accurate at the time based on the
8 online reviews and general reputation of the business.
9 That pour test resulted in a 2.18-ounce pour, which is
10 only slightly higher than a standard pour and certainly
11 not worthy of the reputation of cheap strong drinks as can
12 be evidenced by the multitude of reviews included in the
13 exhibits, which I will reference later.

14 In addition, I have also included a cost
15 comparison worksheet, Exhibit 3, pages 44 to 35. If you
16 look sideways -- and I do apologize. I'm not very good at
17 organizing PDFs, so it's not rotated -- the column at the
18 top shows the cost comparison of the samples of liquor
19 used to calculate the weighted markup. What's interesting
20 here is that not only were the prices lower during the
21 audit period then utilized in the CDTFA's calculation, a
22 significant amount of the bottle cost in the early audit
23 period were actually higher than in 2018.

24 This reduction in bottle cost over time is
25 represented by the negative numbers on the top column of

1 Exhibit 3, pages 44 and 45. This tells us that not only
2 does the matching principal need to be considered because
3 of the price increases in late 2017 that was passed onto
4 the customers, but also due to the costing difference.

5 We provided the evidence of bottle costs. The
6 CDTFA agreed during the audit to prices per the bar fact
7 sheet, and the CDTFA conducted a pour test in the field,
8 including the cocktail sizes. We feel there is no reason
9 to utilize anything other than the samples, pricing, and
10 pour tests as determined with the field auditor.

11 As to the second issue of the pour size of the
12 martini glass, per CDTFA Exhibit I, page 434, again the
13 letter dated September 23rd, 2022. Mr. Parker states that
14 the Appellant also contends that the pour size should be
15 increased to 6 ounces for a martini. However, the
16 Appellant has not supplied documentation as to the price
17 of the specific martini drink. In response to this, we
18 would like to refer back to Exhibit 8, page 103, in the
19 third section of the bar fact sheet section titled
20 "Selling Prices Per Drinks." Rows 7 through 10 show the
21 selling prices for cocktails during the audit.

22 In addition, Exhibits 5, 6, and 7 show the specs
23 of the martini glasses and the invoices of purchases of
24 these glasses by the Lucky 13 during the audit period. As
25 shown on the manufacturer website, this martini glass is

1 an 8.25-ounce glass. And the pour test, as conducted by
2 the field auditor, produced a 6.03-ounce pour, showing the
3 Appellant was still leaving 27 percent of the glass
4 unfilled. Which for anyone that has ordered a martini
5 would know this is commonplace, not an egregious over
6 pour.

7 Referring again to the night of September 22nd --
8 nope -- September 23rd, 2022, CDTFA letter, Mr. Parker
9 states, "Nor has the Appellant shown if the sales of this
10 particular martini drink is considered material." In
11 response, Mr. Spiers and I do not contend that the sales
12 of martini drinks is large. In fact, it is listed only as
13 5 percent of total sales. The adjustments of this has a
14 very minor impact on the outcome of the working papers.
15 However small that amount may be, it still represents
16 sales tax that the Appellant does not owe.

17 Moving back to the CDTFA Exhibit I, page 434, the
18 CDTFA states the industry norm for pouring a drink with
19 twice the amount of alcohol than drinks is to increase the
20 price as to not impinge on the profit margin, and that is
21 based on the Department's experience, liquor pour sizes
22 range between one-and-a-half to two ounces per drink.
23 Greater than a 2 ounce pour size increases the price of
24 the drink. Higher selling prices compensate the business
25 for the additional cost of the alcohol.

1 In response to these statements, there are three
2 issues here. The costing methodology of the Lucky 13, the
3 pour size as evidenced by online reviews, and the lack of
4 necessity from Mr. Spiers and the Lucky 13 to change their
5 operating procedures. As I mentioned previously, during
6 the field audit, the manager of the Lucky 13 attested to
7 the fact that the Lucky 13 did not evaluate pour cost. In
8 addition, the CDTFA argues that the pour sizes are outside
9 industry standards and we agree.

10 Throughout the audit process, Mr. Spiers has
11 provided multiple online reviews showing that the
12 reputation of the Lucky 13 was one of quick, stiff, and
13 cheap drinks. We have included some of these reviews in
14 Exhibit 10, an article by Broke-Ass Stuart -- excuse my
15 language. That's his name -- who is an SF nightlife
16 reporter. And he reports the Lucky 13 has cheap well
17 vodka, cheap drinks, where the pros come to drink. One of
18 the only bars in the city that consistently does buybacks.

19 Exhibit 11 is a 7x7 magazine article which states
20 that the Lucky 13 has what we believe to be the best happy
21 hour in America. Exhibit 12 has yelp and Google reviews
22 stating the following: \$4 mystery shots. The great part
23 of it is the cheap booze. Affordable spirits. The
24 bartender was quick and poured a heavy dose. Cheap drinks
25 but kind of stinks. Be prepared to hold your nose. Four

1 beers under \$20. Cheap drinks and cool bartenders.
2 Neighborhood bar with great cheap beer and dogs. Cheap
3 drinks, fun atmosphere, free popcorn. Cheap drinks, cool
4 peeps and some of the greatest bathroom poetry. Dive bar.
5 Cheap drinks, great prices, free popcorn. PBRs are cheap.
6 Cheap drinks and smoking patio, generous single malt
7 pours. \$5 Pliny and good vibes, great prices. There are
8 more in the exhibits.

9 The CDTFA argument of matching the pour cost and
10 pricing to industry norms is certainly relevant for
11 determining averages. But there is no legal requirement
12 to fall within industry norms. And per the obvious Google
13 reviews, the reputation of the business is outside of
14 these norms. Adding to this, the Lucky 13 was not managed
15 for maximizing profit. Mr. Spiers' career is in an
16 entirely different industry. He made \$150,000 investment
17 that required little to no work effort. He merely managed
18 banking deposits, not even most of the check writing.

19 He was fundamentally an absentee owner. He
20 earned \$4,000 a month salary for 20 years. Many of these
21 years the business also earned profits that added to his
22 \$48,000 annual passive income. This is a whopping
23 32 percent minimum passive return on investment per year,
24 which is astronomical for an absentee owner, especially in
25 this industry. And he will be able to recoup his entire

1 investment when he sells the liquor license.

2 As Mr. Spiers will explain, the Lucky 13 manager
3 Mr. Kraenkel had been in place in the managerial position
4 for the establishment prior to Mr. Spiers' investment in
5 the business. He was in charge with handling -- he was
6 charged with handling vendor and customer relations, event
7 planning, staffing, and scheduling. He's a very skilled
8 front-of-the-house manager. However, he has no
9 understanding of calculation of pour cost, what industry
10 averages are, or what cost of goods sold even means.
11 Again, I can produce the prior Form 1311 that shows that
12 he didn't even understand how to answer that question.

13 And although the combination of an absentee owner
14 and an on-site manager that doesn't understand pour cost
15 leads to minimize profit, and a lack of financial
16 analytics for decision making, Mr. Spiers had no reason to
17 be concerned or upset about the money he was earning on
18 his investment. He, therefore, had no reason to request
19 pour cost analytics. In this unique instance, the bar
20 staff was happy with the money they were making. The
21 owner was happy with his return on investment, and the
22 customers, as earlier referenced, were quite pleased with
23 the establishment.

24 Outside of this audit there was no reason for any
25 review of profit maximization. There's no requirement for

1 a business to optimize its sales through pricing. There's
2 no requirement to increase prices based on vendor costing.
3 There's no requirement to increase prices based on minimum
4 wage or insurance cost either. Most small business owners
5 of the mom-and-pop variety do not have the time it takes
6 or the resources to focus solely on mathematical
7 analytics.

8 The combination of these factors and Mr. Spiers'
9 absenteeism and contentiveness with his earnings all
10 reasonable facts that created a profit margin outside of
11 industry norms. I have utilized the CDTFA working papers
12 as a template where I recalculated the results with the
13 pricing and costing from 2016 and included the martini
14 glass pour size as measured on the on-site pour test.
15 These calculations are in Exhibit 2, pages 5 to 43.

16 I do need to apologize and make a correction for
17 the record. I copied the original working papers from the
18 CDTFA files for this calculation. And in my copying and
19 pasting, I did not realize until my review this week that
20 Mr. Chow's name is still listed on these pages as the
21 preparer. And I would like to make clear that this
22 exhibit, Exhibit 2, was not prepared by the CDTFA office
23 or Mr. Chow.

24 My results when addressing these two issues shows
25 a total of \$268,433 in underreported sales with a balance

1 due of \$23,419. This amount is specifically shown on
2 Exhibit 2, page 5, Row 24, Columns E and H. We are
3 requesting that these calculations be taken into
4 consideration and the audit be adjusted at a minimum based
5 on the above arguments. This would reduce the outstanding
6 balance due by \$17,324. We're all sitting here for
7 \$17,324. Putting this into perspective, this is only a
8 0.96 percent reduction of the original preliminary audit
9 results. Mr. Spiers is asking for a reduction of less
10 than 1 percent of the preliminary audit results based on
11 the evidence as presented.

12 I would also like to address the fact that
13 Mr. Spiers, as he will explain further, does not agree
14 that the Lucky 13 had an additional \$268,433 in taxable
15 transactions that were not reported during the time frame.
16 The preliminary audit results -- the final audit
17 results -- the reaudit results and my calculations all
18 based on estimates of what a business could have sold
19 given a very narrow sample of purchases in a short period
20 of time with a convoluted calculation to extrapolate a
21 possible outcome, if and only if those exact products were
22 purchased in the same proportion at the same cost over a
23 three-year time period.

24 Mr. Spiers stands firm that the sales tax
25 findings were reported accurately and no underreporting

1 occurred. However, we both recognize that with our
2 limited resources the challenges of arguing these
3 calculations and the delays that are holding up the sale
4 of Mr. Spiers' license, it's our sincere hope that, if
5 nothing else, the minimal adjustments that I have detailed
6 can be made so that we can move on -- or he can move on.

7 That's all.

8 Mr. Spiers.

9 JUDGE ALDRICH: I believe you're muted.

10 MR. SPIERS: Thank you so much, Laura. I think
11 you really covered our position very, very well, including
12 some of the nuances of the ownership that I want to
13 discuss now and how this business was run for the 20 years
14 that I had it.

15 So just a little background on myself. I'm a
16 general contractor and a building developer. I'd never
17 bartended in my life. I've been in bars, including the
18 Lucky 13 numerous times, but I'd never bartended. In
19 2020 -- so just to keep for the Judges, I'm referring a
20 lot to Exhibit 15, which is the narrative that I -- a
21 letter that I included in the exhibits kind of giving
22 background of my ownership. And I'm going to add some
23 additional comments over and above what I included there.

24 But the background on my ownership is I was
25 approached by a realtor that I knew in 2020. He knew me

1 as a small developer at the time who is also a general
2 contractor builder. I had built a few smaller projects,
3 such as pair of flats and single-family homes. The
4 Lucky 13 was going to be sold because the owner of that
5 bar and about maybe 6 or 7 others had been deceased, and
6 he was in charge of the estate.

7 So he knew me, and he thought, oh, this is a
8 small piece of land. It's only 25 feet wide, 90 feet
9 long. This might be something I could purchase, not to
10 own a bar, but to maybe demo it myself and build a small
11 project there on the 25-foot wide lot, which I had done at
12 that time, in 2000 I had done previous projects like that.
13 I did not have the capital to buy the land. But
14 coincidentally I just happen to know the guy that owned
15 the lot next door, which is 50 feet wide, who is also
16 another realtor that I had worked with. And, in fact, had
17 sold some of my previous properties for me.

18 We had a very tight relationship. I had
19 mentioned it to Bill Brown that a realtor had approached
20 me to purchase the land and said I can't buy it. I know
21 the guy who can buy it. He's got the lot next door. He's
22 a developer. He's done larger projects. He's the right
23 guy. So that's what happened. Peter Naughton purchased a
24 bar in 2020. And at that time he said to me, "Brian, I
25 know nothing about bars."

1 He was an older Irish gentleman. He goes, "Would
2 you, you know, own the bar, and just kind of oversee it
3 for me as a caretaker for three years. I'm going to
4 immediately go in and get permits for a development
5 project."

6 So, you know, I hesitated and I thought about it.
7 I went to the bar and met Martin, who I liked. I kind of
8 saw the situation there that it was a real neighborhood
9 bar. It was the prototypical dive bar. That's what it
10 was. The lease was a one-page lease, and that's exhibit
11 number --

12 MS. WEISS: 14.

13 MR. SPIERS: 14. Thank you, Laura.

14 Laura is much better than me. I have it here in
15 my notes. That's Exhibit 14.

16 So just to give you an idea, the lease was for
17 three years. It was at \$6,500 a month. No security
18 deposit. That -- my payment never changed over 20 years.
19 I had the same fixed cost for 20 years. Mr. Naughton
20 rapidly moved to get a demo permit approved. I think he
21 had one approved as early as -- one of his first demo
22 permits -- as early as fourth quarter of 2022.

23 Subsequently, the lot next door came for sale,
24 which was a three-unit building.

25 MS. WEISS: Brian, can I interrupt you for one

1 second?

2 MR. SPIERS: Sure.

3 MS. WEISS: You keep referring to 2020 and 2022,
4 and I believe you actually mean 2000 and 2002.

5 MR. SPIERS: Oh, yeah. Sorry. 2000. Thank you,
6 Laura.

7 2000 and 2002. So in 2002, he was approved for a
8 demo permit for the first time. And I included all of the
9 planning exhibits -- probably Laura beat me to this too.
10 Exhibit 13, I believe, has all the permits. It's the
11 permit history. You'll see that. At that time the lot
12 next door, which actually had the backyard patio for the
13 bar at the time, the owner approached me to buy it. And I
14 said I don't want to buy it. I didn't have the funds at
15 the time.

16 Mr. Naughton, in addition to what he already
17 owned, bought that property. So now he had 100 feet of
18 frontage, and he redesigned the building and resubmitted
19 it. And, again, got permits for another building. It got
20 appealed because of some landmark issues with the
21 three-unit building. He decided to sell it. And then
22 2008 hit and the economy crashed and development kind of
23 ceased for a while. So I'm not going to go chapter verse
24 over the 20 years of the permits. You'll see them there.

25 But this bar in various articles, which we

1 provided, was scheduled for demo numerous times, much to
2 the concern of all the neighbors. They loved the place.
3 It was a real neighborhood joint. People would walk there
4 from all over the neighborhood. Mr. Naughton wanted the
5 bar to stay open and not be a closed shuttered business
6 because he did not have a demo permit in the beginning.
7 And number two, it would be labeled an abandoned building
8 by the city, which would cost additional insurance funds
9 and an annual fee to the city and thirdly, for
10 neighborhood goodwill.

11 He had to get approval from the neighborhood
12 groups to do a building there and shuttering a business
13 three years or four years or five years prior to actually
14 developing it would have created bad goodwill for him and
15 his approval process. So that's basically how I came into
16 business.

17 Laura has hit on a lot of the perimeters of -- of
18 my role as an absentee owner. I had my own business to
19 run. As Laura stated I was making money. The rent never
20 changed. I was able to make payments comfortably. I
21 would occasionally go into the bar and bring friends in
22 and be able to have some drinks, you know, to host my
23 friends. It was kind of a sort of charming little
24 ownership for me, and I enjoyed it, and I enjoyed the
25 staff.

1 I wasn't a bar owner. I did not have the
2 expertise or the time to, you know, start going into
3 pricing drinks and pour cost and profit margins. I was
4 there as a caretaker, and that's how I saw my role. And
5 again, this lease was three years, and for the last
6 17 years I was on a month-to-month basis. Never -- the
7 lease never changed, which is really interesting and kind
8 of unheard of.

9 The building itself was dilapidated. And Laura
10 made a joke and mentioned, you know, the conditions. Well
11 the joke kind of was once you got past the smell, you
12 know, you can sit down and enjoy a drink. It was old an
13 old building. Bathrooms were in the front. Refrigeration
14 was antiquated. It led to, you know, probably a lot of
15 lost beer and foam especially, on warm days. I was not
16 going to invest capital in something that I thought could
17 be torn down in six months or a year, you know, over and
18 over and over. So it made no sense to me. The owner did
19 not want me to do that. And so those conditions persisted
20 throughout my ownership.

21 One thing I haven't hit on is the name As Swipe,
22 and I know we're all laughing about it under our breath.
23 And I used to get laughed at when I went into the bank.
24 The entity that sold the bar business was called Al Kies.
25 You know, it was a play on words. They called it Al Keys,

1 two words. So I named the bar As Swipe as kind of an
2 inside joke when I met him, because I thought I would only
3 have it for three years. That's why the name is kind of
4 part of how I viewed owning this bar.

5 We were audited in -- the initial audit happened
6 '11 -- excuse me -- '12, '13 and '14 were the years that
7 we were audited. And that number, while not as high as
8 the 1.8 number that Mr. Chow came out with initially on
9 the current audit, was also quite high. At the time I was
10 kind of shocked. You know, I appealed as much as I could
11 within the processes of the CDTFA. I did get that number
12 reduced significantly. The final results weren't realized
13 and where we landed until 2016.

14 This audit covers 2015, '16 and '17. And in 2016
15 when I had settled the previous audit, I did talk to the
16 manager and staff -- not all of them but some of the
17 staff -- and said look, you've got to lighten up on comp
18 drinks, you know, self-consumption and just try to, you
19 know, run a little tighter ship here. Again, there was a
20 pending demo. I'd never thought I'd get audited again.
21 But if you look at the results from '15, '16, and '17, you
22 will see we remarkably improved in '16 and '17. Most of
23 the unreported sales of this current audit are from '15,
24 which is while I was still going through the previous
25 audit. So things did improve. And so I just think I

1 should be noted.

2 You know, Laura already mentioned this. To think
3 that I would tell -- go into the bar and tell the staff to
4 make stronger drinks so we could charge more, it's really,
5 you know, kind of laughable based on my -- my ownership
6 position and nothing I would even consider doing. We were
7 known everywhere as the cheapest drinks in town. Yeah.
8 Strongest, cheapest. You know, Broke Ass Stuart said
9 every third drink was free. That -- I didn't see that
10 article until 2020 when he wrote it, but we referred to it
11 earlier, the article he had written.

12 So it gives you an idea of what the regulars
13 experienced in there, and most of our business was during
14 happy hour when we sold the cheapest drinks, and we had a
15 very large following was -- were these regulars. So I'm
16 sure they were getting a lot of comp drinks, a lot of very
17 strong drinks. And I do think in fairness to the CDTFA,
18 it's way outside of industry norms. Certainly --
19 certainly bars that they would audit that have a very
20 accurate POS system, you know, cameras on the bartenders,
21 not free-pouring drinks, you could use those standards and
22 come up with a pretty accurate number based on invoices.

23 But in this situation, drinks were free poured.
24 There were no cameras. You know, the bartenders were
25 supposed to write down the comps they gave out. You know,

1 whether they wrote them all down or not, it's conjecture.
2 But I have a feeling that it was a pretty loose situation
3 in there. I wasn't in there at night.

4 I actually, you know, recommended to Thomas Chow
5 maybe, you know, send somebody in there on any night of
6 the week. Just send somebody in there and order a drink.
7 Or send someone you know in there and order a drink and
8 tell me what their experience is. Because, you know, I'm
9 not making it up that these are strong drinks and this is
10 how business is run.

11 I understand the CDTFA's positions and why
12 someone would run a business like that, but the nuance
13 explained why. I wasn't there for bottom line, and I --
14 and I didn't own in that type of business. Now, if rents
15 increased every year by 3 percent -- which every other bar
16 experiences minimally -- I probably would have had a
17 different view of this. I may have decided not to
18 continue the month-to-month ownership for the owner and
19 let him deal with it on his own, but that was not the
20 situation here.

21 So I'm just trying to give you a picture of why
22 it appears that I ran a very sloppy business, and I'm
23 giving you the reasons behind this. I was very, very busy
24 with my own business. I was a contractor working full
25 time. And as things progressed from 2000 to 2020, I

1 started to do much bigger and bigger developments,
2 including in that neighborhood. So this was something I
3 didn't spend a lot of time on.

4 We referred to the articles. They're in
5 Exhibits 10, 11, and 12, and there's numerous, you know,
6 Yelp reviews, newspaper articles that really back up what
7 I'm saying. And these articles were written over the
8 entire period of that bar ownership from 2000 to 2020.

9 The pour test, that I thought Laura addressed
10 very well. The pour test I think the first time around my
11 manager did it with the previous auditor from the CDTFA.
12 His name was Guang Jin Zhou. A very nice man. In fact, I
13 have no problem with the professionalism with the CDTFA
14 throughout. They have listened to all of our concerns.
15 They have adjusted accordingly, and they have been very
16 professional to work with. So I have nothing negative to
17 say about my experience.

18 It took longer than I thought. And I -- you
19 know, a lot of that, I think it could be related to the
20 Covid. It slowed everything down. But, you know, that
21 first pour test it was -- you know, Martin's first
22 language is not English. He's German. And Guang Jin
23 Zhou's first language is not English either. So I think
24 there was a little bit of miscommunication. Martin had
25 never done it before.

1 As Laura attested to, you know, he didn't
2 understand. He didn't run formulas on how to price
3 drinks. And I think the confusion on some of the pours
4 where he got confused with a shot in a rocks glass for
5 drinks, and somehow it was like we poured like a jigger
6 shot that you would see in a glass with a lime. That was
7 a large percentage of our sales, which would be a measured
8 pour. Which, in fact, that was a very small part of our
9 sales. Most of -- all of our drinks were free pour.

10 So anybody with, you know, bar experience in
11 owning a bar knows that if you don't use a jigger and it's
12 free pours and you're known as the strongest drinks in
13 town, I bet over 90 percent of those drinks were two-ounce
14 pours. That's -- just didn't happen there. Two-ounce
15 pours is what you see, you know, in a place that pours
16 drinks with a jigger. That's a measured pour. So again,
17 that's just part of the nuance of why it seems like we're
18 so outside of the norm. But I think Laura has hit those
19 points extremely well.

20 You know, regarding -- I'm also appealing the
21 interest. And the reason I'm appealing the interest is
22 that, you know, the first result came back to us -- I'm
23 going by memory here -- at the end of 2019, and it was --
24 it was staggering. It was a shocking number. It was \$1.8
25 million under pour. It didn't have the interest

1 calculated at that point, but just the tax due was a large
2 sum. I did feel, based on my previous audit experience,
3 that we would be able to work on that number and get it
4 down once we, you know, go again.

5 I hired Laura because it was overwhelming for me.
6 She's been a very big help. She has background in the bar
7 business. She's a bookkeeper. So, you know, I really
8 appreciate her due diligence in getting it already reduced
9 close to 75 percent. But the number that wasn't reduced
10 to an even more reasonable number until March of 2020 when
11 it was reduced to approximately \$880,000 -- again, going
12 by memory -- and with the interest, et cetera, the tax --
13 the total bill due was about \$115,000.

14 Now remember March of 2020, that's when Covid
15 started. So my bar shut down on March 15th, And we
16 didn't -- we don't serve food in there, other than free
17 popcorn that we alluded to earlier. So there was no money
18 coming in. I was still paying rent because there was
19 another new landlord at that time. He just purchased it a
20 year prior. He didn't raise the rent, but I had to pay
21 it. And we were unable to open.

22 So I had no money coming in at all. I didn't
23 have the funds sitting in that account to pay, and we were
24 still working on our appeal. It wasn't until 2021 that
25 the appeal was lowered -- or excuse me -- our

1 underreported was lowered once again to a more reasonable
2 number of 400 and -- the current numbers we're at 460 or
3 whatever that number is. Again, at that time I had
4 already taken and an SBA loan to pay the interest, and we
5 had been closed since December of 2020.

6 This business opened in the fourth quarter of
7 2020 for about two months. We can only open part-time
8 because business was sparse. We opened on the weekends.
9 After that experiment, both myself and the staff
10 weren't -- nobody is making enough money. I was paying
11 the rent. We shut the business down completely in
12 December of 2020, and that building right now is still
13 vacant.

14 So given the time -- given the original amount
15 that was due, and I didn't have the funds in that
16 particular business to pay up front and wait later and try
17 to debate to see if we owed it or not, and how long it
18 took -- a lot of it due to Covid and some slow responses
19 maybe but mostly due to Covid, I think -- I feel that I
20 should be relieved on the interest due based on the
21 circumstances.

22 And, you know, Laura at the end is arguing for
23 a -- based on her data that she's provided with her
24 accounting expertise, lowering this another \$17,000 of tax
25 due and dropping the underreported number down maybe close

1 to another 50 percent, you know, and that's our goal here.
2 I do want to say that I agree that, you know, I'm not sure
3 we underreported \$300,000 in sales, you know.

4 Whatever came into that bar, you know, was
5 deposited into the bank, and that's how we ran the
6 business. I did some of the deposits. Martin did some of
7 the deposits, and my wife occasionally would do some of
8 the deposits for me. But we still don't feel that we
9 unreported a significant amount of sales. It might have
10 been some of the other issues in the bar that could have
11 contributed to that, that we've already talked about.

12 So that's pretty much my statement with regard to
13 my ownership role, and why I think that is material to the
14 overall consideration of our appeal, and I'll concede any
15 extra time we have.

16 JUDGE ALDRICH: Thank you, Mr. Spiers. Before we
17 move over to CDTFA's combined opening and closing, I did
18 have a brief question, and I'm not sure who would be best
19 to answer it. Perhaps it's Ms. Weiss. But with respect
20 to the martinis, could you define what do you mean by pour
21 size? I just want to make sure that we're not speaking
22 past one another.

23 MR. SPIERS: You're muted.

24 JUDGE ALDRICH: You're muted.

25 MS. WEISS: Sorry. I was looking for the -- I

1 was trying to get it there.

2 The martini pour size, when Mr. Chow came in --
3 and the CDTFA could correct me if I have part of this
4 wrong. I was not present. This is my understanding of
5 what happened. As they take each size of glassware that
6 the business has, and they have one of the bartenders --
7 just one of the bartenders, not everybody that worked
8 there -- do -- mimic what it would be to pour the alcohol
9 into that drink size. And then the field officer takes
10 the glass and measures the amount of alcohol that was
11 poured into each of the glass sizes.

12 And for the martini glass in particular, the
13 Libby 400 cosmopolitan glass is a martini -- a stemless
14 martini glass that just has -- it's a bulb at the bottom
15 so it's just a V-shaped glass. It's 8.25 ounces. From
16 the report, again I was not there, Mr. Kraenkel poured
17 6.03 ounces into the martini glass, and then Mr. Chow took
18 that martini glass with the 6.03 ounces and poured it into
19 his measurement -- you know, a measuring cup -- again, I
20 can be corrected if this is wrong -- and then marked down
21 what that pour size was on the bar fact sheet 1311, which
22 off the top of my head, I don't know the exhibit number.
23 Exhibit 8.

24 JUDGE ALDRICH: Okay. And so with respect to the
25 martinis, were the -- this is, I guess, a bit more

1 factual. But in the evidence will I find anything
2 regarding the composition of those martinis? So for
3 example, some martinis may be straight up. Other martinis
4 may be like a Manhattan and have other, like, juice or
5 additives into the martinis that do not constitute liquor.

6 MS. WEISS: Totally. They -- so that range could
7 even be wider than just a Manhattan or a martini. It
8 could be a cosmo. It could be -- you know, sometimes
9 people just say, can you make me a bullet, you know,
10 shaken up with nothing else in it. So there is no --
11 there was no -- there was a question at some point in the
12 audit about what cocktails -- a sample of cocktails. And
13 the answer, I believe in the audit, only had one type of
14 booze. Which as we all know, is not representative of any
15 bar in the U.S. over a three-year time period that only
16 one singular type of booze would be used in that -- I'm
17 sorry -- liquor, not booze, in any cocktail size or glass
18 or whatever.

19 The Lucky 13, as far as I know, had no way of
20 monitoring how much any one particular brand of alcohol
21 liquor was utilized in a shot versus -- like if we use
22 Ketel One for example, how many of the Ketel One drinks
23 were actually sold in a shot versus as Ketel soda versus a
24 Ketel martini. There's no delineation of those
25 differences in sales. There -- there are sometimes where

1 there would be a Triple Sec and cranberry juice or sweet
2 Vermouth and bitters in a Manhattan. But, again, I don't
3 have any access to any delineation of those type --
4 differences in the utilization of the martini glass.

5 JUDGE ALDRICH: Okay. Thank you.

6 So at this time I think we're going to switch
7 over to CDTFA's opening and closing presentation, if
8 you're ready, Mr. Suazo?

9 MR. SUAZO: I'm ready. No other judges have
10 questions?

11 JUDGE ALDRICH: There will be an opportunity for
12 more questions after CDTFA's portion is concluded.

13 MR. SUAZO: Okay.

14 JUDGE ALDRICH: But I guess in your presentation
15 at some point, even if it's just a closing, could you
16 define what pour size means according to the Department's
17 position?

18 MR. SUAZO: Sure.

19 JUDGE ALDRICH: Thank you.

20

21 PRESENTATION

22 MR. SUAZO: The Appellant operated a bar doing
23 business as Lucky 13 in San Francisco, California. The
24 business was previously audited for the period from
25 April 1st, 2011, through March 31st, 2014. The audit

1 period to be discussed today is from January 1st, 2015,
2 through December 31st, 2017.

3 Records reviewed included federal income tax
4 returns for 2015 and 2016, profit and loss statements,
5 general ledgers, bank statements, and purchase invoices.
6 The Appellant utilized two cash registers. However, no
7 sales tapes were maintained to verify prices of drinks,
8 percentages of types of drinks sold, or recorded sales
9 amounts. Credit cards were not accepted and sales were
10 cash only; Exhibit B, page 21.

11 Comparison of federal income tax returns recorded
12 sales to sales and use tax returns reported sales
13 disclosed no discrepancies. The review of the federal
14 income tax returns disclosed a small loss for the combined
15 two-year time period and minimal wages paid; Exhibit F,
16 page 308. Bank deposits were also compared to sales and
17 use tax returns reported sales for the audit period, and
18 revealed that not all sales were deposited into the
19 Appellant's bank account; Exhibit F, pages 306 and 307.

20 The Department calculated Appellant's markup
21 using sales and use tax return record sales to alcoholic
22 beverage purchases per the general ledger. This markup
23 was just under 107 percent; Exhibit F, page 305. The
24 markup was considered unreasonable because it was far
25 below the industry averages.

1 In addition, the prior audit's audited markup of
2 214 percent, Exhibit H, page 360, is more than double this
3 audit's recorded markup. As a result, the Department used
4 alternative methods to determine if Appellant had
5 unreported taxable sales. A purchase segregation was
6 performed for the third quarter 2016 period. The
7 purchases were segregated into the following categories:
8 Well liquor, call and premium liquor, wine, bottled beer,
9 draft beer, mix and miscellaneous beverages, along with
10 supply items.

11 Weighted percentages for each category were
12 computed; Exhibit E, pages 260 to 265. Shelf tests were
13 conducted on the aforementioned categories using purchase
14 invoices provided by the Appellant for April and May 2018,
15 and the Appellant's prices per the bar fact sheet;
16 Exhibit F, pages 309 and 210. Bottled beer markup was
17 adjusted for 1 percent breakage allowance; Exhibit E,
18 pages 258 and 259. Draft beer markup was adjusted for
19 regular and happy hour pricing and a spillage allowance of
20 10 percent; Exhibit F, pages 294 and 297. Wine markup was
21 adjusted for a 6 percent allowance for spillage;
22 Exhibit F, page 291.

23 Well, call and premium liquor markup was adjusted
24 for various pour sizes based on the type of glass used and
25 the percentage of liquor as estimated by the Appellant on

1 the bar fact sheet; Exhibit E, page 257. Happy hour and
2 regular pricing and a 12 percent spillage allowance was
3 also granted; Exhibit E, pages 251 to 256. The shelf test
4 markups were applied to the weighted percentages of the
5 segregation test to calculate an overall weighted markup
6 of just over 167 percent on alcoholic beverages; Exhibit
7 E, page 250.

8 This markup is lower than the prior audit's
9 markup of 214 percent. Then the Department calculated the
10 audited cost of goods sold; Exhibit E, page 249, using the
11 general ledger purchases of alcohol, Exhibit F, page 25,
12 reduced by the taxpayer agreed unreported
13 self-consumption, Exhibit F, page 282, and Exhibit H,
14 pages 376 to 378, and pilferage of 2 percent. The markup
15 factor was applied to the audited cost of goods sold to
16 calculate audited taxable sales of close to \$2.7 million.

17 The audited taxable sales were compared to sales
18 and use tax recorded taxable sales of \$2.3 million, and a
19 difference of \$375,000 was computed; Exhibit E, page 249.
20 The total taxable measure assessed in the audit is
21 \$468,000, which is from the \$375,000 in unreported taxable
22 sales and \$91,000 in unreported taxable self-consumption;
23 Exhibit F -- Exhibit E, page 241. Sorry.

24 Appellant claims drink prices changed in
25 February 2018 and markup should be based on the pricing

1 for the period from January 2015 through January 2018. As
2 stated in Department's additional reply brief, Exhibit I,
3 page 434, a review of the prior audit performed on the
4 Appellant's business covering the period from April 1st,
5 2011, through March 31st, 2014, disclose that prices were
6 lower than the claimed prices for the period from
7 January 1st, 2015, through September 30th, 2017.

8 The pour sizes and the lower priced drinks are
9 2.18 ounce per serving. This is 0.71 percent ounces
10 smaller than the 2.89-ounce pour size using the current
11 audit shelf test for liquor. The shelf test in the prior
12 audit used selling prices and purchase invoices for the
13 months of September and October 2014; Exhibit H, pages 360
14 through 374. Bar industry average for liquor drinks is
15 about 1.5 to 2 ounces. The 2.89 ounce pour used to
16 establish a markup on liquor for this audit is
17 significantly greater than the industry average.

18 In addition, Appellant did not show any increase
19 in prices associated with the larger pour sizes; Exhibit
20 I, page 434. Generally, the Department's experience is
21 that selling prices go up when cost increase to maintain
22 the same profit margin. The prior audit's markup of 214
23 percent, Exhibit H, 215 -- or Exhibit H, page 360. Sorry.
24 In this audit, markup decreased to 167.25 percent;
25 Exhibit E, page 250.

1 If the higher that's established in the prior
2 audit is applied to the audited purchase, then the
3 Appellant's liability would increase. The Department used
4 accepted audit methods, which include using balance
5 purchasing records. Despite Appellant's lack of
6 documentary evidence, the Department accepted sales prices
7 as provided by the Appellant, allowed generous pour sizes,
8 and permitted standard allowances as adjustments. The
9 audited markup of 167 percent is less than half of the
10 industry average for a full-service bar. Based on the
11 foregoing, the Department has shown that its determination
12 is reasonable, and the Appellant has not provided
13 sufficient evidence or other documentation to prove
14 otherwise.

15 Appellant has also requested interest relief and
16 submitted a Form 735. Based on analysis by Department,
17 there were no periods of unreasonable delays attributable
18 to CDTFA offices, bureaus, units, and sections preaudit
19 and appeal, pursuant to Revenue & Taxation Code
20 Section 6593.5. Therefore, interest relief is not
21 recommended. It should be noted that no interest was
22 approved for the period from March 20th through June
23 20th -- March 2020 through June 2020 due to the Covid
24 pandemic.

25 In relation to the pour size, the pour size is

1 the amount of liquor that's actually poured into a drink.
2 Therefore, when you're doing a martini, let's say, most of
3 the time when you see a martini being done, it's going to
4 have vodka or gin. You're going to pour it in some ice.
5 You are going to either shake it or stir it. You're going
6 to pour it into a glass. They might put vermouth in
7 before, or they coat the glass with vermouth -- the dry
8 vermouth -- splash it out, and then put in olives along
9 with a toothpick. So that's going to take up some room in
10 there.

11 The thing with the 6.03 pour size is if it's got
12 the ice in there -- not ice. When you shake it or stir
13 it, the ice is going to melt into the martini -- into
14 the -- with the liquor. So when you pour or it and strain
15 it into the glass, it's going to show a larger size than
16 it actually is. So in the first audit what happened was
17 they allowed the 3.33 percent because that's what was
18 documented and that was verifiable.

19 The second audit they were going to do an
20 undercover pour test, however, the business was already
21 closed, so they couldn't do an undercover pour test. This
22 is documented in both the decision on page -- this is
23 documented in the decision on Exhibit B, page 28. And
24 it's also talked in detail on Exhibit A, pages 6
25 through 8.

1 This concludes our preparation. I'm available to
2 answer any questions you may have.

3 JUDGE ALDRICH: Thank you, Mr. Suazo. So I do
4 have a few questions. We'll have questions for both of
5 the parties. So Appellant indicated that they would like
6 to submit the bar fact sheet from the prior audit. I see
7 that CDTFA has provided a copy of the prior audit, the
8 Exhibit H. Is there an objection to Appellant submitting
9 a copy of the prior audit bar fact sheet into the record?

10 MR. SUAZO: The prior audit bar fact sheets are
11 already in our exhibits. It's Exhibit H, page 406 and
12 407.

13 JUDGE ALDRICH: Okay. Got it. Thank you for
14 looking that up for me. So we won't need to address that.
15 Let's see.

16 At this time I was going to refer it back to my
17 Panel members to see if they have questions for either of
18 the parties.

19 Judge Stanley, do you have questions for either
20 particular party?

21 JUDGE STANLEY: I don't have any additional
22 questions other than what has already been asked.

23 JUDGE ALDRICH: Thank you. Judge Long, do you
24 have any questions for the parties?

25 JUDGE LONG: I do. I have a question for

1 Appellant.

2 I just wanted to clarify. I understand your
3 contention of how the measurement was taken with respect
4 to martini and how an amount was poured into the glass,
5 and it's approximately 27 percent less than capacity of
6 the glass. But also in this case my understanding is that
7 the shelf test is based on the markup of the liquor that
8 ends up in the glass as opposed to the drink on the whole.
9 Is it your contention that if a customer ordered a martini
10 at the Lucky 13, they would receive 6-plus ounces of
11 actual liquor? Or is it a combination of the liquor and
12 other additions?

13 MS. WEISS: Brian, would you like me to address
14 this? You're on mute.

15 MR. SPIERS: Yes, please Laura.

16 MS. WEISS: I -- excuse me. I can't be
17 absolutely certain as to every drink that was poured in
18 there and the pouring habits of each of the staff members,
19 nor can I attest to what percentage of those glasses were
20 used merely for martinis versus some other concoction.

21 I would say that I do have a question for CDTFA,
22 which is that in the pour test it's my understanding that
23 the bartender was asked to pour the alcohol as they would
24 for a drink. Which to me, as a regular customer of a bar,
25 would mean you would pour what you would pour into the

1 shaker that already has the ice in it, and then that would
2 be the amount that is unmixed that Mr. Chow is measuring.

3 So to speak that if I was actually making a
4 martini, I would put the shaker on the bar. I would fill
5 it with ice, and then I would do maybe a six-count pour,
6 shake it, and strain it into the martinis glass. And my
7 understanding was not that the measured diluted martini
8 was the measured amount but the actual alcohol that was
9 poured into the shaker is what Mr. Chow was measuring. I
10 could be wrong and open to feedback from the CDTFA.

11 I would say that there's a good possibility that
12 there were bartenders that were putting six ounces in that
13 glass, that there's a good possibility that because of how
14 loose management was and how loose the employees were,
15 that there were probably times where that martini glass
16 was filled to the tippity-top as has happened before in
17 many places, depending on what's going on.

18 I would say that it's very unlikely that the ice
19 in a shaken martini would account for three ounces in a
20 martini glass. I know that from experience in the bar
21 industry -- for the 30 some-odd years that I have been in
22 the bar industry that bruising of the ice does not create
23 three ounces during the making of an martini. I think
24 there is ambiguity there. I don't think that there is a
25 clear and concise answer.

1 I do think it's very unlikely that the bar staff,
2 with how loose and unruly that the whole business was,
3 that they were filling any portion of their martinis to a
4 third of the glass. I'm not sure if that answers the
5 question.

6 JUDGE LONG: Okay. I think I have my answer.
7 Thank you. I have no more questions.

8 JUDGE ALDRICH: Thank you, Judge Long.

9 I believe Judge Stanley had a question.

10 JUDGE STANLEY: Yes. I had a question about the
11 glass sizes. I see the spec sheet that you provided. But
12 I was wondering if that glass size changed between the
13 first and second audit?

14 MS. WEISS: Of specifically the martini glass?

15 JUDGE STANLEY: Yes.

16 MS. WEISS: I don't know as I was not the
17 bookkeeper for the business in its general operations.
18 I've only assisted with the calculation with the working
19 papers of the audit. I do -- did look through all of
20 their Grenier purchase which is the company that they
21 purchased the martini glasses from. And I provided in
22 Exhibit 7, pages 101 to 102, the invoices of the Lucky 13
23 purchasing this glassware as early as 2016.

24 I can't attest to any purchases prior to that or
25 from the prior audit, but I do know that there's an

1 invoice from Grenier that is included in the exhibits that
2 shows the purchase in 2016.

3 JUDGE STANLEY: Okay. This is Judge Stanley.
4 Thank you. That's all the questions I have.

5 JUDGE ALDRICH: Thank you.

6 This is Judge Aldrich. This question is for
7 CDTFA. The changes that occurred from the initial measure
8 to the measure that's currently before us, was it because
9 CDTFA received additional documentation? Or, I guess, can
10 you speak to that?

11 MS. WEISS: Could you repeat that? I'm sorry.

12 JUDGE ALDRICH: Yes. So I was asking CDTFA to
13 explain if the reason for the changes from the original
14 audit to the reaudited measure, and whether or not
15 Appellant had provided additional documentation.

16 MR. SUAZO: Are you ready?

17 JUDGE ALDRICH: Yes.

18 MR. SUAZO: Basically, there was a change in the
19 happy hour allotment. It went from 40 percent happy hour
20 to 60 percent happy hour. Although in the prior audit
21 when they did a test, which occurred I believe in
22 September 1st 2015 through September 7, 2015, this is
23 on -- I put Exhibit B, page 28, but I think that's wrong.

24 Anyway, in the prior audit, what happened was
25 they did a test, and what they found out was 37 percent of

1 the sales occurred during the happy hour, and
2 62.85 percent occurred during the regular time. So by
3 allowing this flip-flop, to say, they did give up a lot of
4 the measure in that particular instance. Okay.

5 Other stuff, there was documentation provided. I
6 can't tell you off the top of my head because, you know, I
7 have to go into in-depth research to look at it. But the
8 problem that we had was that again, they're asking for
9 reductions and they're asking for changes, but they don't
10 have any documentation to support the changes.

11 The problem is they had two cash registers, and
12 neither one of them is a POS system. We can't document
13 the percentage of sales. We can't document what type of
14 sales occurred. We can't document the prices that
15 actually occurred. All we're relying on is what a person
16 gave us on a bar fact sheet. And so we gave them a large
17 allowance and leeway when we did our audit. That's why
18 the amount of markup was only 169.

19 In a full-service bar the markup is normally 300
20 to 450 percent for a full-service bar. This is less than
21 half of that on average. The pour sizes are astronomical
22 at 2.89. Again, average pour size is 1.5 to 2.0. Most of
23 them are going to be 1.5. As the taxpayer's
24 representative said, she would do a six count. A six
25 count is one-and-a-half ounce pour. Okay.

1 They're also talking about that they are loose in
2 their controls of their inventory. However, wouldn't it
3 also be assumed that they would be loose in their controls
4 of the amount of cash coming in and the amount of sales
5 occurring. Because if they don't have internal controls,
6 they can't actually say that they know for sure what the
7 sales are. We did a calculation find out what the sales
8 are. We know that the sales are incorrect.

9 They acknowledge, at least in part, that the
10 sales were incorrect when they did the reaudit on their
11 own. Okay. The problem with the reaudit is, again,
12 they're using the prices of 2018, I believe. They're
13 using prices of 2018, April and May, and they're comparing
14 them to prices prior to October 2017. Okay. So we didn't
15 use that. The pour size went up 0.7 -- over 7 ounce --
16 0.7 ounces, which is quite an increase in a year -- and
17 basically, in a year's time or a little bit over a year's
18 time from when the prior audit happened and when this
19 audit occurs.

20 As to the situation where the internal controls
21 are almost gone, there's basically a problem that we have
22 is, you know, as we cited before the markup is just too
23 low. It appears that it's too low. We have done
24 adjustments to try and facilitate the audit to go through.
25 They're asking for certain accommodations into their

1 audit, but they have no proof to support that those
2 accommodations should be granted.

3 JUDGE ALDRICH: Thank you, Mr. Suazo.

4 I believe that concludes the questions from the
5 Panel. At this time I'd like to give the Appellant five
6 minutes for a rebuttal or a closing.

7 MR. SPIERS: Laura, you want to --

8 MS. WEISS: Sure.

9

10 CLOSING STATEMENT

11 MS. WEISS: In response, I would say a couple --
12 in addition to the evidence and exhibits that I've already
13 discussed, I think one of the major faults here is relying
14 on the prior audit when during -- I did do some review in
15 the prior audit. It certainly wasn't as in-depth as I did
16 during this audit, and there are some specific items that
17 I discovered in this audit that had a vast mathematical
18 difference in the calculations that we didn't try and have
19 discussions with the CDTFA in the prior audit.

20 In addition, Brian didn't go through the appeals
21 process, didn't try to have a hearing with you guys for
22 that audit. And I think he was not pleased with what the
23 results were, nor did he believe that that was accurate,
24 particularly the pour sizes from the prior audit being
25 only 2.18 ounces. And I think that that should be taken

1 into consideration that Brian does feel like his pour size
2 for his staff was astronomically outside of the industry
3 norms.

4 And, you know, the proof that we did provide was,
5 you know, the articles and reviews that we found. We have
6 proof of purchasing this martini glass. We have the pour
7 test Mr. Chow witnessed, and he wrote down the size of the
8 alcohol that was put into that glass. I think that we
9 used as much written evidence and what Mr. Chow has said
10 himself that this isn't -- that the utilization of the
11 prior audit as a marker -- a bench mark for what this
12 business is actually doing is not accurate and that,
13 again, Mr. Spiers agrees that it should be outside of the
14 industry norms.

15 And the fact that, you know, as Mr. Spiers
16 attested to today, this was not a business that was
17 monitored for how much the pour cost were. They were just
18 selling according to the way they had been operating
19 before he got there, and nobody ever thought twice about
20 because everybody was making money.

21 JUDGE ALDRICH: Thank you.

22 Mr. Spiers, anything else before we conclude?

23 MR. SPIERS: I think Laura summarized it quite
24 well.

25 Just the entire staff, including the manager, was

1 there when I acquired the bar. Most of them were there
2 when I closed the bar in 2020. So all these practices
3 were in place. Regarding the pour test, I do think there
4 was some confusion on Martin's part when he did it. I'm
5 not sure that he accurately poured what was really going
6 on with both himself and the rest of the staff when they
7 were in there with all the regulars and pouring their
8 drinks and doing their thing.

9 And, you know, it's anecdotal but you're not
10 going to get as many articles and people referencing that
11 the strongest drinks -- cheapest strongest drinks in town
12 with every third or fourth drink is comped, unless there
13 is some, you know, truth to it. And a two-ounce drink --
14 I'm sorry. That's -- that's not going to be strong in the
15 dive bar industry. So, you know, I'm sorry. And I -- and
16 I understand the CDTFA. We don't have real factual
17 concrete POS systems to back up what we're saying.

18 However, you know, I think we did present -- I do
19 think it's difficult for them to accurately audit it
20 because of that, but I do think we provided enough
21 evidence to and give an idea of what this bar was like.
22 And I'll just leave it at that.

23 JUDGE ALDRICH: Thank you.

24 I want to thank everyone for your time. We're
25 ready to conclude the hearing. The record is now closed,

1 and the panel will meet and decide the case based off of
2 the evidence and arguments presented today. We'll send
3 both parties our written decision no later than 100 days
4 from today.

5 (Proceedings adjourned at 11:54 a.m.)
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I further certify that I am in no way interested
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I have hereunto subscribed my name this 24th day
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