

## BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF: )  
 )  
S. DHAWAN and A. DHAWAN, ) OTA NO. 21017112  
 )  
Appellants. )  
\_\_\_\_\_ )

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TRANSCRIPT OF PROCEEDINGS

Tuesday, September 19, 2023

Reported by:

CHRISTINA RODRIGUEZ  
Hearing Reporter

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TRANSCRIPT OF PROCEEDINGS,  
commencing at 9:44 a.m. and concluding at  
11:07 a.m. on Tuesday, September 19, 2023,  
reported by Christina L. Rodriguez, Hearing  
Reporter.

1 APPEARANCES:

2  
3 Administrative Law Judge: JOSHUA LAMBERT  
4 TOMMY LEUNG  
5 ANDREA LONG

6 For the Appellant: S. DHAWAN  
7

8 For the Respondent: STATE OF CALIFORNIA  
9 FRANCHISE TAX BOARD  
10 PAMELA BERTANI  
11 JASON RILEY  
12  
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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-2 were received in Judge Lambert's minutes and orders at page 6)

(Department's Exhibits A-S were received in Judge Lambert's minutes and orders at page 6)

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

PAGE

By Mr. Dhawan 7

By Ms. Bertani 15

C L O S I N G   S T A T E M E N T

PAGE

By Ms. Bertani 40

By Mr. Dhawan 43

1 California; Tuesday, September 19, 2023

2 9:44 a.m.

3  
4  
5 JUDGE LAMBERT: We are now on the record in  
6 the Office of Tax Appeals oral hearing for the Appeal of  
7 Sanjay and Anjali Dhawan. Case number 21017112. The  
8 date is September 19th, 2023, and the time is 9:44 a.m.

9 My name is Josh Lambert, and I am the lead  
10 Administrative Law Judge for this hearing. And my  
11 co-pellant's today are Judge Tommy Leung and Judge  
12 Andrea Long.

13 FTB, can you please introduce yourselves, for  
14 the record.

15 MS. BERTANI: Good morning. My name it Pam  
16 Bertani, and I am here representing the Franchise Tax  
17 Board Respondent in this matter.

18 MR. RILEY: Jason Riley. Also representing  
19 Franchise Tax Board.

20 JUDGE LAMBERT: Thank you.

21 And for the Appellants, can you please  
22 introduce yourself, for the record.

23 MR. DHAWAN: Sanjay Dhawan. Taxpayer.

24 JUDGE LAMBERT: Thank you all for attending.

25 As agreed to by the parties, the issue is

1 whether the stock options and restricted stock units are  
2 ordinary income or capital gain income. And this  
3 applies -- the issue applies to 2015 through 2017.

4 And to be provided Exhibits A through S; and  
5 Appellants provided Exhibits 1 and 2. There are no  
6 objections and that evidence is now on the record.

7 Mr. Dhawan, we'll give you the opportunity to  
8 explain your position for 30 minutes, and I can swear  
9 you in also right now as -- so you could also testify as  
10 a witness.

11 Can you please raise your right-hand.

12  
13 S. DHAWAN,  
14 produced as a witness, and having been first duly sworn  
15 by The Administrative Law Judge, was examined and  
16 testified as follows:

17  
18 MR. DHAWAN: Yes, I do.

19 JUDGE LAMBERT: Thanks. So now you have 30  
20 minutes, and you can --

21 Oh, FTB had a question.

22 MS. BERTANI: Yeah. I just want a  
23 clarification. So it was our understanding that OTA  
24 has jurisdiction over tax year 2015, but not 2016 and  
25 2017 because the Franchise Tax Board has not issued a

1 notice of action for '16 and '17. Only 2015.

2 JUDGE LAMBERT: Yeah. I remember reading that  
3 from the briefing and because our regulations say we can  
4 determine jurisdiction I think -- and it was brief by  
5 FTB on the jurisdiction issue. If you could mention  
6 that during your presentation, and then we can make a  
7 ruling on the issue of jurisdiction also.

8 MS. BERTANI: Thank you.

9 JUDGE LAMBERT: Thanks.

10 Okay and Mr. Dhawan, you can proceed. You have  
11 30 minutes.

12  
13 PRESENTATION

14 MR. DHAWAN: Sure. Thank you.

15 Good morning Judges. Good morning FTB  
16 colleagues. So my name is Sanjay Dhawan. I'm an  
17 engineer by education, and I called San Francisco, Bay  
18 Area, as my home starting 1989 to come and build my  
19 technology vision. Since 1996, I have started in  
20 successfully build six different companies of various  
21 sizes.

22 The Wi-Fi that you use today was invented by  
23 me, and the very first Wi-Fi systems on this planet were  
24 built by me. I made technology contributions. I made  
25 many technology contributions, and I feel very honored

1 to be part of the Bay Area technology ecosystem.

2 Including -- some of you probably use CD that was  
3 licensed by Apple from my last company.

4 I share this because, you know, America has  
5 been great in platform for me, and I'm honored and  
6 thankful to the country for what it has offered to me.  
7 Of all people, I'm very happy to pay my fair share of  
8 taxes as that is my way of giving back to the country  
9 that has been so good to me.

10 The discussion today is more about the  
11 principle behind the transaction and the related taxes  
12 from it. It's really not about 100k for me personally,  
13 it's about sort of the principle of how, you know,  
14 taxation should be handled. You know, I say this  
15 because in my last tax filing -- and I paid 22 million  
16 in Federal and State taxes.

17 This was last -- last tax filing that I did.  
18 And over the last so many years, I paid, you know, tens  
19 of millions in taxes, and I always said it's an honor to  
20 pay my fair share of taxes because, you know, it is my  
21 way of giving back to the country that has been so good  
22 to me and my family.

23 So let me go into some of the facts as I want  
24 to, you know, present to all of you. In August of 2020,  
25 I joined Symphony Services as it's CEO to transform and



1 build that company. This company was a major lost  
2 making-company, and I turned it around in it's strategy  
3 and financial's.

4 This company later merged with Teleca, a  
5 Swedish company, and became simply Teleca in 2012. And  
6 then in January of 2015, it was announced that Symphony  
7 Teleca is being acquired by Harman, which was a public  
8 -- publicly listed company on Nasdaq.

9 As part of this transaction, the following  
10 steps happened: There was a Share Purchase Agreement  
11 that was signed and executed in January of 2015. I have  
12 provided the copy of that agreement. Please note, it's  
13 a "Share Purchase Agreement."

14 The acquiring company, Harman, is buying the  
15 shares of my company, which I was CEO of -- called  
16 Symphony Teleca. This transaction-close happened in  
17 April of 2015. So it took them about three months from  
18 the day that the transaction was announced, in January  
19 of 2015 to April of 2015, to complete the transaction.

20 During this period, from January to April of  
21 2015, all of, you know, Symphony Teleca -- options,  
22 shares, RSU's, et cetera -- what executed invested for  
23 inclusion in the transaction.

24 The Merger Agreement, the Share Purchase  
25 Agreement, calls out a for a multi-step process for

1 employees like me, and the consideration was given to  
2 all of the employees over the three-year period -- 2015,  
3 2016, and 2017.

4 Basically, my -- my vested shares from my  
5 options and RSU's were purchased over a three-year  
6 period. This was done to make sure that the CEO and the  
7 management team and the employees stayed with the new  
8 company and increase the retention rate.

9 So while the other shareholders were paid  
10 immediately, the employees, CEO management team, and  
11 employees were paid overtime because the buying company  
12 wanted to make sure that, you know, they use the payment  
13 as a mechanism for retention of us in the -- in the new  
14 company that they were acquiring.

15 The Sale Purchase Consideration was reported  
16 to all employees, including myself, via Harman payroll.  
17 This was the biggest mistake. And this is the mistake,  
18 basically, that I made to -- to agree for this operation  
19 clause in the Share Purchase Agreement. So let me  
20 explain why, first, the buyer wanted to pay through the  
21 payroll.

22 The buyer, in this case, was a public company  
23 called Harman. We had 8,500 employees. We had almost  
24 operations in 21 countries. And the buyer, you know,  
25 forced this clause to pay the consideration of share

1 purchases through the payroll because they wanted to,  
2 you know, make it simpler and easier for them because  
3 they had to make these payments to thousands of  
4 employees, including myself, as the CEO of the company.

5 And because of that, they forced this clause  
6 in the Share Purchase Agreement and I, you know, to this  
7 day, sort of regret as the CEO. I could have put my  
8 foot down and said, "No. I don't want to agree to this."  
9 But I did agree to it, and it was part of the -- part of  
10 the Share Purchase Agreement.

11 This is the real cause of all confusion. The  
12 gains from the sale are the gains from the sale of  
13 stock. It's -- there's no other gains. There's, you  
14 know, basically, like -- like I said, the agreement is  
15 called a Shared Purchase Agreement. And basically, the  
16 acquiring company is acquiring the shares of my company.

17 And in reality, it should have been reported  
18 through a 1099; miscellaneous income; or some other way.  
19 Instead, you know, Harman was, you know, reporting it  
20 through the payroll. In -- to make -- to make matters  
21 more complicated, in 2016, Harman, the public company  
22 quote, unquote by Samsung.

23 And now, you know, sort of the reporting of,  
24 you know, the payrolls and, you know, the company that  
25 has 350,000 employees worldwide becomes, you know, sort

1 of, you know, way, way, too complicated to sort of, you  
2 know, get every single thing, you know, right from a  
3 reporting standpoint.

4 Since I was employee number one and the CEO of  
5 the company, the reporting through the Harman payroll  
6 applied to all of us, including me. Basically, the  
7 purchase price minus the share cost was calculated per  
8 employee, and this along was paid with a payroll of  
9 Harman.

10 This is why, you know, the -- one of the most  
11 important sort of documents that I have submitted to FTB  
12 and to the Judges here are the documents coming from  
13 Harman payroll. If you look at that document, it really  
14 clearly says the, you know, my normal income which is my  
15 base salary. It lists my bonus income, which is the  
16 normal ordinary income that I earn every year based on  
17 bonus.

18 But then it also lists, very clearly, the  
19 income that is coming from the sale of these shares  
20 under the Sale Purchase Agreement. And I've, you know,  
21 given the documents for 2015, 2016, and 2017.

22 And this income, the separation of the income  
23 -- ordinary income, which is from my normal job for, you  
24 know, which is the base salary and the bonus and the  
25 separate income where it lists the income coming from

1 the purchase of these shares from the transaction.

2           You know, when I -- I want to quote an IRS --  
3 IRS publication, topic number 409. Which says that, you  
4 know, everything you own and use for personal investment  
5 purpose, is a capital asset. Excludes income. Examples  
6 include a home, personal-used items like household  
7 furnishes, and stocks or bonds held as investments.

8           When you sell a capital asset, the difference  
9 between the adjusted bases in the asset in the amount  
10 you realize from the sale, is a capital gain or capital  
11 loss. In this case, you know, the income that we're  
12 discussing here, is the income that was generated by the  
13 Share Purchase Agreement. Nothing else. That is what  
14 it was.

15           Since all the shares were own-invested between  
16 January and April of 2015, this is the period when we  
17 first announced and signed the Share Purchase Agreement,  
18 and the period when the actual transaction-close  
19 happens. The treatment of the gain loss from these  
20 shares must be handled as a short or long-term capital  
21 gains.

22           If the reporting of the income was done  
23 properly by the buyer, meaning, you know, not through  
24 the payroll, but -- but through the normal, you know,  
25 1099 process, we wouldn't be sitting here. We wouldn't

1 be having this discussion at all because, you know, but  
2 it happens all the time.

3 If you look at the 1099 I received from my  
4 last public company, Cerence -- as I do my taxes for  
5 2022 -- has the same 1099, you know, which is with  
6 regards to the Share Purchase Agreement that I'm  
7 including in my 2022 taxes.

8 The 2015 taxes treated the transaction income  
9 as short-term capital gains since I held the shares for  
10 less than one year.

11 And my 2016 and 2017 taxes treated the  
12 transaction income as long-term capital gains. Although  
13 for California State -- for FTB, there is really no  
14 difference in the tax rate for short or long-terms.  
15 It's really immaterial whether it's a short-term or a  
16 long-term capital gains.

17 So in summary, the shares were invested and  
18 acquired in January through April of 2015, and the  
19 consideration for the sale of these shares took place in  
20 2015, '16, and '17 and has a treatment should be short  
21 or long-term capital gains.

22 Since this transaction is about a company  
23 purchasing the assets of another company through a Share  
24 Purchase Agreement, I just simply cannot understand why  
25 there is this debate that this shares, which are being

1 purchased, are not capital assets.

2 That's all I have to say. Thank you.

3 JUDGE LAMBERT: Thank you, Mr. Dhawan.

4 Ms. Bertani, do you have any questions for  
5 Mr. Dhawan?

6 MS. BERTANI: Not at this time, Judge. Thank  
7 you.

8 JUDGE LAMBERT: Okay. Thanks.

9 I'll turn to the panel and see if they have  
10 any questions.

11 Judge Leung, did you have any questions?

12 JUDGE LEUNG: Thank you. By this time, maybe  
13 afterwards, I'll have questions. Thank you.

14 JUDGE LAMBERT: Thanks.

15 And Judge Long, do you have any questions?

16 JUDGE LONG: I do not -- I do not have any  
17 questions, at this time, thank you.

18 JUDGE LAMBERT: And this is Judge Lambert. I  
19 have no questions, at this time, but maybe after FTB's  
20 presentation. So we can move on to FTB's presentation  
21 which is set for about 60 minutes.

22 Ms. Bertani you can proceed. Thanks.

23  
24 PRESENTATION

25 MS. BERTANI: Thank you.

1           This case involves Appellants'  
2 re-characterization of ordinary income as capital gains  
3 income for tax year 2015.

4           Respondent has brief the issue of jurisdiction  
5 in response to OTA's request for additional briefing,  
6 and maintains that the issue on appeal is limited to tax  
7 year 2015. As respondent has not issued a notice of  
8 action or any other actionable document for tax years  
9 2016 and 2017.

10           Mr. Dhawan's 2015 form W-2 from employer  
11 Symphony Teleca Services, which is at Respondent's  
12 Exhibit D, page 6, reports over \$6,000,000 dollars in  
13 wages, tips, and other compensation which Appellants  
14 reported a state wages on their 2015 California Tax  
15 Return.

16           After adjustments, Appellants reported  
17 \$5,997,117 dollars of taxable income. Re-characterized  
18 \$5,717,899 dollars as other income. And on Appellant's  
19 Schedule D to their 2015 form 1040, Appellants reported  
20 a \$5,717,899 dollar short-term capital gain; offset by  
21 an \$831,384 dollar long-term capital loss.

22           Resulting in a \$4,886,515 dollar capital gain  
23 which Appellants reported on their 2015 California Tax  
24 Return at Respondent's Exhibit D, page 5.

25           As reflected in the 2015 notice of Proposed



1 Assessment, Respondent's Exhibit I, page 1, Respondent  
2 proposed to disallow their reported capital gain and  
3 re-characterized the reported other income as ordinary  
4 income, resulting in an \$828,384 dollar increase in  
5 Appellant's 2015 taxable income.

6 And therein lies the issue on appeal: Whether  
7 Appellants reported income received from the disposition  
8 of stock options and restricted stock units constitutes  
9 ordinary income or capital gains income.

10 Respondent respectfully submits that  
11 Appellants receive this income in connection with  
12 Mr. Dhawan's performance of services as an employee of  
13 Symphony, and subsequently Harman.

14 Because the options and RSU vesting was  
15 expressly conditioned on two key conditions: Number  
16 one, Mr. Dhawan's continued employment with his employer  
17 through the vesting period; and number two, the  
18 company's achievement of specific performance related  
19 goals set forth in Mr. Dhawan's Symphony Employment  
20 Agreement.

21 And it's this linkage of Appellant's stock  
22 options and RSU compensation to Mr. Dhawan's continued  
23 employment and the company's achievement of specific  
24 performance related goals that establishes the  
25 corresponding compensation paid on vesting was intended

1 as compensation for Mr. Dhawan's services during this  
2 specified vesting period, and therefore constitutes  
3 ordinary income, and not capital gain income.

4 In fact, the record will show that on several  
5 occasions, Appellants expressly conceded to respond in  
6 his determination in this regard and agreed that  
7 Appellant's 2015 options and RSU income constitutes  
8 ordinary income.

9 Respondent's Exhibit Q, page 1, comprises an  
10 excerpt from Appellant's May 9, 2021, Reply Brief in which  
11 Mr. Dhawan states quote:

12 "I have agreed that the 2015 taxes should not  
13 include the reclassification of ordinary income as  
14 capital gain because the transaction was done in 2015,  
15 and the stocks were brought and sold in the same month  
16 and held for less than a year."

17 Closed quote.

18 Respondent's Exhibit Q, page 3, also comprises  
19 an excerpt from Appellant's May 2021 Reply Brief in which  
20 Mr. Dhawan states, quote:

21 "I agree with the determination for tax year  
22 2015. All the RSU's and stock options were exercised  
23 and owned by me upon execution of the Merger Agreement  
24 in 2015. The merger consideration that was paid to me  
25 in 2015 can be treated as ordinary income, and I agree

1 with it."

2 Closed quote.

3 Respondent's Exhibit Q, page 8, comprises  
4 another exert from the 2021 Reply Brief. The statement  
5 of facts in which Appellant states quote:

6 "I am okay with not classify -- reclassifying  
7 the 2015 income and agree with the FTB's proposal."

8 Closed quote.

9 The last two documents were also produced in  
10 conjunction with Appellant's 2021 opening brief.

11 For the first time in the appeal record, after  
12 offering these express concessions in October 2021,  
13 Appellants asserted that Mr. Dhawan's 2015 stock options  
14 and RSU income should no longer be characterized as  
15 ordinary income, but rather as the sale of a capital  
16 asset.

17 Now, Appellants characterize the 2015's  
18 options and RSU income as an asset sale, and not  
19 ordinary income.

20 Appellant's reasoning in this regard is proffer  
21 in Respondent's Exhibit R, page 1, in which Appellants  
22 contend the only reason that Appellants previously  
23 agreed with Respondent's 2015 determination is that the  
24 California Tax Code treats short-term and long-term  
25 capital gains the same, and Appellant contends they've

1 provided proof that the W-2 income was a combination of  
2 Mr. Dhawan's normal salary and bonus and stock sale  
3 income.

4           Hence, Appellants cannot agree with the 2015  
5 tax adjustments proposed by Respondent. However, the  
6 earning statements and employer payroll records that  
7 Appellants proffer as evidence at Appellant's Exhibit 2,  
8 pages 1 through 6, do not constitute a legal basis for  
9 characterizing Appellant's options and RSU income as  
10 capital gain's income.

11           The correct legal standard for making this  
12 determination is set forth in IRS C, section 83A, in  
13 corresponding case law. Appellants proffer no legal  
14 precedent or evidence sufficient to substantiate it's  
15 characterization of the 2015 options and RSU income as  
16 capital gains income.

17           As the evidence of record will demonstrate,  
18 particularly based on Mr. Dhawan's Employment Agreement  
19 with Symphony and the 2015 Merger Agreement itself,  
20 Mr. Dhawan's entitlement to stock options and RSU income  
21 is inextricably in contractually linked to Mr. Dhawan's  
22 continued employment with Symphony, and subsequently  
23 Harman, and the company's achievement of specific  
24 performance related goals which establishes that  
25 corresponding income was intended as compensation for

1 services, and therefore constitutes ordinary income.

2 Internal Revenue Code, section 83A, which is  
3 incorporated in the California Law by Revenue and  
4 Taxation Code, section 17081, governs the taxation of  
5 property such as Appellant's stock options and  
6 restricted stock units that's transfer -- transferred in  
7 connection with the performance of services.

8 Under section 83A, gross income for tax  
9 purposes includes income from such property in the first  
10 year in which the rights of the person having the  
11 beneficial interest in the property are transferable or  
12 a not subject to a substantial risk of forfeiture,  
13 whichever occurs earlier.

14 A substantial risk of forfeiture exist where  
15 the rights of a person in property are conditioned  
16 directly or indirectly upon the future performance of  
17 substantial services by an individual. The rights of a  
18 person in property are transferable only if the rights  
19 in such property of any transferee are not subject to a  
20 substantial risk of forfeiture.

21 In the Appeal of Stabell, a presidential OTA  
22 opinion, OTA analyze whether Appellant in that case  
23 established error in Respondent's determination that a  
24 portion of Appellant's gross income from the vesting of  
25 long-term incentive plan, or LTI mirror shares,

1 constituted California's source income. And in doing  
2 so, OTA analyzed IRC, section 83A.

3 In that case, through his employment, Mr.  
4 Stabell was awarded LTI mirror shares and the award  
5 letter -- the corresponding award letter explained the  
6 LTI award investing. Expressly stating that the vesting  
7 of the LTI shares was subject to two conditions: Number  
8 one, Appellant's continued employment with the employer  
9 through vesting; and number two, the company's  
10 achievement of specific performance related goals.

11 Citing IRC's, section 83A, and the express  
12 vesting conditions stated in the award letter, OTA  
13 addressed the substantial risk of forfeiture and  
14 performance of services statutory requirements.

15 With respect to the substantial risk of  
16 forfeiture component, OTA found that Appellant's LTI  
17 mirror shares remain subject to a substantial risk of  
18 forfeiture until the stated vesting dates because the  
19 mirror share value payments on the vesting dates were  
20 specifically conditioned on Appellant's continued  
21 employment and the timely achievement of the designated  
22 performance related goals.

23 Thus, Appellant's LTI compensation remains  
24 subject to a substantial risk of forfeiture until the  
25 specified vesting dates, and the income resulting from

1 the LTI vesting was properly recognized as income when  
2 the shares vested and Appellant was paid for his shares  
3 by his employer.

4 With respect to the property transfer in  
5 conjunction with services component, the OTA found,  
6 quote:

7 "The vesting of the mirror shares was  
8 specifically related to -- to and made contingent upon  
9 Appellant's continued employment with the group on the  
10 vesting dates any achievement of specific performance  
11 related goals."

12 The linking of the mirror shares to  
13 Appellant's continued employment with the group and the  
14 groups' achievement a specified performance related  
15 goals establishes that the LTI compensation paid on  
16 vesting was in fact intended as compensation for  
17 Appellant's services during the vesting period under the  
18 reasoning in LoBue, as it was intended to incentivize  
19 Appellant and secure better services for Appellant  
20 during the period.

21 Thus, the LTI compensation paid to Appellant  
22 in that case constitutes compensation for Appellant's  
23 services performed during the vesting period. OTA  
24 concluded that the LTI compensation constitutes gross  
25 income from services performed in part of California.

1           In it's Opening Brief, Supplemental Brief, and  
2 Reply Brief, Respondent discuss in detail Supreme Court  
3 Precedent and Commissioner v. LoBue; 9th Circuit Court  
4 of Appeal Precedent and Alvaz v. Commissioner; State  
5 Board of Equalization Precedent in Appeal of Parell; and  
6 the Tax Court's Opinion and Cosmin v. Commissioner; all  
7 of which affirm Respondent's determination that  
8 Appellant's stock options and RSU income, which is  
9 expressly linked to Mr. Dhawan's continued employment  
10 through vesting and the company's achievement of  
11 specific performance related goals, is intended as  
12 compensation for services, and therefore constitutes as  
13 ordinary income and not capital gains income.

14           With this Precedent in mind, I will now turn  
15 to the Evidentiary Record to establish that Appellant's  
16 stock options and RSU income was intended as  
17 compensation, and therefore constitutes ordinary income.

18           Two operative documents extensively govern the  
19 disposition of Mr. Dhawan's stock options and RSU income  
20 as a Symphony employee and subsequently Harman. Mr.  
21 Dhawan's 2010 Symphony Employment Agreement and the 2015  
22 Merger Agreement itself.

23           With respect to the IRC, section 83A,  
24 substantial risk of element, Appellants confirm as  
25 Mr. Dhawan has on the record today, and also a



1 Respondent's Exhibit Q, page 3, that all the RSU's and  
2 options were exercised and owned by Appellants upon the  
3 execution of the 2015 Merger Agreement.

4 Disclosures scheduled 3.14 to the 2015 Merger  
5 Agreement, which is at Respondent's Exhibit S, page 11,  
6 also confirms that the stock options and RSU's vested in  
7 2015 upon execution of the Merger Agreement subject to  
8 the terms and conditions of Mr. Dhawan's 2010 Symphony  
9 Employment Agreement.

10 The 2010 Symphony Employment Agreement  
11 conditions liquidity options vesting on: Number one, a  
12 change in control which here was the 2015 Harman merger;  
13 number two, Mr. Dhawan's continued employment with the  
14 company through the change and control; and three, the  
15 company's achievement of specific related goals.

16 RSU vesting is conditioned on Mr. Dhawan's  
17 continued employment through vesting; the company's  
18 achievement of designated performance related goals; and  
19 in connection with a change in control, Mr. Dhawan's  
20 entitled to receive full and immediate vesting with  
21 respect to this specified portions of the RSU's.

22 These documents establish that Mr. Dhawan's  
23 stock options and RSU's remain subject to a substantial  
24 risk of forfeiture until the stated vesting dates  
25 because the correspondent dates on vesting were

1 specifically conditioned on Mr. Dhawan's continued  
2 employment and the company's achievement of performance  
3 related goals.

4 Thus, Appellants' options and RSU income  
5 remains subject to a substantial risk of forfeiture  
6 until 2015 when the Merger Agreement was executed. An  
7 income resulting from the options and RSU's is properly  
8 recognized as income when the options and RSU's vested,  
9 and Appellants were correspondently paid by Mr. Dhawan's  
10 employer in 2015.

11 With respect to IRC, section 83A, the  
12 performance of services element, Mr. Dhawan's Symphony  
13 Employment Agreement and the Merger Agreement  
14 establishes that Appellants' options and RSU vesting is  
15 expressly linked to two key components:

16 Mr. Dhawan's continued employment with the  
17 company through vesting and the company's achievement of  
18 specific performance related goals, which according to  
19 your decision in Appeal of Stabell, renders  
20 corresponding income intended as compensation and  
21 consequently ordinary income, and not capital gains  
22 income.

23 Turning now to the 2010 Symphony Employment  
24 Agreement, which is at Respondent's Exhibit O, pages 4  
25 through 17. Paragraph four of the 2010 Symphony

1 Employment Agreement sets forth the requirements from  
2 Mr. Dhawan's eligibility to receive stock options and  
3 restricted stock units.

4 Paragraph four specifically states that in  
5 connection with Mr. Dhawan's employment with the  
6 company, Mr. Dhawan would be eligible to receive grants  
7 of equity awards in the form of stock options and  
8 restricted stock units based on the common stock of the  
9 company.

10 Under the paragraph 4A, sign-on option, which  
11 is at Respondent's Exhibit O, page 5, Mr. Dhawan will be  
12 granted an option for the purchase of \$1,250,000 shares  
13 of common stock with vesting expressly linked to  
14 Mr. Dhawan's continued employment with Symphony through  
15 each applicable vesting date.

16 Under the paragraph 4B, liquidity option,  
17 Respondent's Exhibit O, page 5, Mr. Dhawan will be  
18 granted an option for the purchase of \$1,000,000 shares  
19 of common stock.

20 Eligibility in vesting are linked to three  
21 elements: Number one, the change in control; number  
22 two, the achievement of share price hurdles in  
23 connection with the liquidity event as set forth in  
24 Exhibit C to the Symphony Employment Agreement; and  
25 expressly on Mr. Dhawan's continued employment with

1 Symphony through the liquidity event.

2 Under the paragraph 4C, restricted stock units  
3 provision, at Respondent's Exhibit 0, pages 5 and 6,  
4 Mr. Dhawan will be eligible to receive five annual  
5 grants of RSU's covering an aggregate of \$1,250,000  
6 shares of common stock.

7 Vesting is subject to the company's  
8 achievement of performance related goals set forth in  
9 Exhibit B, to the Symphony Employment Agreement, to Mr.  
10 Dhawan's continued employment with the company and in  
11 connection with the change in control, Mr. Dhawan will  
12 be entitled to receive full and immediate vesting with  
13 respect to the specified portion of RSU's.

14 According to this provision, if the applicable  
15 performance objectives for the physical year were not  
16 achieved, the award of RSU's would be forfeited and  
17 canceled without payment to Mr. Dhawan. Also, according  
18 to this provision, in the event of the termination of  
19 Mr. Dhawan's employment, any outstanding, unvested RSU's  
20 then held by Mr. Dhawan will be automatically forfeited  
21 and canceled as of the date of Mr. Dhawan's employment  
22 termination without payment to Mr. Dhawan.

23 Under the paragraph three, performance bonuses  
24 provision at Respondent's Exhibit 0, page 5, commencing  
25 with physical year 2010, Mr. Dhawan was eligible to

1 receive an annual \$335,000 dollar performance bonus  
2 subject to a \$500,000 dollar maximum.

3 Eligibility for the performance bonus is  
4 linked to the company's achievement of target business  
5 plan and objectives based on performance objective set  
6 forth in Exhibit B to the Employment Agreement.

7 Exhibit B to the 2010 Symphony Employment  
8 Agreement, at Respondent's Exhibit 0, pages 15 and 16,  
9 sets forth the annual performance objectives applicable  
10 to the vesting of shares represented by the RSU's.  
11 Exhibit C, to the 2010 Symphony's Employment Agreement,  
12 sets forth the liquidity option's price share hurdles.  
13 Now, that's at Respondent's Exhibit 0, page 17.

14 So to recap, according to to the Symphony  
15 Employment Agreement, the paragraph 4A, sign-on option,  
16 is expressly contingent on Mr. Dhawan's continued  
17 employment with the company through each applicable  
18 vesting date.

19 The paragraph 4B, liquidity option, is  
20 expressly contingent on the company's achievement of  
21 share price hurdles in connection with the liquidity  
22 event as set forth in Exhibit C and to Mr. Dhawan's  
23 continued employment with the company through the  
24 liquidity event.

25 The paragraph 4C, restricted stock units

1 grant, is expressly contingent on the achievement of the  
2 performance objective set forth in Exhibit B, to the  
3 Employee Agreement, and expressly contingent on  
4 Mr. Dhawan's continued employment with the company  
5 through vesting.

6 The paragraph three, performance bonus, is  
7 expressly contingent on the achievement of the  
8 performance objective set forth in Exhibit B, to the  
9 Symphony Employment Agreement, and on Mr. Dhawan's  
10 continued employment with the company through vesting.

11 This linkage of Mr. Dhawan's stock options and  
12 restricted stock units and performance bonus, the  
13 linkage of this compensation to Mr. Dhawan's continued  
14 employment with the company through vesting and the  
15 company's achievement of specific performance related  
16 goals establishes that corresponding compensation paid  
17 to Appellants upon vesting, was explicitly intended as  
18 compensation for Mr. Dhawan's services through the  
19 vesting period.

20 The stock options, RSU's, and performance  
21 bonuses were intended to incentivize Mr. Dhawan's  
22 performance and secure optimal services from him during  
23 the course of his employment with Symphony.

24 Under IRC, section 83A, and corresponding case  
25 law, Mr. Dhawan's options, RSU, and bonus compensation

1 constitutes compensation for services, and therefore is  
2 properly characterized as ordinary income and not  
3 capital gains income.

4 And now turning to the 2015 Merger Agreement,  
5 which is at Respondent's Exhibit B, pages 1 through 33.  
6 The 2015 Merger Agreement makes clear that Mr. Dhawan's  
7 continued employment with Symphony, and subsequently  
8 Harman through the 2015 merger, was essential to the  
9 merger being consummated.

10 According to the 2015 Merger Agreement at  
11 Respondent's Exhibit B, page 2, were as concurrently  
12 with the execution of this agreement as a condition and  
13 inducement for Parent's willingness to enter into this  
14 agreement, Mr. Dhawan is entering into an Employment  
15 Agreement with Parent, which is Harman.

16 Pursuant to the Merger Agreement, Article 9,  
17 conditions of closing, paragraph 9.02H, the Employment  
18 Agreement with Sanjay Dhawan shall be in full force and  
19 effect, and Mr. Dhawan shall not have seized employment  
20 with Harman. That's at Respondent's Exhibit S, page 3.

21 Discloser's Schedule 3.14, to the 2015 Merger  
22 Agreement, which is at Respondent's Exhibit S, page 11,  
23 confirms the applicable vesting date as the merger date  
24 in 2015 and specifically links Mr. Dhawan's entitlement  
25 to options and RSU compensation to Mr. Dhawan's

1 continued employment with the company through vesting  
2 and the company's achievement of specific performance  
3 related goals.

4 Discloser's Schedule 3.14 states at  
5 Respondent's Exhibit S, page 11, all of the options  
6 listed in NX 3.05A accelerated vest upon a change in  
7 control;.

8 The restricted stock units listed in NX 3.05  
9 that were granted in 2011 accelerate in vest upon a  
10 change in control;

11 And the RSU's listed in NX 3.05A that were  
12 granted in 2014 accelerated vest upon a change in  
13 control with respect to 50 percent of such restricted  
14 stock units.

15 Pursuant to Mr. Dhawan's liquidity option as  
16 defined in his Employment Agreement to purchase one  
17 million shares of the company's common stock, which was  
18 granted on October 21, 2010, a number of shares subject  
19 to such option will be eligible to vest. Subject to:

20 Number one, a timely change in control; number  
21 two, the achievement of specific performance related  
22 goals. And number three, to Mr. Dhawan's continued  
23 employment through the change and control.

24 Merger Agreement, NX 3.05A, list Mr. Dhawan's  
25 RSU's at Respondent's Exhibit P, pages 1 through 3. The



1 RSU's listed in NX 3.05A, also appeared to be listed in  
2 Merger Agreement's Schedule 1.03B. And Merger Agreement  
3 Schedule 1.03B is at Respondent's Exhibit S, page 7.

4 According to NX 3.05A, the number of RSU's  
5 listed extensively represent, quote:

6 "The number eligible to vest on the occurrence  
7 of either an IPO or a change of control if one of these  
8 events occurs within five years. Until the trigger, the  
9 shares aren't actually vested per eligible to vest upon  
10 the occurrence of the trigger."

11 And this next sentence is underlined.

12 This is not applicable for Sanjay Dhawan's  
13 RSU's as this is governed by his Employment Agreement  
14 separately. That's at Respondent's Exhibit P, page 3.  
15 Thus according to NX 3.05A, the disposition of  
16 Mr. Dhawan's RSU's is governed by his Employment  
17 Agreement.

18 And just to note, I mean, NX 3.05A does not  
19 specify which Employment Agreement is referenced here --  
20 meaning the Symphony Employment Agreement or his  
21 subsequent Harman Employment Agreement -- but under  
22 either of the two, Mr. Dhawan's RSU's vest subject to  
23 his continued employment with the company and the  
24 company's achievement of specific performance related  
25 goals.

1 Under Merger Agreement, section 1.03A, that  
2 provision specifies the merger's effect on stock  
3 options. Which is at Respondent's Exhibit B, page 5.

4 To the extent that the Merger Agreement,  
5 section 1.03A, contemplates the disposition of  
6 Mr. Dhawan's liquidity options pursuant to the Symphony  
7 Employee Agreement recall that the liquidity options  
8 vested is linked to a change and control, Mr. Dhawan's  
9 continued employment with the company and the company's  
10 achievement of specific performance related goals.

11 Section 1.03B specifies the merger's effect on  
12 RSU's, which is at Respondent's Exhibit B, pages 5 and  
13 6. Mr. Dhawan's entitlement to RSU compensation is  
14 linked again to his continued employment with the  
15 company.

16 In fact, if Mr. Dhawan terminated employment  
17 with Symphony or it's affiliates before applicable  
18 vesting dates set forth in Schedule 1.03B, set forth of  
19 the Merger Agreement, then Mr. Dhawan would forfeit a  
20 corresponding compensation.

21 That provision, section 1.03B, states that it  
22 being understood, that if the employment of the  
23 applicable restricted stockholder with Symphony Teleca  
24 Corporation and its affiliates terminates before a  
25 vesting dates set forth in Section 1.03B, the right to

1 the corresponding restricted consideration shall be  
2 forfeited any such consideration so forfeited, a  
3 forfeited amount.

4           So here again, under the 2015 Merger  
5 Agreement, the linkage of Mr. Dhawan's options and RSU's  
6 to Mr. Dhawan's continued employment with the company,  
7 through vesting and the company's achievement of  
8 specific performance related goals, establishes that the  
9 options and RSU compensation paid to Appellants upon  
10 vesting was intended as compensation for Mr. Dhawan's  
11 services during the applicable vesting periods under the  
12 reasoning in Stabell, Alvaz, and LoBue; and such  
13 compensation is properly characterized as ordinary  
14 income and not capital gains income.

15           Under IRC, Section 83A, and corresponding case  
16 precedent -- particularly the Appeal of Stabell opinion  
17 -- Mr. Dhawan's 2010 Symphony Employment Agreement and  
18 the 2015 Merger Agreement expressly conditioned vesting,  
19 and Mr. Dhawan's entitlement to the stock options and  
20 RSU's conditions that on two key elements:

21           Number one, Mr. Dhawan's continued employment  
22 through vesting; and number two, the company's  
23 achievement of specific performance related goals.

24           Again, this linkage of the options and RSU  
25 compensation to continue employment and the achievement

1 of performance goals establishes that Appellant's  
2 corresponding compensation was intended as compensation  
3 for services performed during the vesting period as it  
4 was intended to incentivize Mr. Dhawan and secure better  
5 services from him during that period.

6           Consequently, Appellant's options and RSU  
7 compensation constitutes ordinary income and not capital  
8 gains income.

9           This concludes my presentation. And I'm happy  
10 to take questions.

11           JUDGE LAMBERT: Thank you, Ms. Bertani.

12           I'll turn to the panel to see if they have any  
13 questions for either party.

14           Judge Leung, do you have any questions.

15           JUDGE LEUNG: Judge Lambert, not at this time.  
16 I'll wait towards the end. Thank you.

17           JUDGE LAMBERT: Okay. Thanks.

18           And Judge Long do you have any questions.

19           JUDGE LONG: This is Judge Long, I have no  
20 questions. Thank you.

21           JUDGE LAMBERT: This is Judge Lambert.

22           I guess Mr. Dhawan I'll just -- and now that  
23 FTB has given their arguments and their pointing to the  
24 performance related goal aspects and the contract. Just  
25 how would you respond to that -- those arguments.

1 MR. DHAWAN: Sure.

2 So firstly, there was -- I did not receive  
3 even a single dollar of consideration for Symphony  
4 Technology shares through any other means but through  
5 the three payrolls that I have submitted the details;  
6 2015, 2016, and 2017.

7 All the vesting and all the clauses that, you  
8 know, FTB mentioned, they all seize to exist with the  
9 Merger Agreement.

10 So all the change and control, you know,  
11 performance options of my, you know, Symphony Teleca  
12 employment letter -- et cetera, et cetera -- all of that  
13 stuff seize to exist as the merger happened which was,  
14 as I mentioned, announced in January of 2015 and  
15 executed for a completion in April of 2015.

16 The only reason why -- only reason, and it is  
17 documented in the Merger Agreement, the only reason why  
18 thousands of employees were paid their merger  
19 consideration for purchasing their shares by the buyer  
20 through the payroll was to make it convenient so that  
21 these thousands of employees, including myself, who were  
22 based in 21 different countries.

23 And Harman felt that they want to make the  
24 payments through those, you know, through the payroll  
25 because all the countries have payrolls running and

1 doing payments. Otherwise becomes, you know, you know,  
2 highly cumbersome process.

3 I am not a tax lawyer. I, you know, when  
4 initially the FTB contacted me for the audit, they  
5 raised three issues in that audit. The first two issues  
6 FTB has considered and said, "Okay Sanjay, you've given  
7 us the documentation, and everything is all good."

8 The third matter, this is the only matter that  
9 has been opened, and in my earlier responses, you know,  
10 when I was basically, you know, I was trying to --  
11 trying to close the matter.

12 And from a -- my understanding of the tax code  
13 for Franchise Tax Board for California, there is really  
14 no difference in the short-term, you know, capital gains  
15 verses -- verses ordinary income. And my thing is why  
16 are we fighting this. There is really no difference.

17 So lets close the -- close the matter. Having  
18 said that, the 100 percent of the income related to this  
19 transaction was paid through this payroll, and none was  
20 linked to, you know, performance or any other clauses.

21 There were new agreement that was put by the  
22 buyer, Harman, that, you know, FTB referenced. And the  
23 income for that, including the LTI reference that miss  
24 Pam was making was absolutely attached to my continued  
25 employment and performance.

1           Having said that, if you look at the payroll  
2       slips, I'm looking at 2016 one here -- I'm not able to  
3       find the 2015 one -- but, in the 2016 one, it clearly  
4       says STC is sub. There is a column here which basically  
5       says that, you know, of the \$8.4 million of total income  
6       in 2016, 7.067 came from the income from this Merger  
7       Agreement.

8           The Harman income; the Harman LTIP income; the  
9       Harman bonus income -- which is absolutely considered  
10      as, you know, as ordinary income -- was separate and was  
11      reported separately.

12          So coming back, you know, it's difficult for  
13      me to -- to understand why the income, which was  
14      reported by the buyer for their convenience through the  
15      payroll systems across the world, you know, I'm being  
16      forced to sort of, you know, treat it as order ordinary  
17      income.

18          It is the income for the purchase of my  
19      previous company. There were no other performance or  
20      other clauses that were associated with it because my  
21      Employment Agreement with Symphony Teleca seized to  
22      exist in April of 2015 once the Merger Agreement was  
23      completed.

24          And, in fact, if you look at, you know, there  
25      were different salaries, different bonus plans and all

1 that stuff; and the new bonus plan, new salary, got into  
2 effect starting April of 2015. And the previous  
3 agreement sort of seized to exist.

4 So that's -- that's my explanation, Judge.

5 JUDGE LAMBERT: Thank you, Mr. Dhawan.

6 I will now move to closer marks with FTB. If  
7 you wanted to give closer marks and then I'll go back to  
8 Mr. Dhawan's for his closer marks.

9 So, Ms. Bertani, if you wanted to proceed with  
10 that for five minutes.

11  
12 CLOSING STATEMENT

13 MS. BERTANI: Thank you, Judge. Thank you,  
14 Judge.

15 In closing, much like the Appellant's offer  
16 letter in your Appeal of Stabell opinion, here Mr.  
17 Dhawan's Symphony Employment Agreement and the Merger  
18 Agreement, expressly link Appellant's stock options and  
19 RSU's vesting to two specific conditions:

20 Number one, Mr. Dhawan's continued employment  
21 with his employer through vesting; and number two, the  
22 company's achievement of specific performance related  
23 goals in a timely manner.

24 This linkage establishes that Appellant's  
25 stock options and RSU compensation paid on vesting in



1 2015 was, in fact, intended as compensation for Mr.  
2 Dhawan's services during the vesting period, and  
3 therefore constitutes ordinary income and not capital  
4 gains income.

5 Moreover, the evidence here in record in this  
6 case demonstrably establishes that Appellant's options  
7 and RSU income constitutes ordinary income and not  
8 capital gains income.

9 Number one, Mr. Dhawan's 2015 form W-2 issued  
10 by Symphony, expressly characterizes Mr. Dhawan's  
11 income; including the options and RSU income as state  
12 wages, tips, et cetera. That's Respondent's Exhibit D,  
13 page six.

14 Number two, Appellants reported the 2015 form  
15 W-2 income as state wages on line 12 of their 2015  
16 California Tax Return. That's at Respondent's Exhibit D,  
17 page two.

18 Number three, Appellants expressly concede  
19 multiple times during the course of this appeal that  
20 Respondents correctly characterize Appellant's 2015  
21 options and RSU income as ordinary income -- at  
22 Respondent's Exhibit Q, pages 1, 3, and 8.

23 The Employment Agreement expressly links  
24 Appellant's options and RSU vesting and eligibility to  
25 two key Appeal of Stabell conditions; establishing that

1 the corresponding income is intended as compensation.

2 Number one, Mr. Dhawan's continued employment  
3 with the company through vesting; and number two, the  
4 company's achievement of specific performance related  
5 goals. That's at Respondent's Exhibit O, pages 5 and 6.

6 And number five, the 2015 Merger Agreement  
7 expressly links Appellant's options and RSU income to  
8 the two Stabell conditions; establishing that  
9 corresponding income was intended as compensation of  
10 services, and therefore constitutes ordinary gross  
11 income.

12 And I will refer to Merger Agreement  
13 disclosure schedule 3.14, at Respondent's Exhibit S,  
14 page 11; Merger Agreement Annex 3.05A, which is at  
15 Respondent's Exhibit P, page 3; and Merger Agreement  
16 sections 1.03A and 1.03B, which is at Respondent's  
17 Exhibit B, pages 5 and 6.

18 Appellants have proffered no evidence,  
19 statutory, or case law to prove that their stock options  
20 and RSU income constitutes capital gains income, and  
21 therefore have failed to overcome Respondent's  
22 presumptively correct determination in this regard.  
23 Respondent respectfully request that OTA sustain  
24 Respondent's determination in it's entirety.

25 Thank you.

1 JUDGE LAMBERT: Thank you, Ms. Bertani.

2 And Mr. Dhawan, if you like to make your  
3 closing remarks now, for five minutes. Thanks.

4  
5 CLOSING STATEMENT

6 MR. DHAWAN: Sure. Thank you, Judge.

7 You know, I am -- I'm not a lawyer, as I said  
8 in my opening. I'm an engineer, you know, focused on,  
9 you know, building technology companies.

10 I think, in this case, the biggest -- the  
11 reason for the biggest confusion and the reason why we  
12 are all here is because four employees, including myself  
13 as a CEO of the company; the continued employees as part  
14 of the Merger Agreement, a determination was taken by  
15 the buyer that they would pay all considerations for the  
16 merger through the payroll.

17 That is the reason for this whole confusion.  
18 It should not have been reported through the merger  
19 proceed -- merger proceeds should not have been reported  
20 through payroll, and they did it for purely for their  
21 confusion. For their convenience. And that is what is  
22 causing all this confusion.

23 The -- once the Merger Agreement was signed  
24 and implemented, there was no performance. There was no  
25 vesting for the Symphony shares. There were all -- it

1 was all done. It was a Merger Agreement. From that  
2 point onwards, from April 2015 onwards, there were only  
3 payments against the Merger Agreement and a new  
4 Employment Agreement that was put in place.

5 This is the reason why I have tried my best to  
6 show to FTB and to this Court here. The split of the  
7 normal, continued income -- which is the ordinary income  
8 and the merger related income -- the merger related  
9 income is purely the sale of stock. The sale of stock.

10 That was vested under the change of control  
11 agreements, RSU, options, and all that stuff by April of  
12 2015. After April of 2015, there is no Symphony Teleca.  
13 There is no vesting that survives this agreement.

14 And the only thing that happened was the  
15 payment associated with that agreement that was paid  
16 over the next, you know, three years in mostly 2015 and  
17 some in '16 and '17. And the payments are, basically,  
18 purchase of stock that Harman did from me.

19 That's it. Which is under this agreement. So  
20 my, you know, so I stand by the statement that I made  
21 earlier that not even a single dollar was paid to me  
22 outside of the Harman payroll. 100 percent of my merger  
23 related share sale to Harman happened through the  
24 payroll entrees.

25 There were no performance or anything else

1 associated with that part of the income. There was ATI  
2 and all that stuff, which is a new agreement -- and  
3 we're not discussing that. That is absolutely, you  
4 know, ordinary income, and I'm paying taxes on that.

5 So coming back, I am not trying to, you know,  
6 debate or save 100k in dispute here. As I mentioned  
7 earlier, I am very honored to be paying, you know, my  
8 fair share.

9 And hopefully, you know, many, many more in  
10 the coming years, you know, as I proceed with my -- at  
11 the current sixth company which, by the way, is also  
12 called Symphony. It's called Symphony AI. And, so,  
13 please root for us as my next company, as well.

14 But the, you know, in this particular case, it  
15 really comes back to the principle of how the Merger  
16 Agreement was implemented. And hence, you know, I stand  
17 by my request that the income that was associated with  
18 the purchase of my shares, by Harman, is a share of --  
19 is a purchase of capital assets. And hence, it should  
20 be treated as capital gains or losses.

21 In this case, it was capital gains.

22 Thank you.

23 JUDGE LAMBERT: Thank you Mr. Dhawan.

24 So I'm going to turn to the panel to see if  
25 there's any questions.

1 Judge Leung, do you have any questions?

2 JUDGE LEUNG: Yes, I do.

3 And I'm going to start with the transaction  
4 itself.

5 Good morning, Mr. Dhawan. Thank you for your  
6 contributions to I-T.

7 MR. DHAWAN: Good morning.

8 JUDGE LEUNG: Tell me what happened with your  
9 Federal Return. Did you originally file this entire  
10 round of wages and then later filed Amended Federal Tax  
11 Return, or what happened there?

12 MR. DHAWAN: No. I have not filed any  
13 amendment with Federal Return. I filed both Federal and  
14 California Return with the same -- same principle. And  
15 there has been no (inaudible).

16 JUDGE LEUNG: So you treated the entire  
17 Federal Income Tax as wages, not as capital gain?

18 MR. DHAWAN: No. It's as capital gains for  
19 2015 and 2016. Same treatment as with the California.

20 JUDGE LEUNG: Okay.

21 Franchise Tax Board, do you have any -- any  
22 response to that as there is a Federal IRC section the  
23 IRS has not touched? Mr. Dhawan's treatment of these  
24 options as basically borrowing income -- capital gains  
25 income.

1 MS. BERTANI: My only response, Judge, would  
2 be that based on the applicable case law and IRC,  
3 section 83A, the disposition of Mr. Dhawan's RSU's and  
4 stock options were based on the terms and conditions set  
5 forth in the Symphony Employment Agreement.

6 Even though that agreement may have gone away  
7 after the 2015 merger, the fact to the matter is that  
8 the options and RSU's were granted based on the  
9 conditions in that agreement. And those two conditions  
10 are that, basically, that he remain an employee through  
11 vesting, and that the company achieves specific  
12 performance related goals under the applicable case law.

13 That establishes that that compensation is  
14 intended as compensation for services through the  
15 vesting period, and therefore is ordinary income under  
16 IRC, section 83A.

17 JUDGE LEUNG: Okay. Lets -- lets go to the  
18 substance of the options and RSU's.

19 Mr. Dhawan, I imagine you as CEO of Symphony,  
20 a hand in creating that stock option we're in. So tell  
21 me, what were the stock options and RSU's for? Were you  
22 -- were you contemplating that when these things vested,  
23 you would be allowed to buy Symphony stock?

24 Or were you allowed to -- or you were actually  
25 given Symphony stock? Or you were given an option to

1 buy that stock. What happened at vesting?

2 MR. DHAWAN: So I was not fully involved,  
3 Judge, for creating the plans. It was, as I said, I  
4 joined the company in 2010 as a CEO replacing other CEO,  
5 and some of these plans were put in place before me  
6 because the company was in operations I think at least  
7 six, seven years before I came in as the CEO.

8 Secondly, you know, the options and RSU's  
9 which were -- which were given for the four years that I  
10 was working there, you know, we didn't, you know, there  
11 were vesting happening because some of it was time  
12 vesting; some of it was performance vesting, but none of  
13 it was exercised until the actual merger implementation  
14 started.

15 So I didn't own any shares in the company. I  
16 had rights to buy the shares, but I did not own any  
17 shares, and that was true for most of the employees as  
18 well. Because unless you know that there is a, you  
19 know, those shares are worth something, you don't really  
20 exercise those shares.

21 When the merger discussions and the actual  
22 agreement was signed in January of 2015, there were  
23 professional law firms who basically took over the  
24 implementation. On our site was a law firm called  
25 Orrick, who was the firm which was implementing this



1 Merger Agreement.

2 And they basically went through the cap table  
3 and went through, again, all the calculations of, you  
4 know, the vestings and who owned what shares because  
5 there were many other investors, and it was almost a  
6 billion dollar transaction.

7 And so there were, you know, all of that was  
8 implemented by professional lawyers and tax firms,  
9 basically.

10 And the place where, like, I keep repeating,  
11 where, you know, I have huge regrets -- is to agree to  
12 -- that all these, you know, few thousand employees --  
13 and they have merger consideration to be paid through  
14 the payroll because that is where this, sort of, you  
15 know, cause in on this confusion.

16 JUDGE LEUNG: We're going back to the -- you  
17 were vested in some of these option but didn't exercise.  
18 Did the options give you an exercised priced? Were you,  
19 like, okay, if you wanted to exercise it, you would be  
20 allowed to buy the stock at --

21 MR. DHAWAN: -- yeah.

22 JUDGE LEUNG: -- two thousand share, or a buck  
23 fifty a share, or a discount. What exactly was the --  
24 the exercise? What number -- what was the value of that  
25 exercise? How much would you buy that stock for?

1 MR. DHAWAN: Yeah, it's there in the Merger  
2 Agreement. What rings a bell is dollar fourteen, or  
3 something like that, Judge. I'm trying to find the --  
4 the exact number here.

5 So I owned 2.476 million options. Average  
6 price was dollar forty-one. And --

7 JUDGE LEUNG: So you --

8 MR. DHAWAN: -- and 2.95 million RSU's.

9 JUDGE LEUNG: Okay.

10 MR. DHAWAN: The way the Merger Agreement was  
11 implemented, Judge, was that we never paid, you know,  
12 the actual cash. It was naked out of the gains.

13 JUDGE LEUNG: I understand. I'm trying to see  
14 whether there -- I'm trying to break down the Merger  
15 Agreement; which they did everything in one big payment.

16 MR. DHAWAN: That is correct.

17 JUDGE LEUNG: To see what part of payment was  
18 for your compensation and whether part of payment was  
19 for the sale of stock. That's where I'm going.

20 I want to know whether there is a differential  
21 between the strike price for your exercise of the  
22 options, which assuming there was no Harman in the  
23 picture, that you could've -- you could've paid for that  
24 stock verses what a -- a party was trying to purchase  
25 Symphony. The Symphony SCA would paid -- you know,

1 pay.

2 So you would have part compensation and part  
3 capital gain.

4 MR. DHAWAN: The price average -- my average  
5 price was dollar forty-one, and it's documented in the  
6 Merger Agreement.

7 JUDGE LEUNG: And at the time the merger, what  
8 did Harman -- how much per share did Harman pays for  
9 each share of Symphony?

10 MR. DHAWAN: Oh, I don't remember that. It's  
11 there in the document. I don't remember that.

12 JUDGE LEUNG: Okay. Franchise Tax --

13 Go ahead, Mr. Dhawan.

14 MR. DHAWAN: You know, recollection is five or  
15 six dollars, but that's pure speaking from memory. I'm  
16 not subject the Merger Agreement.

17 JUDGE LEUNG: Okay.

18 Ms. Bertani, do you have any insight of this?  
19 Am I going off the rails again? Or is there -- is there  
20 a compensation portion of this transaction and a  
21 separate bartering transaction, or are you supposed to  
22 -- or mixed together.

23 MS. BERTANI: No. There is no separate  
24 bartering transaction. There is no arm's length  
25 transaction here. This is -- this is stock -- this is

1 compensation in the forms of stock options and  
2 restricted stock units. But there was no arm's length  
3 transaction which would obviate application of IRC,  
4 section 83A.

5 The Franchise Tax Board's opinion, or  
6 position, is that the linkage of these options, no  
7 matter what the price, no matter what was paid, they  
8 were expressly linked in the Employment Agreement and  
9 the Merger Agreement to the two expressed conditions.

10 In other words, if Mr. Dhawan had discontinued  
11 his employment with Symphony before vesting, or if the  
12 company had failed to achieve specific performance  
13 related goals by the designated date, eligibility to  
14 these shares would be terminated. Would be canceled.  
15 Would be forfeited.

16 So there is no separation between a  
17 compensation side and a bartering side. There is no  
18 bartering. The agreement makes it very clear. You have  
19 to stay employed with the company, and the company has  
20 to perform.

21 In fact, Mr. Dhawan testified earlier that,  
22 you know, the merger compensation was actually an  
23 inducement to retain employees which further establish  
24 -- establishes that the compensation was paid to  
25 incentivize certain employees, especially Mr. Dhawan to

1 stay with the company through the merger events.

2 So under both the 2010 Merger Agreement with  
3 Symphony -- I'm sorry, the 2010 Employment Agreement  
4 with Symphony and the 2015 Merger Agreement.

5 The linkage of these options, no matter what  
6 they cost or what was paid, the bottom line is, there  
7 would have been nothing to be compensated for in January  
8 of 2015 had the options and RSU's not been granted under  
9 the 2010 Symphony Employment Agreement and accelerated  
10 and extinguished in January of 2015.

11 The linkage of those options and RSU's to Mr.  
12 Dhawan's continued employment to incentivize better  
13 service out of him clearly establishes that this  
14 compensation is intended as compensation for services,  
15 and therefore according to the Appeals of Stabell and  
16 Internal Revenue Code, section 83A, that is compensation  
17 for services.

18 It's ordinary gross income. There's no  
19 precedent of record to establish any of these RSU's or  
20 stock options as capital gains or capital assets.

21 JUDGE LEUNG: Now you -- you mentioned in your  
22 presentation that the -- I think you said it was Exhibit  
23 D, W-2 statement, was issued by Symphony.

24 MS. BERTANI: Yes.

25 JUDGE LEUNG: And not Harman.

1 MS. BERTANI: Yes. The W-2 statement was  
2 issued by Symphony Teleca for 2015. Yes, for 2015. And  
3 that is at Exhibit D, page 6.

4 JUDGE LEUNG: Even though Harman was the  
5 payer, it shows up on Symphony's W-2.

6 MS. BERTANI: Correct.

7 JUDGE LEUNG: How does that happen?

8 MS. BERTANI: That would be a corporate  
9 question. I'm not exactly sure on how that could  
10 happen, but I guess in the course of the merger,  
11 Mr. Dhawan has stated several times that he regrets  
12 having Harman do the accounting and issue the checks and  
13 it's caused confusion.

14 And while that may be the case, the W-2 was  
15 issued by Symphony, and the Merger Agreement was  
16 structured as it was structured.

17 And I understand that Mr. Dhawan said that he  
18 regrets those clauses, but as Judge Lambert said in the  
19 Appeal of Omar, while a taxpayers free to organize it's  
20 affairs as it chooses; nevertheless, once having done  
21 so, it must accept the tax consequences of its choice,  
22 whether contemplated or not. And perhaps that is what  
23 might be the issue in this case.

24 To answer your question, I'm not exactly sure  
25 how that happened. But the fact to the matter is, that

1 it did happen. Symphony did issue the W-2. And the  
2 compensation, according to Mr. Dhawan's based on his  
3 agreement, the 2010 Symphony Employment Agreement.

4 There was no other agreement with Symphony  
5 after the 2010 agreement. After Symphony and Symphony  
6 Teleca -- or Symphony Teleca was merged in 2012, I  
7 believe. The 2010 Symphony Agreement remains the  
8 operative agreement for his term of employment with  
9 Symphony.

10 JUDGE LEUNG: Okay.

11 And lets turn to jurisdiction issue.  
12 Exhibits, I believe, J and K contained notices of  
13 overassessment.

14 MS. BERTANI: Correct.

15 JUDGE LEUNG: For 2016, 2017. Respectfully.

16 Tell us about those notices. What are their  
17 purposes?

18 MS. BERTANI: The only purpose of the notice  
19 is of overassessment in the exhibits is that to the  
20 extent that the notice of overassessment indicates the  
21 specific amount on each notice, that amount will be  
22 applied to the Appellant's outstanding 2015 tax amount  
23 due.

24 So the notices of overassessment will be  
25 applied to decrease the Appellant's 2015 tax due.

1 JUDGE LEUNG: So should Franchise Tax Board  
2 prevail, that amount would be applied 2016, 2017, over a  
3 success as would be applied to his 2015 tax year?

4 MS. BERTANI: Correct.

5 Oops, sorry about that.

6 JUDGE LEUNG: What would happen if should the  
7 Taxpayer prevail? What would happen to those transfers?

8 MS. BERTANI: So if the Franchise Tax Board's  
9 determination was not sustained, I would think that the  
10 Franchise Tax Board would need to reassess it's  
11 determination. So there could be some changes,  
12 obviously. But we would have to reassess our  
13 determination based on your ruling.

14 JUDGE LEUNG: Okay. I guess he would  
15 hypothetically get another shot at filing a claim --  
16 filing claims for that year, or that year will stay open  
17 for that type of adjustment to be made.

18 JUDGE LAMBERT: Yeah. I think that's why in  
19 OTA regulations through 104G -- I think it's G now. It  
20 used to be E but, like, OTA doesn't -- specifically it  
21 doesn't have jurisdiction over a notice of proposed  
22 overassessment.

23 JUDGE LEUNG: Okay. Thank you.

24 Thank you, Mr. Dhawan.

25 Thank you, Franchise Tax Board.



1 MS. BERTANI: Thank you.

2 MR. DHAWAN: Thank you.

3 JUDGE LEUNG: And Judge Lambert.

4 JUDGE LAMBERT: Thank you.

5 Thank you, Judge Leung.

6 And Judge Long, do you have any questions?

7 JUDGE LONG: This is Judge Long. I do not  
8 have any questions. Thank you.

9 JUDGE LAMBERT: Thank you.

10 And this is Judge Lambert, and if there's  
11 nothing further, I'll conclude the hearing. And I want  
12 to thank both parties for appearing today. We will  
13 issue a rendered opinion within 100 days.

14 And the record is now close.

15 Thank you.

16 MS. BERTANI: Thank you.

17 MR. DHAWAN: Thank you.

18 (Proceedings concluded at 11:07 a.m.)  
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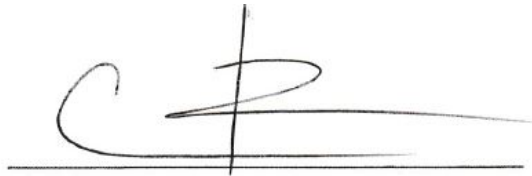
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2  
3 I, Christina L. Rodriguez, Hearing Reporter in  
4 and for the State of California, do hereby certify:

5 That the foregoing transcript of proceedings  
6 was taken before me at the time and place set forth,  
7 that the testimony and proceedings were reported  
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10 supervision, that the foregoing is a true record of the  
11 testimony and proceedings taken at that time.

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

14 I have hereunto subscribed my name this 11th  
15 day of October, 2023.

16  
17  
18  
19 

20 Hearing Reporter

21 CHRISTINA RODRIGUEZ  
22  
23  
24  
25

<hr/>	<b>11:07</b> 2:18 57:18	<b>2015's</b> 19:17	<b>4C</b> 28:2 29:25
<b>\$</b>	<b>12</b> 41:15	<b>2016</b> 6:24 10:3	<hr/>
<b>\$1,000,000</b> 27:18	<b>15</b> 4:13 29:8	11:21 12:21 14:11	<b>5</b>
<b>\$1,250,000</b> 27:12	<b>16</b> 7:1 14:20 29:8	16:9 37:6 39:2,3,6	<hr/>
28:5	44:17	46:19 55:15 56:2	<b>5</b> 16:24 27:11,17
<b>\$335,000</b> 29:1	<b>17</b> 7:1 14:20 26:25	<b>2017</b> 6:3,25 10:3	28:3,24 34:3,12
<b>\$4,886,515</b> 16:22	29:13 44:17	12:21 14:11 16:9	42:5,17
<b>\$5,717,899</b> 16:18,	<b>17081</b> 21:4	37:6 55:15 56:2	<b>50</b> 32:13
20	<b>19</b> 2:18 5:1	<b>2020</b> 8:24	<hr/>
<b>\$5,997,117</b> 16:17	<b>1989</b> 7:18	<b>2021</b> 18:10,19	<b>6</b>
<b>\$500,000</b> 29:2	<b>1996</b> 7:19	19:4,10,12	<hr/>
<b>\$6,000,000</b> 16:12	<b>19th</b> 5:8	<b>2022</b> 14:5,7	<b>6</b> 4:4,6 16:12 20:8
<b>\$8.4</b> 39:5	<hr/>	<b>2023</b> 2:18 5:1,8	28:3 34:13 42:5,
<b>\$828,384</b> 17:4	<b>2</b>	<b>21</b> 10:24 32:18	17 54:3
<b>\$831,384</b> 16:21	<hr/>	37:22	<b>60</b> 15:21
<hr/>	<b>2</b> 6:5 20:7 31:11	<b>21017112</b> 2:6 5:7	<hr/>
<b>0</b>	<b>2.476</b> 50:5	<b>22</b> 8:15	<b>7</b>
<hr/>	<b>2.95</b> 50:8	<hr/>	<hr/>
<b>0</b> 28:3 29:8,13	<b>2010</b> 24:21 25:8,	<b>3</b>	<b>7</b> 4:12 33:3
<hr/>	10 26:23,25 28:25	<b>3</b> 18:18 25:1 31:20	<b>7.067</b> 39:6
<b>1</b>	29:7,11 32:18	32:25 33:14 41:22	<hr/>
<hr/>	35:17 48:4 53:2,3,	42:15	<b>8</b>
<b>1</b> 6:5 17:1 18:9	9 55:3,5,7	<b>3.05</b> 32:8	<hr/>
19:21 20:8 31:5	<b>2011</b> 32:9	<b>3.05A</b> 32:6,11,24	<b>8</b> 19:3 41:22
32:25 41:22	<b>2012</b> 9:5 55:6	33:1,4,15,18	<b>8,500</b> 10:23
<b>1-2</b> 4:4	<b>2014</b> 32:12	42:14	<b>83A</b> 20:12 21:2,8
<b>1.03A</b> 34:1,5	<b>2015</b> 6:3,24 7:1	<b>3.14</b> 25:4 31:21	22:2,11 24:23
42:16	9:6,11,17,19,21	32:4 42:13	26:11 30:24 35:15
<b>1.03B</b> 33:2,3	10:2 12:21 13:16	<b>30</b> 6:8,19 7:11	47:3,16 52:4
34:11,18,21,25	14:8,18,20 16:3,7,	<b>33</b> 31:5	53:16
42:16	10,14,19,23,25	<b>350,000</b> 11:25	<hr/>
<b>100</b> 38:18 44:22	17:5 18:7,12,14,	<hr/>	<b>9</b>
57:13	22,24,25 19:7,13,	<b>4</b>	<hr/>
<b>100k</b> 8:12 45:6	23 20:4,15,19	<b>4</b> 26:24	<b>9</b> 18:10 31:16
<b>1040</b> 16:19	24:21 25:3,4,7,12	<b>40</b> 4:17	<b>9.02H</b> 31:17
<b>104G</b> 56:19	26:6,10 31:4,6,8,	<b>409</b> 13:3	<b>9:44</b> 2:17 5:2,8
<b>1099</b> 11:18 13:25	10,21,24 35:4,18	<b>43</b> 4:18	<b>9th</b> 24:3
14:3,5	37:6,14,15 39:3,	<b>4A</b> 27:10 29:15	<hr/>
<b>11</b> 25:5 31:22 32:5	22 40:2 41:1,9,14,	<b>4B</b> 27:16 29:19	<b>A</b>
42:14	15,20 42:6 44:2,		<hr/>
	12,16 46:19 47:7		<b>A-S</b> 4:5
	48:22 53:4,8,10		<b>a.m.</b> 2:17,18 5:2,8
	54:2 55:22,25		57:18
	56:3		

- absolutely** 38:24  
39:9 45:3
- accelerate** 32:9
- accelerated** 32:6,  
12 53:9
- accept** 54:21
- accounting**  
54:12
- achieve** 52:12
- achieved** 28:16
- achievement**  
17:18,23 20:23  
22:10,21 23:10,14  
24:10 25:15,18  
26:2,17 27:22  
28:8 29:4,20 30:1,  
7,15 32:2,21  
33:24 34:10 35:7,  
23,25 40:22 42:4
- achieves** 47:11
- acquired** 9:7  
14:18
- acquiring** 9:14  
10:14 11:16
- action** 7:1 16:8
- actionable** 16:8
- actual** 13:18  
48:13,21 50:12
- additional** 16:5
- addressed** 22:13
- adjusted** 13:9
- adjustment**  
56:17
- adjustments**  
16:16 20:5
- Administrative**  
3:3 5:10 6:15
- affairs** 54:20
- affiliates** 34:17,24
- affirm** 24:7
- aggregate** 28:5
- agree** 10:18 11:8,  
9 18:21,25 19:7  
20:4 49:11
- agreed** 5:25 18:6,  
12 19:23
- agreement** 9:10,  
12,13,24,25 10:19  
11:6,10,14,15  
12:20 13:13,17  
14:6,24 17:20  
18:23 20:18,19  
24:21,22 25:3,5,7,  
9,10 26:6,13,24  
27:1,24 28:9 29:6,  
8,11,15 30:3,9  
31:4,6,10,12,14,  
15,16,18,22  
32:16,24 33:2,13,  
17,19,20,21 34:1,  
4,7,19 35:5,17,18  
37:9,17 38:21  
39:7,21,22 40:3,  
17,18 41:23 42:6,  
12,14,15 43:14,23  
44:1,3,4,13,15,19  
45:2,16 47:5,6,9  
48:22 49:1 50:2,  
10,15 51:6,16  
52:8,9,18 53:2,3,  
4,9 54:15 55:3,4,  
5,7,8
- Agreement's**  
33:2
- agreements**  
44:11
- ahead** 51:13
- AI** 45:12
- allowed** 47:23,24  
49:20
- Alvaz** 24:4 35:12
- Amended** 46:10
- amendment**  
46:13
- America** 8:4
- amount** 13:9 35:3  
55:21,22 56:2
- analyze** 21:22
- analyzed** 22:2
- Andrea** 3:4 5:12
- Anjali** 5:7
- Annex** 42:14
- announced** 9:6,  
18 13:17 37:14
- annual** 28:4 29:1,  
9
- appeal** 2:5 5:6  
16:6 17:6 19:11  
21:21 24:4,5  
26:19 35:16 40:16  
41:19,25 54:19
- Appeals** 2:1 5:6  
53:15
- APPEARANCES**  
3:1
- appeared** 33:1
- appearing** 57:12
- Appellant** 3:6  
19:5,25 21:22  
23:2,19,21
- appellant's** 4:4  
16:18 17:5,21  
18:7,10,19 19:10,  
20 20:7,9 21:5,24  
22:8,16,20,23  
23:9,13,17,22  
24:8,15 36:1,6  
40:15,18,24 41:6,  
20,24 42:7 55:22,  
25
- Appellants** 2:7  
5:21 6:5 16:13,16,  
19,23 17:7,11  
18:5 19:13,17,21,  
22 20:4,7,13  
24:24 25:2 26:9  
30:17 35:9 41:14,  
18 42:18
- Appellants'** 16:1  
26:4,14
- Apple** 8:3
- applicable** 27:15  
28:14 29:9,17  
31:23 33:12  
34:17,23 35:11  
47:2,12
- application** 52:3
- applied** 12:6  
55:22,25 56:2,3
- applies** 6:3
- April** 9:17,19,20  
13:16 14:18 37:15  
39:22 40:2 44:2,  
11,12
- Area** 7:18 8:1
- arguments**  
36:23,25
- arm's** 51:24 52:2
- Article** 31:16
- aspects** 36:24
- asserted** 19:13
- Assessment**  
17:1
- asset** 13:5,8,9  
19:16,18
- assets** 14:23 15:1  
45:19 53:20
- assuming** 50:22
- ATI** 45:1
- attached** 38:24
- attending** 5:24
- audit** 38:4,5
- August** 8:24
- automatically**  
28:20
- average** 50:5 51:4
- award** 22:4,5,6,12  
28:16
- awarded** 22:4
- awards** 27:7

---

**B**


---

**back** 8:8,21 39:12  
40:7 45:5,15  
49:16

**bartering** 51:21,  
24 52:17,18

**base** 12:15,24

**based** 12:16  
20:18 27:8 29:5  
37:22 47:2,4,8  
55:2 56:13

**bases** 13:9

**basically** 10:4,18  
11:14,15 12:6  
38:10 39:4 44:17  
46:24 47:10 48:23  
49:2,9

**basis** 20:8

**Bay** 7:17 8:1

**bell** 50:2

**beneficial** 21:11

**Bertani** 3:9 4:13,  
17 5:15,16 6:22  
7:8 15:4,6,22,25  
36:11 40:9,13  
43:1 47:1 51:18,  
23 53:24 54:1,6,8  
55:14,18 56:4,8  
57:1,16

**big** 50:15

**biggest** 10:17  
43:10,11

**billion** 49:6

**Board** 3:8 5:17,19  
6:25 24:5 38:13  
46:21 56:1,10,25

**Board's** 52:5 56:8

**bonds** 13:7

**bonus** 12:15,17,  
24 20:2 29:1,3  
30:6,12,25 39:9,  
25 40:1

**bonuses** 28:23  
30:21

**borrowing** 46:24

**bottom** 53:6

**break** 50:14

**briefing** 7:3 16:5

**brought** 18:15

**buck** 49:22

**build** 7:18,20 9:1

**building** 43:9

**built** 7:24

**business** 29:4

**buy** 47:23 48:1,16  
49:20,25

**buyer** 10:20,22,24  
13:23 37:19 38:22  
39:14 43:15

**buying** 9:14 10:11

---

**C**


---

**calculated** 12:7

**calculations** 49:3

**California** 2:2 3:8  
5:1 14:13 16:14,  
23 19:24 21:3  
23:25 38:13 41:16  
46:14,19

**California's** 22:1

**called** 7:17 9:15  
10:23 11:15 45:12  
48:24

**calls** 9:25

**canceled** 28:17,  
21 52:14

**cap** 49:2

**capital** 6:2 13:5,8,  
10,20 14:9,12,16,  
21 15:1 16:2,20,  
21,22 17:2,9 18:3,  
14 19:15,25

20:10,16 24:13  
26:21 31:3 35:14  
36:7 38:14 41:3,8  
42:20 45:19,20,21  
46:17,18,24 51:3  
53:20

**case** 5:7 10:22  
13:11 16:1 20:13  
21:22 22:3 23:22  
30:24 35:15 41:6  
42:19 43:10  
45:14,21 47:2,12  
54:14,23

**cash** 50:12

**caused** 54:13

**causing** 43:22

**CD** 8:2

**CEO** 8:25 9:15  
10:6,10 11:4,7  
12:4 43:13 47:19  
48:4,7

**Cerence** 14:4

**cetera** 9:22 37:12  
41:12

**change** 25:12,14,  
19 27:21 28:11  
32:6,10,12,20,23  
33:7 34:8 37:10  
44:10

**characterization**  
20:15

**characterize**  
19:17 41:20

**characterized**  
19:14 31:2 35:13

**characterizes**  
41:10

**characterizing**  
20:9

**checks** 54:12

**choice** 54:21

**chooses** 54:20

**Christina** 2:19

**Circuit** 24:3

**Citing** 22:11

**claim** 56:15

**claims** 56:16

**clarification** 6:23

**classify** 19:6

**clause** 10:19,25  
11:5

**clauses** 37:7  
38:20 39:20 54:18

**clear** 31:6 52:18

**close** 38:11,17  
57:14

**Closed** 18:17  
19:2,8

**closer** 40:6,7,8

**closing** 4:15  
31:17 40:12,15  
43:3,5

**co-pellant's** 5:11

**code** 19:24 21:2,4  
38:12 53:16

**colleagues** 7:16

**column** 39:4

**combination**  
20:1

**commencing**  
2:17 28:24

**Commissioner**  
24:3,4,6

**common** 27:8,13,  
19 28:6 32:17

**companies** 7:20  
43:9

**company** 8:3 9:1,  
4,5,8,14,15 10:8,  
11,14,22 11:4,16,  
21,24 12:5 14:4,  
22,23 25:14 26:17  
27:6,9 28:10  
29:17,23 30:4,10,  
14 32:1 33:23

34:9,15 35:6 39:19 42:3 43:13 45:11,13 47:11 48:4,6,15 52:12, 19 53:1	<b>concluded</b> 23:24 57:18	<b>consummated</b> 31:9	<b>correct</b> 20:11 42:22 50:16 54:6 55:14 56:4
<b>company's</b> 17:18,23 20:23 22:9 24:10 25:15, 17 26:2,17 28:7 29:4,20 30:15 32:2,17 33:24 34:9 35:7,22 40:22 42:4	<b>concludes</b> 36:9	<b>contacted</b> 38:4	<b>correctly</b> 41:20
<b>compensated</b> 53:7	<b>concluding</b> 2:17	<b>contained</b> 55:12	<b>correspondent</b> 25:25
<b>compensation</b> 16:13 17:22,25 18:1 20:25 22:23 23:15,16,21,22,24 24:12,17 26:20 30:13,16,18,25 31:1,25 34:13,20 35:9,10,13,25 36:2,7 40:25 41:1 42:1,9 47:13,14 50:18 51:2,20 52:1,17,22,24 53:14,16 55:2	<b>concurrently</b> 31:11	<b>contemplated</b> 54:22	<b>correspondently</b> 26:9
<b>complete</b> 9:19	<b>condition</b> 31:12	<b>contemplates</b> 34:5	<b>Cosmin</b> 24:6
<b>completed</b> 39:23	<b>conditioned</b> 17:15 21:15 22:20 25:16 26:1 35:18	<b>contemplating</b> 47:22	<b>cost</b> 12:7 53:6
<b>completion</b> 37:15	<b>conditions</b> 17:15 22:7,12 25:8,11 31:17 35:20 40:19 41:25 42:8 47:4,9 52:9	<b>contend</b> 19:22	<b>could've</b> 50:23
<b>complicated</b> 11:21 12:1	<b>confirm</b> 24:24	<b>contends</b> 19:25	<b>countries</b> 10:24 37:22,25
<b>component</b> 22:16 23:5	<b>confirms</b> 25:6 31:23	<b>contingent</b> 23:8 29:16,20 30:1,3,7	<b>country</b> 8:6,8,21
<b>components</b> 26:15	<b>confusion</b> 11:11 43:11,17,21,22 49:15 54:13	<b>continue</b> 35:25	<b>Court</b> 24:2,3 44:6
<b>comprises</b> 18:9, 18 19:3	<b>conjunction</b> 19:10 23:5	<b>continued</b> 17:16, 22 20:22 22:8,20 23:9,13 24:9 25:13,17 26:1,16 27:14,25 28:10 29:16,23 30:4,10, 13 31:7 32:1,22 33:23 34:9,14 35:6,21 38:24 40:20 42:2 43:13 44:7 53:12	<b>Court's</b> 24:6
<b>concede</b> 41:18	<b>connection</b> 17:11 21:7 25:19 27:5,23 28:11 29:21	<b>contract</b> 36:24	<b>covering</b> 28:5
<b>conceded</b> 18:5	<b>consequences</b> 54:21	<b>contractually</b> 20:21	<b>creating</b> 47:20 48:3
<b>concessions</b> 19:12	<b>consideration</b> 10:1,15,25 14:19 18:24 35:1,2 37:3, 19 49:13	<b>contributions</b> 7:24,25 46:6	<b>cumbersome</b> 38:2
<b>conclude</b> 57:11	<b>considerations</b> 43:15	<b>control</b> 25:12,14, 19 27:21 28:11 32:7,10,13,20,23 33:7 34:8 37:10 44:10	<b>current</b> 45:11
	<b>considered</b> 38:6 39:9	<b>convenience</b> 39:14 43:21	<hr/>
	<b>constitute</b> 20:8	<b>convenient</b> 37:20	<b>D</b>
	<b>constituted</b> 22:1	<b>copy</b> 9:12	<hr/>
	<b>constitutes</b> 17:8 18:2,7 21:1 23:22, 24 24:12,17 31:1 36:7 41:3,7 42:10, 20	<b>corporate</b> 54:8	<b>date</b> 5:8 27:15 28:21 29:18 31:23 52:13
		<b>Corporation</b> 34:24	<b>dates</b> 22:18,19,25 23:10 25:24,25 34:18,25
			<b>day</b> 9:18 11:7
			<b>days</b> 57:13
			<b>debate</b> 14:25 45:6
			<b>decision</b> 26:19
			<b>decrease</b> 55:25
			<b>defined</b> 32:16
			<b>demonstrably</b> 41:6
			<b>demonstrate</b>

20:17	<b>differential</b> 50:20		34:9,14,16,22
<b>department's</b> 4:5	<b>difficult</b> 39:12	<hr/> <b>E</b> <hr/>	35:6,17,21,25
<b>designated</b> 22:21 25:18 52:13	<b>directly</b> 21:16	<b>earlier</b> 21:13 38:9 44:21 45:7 52:21	37:12 38:25 39:21 40:17,20 41:23 42:2 44:4 47:5 52:8,11 53:3,9,12 55:3,8
<b>detail</b> 24:2	<b>disallow</b> 17:2	<b>earn</b> 12:16	<b>end</b> 36:16
<b>details</b> 37:5	<b>Discloser's</b> 31:21 32:4	<b>earning</b> 20:6	<b>engineer</b> 7:17 43:8
<b>determination</b> 18:6,21 19:23 20:12 21:23 24:7 42:22,24 43:14 56:9,11,13	<b>disclosure</b> 42:13	<b>easier</b> 11:2	<b>enter</b> 31:13
<b>determine</b> 7:4	<b>Disclosures</b> 25:4	<b>ecosystem</b> 8:1	<b>entering</b> 31:14
<b>Dhawan</b> 2:6 3:6 4:12,18 5:7,23 6:7,13,18 7:10,14, 16 15:3,5 18:11, 20 24:25 27:6,11, 17 28:4,11,17,20, 22,25 31:14,18,19 34:16,19 36:4,22 37:1 40:5 43:2,6 45:23 46:5,7,12, 18 47:19 48:2 49:21 50:1,8,10, 16 51:4,10,13,14 52:10,21,25 54:11,17 56:24 57:2,17	<b>discontinued</b> 52:10	<b>education</b> 7:17	<b>entire</b> 46:9,16
	<b>discount</b> 49:23	<b>effect</b> 31:19 34:2, 11 40:2	<b>entirety</b> 42:24
	<b>discuss</b> 24:2	<b>element</b> 24:24 26:12	<b>entitled</b> 25:20 28:12
	<b>discussing</b> 13:12 45:3	<b>elements</b> 27:21 35:20	<b>entitlement</b> 20:20 31:24 34:13 35:19
	<b>discussion</b> 8:10 14:1	<b>eligibility</b> 27:2,20 29:3 41:24 52:13	<b>entrees</b> 44:24
	<b>discussions</b> 48:21	<b>eligible</b> 27:6 28:4, 25 32:19 33:6,9	<b>Equalization</b> 24:5
	<b>disposition</b> 17:7 24:19 33:15 34:5 47:3	<b>employed</b> 52:19	<b>equity</b> 27:7
	<b>dispute</b> 45:6	<b>employee</b> 12:4,8 17:12 24:20 30:3 34:7 47:10	<b>error</b> 21:23
	<b>document</b> 12:13 16:8 51:11	<b>employees</b> 10:1, 2,7,10,11,16,23 11:4,25 37:18,21 43:12,13 48:17 49:12 52:23,25	<b>essential</b> 31:8
	<b>documentation</b> 38:7	<b>employer</b> 16:10 17:16 20:6 22:8 23:3 26:10 40:21	<b>establish</b> 24:15 25:22 52:23 53:19
	<b>documented</b> 37:17 51:5	<b>employment</b> 17:16,19,23 20:18,22 22:3,8, 21 23:9,13 24:9, 21 25:9,10,13,17 26:2,13,16,23 27:1,5,14,24,25 28:9,10,19,21 29:6,7,11,15,17, 23 30:4,9,10,14, 23 31:7,14,17,19 32:1,16,23 33:13, 16,19,20,21,23	<b>established</b> 21:23
	<b>documents</b> 12:11,12,21 19:9 24:18 25:22		<b>establishes</b> 17:24 20:24 23:15 26:14 30:16 35:8 36:1 40:24 41:6 47:13 52:24 53:13
	<b>dollar</b> 16:20,21,22 17:4 29:1,2 37:3 44:21 49:6 50:2,6 51:5		<b>establishing</b> 41:25 42:8
	<b>dollars</b> 16:12,17, 18 51:15		<b>event</b> 27:23 28:1, 18 29:22,24
	<b>due</b> 55:23,25		<b>events</b> 33:8 53:1
	<b>duly</b> 6:14		<b>evidence</b> 6:6 20:7,14,17 41:5 42:18

<b>Evidentiary</b> 24:15	35:18 40:18 41:10,18,23 42:7 52:8	<b>forfeited</b> 28:16,20 35:2,3 52:15	46:18,24 50:12 53:20
<b>exact</b> 50:4		<b>forfeiture</b> 21:12, 14,20 22:13,16, 18,24 25:24 26:5	<b>generated</b> 13:12
<b>examined</b> 6:15	<b>extensively</b> 24:18 33:5	<b>form</b> 16:10,19 27:7 41:9,14	<b>give</b> 6:7 40:7 49:18
<b>Examples</b> 13:5	<b>extent</b> 34:4 55:20	<b>forms</b> 52:1	<b>giving</b> 8:8,21
<b>Excludes</b> 13:5	<b>extinguished</b> 53:10	<b>forty-one</b> 50:6 51:5	<b>goal</b> 36:24
<b>executed</b> 9:11,22 26:6 37:15	<hr/> <b>F</b> <hr/>	<b>found</b> 22:16 23:5	<b>goals</b> 17:19,24 20:24 22:10,22 23:11,15 24:11 25:15,18 26:3,18 28:8 30:16 32:3, 22 33:25 34:10 35:8,23 36:1 40:23 42:5 47:12 52:13
<b>execution</b> 18:23 25:3,7 31:12	<b>fact</b> 18:4 23:16 34:16 39:24 41:1 47:7 52:21 54:25	<b>fourteen</b> 50:2	<b>good</b> 5:15 7:15 8:9,21 38:7 46:5,7
<b>exercise</b> 48:20 49:17,19,24,25 50:21	<b>facts</b> 8:23 19:5	<b>Franchise</b> 3:8 5:16,19 6:25 38:13 46:21 51:12 52:5 56:1,8,10,25	<b>govern</b> 24:18
<b>exercised</b> 18:22 25:2 48:13 49:18	<b>failed</b> 42:21 52:12	<b>Francisco</b> 7:17	<b>governed</b> 33:13, 16
<b>exert</b> 18:10,19 19:4	<b>fair</b> 8:7,20 45:8	<b>free</b> 54:19	<b>governs</b> 21:4
<b>Exhibit</b> 16:12,24 17:1 18:9,18 19:3, 21 20:7 25:1,5 26:24 27:11,17,24 28:3,9,24 29:6,7, 8,11,13,22 30:2,8 31:5,11,20,22 32:5,25 33:3,14 34:3,12 41:12,16, 22 42:5,13,15,17 53:22 54:3	<b>family</b> 8:22	<b>FTB</b> 5:13 6:21 7:5, 15 12:11 14:13 36:23 37:8 38:4,6, 22 40:6 44:6	<b>grant</b> 30:1
<b>exhibits</b> 4:4,5 6:4, 5 55:12,19	<b>Federal</b> 8:16 46:9, 10,13,17,22	<b>FTB's</b> 15:19,20 19:7	<b>granted</b> 27:12,18 32:9,12,18 47:8 53:8
<b>exist</b> 21:14 37:8, 13 39:22 40:3	<b>feel</b> 7:25	<b>full</b> 25:20 28:12 31:18	<b>grants</b> 27:6 28:5
<b>explain</b> 6:8 10:20	<b>felt</b> 37:23	<b>fully</b> 48:2	<b>great</b> 8:5
<b>explained</b> 22:5	<b>fifty</b> 49:23	<b>furnishes</b> 13:7	<b>gross</b> 21:8,24 23:24 42:10 53:18
<b>explanation</b> 40:4	<b>fighting</b> 38:16	<b>future</b> 21:16	<b>group</b> 23:9,13
<b>explicitly</b> 30:17	<b>file</b> 46:9	<hr/> <b>G</b> <hr/>	<b>groups'</b> 23:14
<b>express</b> 19:12 22:11	<b>filed</b> 46:10,12,13	<b>gain</b> 6:2 13:10,19 16:20,22 17:2 18:3,14 46:17 51:3	<b>guess</b> 36:22 54:10 56:14
<b>expressed</b> 52:9	<b>filing</b> 8:15,17 56:15,16	<b>gain's</b> 20:10	<hr/> <b>H</b> <hr/>
<b>expressly</b> 17:15 18:5 22:6 24:9 26:15 27:13,25 29:16,20 30:1,3,7	<b>financial's</b> 9:3	<b>gains</b> 11:12,13 13:21 14:9,12,16, 21 16:2 17:9 19:25 20:16 24:13 26:21 31:3 35:14 36:8 38:14 41:4,8 42:20 45:20,21	<b>hand</b> 47:20
	<b>find</b> 39:3 50:3		<b>handled</b> 8:14 13:20
	<b>firm</b> 48:24,25		<b>happen</b> 54:7,10 55:1 56:6,7
	<b>firms</b> 48:23 49:8		
	<b>firstly</b> 37:2		
	<b>focused</b> 43:8		
	<b>foot</b> 11:8		
	<b>force</b> 31:18		
	<b>forced</b> 10:25 11:5 39:16		
	<b>forfeit</b> 34:19		



**happened** 9:10,  
16 37:13 44:14,23  
46:8,11 48:1  
54:25

**happening** 48:11

**happy** 8:7 36:9

**Harman** 9:7,14  
10:16,23 11:19,21  
12:5,9,13 17:13  
20:23 24:20 25:12  
31:8,15,20 33:21  
37:23 38:22 39:8,  
9 44:18,22,23  
45:18 50:22 51:8  
53:25 54:4,12

**hearing** 2:19 5:6,  
10 57:11

**held** 13:7 14:9  
18:16 28:20

**highly** 38:2

**home** 7:18 13:6

**honor** 8:19

**honored** 7:25 8:5  
45:7

**household** 13:6

**huge** 49:11

**hurdles** 27:22  
29:12,21

**hypothetically**  
56:15

---

## I

---

**I-T** 46:6

**imagine** 47:19

**immaterial** 14:15

**immediately**  
10:10

**implementation**  
48:13,24

**implemented**  
43:24 45:16 49:8  
50:11

**implementing**  
48:25

**important** 12:11

**inaudible** 46:15

**incentive** 21:25

**incentivize** 23:18  
30:21 36:4 52:25  
53:12

**include** 13:6  
18:13

**includes** 21:9

**including** 8:2  
10:16 11:4 12:6  
14:7 37:21 38:23  
41:11 43:12

**inclusion** 9:23

**income** 6:2 11:18  
12:14,15,16,19,  
22,23,25 13:5,11,  
12,22 14:8,12  
16:2,3,17,18 17:3,  
4,5,7,9,11 18:3,7,  
8,13,25 19:7,14,  
15,18,19 20:1,3,9,  
10,15,16,20,25  
21:1,8,9,24 22:1,  
25 23:1,25 24:8,  
13,16,17,19 26:4,  
7,8,20,21,22 31:2,  
3 35:14 36:7,8  
38:15,18,23 39:5,  
6,8,9,10,13,17,18  
41:3,4,7,8,11,15,  
21 42:1,7,9,11,20  
44:7,8,9 45:1,4,17  
46:17,24,25 47:15  
53:18

**incorporated**  
21:3

**increase** 10:8  
17:4

**indirectly** 21:16

**individual** 21:17

**inducement**  
31:13 52:23

**inextricably**  
20:21

**initially** 38:4

**insight** 51:18

**intended** 17:25  
20:25 23:16,18  
24:11,16 26:20  
30:17,21 35:10  
36:2,4 41:1 42:1,9  
47:14 53:14

**interest** 21:11

**Internal** 21:2  
53:16

**introduce** 5:13,22

**invented** 7:22

**invested** 9:22  
14:17

**investing** 22:6

**investment** 13:4

**investments**  
13:7

**investors** 49:5

**involved** 48:2

**involves** 16:1

**IPO** 33:7

**IRC** 22:2 24:23  
26:11 30:24 35:15  
46:22 47:2,16  
52:3

**IRC's** 22:11

**IRS** 13:2,3 20:12  
46:23

**issue** 5:25 6:3 7:5,  
7 16:4,6 17:6  
54:12,23 55:1,11  
57:13

**issued** 6:25 16:7  
41:9 53:23 54:2,  
15

**issues** 38:5

**items** 13:6

---

## J

---

**January** 9:6,11,  
18,20 13:16 14:18  
37:14 48:22 53:7,  
10

**Jason** 3:10 5:18

**job** 12:23

**joined** 8:25 48:4

**Josh** 5:9

**JOSHUA** 3:3

**Judge** 3:3 4:4,5  
5:5,10,11,20,24  
6:15,19 7:2,9  
15:3,6,8,11,12,14,  
15,16,18 36:11,  
14,15,17,18,19,21  
40:4,5,13,14 43:1,  
6 45:23 46:1,2,8,  
16,20 47:1,17  
48:3 49:16,22  
50:3,7,9,11,13,17  
51:7,12,17 53:21,  
25 54:4,7,18  
55:10,15 56:1,6,  
14,18,23 57:3,4,5,  
6,7,9,10

**Judges** 7:15  
12:12

**jurisdiction** 6:24  
7:4,5,7 16:4 55:11  
56:21

---

## K

---

**key** 17:15 26:15  
35:20 41:25

---

## L

---

**Lambert** 3:3 5:5,  
9,20,24 6:19 7:2,9  
15:3,8,14,18  
36:11,15,17,21  
40:5 43:1 45:23  
54:18 56:18 57:3,

- 4,9,10  
**Lambert's** 4:4,6  
**law** 3:3 5:10 6:15  
 20:13 21:3 30:25  
 42:19 47:2,12  
 48:23,24  
**lawyer** 38:3 43:7  
**lawyers** 49:8  
**lead** 5:9  
**legal** 20:8,11,13  
**length** 51:24 52:2  
**lets** 38:17 47:17  
 55:11  
**letter** 22:5,12  
 37:12 40:16  
**Leung** 3:3 5:11  
 15:11,12 36:14,15  
 46:1,2,8,16,20  
 47:17 49:16,22  
 50:7,9,13,17 51:7,  
 12,17 53:21,25  
 54:4,7 55:10,15  
 56:1,6,14,23 57:3,  
 5  
**licensed** 8:3  
**lies** 17:6  
**limited** 16:6  
**link** 40:18  
**linkage** 17:21  
 30:11,13 35:5,24  
 40:24 52:6 53:5,  
 11  
**linked** 20:21 24:9  
 26:15 27:13,20  
 29:4 34:8,14  
 38:20 52:8  
**linking** 23:12  
**links** 31:24 41:23  
 42:7  
**liquidity** 25:11  
 27:16,23 28:1  
 29:12,19,21,24  
 32:15 34:6,7  
**list** 32:24  
**listed** 9:8 32:6,8,  
 11 33:1,5  
**lists** 12:15,18,25  
**Lobue** 23:18 24:3  
 35:12  
**Long** 3:4 5:12  
 15:15,16 36:18,19  
 57:6,7  
**long-term** 13:20  
 14:12,16,21 16:21  
 19:24 21:25  
**long-terms** 14:14  
**longer** 19:14  
**loses** 45:20  
**loss** 13:11,19  
 16:21  
**lost** 9:1  
**LTI** 21:25 22:4,6,7,  
 16,23 23:1,15,21,  
 24 38:23  
**LTIP** 39:8
- 
- M**
- 
- made** 7:24 10:18  
 23:8 44:20 56:17  
**maintains** 16:6  
**major** 9:1  
**make** 7:6 10:6,12  
 11:2,3,20 37:20,  
 23 43:2  
**makes** 31:6 52:18  
**making** 20:11  
 38:24  
**making-**  
**company** 9:2  
**management**  
 10:7,10  
**manner** 40:23  
**marks** 40:6,7,8  
**matter** 2:5 5:17  
 38:8,11,17 47:7  
 52:7 53:5 54:25  
**matters** 11:20  
**maximum** 29:2  
**meaning** 13:23  
 33:20  
**means** 37:4  
**mechanism**  
 10:13  
**memory** 51:15  
**mention** 7:5  
**mentioned** 37:8,  
 14 45:6 53:21  
**merged** 9:4 55:6  
**merger** 9:24  
 18:23,24 20:19  
 24:22 25:3,4,7,12  
 26:6,13 31:4,6,8,  
 9,10,16,21,23  
 32:24 33:2 34:1,4,  
 19 35:4,18 37:9,  
 13,17,18 39:6,22  
 40:17 42:6,12,14,  
 15 43:14,16,18,  
 19,23 44:1,3,8,22  
 45:15 47:7 48:13,  
 21 49:1,13 50:1,  
 10,14 51:6,7,16  
 52:9,22 53:1,2,4  
 54:10,15  
**merger's** 34:2,11  
**million** 8:15 32:17  
 39:5 50:5,8  
**millions** 8:19  
**mind** 24:14  
**minus** 12:7  
**minutes** 4:4,6  
 6:8,20 7:11 15:21  
 40:10 43:3  
**mirror** 21:25 22:4,  
 17,19 23:7,12  
**miscellaneous**  
 11:18  
**mistake** 10:17  
**mixed** 51:22  
**month** 18:15  
**months** 9:17  
**morning** 5:15  
 7:15 46:5,7  
**move** 15:20 40:6  
**multi-step** 9:25  
**multiple** 41:19
- 
- N**
- 
- naked** 50:12  
**Nasdaq** 9:8  
**normal** 12:14,16,  
 23 13:24 20:2  
 44:7  
**note** 9:12 33:18  
**notice** 7:1 16:7,25  
 55:18,20,21 56:21  
**notices** 55:12,16,  
 24  
**number** 5:7 12:4  
 13:3 17:15,17  
 22:7,9 25:11,13  
 27:21 32:18,20,22  
 33:4,6 35:21,22  
 40:20,21 41:9,14,  
 18 42:2,3,6 49:24  
 50:4  
**NX** 32:6,8,11,24  
 33:1,4,15,18
- 
- O**
- 
- objections** 6:6  
**objective** 29:5  
 30:2,8  
**objectives** 28:15  
 29:5,9  
**obviate** 52:3  
**occasions** 18:5

<b>occurrence</b> 33:6, 10	40:18,25 41:6,11, 21,24 42:7,19 44:11 46:24 47:4, 8,18,21 48:8 49:18 50:5,22 52:1,6 53:5,8,11, 20	42:5,17	<b>pays</b> 51:8
<b>occurs</b> 21:13 33:8		<b>paid</b> 8:15,18 10:9, 11 12:8 17:25 18:24 23:2,15,21 26:9 30:16 35:9 37:18 38:19 40:25 44:15,21 49:13 50:11,23,25 52:7, 24 53:6	<b>people</b> 8:7
<b>October</b> 19:12 32:18		<b>Pam</b> 5:15 38:24	<b>percent</b> 32:13 38:18 44:22
<b>offer</b> 40:15	<b>oral</b> 5:6	<b>PAMELA</b> 3:9	<b>perform</b> 52:20
<b>offered</b> 8:6	<b>order</b> 39:16	<b>panel</b> 15:9 36:12 45:24	<b>performance</b> 17:12,18,24 20:24 21:7,16 22:10,14, 22 23:10,14 24:11 25:18 26:2,12,18 28:8,15,23 29:1,3, 5,9 30:2,6,8,12, 15,20,22 32:2,21 33:24 34:10 35:8, 23 36:1,24 37:11 38:20,25 39:19 40:22 42:4 43:24 44:25 47:12 48:12 52:12
<b>offering</b> 19:12	<b>orders</b> 4:4,6	<b>paragraph</b> 26:25 27:4,10,16 28:2, 23 29:15,19,25 30:6 31:17	<b>performed</b> 23:23, 25 36:3
<b>Office</b> 2:1 5:6	<b>ordinary</b> 6:2 12:16,23 16:2 17:3,9 18:3,8,13, 25 19:15,19 21:1 24:13,17 26:21 31:2 35:13 36:7 38:15 39:10,16 41:3,7,21 42:10 44:7 45:4 47:15 53:18	<b>Parent</b> 31:15	<b>period</b> 9:20 10:2,6 13:16,18 17:17 18:2 23:17,20,23 30:19 36:3,5 41:2 47:15
<b>offset</b> 16:20	<b>organize</b> 54:19	<b>Parent's</b> 31:13	<b>periods</b> 35:11
<b>Omar</b> 54:19	<b>originally</b> 46:9	<b>part</b> 8:1 9:9 11:9 23:25 43:13 45:1 50:17,18 51:2	<b>person</b> 21:10,15, 18
<b>onwards</b> 44:2	<b>Orrick</b> 48:25	<b>parties</b> 5:25 57:12	<b>personal</b> 13:4
<b>Oops</b> 56:5	<b>OTA</b> 2:6 6:23 21:21,22 22:2,12, 16 23:5,23 42:23 56:19,20	<b>party</b> 36:13 50:24	<b>personal-used</b> 13:6
<b>open</b> 56:16	<b>OTA's</b> 16:5	<b>pay</b> 8:7,20 10:20, 25 43:15 51:1	<b>personally</b> 8:12
<b>opened</b> 38:9	<b>outstanding</b> 28:19 55:22	<b>payer</b> 54:5	<b>physical</b> 28:15,25
<b>opening</b> 19:10 24:1 43:8	<b>overassessment</b> 55:13,19,20,24 56:22	<b>paying</b> 45:4,7	<b>picture</b> 50:23
<b>operation</b> 10:18	<b>overcome</b> 42:21	<b>payment</b> 10:12 28:17,22 44:15 50:15,17,18	<b>place</b> 14:19 44:4 48:5 49:10
<b>operations</b> 10:24 48:6	<b>overtime</b> 10:11	<b>payments</b> 11:3 22:19 37:24 38:1 44:3,17	<b>plan</b> 21:25 29:5 40:1
<b>operative</b> 24:18 55:8	<b>own-invested</b> 13:15	<b>payroll</b> 10:16,21 11:1,20 12:5,8,13 13:24 20:6 37:20, 24 38:19 39:1,15 43:16,20 44:22,24 49:14	<b>planet</b> 7:23
<b>opinion</b> 21:22 24:6 35:16 40:16 52:5 57:13	<b>owned</b> 18:23 25:2 49:4 50:5	<b>payrolls</b> 11:24 37:5,25	<b>plans</b> 39:25 48:3, 5
<b>opportunity</b> 6:7	<hr/> <b>P</b> <hr/>		<b>platform</b> 8:5
<b>optimal</b> 30:22			
<b>option</b> 27:10,12, 16,18 29:15,19 32:15,19 47:20,25 49:17	<b>pages</b> 20:8 26:24 28:3 29:8 31:5 32:25 34:12 41:22		
<b>option's</b> 29:12			
<b>options</b> 6:1 9:21 10:5 17:8,14,22 18:7,22 19:13,18 20:9,15,20 21:5 24:8,16,19 25:2,6, 11,23 26:4,7,8,14 27:2,7 30:11,20, 25 31:25 32:5 34:3,6,7 35:5,9, 19,24 36:6 37:11			

**point** 44:2**pointing** 36:23**portion** 21:24  
28:13 51:20**portions** 25:21**position** 6:8 52:6**precedent** 20:14  
24:3,4,5,14 35:16  
53:19**present** 8:24**presentation**  
4:10 7:6,13 15:20,  
24 36:9 53:22**presidential**  
21:21**presumptively**  
42:22**prevail** 56:2,7**previous** 39:19  
40:2**previously** 19:22**price** 12:7 27:22  
29:12,21 50:6,21  
51:4,5 52:7**priced** 49:18**principle** 8:11,13  
45:15 46:14**proceed** 7:10  
15:22 40:9 43:19  
45:10**proceedings**  
2:16 57:18**proceeds** 43:19**process** 9:25  
13:25 38:2**produced** 6:14  
19:9**professional**  
48:23 49:8**proffer** 19:20  
20:7,13**proffered** 42:18**proof** 20:1**properly** 13:23  
23:1 26:7 31:2  
35:13**property** 21:5,9,  
11,15,18,19 23:4**proposal** 19:7**proposed** 16:25  
17:2 20:5 56:21**prove** 42:19**provided** 6:4,5  
9:12 20:1**provision** 28:3,  
14,18,24 34:2,21**public** 9:7 10:22  
11:21 14:4**publication** 13:3**publicly** 9:8**purchase** 9:10,  
13,24 10:15,19  
11:6,10,15 12:7,  
20 13:1,13,17  
14:6,24 27:12,18  
32:16 39:18 44:18  
45:18,19 50:24**purchased** 10:5  
15:1**purchases** 11:1**purchasing**  
14:23 37:19**pure** 51:15**purely** 43:20 44:9**purpose** 13:5  
55:18**purposes** 21:9  
55:17**pursuant** 31:16  
32:15 34:6**put** 11:7 38:21  
44:4 48:5

---

**Q**

---

**question** 6:21  
54:9,24**questions** 15:4,  
10,11,13,15,17,19  
36:10,13,14,18,20  
45:25 46:1 57:6,8**quote** 11:22 13:2  
18:11,17,20 19:2,  
5,8 23:6 33:5

---

**R**

---

**rails** 51:19**raise** 6:11**raised** 38:5**rate** 10:8 14:14**re-  
characterization**  
16:2**re-characterized**  
16:17 17:3**reading** 7:2**real** 11:11**reality** 11:17**realize** 13:10**reason** 19:22  
37:16,17 43:11,17  
44:5**reasoning** 19:20  
23:18 35:12**reassess** 56:10,  
12**recall** 34:7**recap** 29:14**receive** 17:11  
25:20 27:2,6 28:4,  
12 29:1 37:2**received** 4:4,5  
14:3 17:7**reclassification**  
18:13**reclassifying**  
19:6**recognized** 23:1  
26:8**recollection**  
51:14**record** 5:5,14,22  
6:6 18:4 19:11  
20:17 24:15,25  
41:5 53:19 57:14**records** 20:6**refer** 42:12**reference** 38:23**referenced** 33:19  
38:22**reflected** 16:25**regard** 18:6 19:20  
42:22**regret** 11:7**regrets** 49:11  
54:11,18**regulations** 7:3  
56:19**related** 8:11  
17:18,24 20:24  
22:10,22 23:8,11,  
14 24:11 25:15,18  
26:3,18 28:8  
30:15 32:3,21  
33:24 34:10 35:8,  
23 36:24 38:18  
40:22 42:4 44:8,  
23 47:12 52:13**remain** 22:17  
25:23 47:10**remains** 22:23  
26:5 55:7**remarks** 43:3**remember** 7:2  
51:10,11**rendered** 57:13

- renders** 26:19  
**repeating** 49:10  
**replacing** 48:4  
**Reply** 18:10,19  
 19:4 24:2  
**reported** 2:19  
 10:15 11:17  
 16:14,16,19,23  
 17:2,3,7 39:11,14  
 41:14 43:18,19  
**Reporter** 2:20  
**reporting** 11:19,  
 23 12:3,5 13:22  
**reports** 16:12  
**represent** 33:5  
**represented**  
 29:10  
**representing**  
 5:16,18  
**request** 16:5  
 42:23 45:17  
**requirements**  
 22:14 27:1  
**respect** 22:15  
 23:4 24:23 25:21  
 26:11 28:13 32:13  
**respectfully**  
 17:10 42:23 55:15  
**respond** 18:5  
 36:25  
**respondent** 3:8  
 5:17 16:4,7 17:1,  
 10 20:5 24:2  
 42:23  
**Respondent's**  
 16:11,24 17:1  
 18:9,18 19:3,21,  
 23 21:23 24:7  
 25:1,5 26:24  
 27:11,17 28:3,24  
 29:8,13 31:5,11,  
 20,22 32:5,25  
 33:3,14 34:3,12  
 41:12,16,22 42:5,  
 13,15,16,21,24  
**Respondents**  
 41:20  
**response** 16:5  
 46:22 47:1  
**responses** 38:9  
**restricted** 6:1  
 17:8 21:6 27:3,8  
 28:2 29:25 30:12  
 32:8,13 34:23  
 35:1 52:2  
**resulting** 16:22  
 17:4 22:25 26:7  
**retain** 52:23  
**retention** 10:8,13  
**Return** 16:15,24  
 41:16 46:9,11,13,  
 14  
**Revenue** 21:2,3  
 53:16  
**right-hand** 6:11  
**rights** 21:10,15,  
 17,18 48:16  
**Riley** 3:10 5:18  
**rings** 50:2  
**risk** 21:12,14,20  
 22:13,15,17,24  
 24:24 25:24 26:5  
**Rodriguez** 2:19  
**root** 45:13  
**round** 46:10  
**RSU** 17:14,22  
 18:7 19:14,18  
 20:9,15,20 24:8,  
 16,19 25:16 26:4,  
 14 30:25 31:25  
 34:13 35:9,24  
 36:6 40:25 41:7,  
 11,21,24 42:7,20  
 44:11  
**RSU's** 9:22 10:5  
 18:22 25:1,6,21,  
 23 26:7,8 28:5,13,  
 16,19 29:10 30:20  
 32:11,25 33:1,4,  
 13,16,22 34:12  
 35:5,20 40:19  
 47:3,8,18,21 48:8  
 50:8 53:8,11,19  
**ruling** 7:7 56:13  
**running** 37:25  


---

**S**  


---

**salaries** 39:25  
**salary** 12:15,24  
 20:2 40:1  
**sale** 10:15 11:12  
 12:19,20 13:10  
 14:19 19:15,18  
 20:2 44:9,23  
 50:19  
**Samsung** 11:22  
**San** 7:17  
**Sanjay** 5:7,23  
 7:16 31:18 33:12  
 38:6  
**save** 45:6  
**SCA** 50:25  
**schedule** 16:19  
 31:21 32:4 33:2,3  
 34:18 42:13  
**scheduled** 25:4  
**section** 20:12  
 21:2,4,8 22:2,11  
 24:23 26:11 30:24  
 34:1,5,11,21,25  
 35:15 46:22 47:3,  
 16 52:4 53:16  
**sections** 42:16  
**secure** 23:19  
 30:22 36:4  
**seize** 37:8,13  
**seized** 31:19  
 39:21 40:3  
**sell** 13:8  
**sentence** 33:11  
**separate** 12:25  
 39:10 51:21,23  
**separately** 33:14  
 39:11  
**separation** 12:22  
 52:16  
**September** 2:18  
 5:1,8  
**service** 53:13  
**services** 8:25  
 16:11 17:12 18:1  
 21:1,7,17 22:14  
 23:5,17,19,23,25  
 24:12 26:12  
 30:18,22 31:1  
 35:11 36:3,5 41:2  
 42:10 47:14  
 53:14,17  
**set** 15:21 17:19  
 20:12 27:23 28:8  
 29:5,22 30:2,8  
 34:18,25 47:4  
**sets** 27:1 29:9,12  
**share** 8:4,7,20  
 9:10,13,24 10:19,  
 25 11:6,10 12:7  
 13:13,17 14:6,23  
 22:19 27:22  
 29:12,21 44:23  
 45:8,18 49:22,23  
 51:8,9  
**Shared** 11:15  
**shareholders**  
 10:9  
**shares** 9:15,22  
 10:4 11:16 12:19  
 13:1,15,20 14:9,  
 17,19,25 21:25  
 22:4,7,17 23:2,7,  
 12 27:12,18 28:6  
 29:10 32:17,18  
 33:9 37:4,19  
 43:25 45:18  
 48:15,16,17,19,20  
 49:4 52:14

**short** 13:20 14:14,  
20

**short-come** 14:9

**short-term** 14:15  
16:20 19:24 38:14

**shot** 56:15

**show** 18:4 44:6

**shows** 54:5

**side** 52:17

**sign-on** 27:10  
29:15

**signed** 9:11 13:17  
43:23 48:22

**simpler** 11:2

**simply** 9:5 14:24

**single** 12:2 37:3  
44:21

**site** 48:24

**sitting** 13:25

**sixth** 45:11

**sizes** 7:21

**slips** 39:2

**sold** 18:15

**sort** 8:13 11:7,23,  
25 12:1,11 39:16  
40:3 49:14

**source** 22:1

**speaking** 51:15

**specific** 17:18,23  
20:23 22:10 23:10  
24:11 25:15 26:18  
30:15 32:2,21  
33:24 34:10 35:8,  
23 40:19,22 42:4  
47:11 52:12 55:21

**specifically**  
22:20 23:8 26:1  
27:4 31:24 56:20

**specifies** 34:2,11

**split** 44:6

**Stabell** 21:21 22:4  
26:19 35:12,16  
40:16 41:25 42:8  
53:15

**stand** 44:20 45:16

**standard** 20:11

**standpoint** 12:3

**start** 46:3

**started** 7:19  
48:14

**starting** 7:18 40:2

**state** 2:2 3:8 8:16  
14:13 16:14 24:4  
41:11,15

**stated** 22:12,18  
25:24 54:11

**statement** 4:15  
19:4 40:12 43:5  
44:20 53:23 54:1

**statements** 20:6

**states** 18:11,20  
19:5 27:4 32:4  
34:21

**stating** 22:6

**statutory** 22:14  
42:19

**stay** 52:19 53:1  
56:16

**stayed** 10:7

**STC** 39:4

**steps** 9:10

**stock** 6:1 11:13  
17:8,21 18:22  
19:13 20:2,20  
21:5,6 24:8,16,19  
25:6,23 27:2,3,7,  
8,13,19 28:2,6  
29:25 30:11,12,20  
32:8,14,17 34:2  
35:19 40:18,25  
42:19 44:9,18  
47:4,20,21,23,25  
48:1 49:20,25  
50:19,24 51:25

52:1,2 53:20

**stockholder**  
34:23

**stocks** 13:7 18:15

**strategy** 9:2

**strike** 50:21

**structured** 54:16

**stuff** 37:13 40:1  
44:11 45:2

**subject** 21:12,19  
22:7,17,24 25:7,  
23 26:5 28:7 29:2  
32:18,19 33:22  
51:16

**submits** 17:10

**submitted** 12:11  
37:5

**subsequent**  
33:21

**subsequently**  
17:13 20:22 24:20  
31:7

**substance** 47:18

**substantial**  
21:12,14,17,20  
22:13,15,17,24  
24:24 25:23 26:5

**substantiate**  
20:14

**success** 56:3

**successfully**  
7:20

**sufficient** 20:14

**summary** 14:17

**Supplemental**  
24:1

**supposed** 51:21

**Supreme** 24:2

**survives** 44:13

**sustain** 42:23

**sustained** 56:9

**swear** 6:8

**Swedish** 9:5

**sworn** 6:14

**Symphony** 8:25  
9:6,16,21 16:11  
17:13,19 20:19,22  
24:20,21 25:8,10  
26:12,23,25  
27:14,24 28:1,9  
29:7,14 30:9,23  
31:7 33:20 34:6,  
17,23 35:17 37:3,  
11 39:21 40:17  
41:10 43:25 44:12  
45:12 47:5,19,23,  
25 50:25 51:9  
52:11 53:3,4,9,23  
54:2,15 55:1,3,4,  
5,6,7,9

**Symphony's**  
29:11 54:5

**systems** 7:23  
39:15

---

## T

---

**table** 49:2

**target** 29:4

**tax** 2:1 3:8 5:6,16,  
19 6:24,25 8:15,  
17 14:14 16:3,6,8,  
14,23 18:21 19:24  
20:5 21:8 24:6  
38:3,12,13 41:16  
46:10,17,21 49:8  
51:12 52:5 54:21  
55:22,25 56:1,3,8,  
10,25

**taxable** 16:17  
17:5

**taxation** 8:14  
21:4

**taxes** 8:8,11,16,  
19,20 14:4,7,8,11  
18:12 45:4

**Taxpayer** 5:23  
56:7

**taxpayers** 54:19

**team** 10:7,10

**technology** 7:19,  
24,25 8:1 37:4  
43:9

**Teleca** 9:4,5,7,16,  
21 16:11 34:23  
37:11 39:21 44:12  
54:2 55:6

**tens** 8:18

**term** 55:8

**terminated** 34:16  
52:14

**terminates** 34:24

**termination**  
28:18,22

**terms** 25:8 47:4

**testified** 6:16  
52:21

**testify** 6:9

**thankful** 8:6

**thing** 12:2 38:15  
44:14

**things** 47:22

**thousand** 49:12,  
22

**thousands** 11:3  
37:18,21

**three-year** 10:2,5

**time** 5:8 14:2 15:6,  
12,17,19 19:11  
36:15 48:11 51:7

**timely** 22:21  
32:20 40:23

**times** 41:19 54:11

**tips** 16:13 41:12

**today** 5:11 7:22  
8:10 24:25 57:12

**Tommy** 3:3 5:11

**topic** 13:3

**total** 39:5

**touched** 46:23

**transaction** 8:11  
9:9,18,19,23 13:1  
14:8,12,22 18:14  
38:19 46:3 49:6  
51:20,21,24,25  
52:3

**transaction-  
close** 9:16 13:18

**TRANSCRIPT**  
2:16

**transfer** 21:6 23:4

**transferable**  
21:11,18

**transferee** 21:19

**transferred** 21:6

**transfers** 56:7

**transform** 8:25

**treat** 39:16

**treated** 14:8,11  
18:25 45:20 46:16

**treatment** 13:19  
14:20 46:19,23

**treats** 19:24

**trigger** 33:8,10

**true** 48:17

**Tuesday** 2:18 5:1

**turn** 15:9 24:14  
36:12 45:24 55:11

**turned** 9:2

**turning** 26:23  
31:4

**type** 56:17

---

## U

---

**underlined** 33:11

**understand**

14:24 39:13 50:13  
54:17

**understanding**  
6:23 38:12

**understood**  
34:22

**units** 6:1 17:8  
21:6 27:3,8 28:2  
29:25 30:12 32:8,  
14 52:2

**unquote** 11:22

**unvested** 28:19

---

## V

---

**verses** 38:15  
50:24

**vest** 32:6,9,12,19  
33:6,9,22

**vested** 10:4 23:2  
25:6 26:8 33:9  
34:8 44:10 47:22  
49:17

**vesting** 17:14,17,  
25 18:2 21:24  
22:6,9,12,18,19,  
25 23:1,7,10,16,  
17,23 24:10  
25:11,16,17,20,  
24,25 26:14,17  
27:13,15,20 28:7,  
12 29:10,18 30:5,  
10,14,17,19 31:23  
32:1 34:18,25  
35:7,10,11,18,22  
36:3 37:7 40:19,  
21,25 41:2,24  
42:3 43:25 44:13  
47:11,15 48:1,11,  
12 52:11

**vestings** 49:4

**vision** 7:19

---

## W

---

**W-2** 16:10 20:1  
41:9,15 53:23  
54:1,5,14 55:1

**wages** 16:13,14  
41:12,15 46:10,17

**wait** 36:16

**wanted** 10:12,20  
11:1 40:7,9 49:19

**whichever** 21:13

**Wi-fi** 7:22,23

**willingness**  
31:13

**words** 52:10

**working** 48:10

**world** 39:15

**worldwide** 11:25

**worth** 48:19

---

## Y

---

**year** 6:24 12:16  
14:10 16:3,7  
18:16,21 21:10  
28:15,25 56:3,16

**years** 8:18 16:8  
33:8 44:16 45:10  
48:7,9