BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,	)
	)
INTEGRITY REBAR PLACERS,	) OTA NO. 20035950
	)
APPELLANT.	)
	)
_____	)

TRANSCRIPT OF ELECTRONIC PROCEEDINGS

State of California

Thursday, September 21, 2023

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, INTEGRITY REBAR PLACERS, APPELLANT.	OTA NO. 20035950

Transcript of Electronic Proceedings, taken in the State of California, commencing at 1:09 p.m. and concluding at 2:54 p.m. on Thursday, September 21, 2023, reported by Ernalyn M. Alonzo, Hearing Reporter, in and for the State of California.

APPEARANCES:

Panel Lead:	ALJ JOSHUA LAMBERT
Panel Members:	ALJ ANDREW KWEE ALJ SHERIENE RIDENOUR
For the Appellant:	JESSE MCCLELLAN
For the Respondent:	STATE OF CALIFORNIA DEPARTMENT TAX AND FEE ADMINISTRATION JARRETT NOBLE CARY HUXOLL JASON PARKER

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-7 were received at page 6.)

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

OPENING STATEMENT

PRESENTATION

CLOSING STATEMENT

1 California; Thursday, September 21, 2023
2 1:09 p.m.
3
4 JUDGE LAMBERT: We are now on the record in the
5 Office of Tax Appeals oral hearing for the Appeal of
6 Integrity Rebar Placers, Case No. 20035950. The date is
7 September 21st, 2023, and the time is 1:09 p.m. My name
8 is Josh Lambert, and I'm the lead Administrative Law Judge
9 for that hearing. And my co-Panelist today are Judge Kwee
10 and Judge Ridenour.
11 CDTFA, can you please introduce yourselves for
12 the record.
13 MR. NOBLE: This is Jarret Noble with CDTFA.
14 MR. HUXSOLL: Cary Huxsoll with CDTFA.
15 MR. PARKER: I'm Jason Parker with CDTFA.
16 JUDGE LAMBERT: Thank you.
17 And for Appellant, can you please introduce
18 yourselves for the record.
19 MR. MCCLELLAN: Yes. Good afternoon. My name is
20 Jesse McClellan with McClellan Davis appearing on behalf
21 of Integrity Rebar Placers and joined by my client's
22 controller, Emily Webster.
23 JUDGE LAMBERT: Thanks for attending everyone.
24 As agreed to by the parties the issues are
25 whether Appellant's purchases of materials were subject to

tax at the time of purchase; whether OTA has jurisdiction to determine that Respondent's interpretation of the law was promulgated in accordance with the APA, and if so, whether the interpretation was promulgated in accordance with the APA; whether interest has been properly computed; and whether Appellant is eligible for relief of interest pursuant to R&TC Section 6593.5.

CDTFA provides Exhibits A through E. You submitted last week, I think, by CDTFA, which is the email that we discussed at the conference, and Appellant provides Exhibits 1 through 7. There are no objections, and the evidence is now in the record.

(Appellant's Exhibits 1-7 were received in evidence by the Administrative Law Judge.)

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

JUDGE LAMBERT: So, Mr. McClellan, this is your opportunity to explain your position. We said before you can have up to 60 minutes. And I believe Ms. Webster is going to testify as a witness, so I can swear her in now before the presentation.

Ms. Webster, could you please raise your right hand.

///

///

E. WEBSTER,

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

JUDGE LAMBERT: Thanks.

And after the presentation, CDTFA may ask you questions and the Panel may ask you or Mr. McClellan questions.

So, Mr. McClellan, if you're ready you can proceed at this time. Thanks.

OPENING STATEMENT

MR. MCCLELLAN: Great. Thank you very much.

As previously mentioned, my name is Jesse McClellan with McClellan Davis appearing on behalf of Integrity Rebar Placers, Inc. I will refer to my client as Appellant or IRP during this hearing.

This appeal stems from an audit conducted by CDTFA for periods third quarter '11 through 2Q '14 with the Notice of Determination issued on April 22nd, 2015. During the audit period, Appellant operated as a construction contractor and seller of rebar entering into construction contracts to provide and install steel rebar and making sales of rebar over the counter for resale and

1 at retail.
2 They made more than 280 non-installed
3 over-the-counter sales during the audit period totaling
4 more than $5 million. It performed a total of 93
5 construction contracts during the calendar years of 2012,
6 2013, and 2014, exceeding the number of over the
7 counter -- I'm sorry -- the number of over-the-counter
8 sales exceeded the number of construction contracts by
9 approximately 190 transactions. Now, to help stabilize
10 and to take advantage of both discounts, Appellant
11 purchased as much inventory as possible when prices were
12 low. This resulted in the accumulation of approximately
13 $8 million in inventory at the end of the audit period.
14 There was no difference in the rebar sold over
15 the counter and rebar installed under construction
16 contracts. The rebar is fungible and comingle. For sales
17 and use tax purposes, Appellant purchased most of its
18 inventory without tax, and reported tax on the cost of
19 materials used for construction contracts in the period in
20 which materials were allocated to the contracts or the
21 period in which taxable over-the-counter sales were made.
22 With the exception of an oversight for district tax
23 purposes, there were no material errors in its reporting
24 under this method.
25 The audit staff performed the audit on total

1 purchases assessing tax on purchases, not cost of goods
2 sold. Appellant reported, based on cost of goods sold and
3 the measure of its taxable purchases -- I'm sorry -- in
4 the measure of its taxable sales. Because Appellant had a
5 large ending ex-tax inventory, the audit method results in
6 a liability roughly equaling the value of the ending
7 inventory. Effectively, the audit assesses tax on
8 Appellant's ending inventory.
9 So this case is really about timing. The dispute
10 comes down to when tax is due, not if tax is due. There's
11 no dispute the tax is due on the materials at issue when
12 they're sold at retail or consumed in the performance of a
13 construction contract. So I'll demonstrate this is merely
14 a matter of timing, we performed an analysis of material
15 purchases and reporting starting in third quarter '11, the
16 start of this audit period, through third quarter '20, the
17 period in which Appellant liquidated all of its inventory
18 to avoid this issue going forward.
19 So that test was, we believe, a good indication
20 of what the actual practice was, and how it aligned with
21 the cost of goods sold without having to consider the
22 confusing nature of inventory. The net result shown in
23 Exhibit 6 is a net credit of $248,000 in tax. So in other
24 words, when you take away the timing issue, Appellant
25 appears to have overpaid its tax obligation because it

1 included nontaxable transportation charges in its taxable
2 reporting.
3 JUDGE LAMBERT: Mr. McClellan?
4 MR. MCCLELLAN: Yes, sir.
5 JUDGE LAMBERT: We can you hear okay, but I feel
6 we're getting, like, I can hear some feedback or something
7 on your audio. Is there multiple windows open with the
8 sound playing perhaps, or maybe it's your connection? Now
9 we're -- you know, is there any way you could fix that?
10 MR. MCCLELLAN: Yes. Let me see what I can do.
11 I've had this discussion before. It's completely quiet
12 where I'm at the moment and --
13 JUDGE LAMBERT: Maybe if you turn the volume down
14 on your computer?
15 MR. MCCLELLAN: Yeah, that's -- let me -- let me
16 try that. And I'm also adjusting these audio settings.
17 JUDGE RIDENOUR: Just real quick. We're going to
18 go off the record while you do this.
19 MR. MCCLELLAN: Okay.
20 JUDGE LAMBERT: Okay. Yeah. We'll go off the
21 record just to fix this.
22 (There was a pause in the proceedings.)
23 JUDGE LAMBERT: Let's go back on the record.
24 And you could just pick up from where you were
25 before. So please continue. Thanks.

1 MR. MCCLELLAN: Okay. Thank you. I think I
2 stopped just before I was going to call my client's
3 controller, Emily Webster, as a witness.
4 And just to briefly check, can you guys hear me
5 okay.
6 JUDGE LAMBERT: Yes. Yes, we can.
7 MR. MCCLELLAN: Excellent.
8 Emily, are you available?
9 MS. WEBSTER: Can you hear me now.
10 MR. MCCLELLAN: I can.
11 MS. WEBSTER: Okay.
12
13 DIRECT EXAMINATION
14 BY MR. MCCLELLAN:
15 Q Okay. Emily, can you please state your name,
16 title, and business location for the record?
17 A Emily Webster, controller, 1345 Nandina Avenue,
18 Perris, California 92571.
19 Q Thank you. And how long have you held the
20 position as controller?
21 A This specific title, 2011.
22 Q Okay. And is your office location at the same
23 location where the business operations are conducted and
24 materials are stored?
25 A Yes.

1 Q Thank you. Can you briefly describe some of your
2 duties as controller?
3 A I'm responsible for preparing contracts,
4 overseeing our AP and AR accounting staff, schedule of
5 values, producing our financial statements internally
6 before they go to our external CPAs for review. And then
7 so I also deal with the purchasing contracts. I work with
8 Ken. He's the owner, and we deal with both buys, and I
9 spend a lot of time analyzing the metals market.
10 Q Excellent. And can you explain why you look at
11 the market trends with respect to the prices?
12 A Yes. So rebar is made out of various scrap, and
13 various scrap is exchange -- is on the Chicago -- sorry --
14 on the Chicago Exchange for metals. And rebar pricing
15 will trend typically two to three months after a drop in
16 that scrap or an increase in that. It'll dictate our
17 pricing. So we watch that very heavily. Because of the
18 lag, it gives us an inside as to where the market might be
19 going.
20 Q Understood. Am I correct that IRP's purchasing
21 practice was primarily designed around purchasing large
22 quantities of steel at advantageous prices under bulk
23 material buying?
24 A Yes.
25 Q I'm sorry. Did you say yes?

1 A Yes.
2 Q Okay. And at the time of purchasing, was it
3 known whether the steel purchase would be used in a
4 construction contract or sold over the counter?
5 A No.
6 Q Okay. Is it common for customers to place
7 over-the-counter orders with little to no notice?
8 A Yes.
9 Q Thank you. And for your business model,
10 considering those factors, is it necessary to carry or
11 have ready access to inventory?
12 A Yes.
13 Q Thank you. Is there any difference between rebar
14 sold over the counter at retail or wholesale and the rebar
15 installed under a construction contract?
16 A No.
17 Q Now, is it the general practice of IRP to operate
18 under a first-in first-out basis, whereby, the steel that
19 comes in first is the first to be sold over the counter or
20 used on a construction contract?
21 A Yes.
22 MR. MCCLELLAN: Thank you. I have no further
23 questions.
24 JUDGE LAMBERT: You can continue your
25 presentation, Mr. McClellan, if you want.

1 MR. MCCLELLAN: Thank you.
2 JUDGE LAMBERT: We can wait until the end of your
3 presentation to ask questions.
4 MR. MCCLELLAN: Excellent.
5
6 PRESENTATION
7 MR. MCCLELLAN: So in summary, CDTFA as it
8 pertains to, sort of, an overview of this case, has gone
9 outside of its own Regulation 1521, Title Construction
10 Contractors, which allows contractors to purchase
11 materials under a resale certificate if they're also in
12 the business of selling materials. In that phrase, also
13 in the business of selling materials is going to be
14 something that you're going to hear a lot. It ultimately
15 in many respects is the crux of this case.
16 CDTFA claims that a contractor must make a
17 significant amount of sales in order to purchase materials
18 under a resale certificate. And the term "significant"
19 remains undefined. We believe Appellant properly complied
20 with the law under its purchasing and reporting practices.
21 The method used by CDTFA in its audit is inconsistent with
22 the law. And even if it's, quote, unquote, "Significant
23 amount of sales," the standard is found to be a reasonable
24 interpretation of the law. The rule qualifies as a
25 regulation by definition, which must be promulgated in

1 accordance with the Administrative Procedures Act in order
2 to be enforceable.
3 Now, in the alternative, if OTA does not accept
4 any of those arguments that we make, we believe Appellant
5 did make a significant amount of sales. So it has
6 complied with CDTFA's unpublished and undefined standard.
7 And in the event that OTA fines against Appellant on all
8 the foregoing arguments, we address whether interest has
9 been properly computed; and if it has been properly
10 computed, whether Appellant is subject to relief of
11 interest for unreasonable delay.
12 Now, as it pertains to the issues, ultimately,
13 the issues that were stated in the opening generally
14 encompass the issues that I will address here today, but
15 I'm saying them in a more precise manner. And Issue One
16 is whether or not Appellant made purchase materials under
17 a resale certificate under the plain language of
18 Regulation 1521 and related law because it is also in the
19 business of selling materials. Now, pursuant to
20 Regulation 1521(b)(2)(A)(2), a construction contractor may
21 contract to sell materials and also to install the
22 materials sold.
23 In summary, that provision explains that a
24 contractor can sell materials over the counter if it
25 transfers title or if under a -- I'm sorry -- if it

1 transfers title prior to installation or under a time and
2 material contract if it charges an amount for sales tax
3 that it's deemed to be a retailer. Now, Regulation 1521
4 subdivision (b)(6)(A), which is, I think, the central
5 portion of the law that this case surrounds says the
6 following: Quote, "Contractors holding valid sellers
7 permits may purchase fixtures and machinery and equipment
8 for resale by issuing resale certificates to their
9 suppliers. They may not purchase materials for resale
10 unless they are also in the business of selling
11 materials."
12 Again, that's Regulation 1521 subdivision
13 (b)(6)(A). So what that regulation says, and what it
14 makes clear is that construction contractors are permitted
15 to sell materials over the counter without installation,
16 and that they may issue resale certificates to their
17 suppliers if they are also in the business of selling
18 materials. Now, that leads us to the all-important
19 sub-issue of what it means to be also in the business of
20 selling materials. The law is very clear in that regard.
21 Revenue & Taxation Code Section 1613 defines business.
22 Revenue & Taxation Code Section 1614 defines seller in
23 relevant part as including every person engaged in the
24 business of selling tangible personal property.
25 Now, the relevant law on this was formed well

1 before Regulation 1521 was rewritten, according to its own
2 history in 1976. So what I want to do is go through the
3 law that exist on this very issue and explain why it's
4 clear what the law says as it pertains to the definition
5 of being in the business of selling and why -- what I'll
6 eventually get to -- why CDTFA's internal rule is entirely
7 inconsistent. It expands upon that binding law that
8 defines what it means to be in the business, and that it
9 shouldn't be used at all.
10 Now, in 1945 the California Appellate Court in
11 Los Angeles City High School District versus State Board
12 of Equalization addressed whether a school district was
13 considered to be in the business of selling and, thereby,
14 required to hold sellers permit and pay tax on its taxable
15 sales. The Court found that an average of three sales per
16 quarter of tangible personal property was sufficient to
17 meet the legal threshold to qualify as a seller.
18 Regulation 1595 incorporates consistent rules into its
19 provisions. Subdivision (a)(1) requires any person who
20 makes three or more sales in a 12-month period to hold a
21 seller's permit regardless of whether the sales are at
22 retail or for resale.
23 Regulation 1595 subdivision (a)(2) provides,
24 quote, "A seller's permit is required of a person engaged
25 in the business of selling tangible personal property. An

1 activity requires the holding of that permit includes but
2 is not limited to the acquisition and sale of tangible
3 personal property. Whether the person's sales are all at
4 retail, all for reseal, or include both sales at retail
5 and sales for resale."
6 I'll provide a quote from the court case that
7 essentially says the exact same thing. Now, ultimately,
8 Appellant satisfies all of these thresholds. They are
9 established and binding authority that CDTFA is required
10 to adhere to. Pursuant to Code Section 600066 and
11 Regulation 1699, every person desiring to engage and/or
12 conduct business as a seller must obtain a seller's
13 permit.
14 Now, in 1943 in Northwestern Pacific Railroad V.
15 State Board of Equalization, the California Supreme Court
16 held that a railroad, which was a common carrier
17 primarily, but that it was in the business of selling for
18 purposes of a sales and use tax law by virtue of 1 sale of
19 13 coaches in 1936, a single sale of 2 coaches and a
20 baggage car in 1936, so a total of two sales that year,
21 and then a sale of a truck and 1 trailer, and 20 flat cars
22 and a locomotive in 1937 -- so a very limited number of
23 sales -- it found that it was in the business of selling.
24 Now, according to CDTFA Publication 146 at page
25 17, quote, "Any construction contractor that obtains this

1 instrument is deemed to be in the business of selling
2 materials," end quote. Lavine V. State Board of
3 Equalization, a 1956 case at page 766 states in relevant
4 part, "There are many situations which develop in the
5 ordinary course of business where the purchaser is unable
6 to determine at the time of the purchase whether he will,
7 in fact, resell the articles purchases or will use them."
8 The resale certificate provisions of the law were enacted
9 to permit the purchase to be tax free under these
10 circumstances until such time as the ultimate disposition
11 of the property is determined.
12 Now, we just heard Emily testify that this
13 business purchases in bulk in order to take advantage of
14 market prices and to stabilize its ability to know what
15 its costs are and, therefore, holds inventory, which is
16 fully available for over-the-counter sales. It made at
17 least 280 over-the-counter sales during the period,
18 exceeding $5 million. Now, in Market Street V. State
19 Board of Equalization, when addressing whether the
20 plaintiff in that case was engaged in business for
21 purposes of sales and use tax law, it states, quote,
22 "Obviously a person or a company can be either a consumer
23 or a retailer or can be both," end quote, which again ties
24 back to Regulation 1595.
25 Now, finally annotations 190.2725 -- I'm sorry --

1 annotation 1902725, which was published in March of 1994
2 provides that a contractor may purchase materials under a
3 resale certificate provided, quote, "At least some of the
4 materials are incorporated into fixture or furniture that
5 is resold," end quote.
6 Similarly, annotations 190.2520 published in
7 1957, 190.2675 published in 1961, 1902720 published in
8 1961, and 1902721 published in 1993 all to support the
9 plain language of Regulation 1521 and the authority that
10 we just went through that's binding on CDTFA and equally
11 binding on OTA, holding that a contractor may purchase
12 materials under a resale certificate if they are also in
13 the business of selling materials. I should say and
14 qualify that as you are all aware that of course the
15 annotations are not binding on neither CDTFA or OTA. The
16 statutes, the regulations, and the appellate-level court
17 case that I cited are.
18 Now, again, during the audit period, Appellant
19 made 280 over-the-counter sells totaling more than $5
20 million. All of the foregoing authority, including the
21 court cases and regulations that I cited are binding upon
22 OTA and must be followed. And they all clearly support
23 that Appellant was, quote, "Also in the business of
24 selling materials." Plus pursuant to Regulation
25 1521(b)(6)(A), Appellant was legally permitted to issue a

1 resale certificate to their suppliers, and they did so in
2 compliance of the law.
3 Now, it is well-settled under Newco that CDTFA
4 must follow its own regulations. OTA recently reiterated
5 this in its case in Janus with the FTB and in the case of
6 Talavera in the case with CDTFA, finding in both of those
7 cases that it didn't have authority to find that a
8 published regulation is invalid, that CDTFA and FTB
9 respectively had to follow its own regulation. Now, CDTFA
10 is typically very adamant about following its own
11 regulations, but it's not doing that here. And if OTA
12 does not compel CDTFA to follow the plain and unambiguous
13 language of 1521, it's all very well supported by other
14 binding legal authority. Is it not effectively finding
15 that regulation to be invalid? We believe it is.
16 Now, CDTFA has provided no legal authority for
17 its deviation from well-established and binding law,
18 either in its case here or in the annotations it cites as
19 purported authority for expanding and altering the plain
20 language in Regulation 1521. And to what end? Just so
21 taxpayers like Appellant have to report tax a quarter or
22 two earlier -- as we'll discuss in a moment -- which is
23 exactly what happened. Attempting to compel Appellant and
24 contractors in general that are also in the business of
25 selling to pay tax on its inventory creates untenable

1 issues that we believe was properly considered when the
2 law was drafted and rewritten in 1976, and that it's not
3 being considered here.
4 For example, it would require a taxpayer in
5 Appellant's position to make a tax-paid purchase resold
6 deduction to obtain a credit for taxes previously paid on
7 its purchases for over-the-counter sales, even if it's
8 subsequent over-the-counter sales are for resale. In that
9 case because there may not be any tax hold measure to
10 report, the taxpayer could not claim the credit due to the
11 limitation provided under Regulation 1700, which precludes
12 a credit from exceeding the taxable measure reported.
13 In other words, you can't claim the credits
14 unless you have taxable measure to report. And if you
15 paid tax on all of your purchases and you're only making
16 sales for resale for a period, then ultimately you would
17 have taxable measure to report. You couldn't claim the
18 credit. You would effectively have to overpay the tax.
19 And if the tax was allegedly validly charged at the time
20 of purchase, arguably the vendor would be unable to obtain
21 a refund from CDTFA, which it could pay back to the
22 taxpayer.
23 And even if it could, that step, I think, is
24 absolutely unnecessary. It creates unnecessary
25 administrative costs for the taxpayer, including this

1 taxpayer. It creates unnecessary administrative burden on
2 the agency. Further, it creates unnecessary complications
3 with tracking and reporting district taxes, which
4 oftentimes you will not know at the time of your purchase,
5 which is a material aspect in this audit. In effect, to
6 maintain its position in this case and similar cases,
7 CDTFA must find that Appellant is not in the business of
8 selling.
9 And as such, is it CDTFA's position that
10 Appellant and other similar contractors are not required
11 to hold sellers permits, even if they make 280 sales in a
12 3-year period that exceed $5 million. We would like CDTFA
13 to answer that question today. Would, essentially, they
14 recreate the threshold for what constitutes an occasional
15 sale beyond more than 3 in a 12-month time frame?
16 Ultimately, that's what they're saying by saying that
17 Appellant is not in the business of selling because it
18 impacts all of those rules. And I don't think it is
19 saying that, but the reality is that's an unintended
20 consequence.
21 Now, we respectfully believe -- and,
22 Judge Lambert, I understand that you are the lead ALJ in
23 the Martinez Steel case. But the decisions in that case
24 and the briefs in that case, and the oral presentation in
25 that case don't address all of this. So we respectfully

1 ask you to reexamine the holding in Martinez Steel by
2 reviewing and analyzing the foregoing binding legal
3 authority to determine what the law says about being in
4 the business of selling and consider overturning that
5 opinion.
6 Based on undisputed facts in this case, OTA
7 should find that Appellant was also in the business of
8 selling materials because there can be no reasonable
9 dispute that it was, and that it properly issued resale
10 certificates to its vendors pursuant to Regulation
11 1521(b)(6)(A). The inquiry stood in there if we're
12 looking only to binding legal authority. Nonetheless,
13 even though the relevant facts in this case are distinct
14 from Martinez, we believe OTA may find in favor of
15 Appellant, even if maintains its opinion of Martinez. We
16 are compelled to address whether the quote, unquote,
17 "Significant rule is a valid interpretation of existing
18 law and enforceable in this case."
19 In order to do that we must do so within the
20 framework of the Administrative Procedures Act. The APA
21 requires agency interpretations, which qualifies as
22 regulations to promulgate in accordance with the APA. If
23 a rule which qualifies as a regulation is not promulgated
24 in accordance with the APA, it is invalid and not
25 enforceable. I will cite all the relevant authorities

1 shortly. But in summary, we must start with an analysis
2 of whether the rule created by CDTFA is a regulation by
3 legal definition.
4 That ultimately will lead us to one of the
5 questions that were posed at the prehearing conference,
6 which is whether or not OTA has jurisdiction to determine
7 this or to address this issue. We think it absolutely
8 does to skip ahead of it because we're not dealing with
9 the published regulation by any stretch of the imagine.
10 It certainly was not promulgated in accordance with the
11 APA as was the case in Janus and Talavera. So frankly,
12 there's no valid regulation to invalidate here. We think
13 that the only valid regulation that potentially is being
14 invalid is Regulation 1521, and for that matter, 1595
15 also.
16 In any event, that leads us to whether the
17 internal rule created by CDTFA, which requires Appellant
18 to make substantial or significant amount of sales in
19 order to be also in the business of selling, is a
20 regulation defined under the law. This is what we're
21 presenting as Issue Two. Now, CDTFA has taken the
22 language of Regulation 1521(b)(6)(A), which has previously
23 stated, provides in relevant part that a resale
24 certificate may be issued, if the contractor is, quote,
25 "Also in the business of selling materials."

1 Now, what it has done is it has inserted
2 effectively the term "significance" into that definition,
3 which is a very meaningful difference. And frankly, what
4 it does is effectively change what existing law already
5 says, as I just discussed. So they have expanded the
6 plain language from being in the business of selling,
7 which is a defined phrase under Regulation 1595 and the
8 binding case law we discussed, and it's seeking to make it
9 significant.
10 It does not, however, defined what significant
11 means. And we don't know why CDTFA chose to alter the
12 language in the regulation in the first place. There's
13 been no explaining. We asked CDTFA prior to this hearing
14 to provide its definition the, and it responded in writing
15 that the term is not defined in the statute of regulation.
16 It provided no further explanation or meaningful
17 definition. And that's included in CDTFA Exhibit E, which
18 was done at our request in the prehearing conference.
19 So turning to the definition of what a regulation
20 constitutes. And, again, if this rule meets that
21 definition -- and as I will explain, the law is very clear
22 that it must be promulgated in accordance with the
23 Administrative Procedures Act. And to do so we look to
24 Government Code Section 11342.600, which defines
25 regulation as, quote, "Every rule, regulation, order, or

1 standard of general application, or the amendment,
2 supplement, or revision of any rule, regulation, order, or
3 standard adopted by any state agency to implement,
4 interpret, or make specific the law enforced or
5 administered by it."
6 Now, according to the California Supreme Court in
7 Morning Star Co. V. SBOE, a regulation subject to the APA
8 has two principle identifying characteristics. First, the
9 agency must intend its rule to apply generally, rather
10 than in a specific case. And the court clarifies that
11 rule need not, however, apply universally. If it applies
12 generally to a certain class, the taxpayers, then
13 ultimately its considered to be broadly applied.
14 Second, the rule must implement, interpret, or
15 make specific the law enforced are administered by the
16 agency. Now, here the rule is clearly being applied to a
17 class of taxpayer and a broad class at that, being
18 construction contractors. It's not specific. An example
19 of a specific interpretation of the law regarding
20 construction contractors is, for example, in annotation
21 1900120 where CDTFA analyzes existing law to determine
22 whether or not wall-to-wall carpeting is considered a
23 material under the law.
24 The rule at issue here is of general application,
25 and it applies to all materials contractors, which means

1 it broadly applies. It's not meant to apply narrowly. We
2 can see that in part by the fact that this issue has come
3 up with two contractors recently before OTA; this case and
4 the Martinez case.
5 Second, CDTFA is very clearly interpreting
6 expanding upon Regulation 1521 and in its requirement for
7 the contractor to be in the business of selling materials,
8 which is a defined phrase. It's defined terms. Those
9 definitions, the court cases that address them all existed
10 prior to the rewriting of 1521. There's no reason to
11 think that the regulation got it wrong. We think it
12 absolutely got it right for several reasons. But
13 ultimately, creating a rule which says a contractor must
14 make a significant amount of sales to be in the business
15 of selling is absolutely an interpretation of the law.
16 And by extension, the rule not only implicates Regulation
17 1521, it also implicates Code Section 6013, 6014,
18 Regulations 1595, 1699, and likely others.
19 Plus, the rule is very clearly a regulation by
20 definition. So another question we must address is
21 whether it matters that the rule is incorporated into or
22 stems from two annotations. It does not. Just because a
23 rule is incorporated into or develop from an annotation
24 does not excluded it from APA rule-making processes if it
25 qualify as a regulation.

1 1999 Office of Administrative Law Determination
2 No. 26 makes this very clear where it analyzes eight
3 challenged annotations, finding that each of them
4 constitute regulation subject to APA rule-making
5 requirements and, therefore, unenforceable. In that
6 scenario the Board of Equalization agreed to delete every
7 one of them. Now, in relevant part CDTFA Regulation 35101
8 defines annotation as conclusions reached regarding a
9 particular factual circumstance that apply to specific
10 factual situations. You'll find that under subdivision
11 (c)(1) and (c)(2).
12 Now, here there can be no reasonable argument
13 that this rule is being applied only to specific factual
14 circumstances as was found in the court by Morning Star
15 when addressing hazardous waste fees administered by the
16 Board of Equalization. The application here is very
17 broad. Moreover, Regulation 235101 subdivision (b) sets
18 forth the onus that it must be precedence to qualify as an
19 annotation, including references to any applicable
20 statutes, regulations, or case law, and a conclusion sort
21 of supported by the analysis of the issues.
22 Now, ultimately, annotations 190.0161 and
23 190.0208 that contain these rules, that we can find for
24 the very first time that appear in 1994, cite no legal
25 authority, including any of the previously mentioned

1 authority that we addressed. And it does not define what
2 it means to be in the business of selling, let alone, what
3 it means to be in the business of selling a significant
4 amount of materials.
5 So, ultimately, we think, at least as it pertains
6 to these rules or this rule -- and the annotations address
7 other things, like, the 90-10 rule for cabinet contractors
8 under Regulation 1521 -- but we think the annotation
9 should be deleted. We don't even think they're valid
10 annotations. And, ultimately, the internal rule
11 established by CDTFA is broadly applied to all materials
12 contractors and interprets and expands upon existing law,
13 therefore, it is a regulation by definition. The fact
14 that the rules contain and purportedly valid annotations
15 does not change the rule status as a regulation by
16 definition.
17 So that leads us to the next issue. If the
18 internally created rule is a regulation whether it must be
19 promulgated in accordance with the APA to the enforceable.
20 The simply answer is yes. That is ultimately very clear.
21 Government Code Section Section 11340.5 subdivision (a)
22 provides that no state agency shall issue, utilize,
23 enforce, or attempt to enforce any guideline, criteria,
24 bulletin, manual, instruction, order, standard of
25 application, or other rule which is a regulation as

1 defined in Section 11342.600, which we just addressed,
2 unless it is promulgated in accordance with the APA,
3 adopted as a regulation, and filed with the Secretary of
4 State pursuant to this chapter.
5 In Morning Star, a California Supreme Court case
6 in the 1999 OAL Determination No. 26 provides a thorough
7 discussion on this point explaining that any regulation
8 that substantially fails to comply with the APA
9 requirements are invalid and unenforceable. The Office of
10 Administrative Law's website sums it up well in stating if
11 you -- if a state agency issues, enforces, or attempts to
12 enforce a rule without following the APA when it is
13 required to, the rule is called an "underground
14 regulation."
15 State agencies are prohibited from enforcing
16 underground regulations. Ultimately, this is
17 quintessential scenario of an underground regulation.
18 There is absolutely no rule making process followed. We
19 can't trace the rule back to anything more than the
20 back-up letters to these annotations that appear in 1994.
21 And even within those annotations, there's no legal
22 authority cited or, for that matter, any sort of logical
23 reasoning applies or analyses to explain why that
24 conclusion was reached, and why it was decided to go
25 outside of the regulation regarding a term that is

1 well-defined in binding case law and regarding a term that
2 is well-defined in another regulation, 1595. Ultimately,
3 this rule is a regulation that is not enforceable under
4 the APA's rules, and it should not be condoned or enforced
5 here. We ask that OTA find accordingly.
6 Now, in the prehearing conference it was asked
7 whether OTA has jurisdiction to address this issue. At
8 the time, I really didn't think of Talavera and I wasn't
9 aware of the Janus case but perhaps that's the reason why
10 I was asked. Having read both of those cases in detail,
11 the question makes more sense. Now, ultimately, we think
12 OTA absolutely has jurisdiction to address this. Before
13 it can make that decision, we think it absolutely has to
14 go through the analysis that we did. But no matter what
15 it finds, it will not find that this rule that's under
16 dispute was ever promulgated in accordance with the APA,
17 was ever published as a regulation, or filed with the
18 Secretary of State.
19 So it's very distinctly and, in relevant part,
20 different from Janus and Talavera where OTA found that it
21 does not have jurisdiction to invalidate what amounted to
22 be regulations that were promulgated in accordance with
23 the APA and filed with the Secretary of State. Here, the
24 rule has not been promulgated in accordance with the APA,
25 published as a regulation, or filed with the Secretary of

1 State. So we're not asking OTA to invalidate a published
2 regulation.
3 Ultimately, we're, in part, we're asking OTA to
4 validate Regulation 1521 and to follow it as it is
5 compelled to do under Newco. Now, once OTA finds that the
6 rule is a regulation, which we believe it will when it
7 goes through the analysis that we performed, which we are
8 specifically asking OTA to do in its opinion. And I'll be
9 more specific about that in our closing, what we're asking
10 OTA to do. But part of it will be to go through this
11 analysis to state the law in the opinion and to analyze
12 this within that framework. And we believe that when it
13 finds that the rule is regulation subject to APA's
14 requirements and, therefore, unenforceable, that
15 ultimately it will then need to go back or it will need to
16 refocus on Regulation 1521 and its plain meaning.
17 And, again, CDTFA and OTA is required to follow
18 their regulations as provided under Newco. And,
19 ultimately, the question is was Appellant also in the
20 business of selling? And when you look at the binding
21 authority under the court cases we've cited in Regulation
22 1595, it is very clear that Appellant was in the business
23 of selling materials. The standard is 3 or more than 3
24 sales in a 12-month period. They well-exceed that
25 standard.

1 Now, out of an abundance of caution in the event
2 that OTA finds that CDTFA is not required to follow the
3 plain language of Regulation 1521, which we would question
4 is that being an invalidation of the regulation and the
5 controlling authority. And if OTA has found -- or I'm
6 sorry. If the rule is considered not to be a regulation
7 as defined and, therefore, not subject to rule making
8 under the APA, we address whether Appellant made a
9 significant or substantial amount of sales.
10 Now, before we do, we again point out that the
11 rule is undefined, which makes this a little bit
12 difficult, which again takes us back to what I just
13 discussed and the reason why the legislature has
14 established the Administrative Procedures Act to make
15 certain that there's involvement from interested parties
16 and people from the industry so we can address all of
17 these questions that, frankly, have not been answered by
18 CDTFA and/or OTA.
19 So we can start with some context. The first --
20 this rule first appeared as best we can tell -- and we're
21 happy to be corrected if CDTFA shares more information.
22 But it appears to first come up in 1994 in annotation
23 1900208. It was published in July of 1994. Now, in
24 August of 1994 you see it again in annotation 1900161.
25 Both annotations state that resale certificates may be

1 issued by a contractor for material purchases if the
2 contractor intends to resale a significant portion of its
3 materials, and at the time of the purchase doesn't know
4 whether or not the items will be resold or used in
5 construction activities.
6 Now, obviously, as we just went through, a
7 significant portion in the knowledge factor isn't in the
8 law. So far as we can tell, it's made up. We're not
9 entirely sure why. So here, as Appellant has stated in
10 her testimony, they did not know at the time of purchase
11 the fungible and comingle rebar will be sold over the
12 counter or used in construction contracts. Now,
13 significant is not defined in the annotations and there's
14 no legal authority referenced in support of the standard.
15 So of course, in the annotations there's no
16 related analysis because there's really nothing to an
17 analyze, and its just rule it stated. And that's the same
18 with the OTA decision, especially, in the first decision
19 with Martinez Steel under the request for rehearing.
20 There's a little more elaboration, but there's still no
21 guidelines that would allow my client or similar taxpayers
22 to know how to comply with this underground mysterious
23 rule.
24 Now, to help guide this appeal, as previously
25 mentioned, we asked CDTFA to define the standard. They

1 couldn't. They didn't. We would like OTA to ask them
2 today what it means. Tell us about it. I'm interested to
3 know. We don't know if it's meant to be based on the
4 number of sale versus the number of contracts performed in
5 a particular period, or it's the value of those sales and
6 the value of the contracts in a particular period. We
7 don't know what a taxpayer is supposed to do if it intends
8 to resell some materials but ends up not doing so due to a
9 turn in market conditions or other unforeseen
10 circumstances.
11 We don't know if the standard is subjective,
12 specific for each taxpayer which we believe would give
13 rise to unequal treatment under the law and significant
14 inconsistencies or if the standard is objective, which
15 would provide consistency and equal treatment, we believe.
16 It appears to be subjective based on the circumstances of
17 each taxpayer, which we question, since it certainly will
18 lead to unreasonable results and inconsistencies.
19 Now, OTA's opinion on Martinez didn't provide any
20 meaningful guidance on what the rule means or how
21 Appellant or similar taxpayers are supposed to comply. We
22 are very interested in hearing from CDTFA on this today.
23 We hope they will provide some guidance. For now, we'll
24 have to do our best based on a plain meaning definition.
25 And I believe I'm coming up on an hour. I know

1 we had some timing things up front.
2 Judge Lambert, can you tell me how much more time
3 I have?
4 JUDGE LAMBERT: This the Judge Lambert. You have
5 around 10 minutes left.
6 MR. MCCLELLAN: Okay. Thank you. That should
7 work fine. Again, Jesse McClellan.
8 So for now we're kind of stuck with the plain
9 meaning definition, so we look to some dictionaries. And
10 essentially, what we found is that significant -- I will
11 say the term "substantial" is has also been used by CDTFA
12 in this regard. There's not even consistency with how
13 they are referring to this. But ultimately, what you find
14 in dictionaries are terms such as meaningful and
15 important, having substance, material, not imaginary.
16 So with those terms in mind, which is all we
17 really have to draw from, Appellant made at least 280
18 sales of rebar over the counter totaling more than
19 $5 million during the audit period. It significantly
20 exceeds the legal threshold as defined for being in the
21 business of selling, which pursuant to 1595 and consistent
22 with all of the binding case law that we had cited is 3 or
23 more in a 12-month period.
24 So, ultimately, we believe that's a good
25 definition for what significant means because it's the

1 only definition that many exist. And, ultimately, the
2 courts and the agency over time use this rule following
3 the timeframe in which these courts made these decisions
4 and analyzed various taxpayers, including taxpayers that
5 are in service-based industries, the same as Appellant
6 here, and concluded that a low threshold is what's
7 required to determine that a taxpayer is a seller. Now
8 increasing that threshold, arbitrarily, isn't allowed and,
9 frankly, it creates unintentional consequences that I
10 mentioned previously.
11 Now what we can also do is we can turn to other
12 resources. Now, I just mentioned 1595, 3 or more sales
13 within a 12-month period triggers the requirement to hold
14 a seller's permit. If you hold a seller's permit, you're
15 permitted to issue resale certificates. Ultimately,
16 there's nothing in the binding law that says something
17 different. Looking beyond that, as example, annotation
18 395.0009 concludes that, "14 separate sales in a 1-month
19 period is," quote, substantial.
20 In the Wayfair case, the Supreme Court held that
21 sales exceeding $100,000 in a 12-month period is
22 sufficient to trigger economic nexus. Now, California
23 increased that threshold to $500,000, both of which
24 Appellant exceeds here. Revenue & Taxation Code 6597
25 provides a threshold of approximately $14,000 in sales per

1 month in order to trigger the application of a 40 percent
2 penalty.
3 Now, CDTFA guidelines publish in its compliance
4 manual provides a monthly tax accrual in excess of $100
5 per month requires quarterly filing. Notably, all these
6 standards provide for a defined threshold that is
7 objective. The nexus standard isn't, hey, if it's a
8 percentage of your sales or this amount, or for reporting
9 purposes depends on the comparative amount. It doesn't do
10 that because, frankly, we think that would be a bad way to
11 write the law and a bad way to administer the law.
12 I mean, in theory you could have a taxpayer under
13 that sort of approach with $10 million in over-the-counter
14 sales where CDTFA is saying, no. You're not in the
15 business of selling. And you can have a business that
16 makes $17,000 in sales, and under that approach, it could
17 qualify. It doesn't make good sense, and I think it's
18 absolutely unnecessary. We have that term defined under
19 binding law. I think we have to follow it. Now,
20 ultimately, 280 sales exceeding $5 million in a 3-year
21 threshold exceeds all of these defined standards.
22 Anything that's actually defined under law Appellant
23 exceeds, which means that its legally permitted to issue
24 resale certificates, as it did here, and pay the tax when
25 the property was allocated to a contract, or if it was

1 solid in a taxable transaction.
2 And we ask OTA, respectfully, to look closely at
3 what it did in Martinez, and I think as equally important,
4 closely at the law that we're citing here today, and
5 closely at the issues we're addressing today. And we're
6 respectfully asking OTA to include that in their written
7 opinion. And if we're wrong in this, we would hope that
8 written opinion would clearly address what the legal
9 authority says, and that there will be a thorough analysis
10 on what the legal authority says, the facts here, and why
11 the conclusion is reached.
12 And ultimately in that, if this standard is going
13 to be upheld, we would hope to see some direction provided
14 to taxpayers that it's clear. I don't know how OTA will
15 do that with -- with -- frankly, without the information
16 necessary to do it, which is kind of a circular reason.
17 It goes back to why we think it's invalid, but we think it
18 should. We don't think it should leave this hanging out
19 in the wind for people to guess at.
20 So, at any event, that leads us to -- to
21 really -- to two issues that, you know, I think are
22 important. But we don't think they should come to light
23 because we do believe that our client ultimately complied
24 with publish binding law. But the next issue is whether
25 interest has been properly computed. And simply stated,

1 this audit period ends in second quarter '14. The
2 liability pertains to inventory on which tax had not yet
3 been paid that was in inventory at the end of the audit
4 period.
5 Now, according to Revenue & Taxation Code Section
6 6482 and 6591, interest is due on unpaid tax until the
7 date of payment. So interest accrues until you pay tax on
8 what's due. Here, we need to sort of visualize this and
9 think about it in terms of a stack of rebar sitting in a
10 yard that was there at the end of second quarter '14.
11 Now, the value is approximately $8 million. The liability
12 precisely in this regard is like $8.2 million, but it's
13 roughly $8 million dollars. Now, Ms. Webster testified
14 that IRP operates on a first-in, first-out basis.
15 So what that means is that even as, you know,
16 they're buying more steel as they can to sort of create
17 more inventory where prices advantageous, ultimately, they
18 are using this steel first. So what that means is in
19 third quarter '14 where they reported taxable transactions
20 of $5.9 million, in fourth quarter '14 where they reported
21 taxable transactions of $5.1 million for a total of $11
22 million, roughly speaking, that would more than encompass
23 in tax would be paid on that stack of rebar that existed
24 at the end of second quarter '14.
25 So tax was paid frankly before the Notice of

1 Determination was issued because the determination was
2 issued in 2015 as previously mentioned. We don't believe
3 there should be any reasonable dispute that occurred.
4 Now, ultimately, CDTFA -- I'm getting this information
5 from the 4-14, and they under what was reported. They
6 understand how this business worked. Tax was paid on this
7 inventory at issue. The Notice of Determination treats it
8 as if tax still has not been paid, which is, frankly,
9 inconsistent with the facts.
10 We think the Code Sections 6482 and 6591 support
11 that it should be treated as paid because it was and that
12 interest should not accrue in the event that the other
13 issues we address are not granted and this liability is
14 not canceled, that interest should not go beyond the due
15 date of the fourth quarter '14 return, which is
16 January 31st, 2015. We ask that OTA find accordingly.
17 Now, as a final alternative, if OTA finds against
18 all of these issues that we've addressed, and we certainly
19 think it should not, but if it does then we believe relief
20 is warranted under Code Section 6593.5. And in short, the
21 NOD was issued in 2015. It was approximately eight or
22 nine years ago since that time. We think two years is a
23 reasonable time to process the appeal. We do think that
24 the audit was done in expeditious matter. It was -- it
25 was done in a reasonable amount of time. We think the

1 appeal, simply, has taken too long. We think two years is
2 reasonable. We think --
3 JUDGE LAMBERT: Mr. McClellan?
4 MR. MCCLELLAN: Yes.
5 JUDGE LAMBERT: Sorry to interrupt. Maybe you
6 could wrap it up, as I think we've reached the one hour.
7 MR. MCCLELLAN: Excellent. I'm done quite
8 literally. So I will just say and conclude that point,
9 which is that we think interest should not exceed two
10 years in the event that the other issues are not favorably
11 resolved for Appellant.
12 Thank you.
13 JUDGE LAMBERT: Thanks, Mr. McClellan. I think
14 there's briefing on those issues -- that issue also.
15 Okay. I'll turn to CDTFA.
16 Mr. Noble, did you have any questions for the
17 witness, Ms. Webster?
18 MR. NOBLE: No, sir. We did not.
19 JUDGE LAMBERT: Okay. Thanks.
20 And I'll ask the Panel if they have any questions
21 at this time.
22 Judge, Kwee did you have any questions?
23 JUDGE KWEE: I had a question for the
24 representative, but not for the witness. Are you limiting
25 it to the witness at this time?

1 JUDGE LAMBERT: No. You can ask anyone.
2 JUDGE KWEE: Okay. So just to make sure I
3 understand the issue with the underground regulation,
4 you're referring to the substantial and significant
5 language from the CDTFA annotation 190061. Is that what
6 the issue was?
7 MR. MCCLELLAN: Well, ultimately, the standard
8 was held in the decision in this case, which CDTFA has
9 submitted as its brief. And it is refused to allow
10 Appellant to purchase under a resale certificate based on
11 that standard.
12 JUDGE KWEE: Okay. Okay. Because I -- I guess
13 I'm not seeing where, if you're saying there's an
14 underground regulation, I'm just not understanding where
15 it's written or being applied somewhere that us a source
16 of concern that it's an underground regulation as opposed
17 to -- you know, because annotations are specifically
18 exempt from the Administrative Procedure Act. And the
19 only place that I could see that it was mentioned was that
20 annotation that I mentioned, the 190161.
21 So I guess the way I was looking at this case is,
22 you know, I think it's clear, and everyone agrees, that
23 CDTFA must follow its own regulations. And, you know, OTA
24 also has a number of precedential decisions addressing the
25 facts, the weight that you afford CDTFA's annotations.

1 So, basically, they aren't law and that we just would
2 determine the weight, if any, to afford them in reaching
3 our decision. And that's how our case are generally
4 approached issues whereas CDTFA annotations are cited and
5 CDTFA decision. And, you know, we determine whether CDTFA
6 was right in interpreting their own regulations or
7 their -- the statutes.
8 I guess I am not understanding how this is an
9 underground regulation issue as opposed to just a typical
10 case where we would determine the weight to give an
11 annotation and whether or not their approach in their
12 decision was, you know, reasonable and rational for CDTFA
13 to meet its initial burden.
14 MR. MCCLELLAN: Thank you for the question. I
15 think it's a good one, and it certainly matters here.
16 So I would start by something you said upfront,
17 which is that annotations are exempt from rule making.
18 That's -- that's not actually true. So what is an item
19 that's set forth as being excluded from the rule making is
20 a legal ruling of counsel. And there are specific
21 elements that exist there in order to meet that standard,
22 including being signed by the Chief of Legal, and -- and
23 other elements that are not present here.
24 Okay. Now, if you look at Office of
25 Administrative Law, the 1999, I think it's No. 26, the

1 determination that they issued. Let me just go to that
2 because I just butchered that citation, but bear with me
3 just a moment.
4 So the Office of Administrative Law addressed
5 eight challenged annotations, which were challenges
6 constituting regulations by definition because they
7 were -- they weren't limited to specific circumstances and
8 being applied to specific circumstances. And its 1999 OAL
9 Determination No. 26. It really does a very thorough job
10 in going through and specifying binding case law,
11 specifying the government codes that apply. It also
12 addresses the exclusion from the rule making process that
13 you're referring to.
14 The rule making process -- or I'm sorry. The
15 Government Code doesn't say anything like, all annotations
16 that are adopted by CDTFA or FTB are excluded from the
17 rule making requirements. It doesn't. And, ultimately,
18 if you read that determination as I would implore all of
19 you to do, and for that matter, all of the legal authority
20 that I've cited today. I think it will become very clear
21 that this rule, which is what it is -- and I don't know
22 what else you would call it -- is absolutely a rule that
23 has been internally adopted which, frankly, by definition
24 means that it's underground where there's not external
25 involvement, or there's not, you know, where there is not

1 interested parties is a regulation. And that just because
2 it's incorporated into an annotation doesn't excuse it.
3 And I'll just finish this here in just a moment.
4 If you think about it, it makes perfect sense, Judge Kwee.
5 I mean, of course the legislature has not
6 delegated its rule-making authority to any agency. Now,
7 what it does -- you know, otherwise CDTFA could make any
8 rule it wished, say it's an annotation, and it would be
9 unassailable. Of course, the reference that I just
10 provided to you makes it very clear that was not the
11 intent. That's not what the law says. It's actually not
12 the case.
13 Now, if it is a valid ruling of Chief Counsel,
14 and it meets all of the elements, and it's, you know,
15 specific and it's limited, that ultimately it doesn't need
16 to be promulgated. Because in essence, it's not really a
17 broadly applied regulation at all. It's to a specific
18 taxpayer, specific set of circumstance, and it can be used
19 by practitioners, by taxpayers, by the OTA, by courts to
20 try to figure out if, you know, what CDTFA is doing in a
21 particular case is right. But it's not intended to create
22 new standards and new rules, which is absolutely what it's
23 done here. And they didn't do a good job in it to boot
24 because the standard is not defined.
25 I mean, if there was a better job of explaining

1 why it was set forth, contrary to all the other
2 annotations that address the same issue in a different
3 way, then people would know what to do, and maybe
4 Appellant would have been able to comply with it. At the
5 moment we still don't really know what it means.
6 So that's why, if you look at this, and you look
7 at the authority that I'm citing, which clearly I -- you
8 know, I spent a lot of time on this preparation, and I
9 covered a lot but -- and I had to do that. But there's a
10 lot more that underlies all this, and I've provide you
11 with the path to go out and read all of this. And I think
12 you will reach the same conclusion that I have. And if
13 not, frankly, reasonable minds can differ. I only ask
14 that OTA include this in their opinion. Cite the
15 authority, analyze it and, you know, make that process
16 known.
17 JUDGE KWEE: This is Judge Kwee. Thank you. And
18 can I just confirm the cite because I don't think it was
19 attached an exhibit. It was 1999 OAL 26?
20 MR. MCCLELLAN: Yes, sir.
21 JUDGE KWEE: Great. Thank you very much.
22 MR. MCCLELLAN: Yes. Yes, it was 1999 OAL
23 Determination No. 26. And I would have been happy to
24 provide that as an exhibit, but because it's legal
25 authority, my understanding is that that's unnecessary,

1 and that we don't typically do that.
2 JUDGE KWEE: Yes. That's fine. Thank you very
3 much. And that's something that we should get off of
4 Westlaw or OAL's website. Thank you, and I do not have
5 any further questions.
6 So I will turn it back to Judge Lambert.
7 JUDGE LAMBERT: Thank you.
8 Judge Ridenour, did you have any questions?
9 JUDGE RIDENOUR: Yes, I do. Thank you very much.
10 First, I have a question for Ms. Webster.
11 So if my calculations are correct, for fourth
12 quarter 2011, you guys sold zero percent despite
13 purchasing about $3,200,000. And then in 2012 you made an
14 additional purchase of about $14 million and only sold
15 $274,676 total for that 2012 and first quarter 2011. My
16 question is to you, at these points when you're making
17 these purchases for 2012 and going into 2013, what was
18 your expectation for selling these for resale, considering
19 you had zero percent for fourth quarter and only less
20 thank 2 percent for 2012?
21 MS. WEBSTER: Emily Webster. We purchase based
22 on what we can afford, primarily is what we have in cash,
23 so that we can go out and make these bulk purchases
24 knowing that we are continuing to bid projects and that
25 random people come in and as us for material all the time;

1 whether it be contractors that we know or the pool guy
2 down the street. We work in an industrial area, and some
3 of our customers have been referred by our neighboring
4 businesses.
5 JUDGE RIDENOUR: Okay. Thank you very much.
6 MR. MCCLELLAN: You know, if I may just follow up
7 on that for a moment?
8 JUDGE RIDENOUR: Go ahead.
9 MR. MCCLELLAN: If you look at the breakdown of
10 the liability and the most recent reaudits, really, the
11 earlier periods are arguably not very relevant. What you
12 see is that a -- you do see a fluctuation between --
13 JUDGE RIDENOUR: I'm sorry. I'm sorry. I have
14 to interrupt. Are you telling me that the sales that are
15 part of the liability are not relevant?
16 MR. MCCLELLAN: Yeah. I think if -- if you just
17 bear with me for a moment, this will make sense. So if
18 you look at Schedule R2414A2 where it goes through and it
19 computes the liability, what you find is that there's for
20 each quarter -- in some quarters there's credits. So you
21 got, you know, for example, in third quarter '11, there's
22 a computed measure of $151,000 in fourth quarter -- I'm
23 sorry. I don't know if I said that right. Let me restate
24 it.
25 In third quarter '11 on this point, there's a

1 computed measure of $151,000. In fourth quarter '11,
2 there's a computed measure of $120. There's a computed
3 credit of $120,000. Now, if you put those together, you
4 come up with a measure of $30,000 or approximately $2,400
5 in measure, which I would consider not material.
6 JUDGE RIDENOUR: Okay. Thank you for that. And
7 I do have a follow-up question for you, Mr. McClellan. It
8 seems to me like you might be conflating the definitions
9 of significant portion of its materials to engage in
10 business. And so I would like you to address that. And
11 then also, before you address that, is it your opinion
12 that OTA opinions need to have APA approval or consider it
13 an underground regulation? Can you answer that first,
14 please?
15 MR. MCCLELLAN: Yeah, let me just -- thank you
16 for the questions. Let me better understand the first
17 one, and I'm probably going to have to ask you follow up
18 on the second one as well because I'm not entirely clear
19 on it.
20 JUDGE RIDENOUR: Okay.
21 MR. MCCLELLAN: But you -- I heard the word
22 conflating. Can you clarify what it is that you're saying
23 that I'm conflating?
24 JUDGE RIDENOUR: Well, it appears to me that you
25 are talking about at least three sales to be engaged in

1 business --
2 MR. MCCLELLAN: Okay.
3 JUDGE RIDENOUR: -- and before needing to hold a
4 seller's permit.
5 MR. MCCLELLAN: Yes.
6 JUDGE RIDENOUR: However, engaged in business
7 does not necessarily mean significant portions of sales.
8 MR. MCCLELLAN: Well --
9 JUDGE RIDENOUR: What's your opinion on that?
10 MR. MCCLELLAN: Okay. So what -- what I'm
11 saying -- and I think I understand your question. And
12 thanks for making it. So what I'm saying is that the
13 regulation uses the term also in the business of selling
14 materials. So in the business of selling really is what
15 you could take that down to, and those terms are very well
16 defined. Okay. So the law, including Regulation 1595,
17 defines in the business of selling as three or more sales.
18 Okay. That's what the law says. That's what the
19 regulation says. That's what we have to follow. Okay.
20 So now come -- and then with that or along those
21 lines, there's a back up to an annotation where without
22 any sort of legal citation that the term significant is
23 entered into in the business of selling. So if there's a
24 significant amount that's sold is the way it was inserted.
25 Well, we don't know what that's defined as. Nobody has

1 ever defined that. They've never said okay, well, that's
2 three or more sales.
3 No one has ever said, well, that means --
4 apparently, it means more than $17,320, which I think is
5 the exact amount that was in Martinez case. So I guess we
6 can use that, but we're still guessing. I don't have, you
7 know, when those sales took place, whether or not it's one
8 period or across the periods. What we do know is that the
9 law defines in the business of selling as three or more.
10 So to me, if you want to say it has to be significant,
11 that must be significant. That's significant enough.
12 I mean, ultimately, there's a -- there are cases
13 that I cite where one sale, one retail sale is enough to
14 treat a person as a retailer. The threshold isn't high in
15 order to be required to hold a seller's permit. And we
16 think that an unintended consequence of what CDTFA is
17 doing here, and what OTA is endorsing is that it's
18 effectively increasing the level by which the seller's
19 permit is required. Because if you're saying they are not
20 in the business of selling, even if they have $5 million
21 in sales, wouldn't that also mean they don't have to hold
22 a seller's permit, and that, effectively, that their sales
23 would be treated as occasional sales?
24 And if you're not saying that, how do you have
25 consistency with what is defined under the law. We -- it

1 just doesn't work which, again, goes back to why there's a
2 need for regulatory process for rules like this that are
3 broadly applied and that are not specific to a set of
4 circumstances. And that ultimately, if there's no other
5 definition that exist or this significant rule, I think
6 you should use the definition that does exist under
7 Regulation 1595 and, essentially, all the related case
8 law, which is three or more.
9 JUDGE RIDENOUR: Okay. I better understand your
10 position now. Thank you. No further questions.
11 JUDGE LAMBERT: This is Judge Lambert. Thanks.
12 And I don't have any questions at this time. So
13 we can turn to CDTFA's presentation.
14 And thank you, Mr. McClellan, for your
15 presentation, and Ms. Webster.
16 Mr. Noble, if you want to proceed with your
17 presentation for 20 minutes, you can start when you're
18 ready. Thanks.
19
20 PRESENTATION
21 MR. NOBLE: Thank you all.
22 In this appeal there is no dispute that Appellant
23 is a construction contractor that furnished and installed
24 steel rebar in California under lump sum construction
25 contracts. In addition, Appellant also makes some sales

1 of steel without installation, either at retail or sales
2 for resale to other retailers or consumers.
3 During the liability period Appellant purchased
4 $53.6 million in steel without paying tax by issuing
5 resale certificates to its suppliers for purchasing
6 materials out of state. According to documents provided
7 by Appellant, it resold around $5.1 million of steel.
8 During the audit, the Department determined it was
9 improper for Appellant to issue resell certificates for
10 its purchases of materials because it did not resell
11 significant amount of the steel it purchased. The
12 deficiency measure established in the appeal of
13 approximately $8.2 million represents the difference
14 between the taxable measure Appellant reported on its
15 sales and use tax returns and the steel it purchased
16 without paying tax.
17 Now, the general rule provided by Regulation 1521
18 subdivision (b)(2)(a)(1) is that construction contractors
19 are consumers of materials they furnish and install in the
20 performance of a construction contract, and either sales
21 or use tax applies to the contractor's purchase of those
22 materials. Furthermore, pursuant to subdivision
23 (b)(6)(A), a construction contractor may not purchase
24 materials for resale unless they are also in the business
25 of selling materials. Pursuant to Regulation 1668

1 subdivision (g), when a purchaser improperly issues resale
2 certificates for property that is not intended to be
3 resold, the tax becomes due at the time of purchase.
4 In short, because a construction contractor is
5 generally the consumer of materials that they furnish and
6 install, it follows that a construction contractor would
7 only be considered in the business of selling materials
8 prior to use if they sold a significant portion of them.
9 Sales and use tax annotations 190.0161 and .0208 go into
10 further detail about construction contractors that also
11 sell materials, and state that a construction contractor
12 may issue a resale certificate when purchasing materials
13 only if they will be reselling those materials.
14 In addition, a construction contractor may issue
15 a resale certificate when they are purchasing a fungible
16 comingle lot of materials, some of which will be resold
17 and some of which will be consumed in the performance of
18 construction contracts, but only when a significant
19 portion of the material is intended to be and is actually
20 resold. Essentially, even when a contractor also sells
21 materials, they can only make an entire purchase of
22 materials without paying tax when they intend to resell
23 significant portions of them.
24 In this case, the evidence establishes that
25 Appellant sold around $5.1 million out of the approximate

1 $53.6 million in steel it purchased during the liability
2 period. While I understand there has been some talk about
3 the number of transactions, approximately 280, around 250
4 of those transactions were to one customer for one job.
5 Now, this means that Appellant resold less than 10 percent
6 of the materials it purchased.
7 In addition, according to audit Schedule 12A5,
8 around $4.8 million or 9.1 percent of Appellant's total
9 material purchase were resales to one customer, with the
10 bulk of those sales, approximately 91 of them, occurring
11 in 2013. The fact that the bulk of Appellant's material
12 sales were to one customer and mostly in 2013, indicates
13 that the majority of Appellant's sales of materials were
14 an anomaly, rather than an indication that Appellant was
15 in the business of selling materials.
16 Accordingly, Appellant's sales of less than 10
17 percent of the materials it purchased during the liability
18 period are not significant and demonstrate that Appellant
19 was not in the business of selling materials, especially,
20 considering that the majority of the sales occurred in
21 only one year of the audit period. More importantly, even
22 when a construction contractor does make sales of
23 materials, such that they would be considered engaged in
24 the business of selling materials, the contractor may only
25 purchase an entire fungible lot of materials with the

1 resale certificate when a significant portion of the
2 materials are intended to be resold and actually are.
3 Thus, even if the Department were to conclude
4 that Appellant was in the business of selling materials
5 during the liability period, Appellant can only issue
6 resale certificates for entire purchases when significant
7 portions of the materials were intended to be and were
8 resold. Again, the fact that Appellant only resold
9 9.6 percent of its total material purchases of $53.6
10 million establishes that Appellant knew it would consume a
11 significant amount of the materials rather than resell
12 them. Furthermore, Appellant did not make any sales of
13 materials during the periods it operated in 2011, but
14 purchased all of its materials without paying tax.
15 And with respect to the remainder of the audit
16 period, Appellant only resold around 2 percent of
17 materials in 2012, 21 percent in 2013, and about 1 percent
18 in 2014. Thus, even in the highest year, 2013, Appellant
19 only resold 21 percent of its materials, and this is not a
20 significant amount such that Appellant could purchase all
21 of its materials for the entire liability period without
22 paying tax. Therefore, pursuant to Section 6094.5 and
23 Regulation 1668 subdivision (g), as well as the provision
24 of 1521, which are all cited in back letters to the
25 annotations, Appellant owed tax at the time it purchased

1 its materials.
2 As for Appellant's argument, the Department is
3 applying an underground regulation and that the
4 Department's application of the aforementioned laws in
5 violation of the Administrative Procedures Act, pursuant
6 to Section 6094.5 subdivision (b) and 1668 subdivision
7 (g), any person who gives a resale certificate for
8 property that he she or knows at the time of the purchase
9 is not to be resold in the regular course of business is
10 liable for the tax that would be due if he or she had not
11 given such a resale certificate. As previously noted,
12 construction contractors are generally the consumers of
13 material they furnish and install in the performance of a
14 construction contract, and either sales or use tax applies
15 to the sale or use of the materials by the contractor.
16 Furthermore, the annotations interpreting the
17 application of tax in this appeal to specific instances
18 when contractors purchase fungible comingle lots of
19 materials were issued in 1994, well before the liability
20 periods at issue.
21 Lastly, OTA has already analyzed the same issue
22 in its precedential opinions for the Appeal of Martinez
23 Steel and found that the Department did not apply an
24 underground regulation, and that the Department's use of
25 sales and use tax annotations and construing its own

1 statutes and regulations was appropriate.
2 Thus, the application of tax in this appeal is
3 clearly supported by CDTFA's existing statutes,
4 regulations, and published annotations. It is also
5 supported by the analysis in the precedential Martinez
6 Steel decisions. As such, the Department did not apply an
7 underground regulation or violate the APA. For the same
8 reason, Appellant is also not entitled to relief of
9 interest pursuant to Section 6593.5 because there was no
10 error or delay by the Department in applying its existing
11 statutes, regulations, and annotations during its audit of
12 Appellant.
13 As for Appellant's assertion that interest should
14 be adjusted because Appellant reported its tax liabilities
15 on a first-in, first-out basis, we note that the
16 Department's position is that tax was due at the time of
17 purchase when Appellant improperly issued resale
18 certificates to its suppliers. While Section 6483 does
19 allow for offsets for overpayments of periods against
20 underpayments for other periods. There were no
21 unaccounted for overpayments in any other periods at
22 issue. Therefore, no offsets are available and no
23 adjustments to the computations of interest based on this
24 assertion are warranted.
25 Based on the foregoing, the evidence establishes

1 that Appellant sold less than 10 percent of the materials
2 it purchased during the liability period, while purchasing
3 all of its material without paying tax. Therefore, under
4 Regulation 1668 subdivision (g), Appellant's purchases of
5 steel with a resale certificate and without payment of tax
6 at the time of purchase were improper, and Appellant is
7 liable for the tax at the time it purchased the steel.
8 Furthermore, none of the authorities in this
9 appeal provide that a retailer can purchase all tangible
10 personal property without paying tax. Rather, the
11 authorities provide that you must intend to resell a
12 significant portion of a comingle lot of goods, and that
13 did not happen here. Accordingly, this appeal should be
14 denied.
15 Thank you. That concludes my presentation.
16 JUDGE LAMBERT: Thank you, Mr. Noble.
17 Judge Kwee, did you have any questions?
18 JUDGE KWEE: Hi. This is Judge Kwee. I don't
19 have any further questions. Thank you.
20 JUDGE LAMBERT: Thanks.
21 This is Judge Lambert. And, Judge Ridenour, did
22 you have any questions?
23 JUDGE RIDENOUR: Yes. Thank you.
24 Mr. Noble, can you clarify for the record CDTFA's
25 position as to what would qualify as significant in this

1 situation for this matter? Would it be dollar amount,
2 number of sales, number of customers, et cetera?
3 MR. NOBLE: Thank you for the question. I would
4 like to point to the -- I think it was Exhibit E, the most
5 recent exhibit, the email.
6 While the representative said that all we said
7 was the tax law does not provide a definition, he left out
8 the remainder of that email. Typically, in situations
9 involving construction contractors purchasing comingle
10 lots of goods, what the Department does is look at total
11 amounts of purchases and compares that to the total amount
12 of materials consumed, or the total amount of materials
13 that were resold.
14 So we look at significant and/or substantial as a
15 word of comparison. You need the whole piece of the pie.
16 So here we looked at 10 percent of the pie was resold,
17 90 percent of the pie was not. So that's kind of how we
18 look at it. And we do generally tend to look at the
19 entire audit period when doing this comparative analysis.
20 JUDGE RIDENOUR: Thank you for the clarification.
21 No more questions at this time.
22 JUDGE LAMBERT: Thanks.
23 This is Judge Lambert. And, Mr. Noble, I was
24 just wondering did you -- maybe you addressed it, but the
25 argument comparing the three sales of the year to get a

1 seller's permit versus a significant amount of sales, can
2 you address that? Or maybe you already did, but I want to
3 hear your thoughts on it.
4 MR. NOBLE: We don't think that the two are
5 related in this nature. We're talking about, like, three
6 sales for an individual citizen to determine if they're,
7 you know, they are required to hold a seller's permit.
8 Whereas with a construction contractor, we're looking at a
9 general rule that they always need to pay sales or use tax
10 when purchasing materials. And exception to that rule is
11 when they are also engaged in business of materials. We
12 don't think that the two regulations are comparable on
13 these specific facts.
14 JUDGE LAMBERT: Thank you. Thank you, Mr. Noble,
15 for your presentation.
16 So now, Mr. McClellan, if you're ready to make
17 your closing remarks for five minutes, you can proceed.
18 JUDGE RIDENOUR: Sorry, Mr. McClellan. I don't
19 think we can hear you. At least I can't.
20 MR. MCCLELLAN: Can you hear me now?
21 JUDGE RIDENOUR: Yes, thank you very much.
22 MR. MCCLELLAN: Good. Can I have 15 minutes on
23 closing? I just wanted to respond to some of the comments
24 that were made, and it may take me a little more than 5.
25 JUDGE LAMBERT: I'm not sure because I know we

1 have another hearing scheduled after this one.
2 MR. MCCLELLAN: Okay.
3 JUDGE LAMBERT: But if you would like to do
4 post-hearing briefing, like, that could be possible.
5 MR. MCCLELLAN: Let me get going on this then,
6 and I'll wrap up as quickly as I can.
7 So -- for Ms. Alonzo, I apologize if I'm speaking
8 awfully fast.
9
10 CLOSING STATEMENT
11 MR. MCCLELLAN: But a couple of points. You
12 know, as it pertains to the definition, CDTFA's argument
13 is essentially, hey, this wasn't significant. Well, it's
14 still not defined. I appreciate Judge Ridenour asking the
15 question. You know, what's significant? Here's the
16 response in summary. If you look at significant and/or
17 substantial as generally being the same, and sort of look
18 at the whole entire picture, and look at the audit period.
19 And you know, we take it all into consideration, and we
20 make a decision. I mean, that's not a definition, and it
21 gives us nothing, really, of substance. It doesn't make
22 any sense.
23 Now, to segregate the terms that are used in the
24 regulation in the business of selling, from that same term
25 that's defined in Regulation 1595 and binding case law

1 goes against well-established rules of construction that
2 say that you have to look at the entire body of law and
3 give meaning to all of it. And to the extent, a reading
4 makes something that is unsupported -- or unsupported in
5 another section of the law or leaves it to be the
6 superfluous and, ultimately, that reading is wrong.
7 The way that I'm approaching this gives meaning
8 to the entire body of law. It's taking a term that is
9 very well established and using that. Now, ultimately,
10 CDTFA also said that the authority used says that you have
11 to have a significant amount of sales. No it doesn't. It
12 absolutely doesn't. I would ask CDTFA to tell me where it
13 actually says that it does, other than the annotation that
14 does not define it. Ultimately, the law defines what it
15 means to be in the business of selling. We trust that you
16 will see that when you read the authority that we read.
17 The only place that you're going to find this rule is in
18 the backup letter to these annotations, and it's
19 undefined.
20 So with that said, if OTA is willing to leave the
21 record open, then I would gladly add to that. But because
22 we're on a timeline, there are some things that I want to
23 summarize before we close here.
24 JUDGE LAMBERT: Mr. McClellan, I was confirming
25 the schedule of the next hearing, and we can give you the

1 extra 10 minutes in addition to the 5. So if you would
2 like, you can have 13 more minutes. Would that be
3 sufficient?
4 MR. MCCLELLAN: Yeah. Let's see if we can do
5 that.
6 JUDGE LAMBERT: Okay.
7 MR. MCCLELLAN: Thank you very much. I
8 appreciate that.
9 So number one, we're asking OTA to address in its
10 opinion whether the law currently defines in the business
11 of selling, specifically, referencing and discussing the
12 law we address today. Now, obviously, OTA is permitted to
13 address any law that it likes. But if it finds more law
14 that defines it in a different way, we would be very
15 interested and, of course, learning of that. But we are
16 asking that of OTA specifically. If OTA finds that the
17 law defines what it means to be in the business of
18 selling, we're asking it to provide justification for
19 expanding that definition to include the significant
20 standard.
21 Keep it in mind that just because it's included
22 in an annotation, it doesn't make it valid. It doesn't
23 make it so. We, with all due respect, we recognize that
24 Martinez still exist. We're asking OTA not to simply
25 refer back to Martinez Steel and say that it made a

1 finding in that case, and then hold that same thing here,
2 because Martinez Steel opinion doesn't address what we
3 just addressed. Neither the briefs, the presentation, or
4 the opinion in that case addressed what we just did.
5 So we are really asking OTA to simply make a
6 thorough analysis on this, citing the existing law as it
7 pertains in the business of selling. Now, CDTFA also
8 made, I think, an important comment when it addressed --
9 or the way that it phrased in the business of selling.
10 The regulation says also in the business of selling.
11 Okay. Regulation 1595 addresses that in the business of
12 selling can mean different things. And the Market Street
13 case also says that, obviously, a business can be a
14 consumer. It can be in the business of selling. It can
15 be either, and it can be both.
16 The regulation is intentional about using the
17 phrase "also." So you can be a construction contractor.
18 You can also be in the business of selling those same
19 materials. And if so, under the definitions that exist
20 under the law, you get to issue a resale certificate. At
21 the end of the day, we don't see why it really matters why
22 CDTFA is seeking to compel a rule that was created in 1994
23 without any known justification to essentially accelerate
24 the reporting, when in this case, ultimately, a full look
25 shows that really it's just a matter of timing.

1 We are also asking OTA to address whether the,
2 quote, unquote, "significant rule" is a regulation by
3 definition. We're asking it to set forth the definition
4 of a regulation in its opinion as defined by the
5 Government Code and then to analyze this rule using the
6 framework that was set forth in Morning Star by the
7 California Supreme Court that establishes whether or not a
8 rule is a regulation by definition. We're asking OTA to
9 please do that.
10 After setting forth the applicable law, including
11 the definition of regulation and analyzing the, quote,
12 unquote, "significant rule" within the framework of
13 Morning Star's two-prong test, if OTA finds that the
14 significant rule is not a regulation by definition, then
15 we ask you to define it in a way that will allow a
16 taxpayer to comply with it because that still hasn't been
17 provided. And CDTFA's response got us no where. I mean,
18 as far as some definitive threshold, which is the way the
19 law works, right, it's required in the regulatory process
20 to look at the law and make sure that it's consistent with
21 other codes, consistent with other regulations, and that
22 it provides specific guidelines. And this rule doesn't.
23 It just -- I still wouldn't know how to explain this to
24 anyone.
25 Now if, ultimately, as it pertains to the

1 interest factor, we don't want to lose sight of this. We
2 don't think there's any reasonable dispute that the taxes
3 on this $8 million in inventory was absolutely paid in the
4 following quarters. Just because the audit doesn't show
5 in that credit doesn't mean that it wasn't paid because
6 additional purchases were made. But those additional
7 purchases would have then went into inventory.
8 And then under the first-in, first-out basis, the
9 existing inventory, which in this case is the
10 approximately $8 million, it was reported and paid. I
11 mean, it's not sitting in the yard to this day. There's
12 no question about that. And frankly, it stops sitting in
13 yard back in January -- or I'm sorry -- in fourth quarter
14 of 2014. Tax was paid on it. Interest should not
15 continue to accrue. I understand that this is a little
16 unorthodox thinking in this regard, but it's the truth.
17 And the facts are the facts.
18 And we understand what we have argued today, what
19 we have raised today calls into question Martinez Steel.
20 But, again, ultimately the briefs, the decision from CDTFA
21 at the lower lever, the arguments didn't address all of
22 this. And we think that it must. And if OTA disagrees
23 with us, so be it.
24 All that we're asking is that it do so in such a
25 way where it's setting forth the law, setting forth the

1 facts, and analyzing it in an opinion so we can understand
2 its reason. We think when it does that, it's going to
3 reach the same conclusion we have.
4 And with that, we greatly appreciate the
5 opportunity to appear before you today, and we thank you
6 in advance for your careful consideration to this case.
7 JUDGE LAMBERT: Thank you, Mr. McClellan.
8 So if there's nothing further, I'm going to
9 conclude the hearing.
10 And I want to thank everyone for appearing today
11 and the parties for giving their presentations, and for
12 Ms. Webster testifying.
13 And the Panel will issue a written opinion within
14 100 days.
15 So thank you everyone, and the record is now
16 closed. Have a good rest of your day.
17 (Proceedings adjourned at 2:54 p.m.)
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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 19th day of October, 2023.

_____
ERNALYN M. ALONZO
HEARING REPORTER