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APPEARANCES:

Panel Lead: ALJ SUZANNE BROWN

Panel Members: ALJ JOSHUA LAMBERT  
ALJ SHERIENE RIDENOUR

For the Appellant: M. GRANT  
JONATHAN LEIGH  
JEFF RODERICK  
JOSEPH A. VINATIERI  
JASON DEMILLE  
BEN LEE

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
AMANDA JACOBS  
CHAD BACCHUS  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-50 were received into evidence at page 8.)

(Department's Exhibits A-H were received into evidence at page 9.)

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Cerritos, California; Tuesday, July 16, 2024

9:30 a.m.

JUDGE BROWN: We're on the record for the Appeal of Alere Home Monitoring, Inc., OTA Case Number 230212512. Today is Tuesday, July 16th, and it is approximately 9:30 a.m. We are holding this hearing in Cerritos, California.

I'm Suzanne Brown. I'm the lead ALJ for this case. My Co-Panelists today are Judge Sheriene Ridenour and Judge Josh Lambert. Although, I am the lead ALJ for purposes of conducting the hearing, all three ALJs are coequal decision makers in the process and are free to ask questions at any time.

I will start by asking each of the participants to please state their name for the record.

I'll start with CDTFA.

MS. JACOBS: Amanda Jacobs, Attorney for CDTFA.

MR. BACCHUS: Chad Bacchus, Attorney for CDTFA.

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

JUDGE BROWN: Thank you.

And next I will ask Appellant's representatives to state their names for the record.

MR. VINATIERI: Joe Vinatieri from Bewley

1 Lassleben & Miller on behalf of Alere Home Monitoring.

2 MR. DEMILLE: Jason DeMille from Bewley Lassleben  
3 & Miller, also on behalf of Alere Home Monitoring.

4 JUDGE BROWN: Thank you. And are there other  
5 representatives here today who will be participating?

6 MR. DEMILLE: We will have joining us next to me,  
7 to my right, Ben Lee. He will not be necessarily  
8 participating. He'll just be primarily observing. And we  
9 have observing today our client from Alere. We have  
10 Jonathan Leigh. We also have Jeffrey Roderick and Mark  
11 Grant [sic].

12 MR. GANT: Gant.

13 MR. DEMILLE: Gant. No wonder I'm not able to  
14 find it when I email him.

15 JUDGE BROWN: Okay. Thank you everyone. I'm  
16 going to refer back to the prehearing conference minutes  
17 and orders that I issued in this case after our prehearing  
18 conference, just as a basis that we'll start from there.  
19 I'm just going to briefly go over the topics that we  
20 discussed.

21 I don't think you need to have it in front of  
22 you, Mr. Vinatieri.

23 I'm just saying we already talked about these  
24 things, and I'm just going to confirm we identified what  
25 the issue for hearing is. The issue concerns Appellant's

1 claim for refund. And I have the issue phrased as whether  
2 adjustments are warranted to the measure of unreported  
3 inventory withdrawals of testing supplies. And I do --  
4 it's not in the phrasing, but I do understand those  
5 testing supplies are testing strips and lancets. And as I  
6 indicated in the prehearing conference order, the legal  
7 questions in dispute include whether sales tax or use tax  
8 would be the applicable tax for the transactions at issue.

9 Does anyone have any questions, or can I just  
10 confirm that is an accurate statement of the issue?

11 Appellant?

12 MR. VINATIERI: Yes. I think as we discussed at  
13 the prehearing, we have the sales tax versus use tax. And  
14 then within each of those taxes, we have 6009.1, et  
15 cetera, et cetera, which --

16 JUDGE BROWN: I understand that those are all  
17 arguments regarding the issue. But to summarize the  
18 issue, you'll agree that the statement is an accurate  
19 statement of the issue?

20 MR. VINATIERI: Yes. Yes.

21 JUDGE BROWN: Okay. And, CDTFA, you agree that  
22 that is accurate?

23 MS. JACOBS: We do. Thank you.

24 JUDGE BROWN: Okay. Thank you.

25 Next I'm go to go move on to the hearing

1 exhibits. Both parties timely submitted their proposed  
2 exhibits prior to the 15-day deadline, which was July 1st.  
3 OTA compiled the exhibits in a courtesy copy binder just  
4 so that we have them all in one place. It's an electronic  
5 hearing binder that was distributed to the parties. And  
6 at the prehearing conference, both parties indicated that  
7 they had no objection to the any of the exhibits being  
8 admitted into evidence to be part of the hearing record  
9 that the Panel can consider when deciding this case.

10 I'll start with Appellant's exhibits. Appellant  
11 submitted Exhibits 1 through 50.

12 CDTFA, I'll confirm that you have no objection to  
13 those exhibits being admitted into evidence.

14 MS. JACOBS: No objection. Thank you.

15 JUDGE BROWN: Okay. Appellant's Exhibits 1  
16 through 50 are admitted.

17 (Appellant's Exhibits 1-50 were received  
18 in evidence by the Administrative Law Judge.)

19 JUDGE BROWN: And next, I will turn to CDTFA's  
20 Exhibits letters A through H. And Appellant indicated at  
21 the prehearing conference that they had no objection to  
22 those exhibits being admitted.

23 Appellant, can I confirm there's no objection to  
24 admission of CDTFA's Exhibits A through H.

25 MR. VINATIERI: There's no objection.



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JUDGE BROWN: Thank you.

CDTFA's Exhibits A through H are admitted.

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

JUDGE BROWN: Neither party indicated that they are calling any witnesses today. So we will just be hearing arguments.

And I'll just briefly revisit the timeline for our hearing today. At the prehearing -- well, first we're going to hear Appellant's opening presentation, then we hear CDTFA's presentation. We'll have requests along the way for both parties. And then after that, we will have Appellant's rebuttal. And I don't know if CDTFA is going to want to make a brief rebuttal. We didn't talk about it, but I don't usually put it on the schedule. But if it comes up, I will give you a minute or two.

In terms of the time, Appellant initially estimated up to 60 minutes, but it said the presentation could take less. So we scheduled for 60 -- we planned for 60 minutes, but now I'll ask the Appellant.

Appellant, how long do you think you'll need for your opening presentation?

MR. VINATIERI: I think we're looking at 45 to 50. It depends on how we move through and the like. So --

1 JUDGE BROWN: Okay. All right. And then CDTFA  
2 estimated 30 minutes, and is that still the case?

3 MS. JACOBS: Yes.

4 JUDGE BROWN: Okay. Depending on how quickly or  
5 how slowly things proceed, I may call a short midmorning  
6 break, because two hours may be a long time for people to  
7 sit still. But if someone needs a break at any point and  
8 haven't called one, just please say so.

9 All right. I have admitted the exhibits, and we  
10 talked about the schedule. I will remind everyone that  
11 because we are live streaming, please do not reveal any  
12 confidential information, such as home addresses or Social  
13 Security numbers.

14 Does anyone have anything else to raise, any  
15 questions or anything, before we begin with the  
16 presentations?

17 MR. VINATIERI: I did have one item -- excuse me.  
18 When we talked -- I'm looking at my notes here -- at the  
19 prehearing, we indicated we wouldn't -- we didn't expect  
20 to have further witnesses. But we did indicate that if  
21 there is need for clarification, that we would have -- we  
22 had Mr. Jeff Roderick, who is the controller. So if there  
23 are some issues comes up relative to actual -- the numbers  
24 and that type of thing and in policies, Mr. Roderick --

25 JUDGE RIDENOUR: Mr. Vinatieri, I'm going to stop

1       you real quick. Do you have the mic on? The stenographer  
2       is having trouble hearing you.

3               MR. VINATIERI: I do.

4               JUDGE RIDENOUR: Can you push it closer to you,  
5       please.

6               MR. VINATIERI: You mean swallow it?

7               There we go. I'll try it again. I'm sorry. Go  
8       like this.

9               (Indicating waving motion with right arm.)

10              MR. VINATIERI: So when we had our prehearing, we  
11       did indicate that we would have Mr. Roderick here today  
12       for any clarification, et cetera. And I'm just looking at  
13       my notes, and he's the controller, and we do have him here  
14       today if an issue comes up that is more appropriate for  
15       him to speak to.

16              JUDGE BROWN: You had already identified him as a  
17       representative. If he is simply going to be making --  
18       contributing to your argument, that is not a problem.  
19       It's only if he's going to be -- if you are now saying  
20       that you want him to testify as a witness that then I  
21       would open it up to CDTEFA to object. And, you know, that  
22       would be a different thing because you did not identify  
23       him as a witness. If he's just making argument, that is  
24       fine. You can bring him in.

25              MR. VINATIERI: I'm not sure how to respond to

1 that because when we did talk about this, we just didn't  
2 anticipate having a witness, but we did indicate that if  
3 there was need for clarification or even rebuttal  
4 potentially, that he would be here today. And we did  
5 discuss this on the --

6 JUDGE BROWN: Right. And as I said, he can make  
7 argument, and you identified him as a representative and  
8 it's not a problem. If it turns out that you have decided  
9 that you want to have him testify and have me swear him in  
10 as a witness, then we'll have a different discussion at  
11 that time.

12 MR. VINATIERI: That works.

13 JUDGE BROWN: Okay. All right. Then if there's  
14 nothing further, if everyone is ready to proceed, I will  
15 say that, Appellant, you may begin with your presentation.  
16 We anticipate it will be, say, 50 minutes.

17 MR. DEMILLE: Thank you for being here today.

18 And Madam Clerk, if at any time you cannot hear  
19 me, please let me know.

20

21 PRESENTATION

22 MR. DEMILLE: This case has been around a long,  
23 long time. And as result of that, it has been quite  
24 extensively briefed. We trust that the Panel has reviewed  
25 those materials carefully, so we will try not to repeat

1       them. But as set forth by the lead judge, we want to  
2       focus our presentation today as much as we can on our  
3       unique set of facts and their interplay as bundled  
4       transactions and the Regulation 1501, true object test.

5               So the issue in this case is the taxability of  
6       home blood testing supplies, lancets, and test strips that  
7       Alere or AHM provides to both in-state and out-of-state  
8       patients as part of its home INR blood monitoring service  
9       pursuant to its contractual obligation with health care  
10      providers, such as Blue Shield. The Department assessed  
11      use tax on the shipment of those supplies to the  
12      out-of-state patients who are the actual -- or where the  
13      actual use occurs, concluding that a taxable use, i.e., a  
14      gift, was made in Livermore when Alere removed the  
15      supplies from its inventory and transferred the supplies  
16      to the common carrier for shipment.

17             We disagree. Alere is a provider of a life and  
18      death medical monitoring service. Pursuant to  
19      Regulation 1501, any tangible personal property  
20      incidentally transferred as part of the service Alere  
21      provides is not subject to tax. Additionally, several  
22      other issues are implicated, including a claim for refund.  
23      We don't waive any of those, and those issues are  
24      discussed in greater detail in our briefs.

25             Now, you just heard me say life and death. You

1 might possibly think that's a little strong. Let's see  
2 what the medical authority say. According to a July 12,  
3 2015, investigation reported in ProPublica, the blood  
4 thinner, warfarin, also known by its brand names Coumadin  
5 and Jantoven, is the most dangerous drug in America.  
6 Coumadin was a breakthrough for patients with an array of  
7 heart problems associated with blood clots, including  
8 abnormal health rhythm, such as atrial fibrillation, known  
9 as AFib, along with pulmonary embolisms, and deep vein  
10 thrombosis.

11 As the drug -- because the drug interacts badly  
12 with certain foods and medications, particularly with  
13 antibiotics, and it requires regular blood tests to ensure  
14 that it's working as intended, the test measures the time  
15 it takes for blood plasma to clot. And in 2013, nearly  
16 2.7 seniors and disabled individuals filled at least one  
17 prescription for the drug. By 2017, warfarin was the 51st  
18 most commonly prescribed drug in the U.S. with more than  
19 15 million prescriptions. However, the drug is extremely  
20 difficult to manage, even for healthy patients.

21 A 2011 report in the New England and Journal of  
22 Medicine found that the drug accounted for some 33,000  
23 emergency hospitalizations among the elderly from 2007 to  
24 2009, more than twice as many as the next highest drug,  
25 insulin. It poses even greater problems for nursing

1 homes. A 2000 peer review study in the American Journal  
2 of Medicine estimated that nursing home residents suffered  
3 34,000 life threatening or serious events related to the  
4 drug each year. And studies suggest that thousands of  
5 injuries go unreported and are never even investigated.  
6 The drug has clear benefits. Still, improper use has  
7 caused many patients incalculable -- and in some cases,  
8 incalculable suffering; and in some cases, has greatly  
9 hastened deaths.

10 So what are the primary issues with it? The drug  
11 must be carefully calibrated. Too much, and you can bleed  
12 uncontrollably. And too little, you can develop life  
13 threatening clots. This problem is certainly not limited  
14 to nursing homes. Regular and accurate monitoring is  
15 needed for anyone taking warfarin, or they face the same  
16 types of issues.

17 An example that is more personal involves my  
18 father, Lloyd DeMille. Lloyd was an avid gardener who  
19 lived in Utah. After he began taking Coumadin, he was  
20 always covered with bruises. After trimming his apricot  
21 tree with a branch falling on his face, his nose from the  
22 top of his head -- from the bottom of his nose to the top  
23 of his head was completely bruised. A few months later,  
24 he fell ill and was placed on hospice care. He slept with  
25 his mouth wide open and ministering the hospice medication

1 was easy.

2           The first thing I noticed when I arrived to see  
3 him, prior to his death, when I went to administer the  
4 2:00 a.m. medication, when I entered his room, the blood  
5 had coagulated around his mouth so that there was only an  
6 opening about the size of a dime. Then I saw the bloody  
7 mess. As it turns out, the nasal canula, which had been  
8 used to deliver the oxygen, had caused the nose bleed  
9 which was uncontrollable. The blood pooled in his mouth  
10 and sprayed throughout the room. After I called to the  
11 hospice nurse, I removed the nasal canula, cleaned the  
12 blood out of his mouth the best I could, and gave him the  
13 medications.

14           He died a few minutes later. Now, Lloyd didn't  
15 bleed to death. He died from a heart condition. But the  
16 uncontrolled bleeding at the end of his life was an  
17 unnecessary part of his death. Based on the bruising that  
18 I personally witnessed and this bleeding incident, it  
19 seems clear to me that Lloyd's Coumadin levels had been  
20 improperly monitored for many, many years. Lloyd would  
21 have benefited from Alere's home blood monitoring service.  
22 Why? As an Alere patient, he would have received training  
23 in how to take a blood sample using a lancet test strip  
24 and meter. He would have known how to insert the  
25 blood-soaked test strip into the meter and read the INR



1 test result, and he would have known the four different  
2 ways that he could have reported the INR result to Alere's  
3 Coag Clinic.

4 Alere would have managed his INR results. And,  
5 by the way, the INR result is the time in which it takes  
6 for blood to clot. Alere would have managed that result  
7 through the Coag Clinic in such a manner that his doctor  
8 would have been alerted to abnormal results. When his  
9 doctor looked at the information made available to him by  
10 Alere, he would have seen Lloyd's INR history, his new  
11 INR, and based on that information, recommended dose  
12 adjustments by the American College of Chest Physicians.  
13 This is a valuable tool for a busy doctor who is  
14 monitoring large number of patients that are taking  
15 Coumadin.

16 This is the reality of this drug. The question  
17 is this, if Lloyd had been a patient of Alere, would the  
18 true object of the contract have been the blood monitoring  
19 service provided by Alere or the supplies?

20 MR. VINATIERI: So let us briefly show you the  
21 actual TPP, tangible personal property, that's the subject  
22 of this hearing. And I'm going to show you the first box.  
23 It says, "CoaguCheck." You just heard Jason talk about  
24 Coag Clinic. So, "CoaguCheck SX System." And I'm going  
25 to open it up it here. And there's books and things in

1 here, but let me -- let me get into the actual pouch.

2 So what we're talking about is a meter. Here's  
3 the meter, tangible personal property. With it is the pin  
4 prick that they utilize for purposes of procuring blood.  
5 In here also are the CoaguCheck soft clicks lancets, and  
6 there are ten of these, I believe. So this -- this is  
7 the -- basically, what you -- what the trainer receives  
8 and what ends up with the patient. In addition to this,  
9 is the CoaguCheck PT test. And you'll see again, it says,  
10 "CoaguCheck." And what's important is it says here, "Only  
11 for CoaguCheck XS System." This is the system: The  
12 meter, the test strip, and the lancet. They're all in  
13 one.

14 Let me show you the strip. And in here are --  
15 I'm thinking six test strips. It's really kind of  
16 interesting how this is done. I'm going to pull one of  
17 them out. And it's kind of hard to see, but this is the  
18 front of the strip right here. On the back of the strip  
19 is a chip. It's a chip. And what happens is when the  
20 individual, the patient, pricks their finger using the  
21 stick here and the lancet, the drop of blood goes on the  
22 end of this strip, and the strip then is put into the  
23 meter. So what we have is, essentially, as I said, it's a  
24 system. And I'm going to put it right here because you  
25 can't -- the system does not work, as it says right here,

1 unless you utilize all three of these items.

2 So now we know what we're talking about in terms  
3 of the tangible personal property. Let's go ahead and  
4 look at the verification comments. How did we get here?  
5 How did we get here? So we're very, very concerned that  
6 in looking at the position of the CDTFA staff, it's  
7 illogical. It's illogical that somehow two of the three  
8 system items would be subject to tax, and the other is  
9 not. But let's -- let's look at the actual verification  
10 comments, and this is Exhibit 23. Exhibit 23, it's the  
11 verification comments. And on page 4 where it says,  
12 "Meters." It says, "The taxpayer provided the  
13 details of" --

14 Are we all there? Sorry.

15 Okay. The taxpayer provided the details of all  
16 testing meters that were capitalized during the audit  
17 period, which were sent out to Medi-Care patients.  
18 Ownership remains with the taxpayer. The patients must  
19 return the meters back to the taxpayer for proper  
20 disposal. Use tax is due on the cost of the meters at the  
21 point it is withdrawn from resale inventory in California.  
22 However, if at that point the intention is to deliver the  
23 meters out of state where functional use will be made  
24 solely out of state, then the meters would not be subject  
25 to California use tax. Would not be subject to California

1 use tax.

2 Auditor only assessed the meters that were  
3 shipped to California. And then the auditor goes on and  
4 cites RTC 6009.1, the exclusion, storage and use  
5 exclusion. Storage and use do not include -- do not  
6 include the keeping, retaining, or exercising any right or  
7 power over tangible personal property for the purpose of  
8 subsequently transporting it outside the state for use  
9 thereafter, solely outside the state or for the purpose of  
10 being processed, fabricated, et cetera, and then used  
11 solely outside the state. That's not the situation here.

12 So with respect to the meters, there is no title  
13 passage. And the auditor decides to go down the use tax  
14 road and decides use tax is due upon withdrawal from  
15 resale inventory in California and correctly -- correctly  
16 states that if the intent is to deliver the meters out of  
17 state to be used in that monitoring service, quote, "where  
18 functional use will be made solely outside of the state,"  
19 close quote. Then the meters aren't subject to the use  
20 tax because RTC 6009.1 exclusion applies. And I might add  
21 also then Regulation 1620, the functional use is defined  
22 as the use for which the TPP meter in this case is  
23 designed to test, to analyze the patient's blood and the  
24 clotting activity, but only as part of the CoaguChek XS  
25 system, which must include the system's blood testing

1 strips that we just looked at, as well as the lancets.

2 So what is said about the strips and the lancets  
3 in the same verification comments? So still looking at  
4 the verification comments, Exhibit 23, quote, "Self  
5 consumed" -- "the taxpayer" -- "Self-Consumed Merchandise:  
6 The taxpayer provides strips and lancets to Medi-Care  
7 patients to use with the testing meters at no charge. The  
8 taxpayer also uses these supplies in the training  
9 services. All strips and lancets are purchased ex-tax and  
10 removed from the resale inventory. The taxable use occurs  
11 in California when the property is transferred to a common  
12 carrier, prior to its shipment to the customer, whether  
13 out-of-state or in California. At the time of shipment,  
14 the taxpayer has made all the use of that property that it  
15 ever will and has given up all power incident to  
16 ownership."

17 So in contrast to 6009.1 treatment of the meters,  
18 the strips and lancets are subjected to tax when these  
19 items are pulled from resale inventory for shipment out of  
20 state. But what use could that be? There certainly  
21 wasn't a donation or a gift. And the meter couldn't  
22 analyze the clotting time of an out-of-state patient's  
23 blood without the actual blood being put on the strip as  
24 part of the Coag system, and then the strip being into --  
25 going into the meter. So how could that be that at the

1 time of shipment, the taxpayers made all the use of that  
2 property that it ever will and has given up all power  
3 incident to ownership.

4 That's not logical. That's not -- that's false.  
5 The use of the supplies, the lancet and the test strip,  
6 can only be made together as one unit with the meter. And  
7 if the meter is excluded because it will be used out of  
8 state, then the lancet and test strips must also be  
9 excluded. How could Alere provide this critical life and  
10 death blood monitoring service? It doesn't make any  
11 sense. The position of the audit staff, it's illogical.

12 So let's talk now about this illogical position.  
13 And let's talk about the mixed or bundled true object  
14 service or a sale as were requested by the lead ALJ at the  
15 prehearing conference. We're focusing on the question of  
16 whether the contracts at issue were mixed or bundled  
17 transactions; whether the true object of the contract was  
18 a service or a sale of TPP. And the case, of course, at  
19 best addresses these issues is Dell versus Superior Court,  
20 the 2009 case of which we're all familiar, 159 Cal.App.  
21 4th 911.

22 So the Dell court acknowledged that, quote,  
23 "Drawing the line between taxable sales of tangible  
24 property and nontaxable sales of services were intangible  
25 is sometimes difficult, especially, for property that was

1 largely created by personal services as transferred" --  
2 and there's a citation -- "where services and tangible  
3 property are inseparably bundled together. Determination  
4 of the taxability of the transaction turns upon whether  
5 the purchaser's true object was to obtain the finished  
6 product or the service." And there's a number of  
7 citations there.

8 And one of those citations is Regulation 1501,  
9 the long standing regulation dealing with service  
10 enterprises. And I know all of us are well familiar with  
11 1501 for a long time. As observed by the court, the  
12 regulation looks to what the true object of the contract  
13 is or the real object that is sought by the buyer. If the  
14 true object for the contract or the real object sought by  
15 the buyer is a performance of a service, then the TPP  
16 transfer incidental to that service is not subject to tax.

17 And let me just read 1501, the short part of it.  
18 Quote, "Persons engaged in the business of rendering  
19 service are consumers, not retailers of the tangible  
20 personal property which they incidentally use in rendering  
21 the service. The basic distinction in determining whether  
22 a particular transaction involves a sale of tangible  
23 personal property or transfer of tangible personal  
24 property incidental to the performance of a service is one  
25 of the true object of the contract. That is, is the real

1 object sought by the buyer or service, per se, or the  
2 property produced by the service. If the true object of  
3 the contract is a service, per se, the transaction is not  
4 subject to tax, even though some tangible personal  
5 property is transferred," unquote.

6 So it also goes in further, and I'm not going to  
7 quote it. But it talks about the true object of  
8 purchasing a sculpture in its physical form is the  
9 acquisition of tangible personal property, which is  
10 subject to tax because they want the physical item.  
11 However, the true object of a business advisory,  
12 recordkeeping, payroll, and tax services is a service,  
13 even though there may be some incidental furnishing of  
14 forms, binders, or other TPP, maybe even a 1040.

15 So the Dell's court's discussion of the Advanced  
16 Schools case -- and the Advanced Schools case is a big  
17 part of the Dell discussion, and it's a bankruptcy case  
18 that applies California law. The Dell court discussion is  
19 pretty simple and very illuminating. The court observed  
20 that, quote, "Advanced Schools noted that California  
21 recognizes three possible situations with regard to mixed  
22 sales of services and property." And this is approving --  
23 this is in the Los Angeles International Airport Hotel  
24 case approving of the Advanced School analysis.

25 And it says, "First, if the tangible property is



1 the primary item or true object of the transaction, in  
2 which case tax applies to the entire sales price. Second,  
3 service is the primary item or true object to the  
4 transaction, in which case, no tax applies to the  
5 transaction. Third, is the truly, quote, 'mixed  
6 transaction where property and services are distinct and  
7 consequential elements of the transaction, in with case,  
8 the transaction is severable into its taxable and  
9 nontaxable components.'

10 Advanced Schools then concluded that the schools'  
11 reliance on the true object test was wrong because it  
12 applies only to bundled transactions, i.e., the first two  
13 that I indicated above, where services rendered are  
14 inseparable from the property transferred. However,  
15 Advanced Schools were engaged in mixed transaction where  
16 the lesson materials provided by the school were separate  
17 from the educational services. So the court, quote,  
18 "Severed the transaction for tax purposes and allocated  
19 tax upon the market price of the materials."

20 So after thorough review of the relevant law,  
21 Dell concluded as follows: Quote, "Where services and  
22 tangible property are inseparably bundled together,  
23 determination of the taxability of the transaction turns  
24 upon whether the purchaser's true object was to obtain the  
25 finished product or the service." And there's a reference

1 to Regular 1501. For bundled transactions of goods and  
2 services, the true object test applies and the entire  
3 transaction is generally taxed or not taxed as a whole.  
4 So bundled transactions are distinguishable from mixed  
5 transactions where goods and services are sold together  
6 and are readily severable.

7 Unlike bundled transactions, the goods and  
8 services in the mixed transaction are distinct, not  
9 intertwined, and each is a significant object of the  
10 transaction, not one that's incidental to the other. In  
11 mixed transactions, separate elements of the transaction  
12 are analyzed as separate transactions for tax purposes,  
13 and the tangible personal property aspect of the  
14 transaction is taxed. The service aspect of the  
15 transaction is not taxed. In this analysis, the Dell  
16 analysis was followed by the court in another case we all  
17 know, and that's Lucent Technologies, Inc. versus State  
18 Board of Equalization. So with that background, which was  
19 not briefed in our -- or any of the briefs, but we want to  
20 make sure we brought it forth today.

21 What exactly does Alere do?

22 And with that, Jason.

23 MR. DEMILLE: So let's discuss Exhibit 36. And  
24 what I am going to refer to is last paragraph on page 1.  
25 This letter was sent to the appeals attorney. After the

1 appeals conference. To provide some additional  
2 information. The bottom paragraph of the letter advises  
3 that pursuant to Federal Regulations, specifically 42 Code  
4 of Federal Regulations, section 410.33, Alere is an  
5 independent diagnostic testing facility, an IDTF. When it  
6 comes to looking at what Alere does, and particularly the  
7 use of the HCPCA, the health care common procedure coding  
8 system sections that are used for billing systems, the  
9 fact that Alere is an IDTF is significant.

10 So what is an IDTF? An IDTF is a facility that  
11 is enrolled with CMS, the centers for Medicare and  
12 Medicaid services to provide services and are, therefore,  
13 eligible to receive reimbursement based upon CMS's  
14 professional fee schedule. This is in contrast -- and  
15 this is a mouthful -- to DMEPOS suppliers. And that  
16 stands for durable medical equipment prosthetics orthotics  
17 and supplies or, in short, just DME with the emphasis  
18 being durable medical equipment suppliers, which are  
19 governed by other regulatory provisions and receive  
20 reimbursement based on the DME fee schedule.

21 So I referenced the 42 CFR, section 410.33. And  
22 I just want to quote a couple of subsections from that:  
23 (A) (1), effective for diagnostic performed on or after  
24 March 15, 1999, carriers will pay for diagnostic under the  
25 physician schedule only when performed by a physician, a

1 group practice of physicians, and approved supplier of  
2 portable X-ray services, a nurse practitioner, or a  
3 clinical nurse specialist, or an independent diagnostic  
4 testing facility, IDTF. An IDTF may be a fixed location,  
5 a mobile entity, or an individual nonphysician  
6 practitioner. It may be -- or it is independent of a  
7 physician's office or hospital. However, these rules  
8 apply when an IDTF furnishes diagnostic procedures in a  
9 physician's office.

10 Subdivision (e), applies with respect to  
11 multistate entities. (E) (1), the point of actual delivery  
12 of service means the place of service on the claim form.  
13 And when we're talking about the claim form, we're talking  
14 about the form that the IDTF files with -- with CMS to  
15 register itself as an IDTF for purposes of reimbursement.  
16 When the IDTF performs or administers an entire diagnostic  
17 test at the beneficiary's location, the beneficiary's  
18 location is the place of service. When one or more  
19 aspects of the diagnostic testing service -- or diagnostic  
20 testing are performed at the IDTF, the IDTF is the place  
21 of service.

22 So for federal payment purposes, the patient's  
23 location is the place of service, the place of use. Alere  
24 gets paid based upon the location of the patient, not  
25 Livermore where the supplies get withdrawn from resale

1 inventory. Now, at the appeals conference, AHM provided a  
2 representative agreement with Blue Shield of California  
3 that is typical of AHM's agreements with health care  
4 plans. That agreement is now found at Exhibit 18. And so  
5 if we can quickly turn there. If you note the title of  
6 the document, it's titled "Allied and Ancillary Provider  
7 Agreement," and in brackets, "Fee for Service." That  
8 heading is important. This is an agreement for the  
9 provision of services by an IDTF, not an agreement for the  
10 provision of DME by a DME supplier.

11 Now, pursuant to this agreement, Alere is a  
12 participating provider in the Blue Shield network to  
13 provide services to Blue Shield members. And you can  
14 review this document, and the word "services" appears  
15 throughout it. If you go to paragraph 2.1, which is on  
16 page 3 of the document under Provider Services, there are  
17 three things that are important. They're listed in that  
18 document.

19 First, it refers to paragraph 1.2, which defines  
20 covered services. And covered services are the medically  
21 necessary health care services, which a member is entitled  
22 to receive pursuant to the Health Services Contract and  
23 evidence of coverage applicable to the member. Second, it  
24 refers to the law under the California Code of Regulations  
25 that establishes a provider's primary consideration, which

1 is the quality of health care services that could be  
2 provided. Third, it refers to Exhibit A of this  
3 particular document, which is located on page 19.

4 And perhaps we can just scroll to page 19. I  
5 don't know if there's a quicker way to scroll or not.  
6 There we go.

7 It refers to page -- to Exhibit A, which defines  
8 the medically necessary health care services AHM will  
9 provide pursuant to the provider agreement. And Exhibit A  
10 shows that AHM is licensed to provide patient training and  
11 remote health monitoring. And the type of service  
12 provided by AHM is "Home Prothrombin Time Monitoring."  
13 Now, Exhibit B of Exhibit 18 -- which is just a couple of  
14 pages back -- further define the services that AHM will  
15 provide as those described by HCPC service descriptions,  
16 G0248 and G0249, and states the amount that Alere will be  
17 paid for the services it will provide under the agreement.

18 G0248 is a description for demonstrating the use  
19 of the home INR monitor. And you can see the description  
20 that is there. It's the demonstration at initial use of  
21 the home INR monitor for patient with mechanical heart  
22 valves who meet BSC coverage criteria, under the direction  
23 of a physician, and includes demonstration use care of the  
24 monitor obtaining at least one blood sample and provision  
25 of the instruction for the home INR test results and

1 documentation of the patient's ability to perform testing.  
2 So, really, the short description of the code is very  
3 accurate, demonstration of the use of the monitor. And  
4 the amount -- the rate that Alere receives for this  
5 service is \$304.95.

6 The G0249 code, the short description of that is,  
7 provide INR test materials and equipment. And if you look  
8 at the service description, it's provision of test  
9 materials and equipment for home INR monitoring to  
10 patients with mechanical heart valves who meet the BSC  
11 coverage criteria. It includes provision of materials for  
12 use in the home and reporting of test results to  
13 physician, per for test. The payment rate there, the  
14 schedule is one \$182.85.

15 Now, if we go back to Exhibit 23, to page 1 of  
16 that exhibit, the auditor's work papers state there -- at  
17 the very bottom of the page, at the very bottom  
18 paragraph -- Medicare Part A covers in-patient hospital  
19 stays, care in a skilled nursing facility, hospice care  
20 and some home health care. Medicare Part B covers certain  
21 doctor services, outpatient care, medical supplies, and  
22 preventive services. The testing meters and supplies are  
23 specifically covered, under Medicare Part B, as durable  
24 medical equipment, DME. And the reference given is to  
25 [www.Medicare.gov](http://www.Medicare.gov).

1           Now, despite the reference to the Medicare web  
2 page, which is only the -- the homepage for Medicare, the  
3 statement is false. Codes G0248 and G0249 are reserved  
4 for the use of service providers. They are found on CMS'  
5 professional fee schedule. They are not found on the DME  
6 fee schedule. Only a service provider, which provides  
7 services pursuant to these two codes, may receive  
8 reimbursement from CMS.

9           Now, I'd like to refer to Exhibit 22, and  
10 Exhibit 22 is this walkthrough of Jane Doe. This is this  
11 flow chart that diagram services provided by Alere. If  
12 it's not too confusing, we want to change the name of our  
13 hypothetical patient from Jane Doe to Sam Pepper, and  
14 there's a reason for that. We'll get there. Sam has been  
15 diagnosed with blood clots, and his doctor thinks he will  
16 benefit from in-home testing services offered by Alere.  
17 We don't want to go through the on-boarding services that  
18 are described in this chart. You're certainly aware from  
19 our briefing that a trainer goes out and trains Sam on how  
20 to test his blood. We want to, instead, focus on step 10  
21 and 11, which highlight the nature of the services that  
22 are provided by Alere.

23           Step 10, once a week or as prescribed, Sam tests  
24 his blood by using the lancet to prick his finger, collect  
25 the blood on a test strip, and insert the test strip into



1 the meter to measure the result of the INR test. He  
2 reports the display on the meter, the INR that is  
3 displayed, to AHM in one of four ways. First, he can do  
4 it through the health check phone app on his phone. He  
5 can do it through s web portal, or he can do it through an  
6 automated service on the telephone, or he can do it  
7 through a live representative on the telephone. So there  
8 are four ways. If he fails to do it, if he fails the  
9 test, AHM will actually place a telephone call to him and  
10 find out what's going on and why he hasn't tested. Step  
11 11, AHR processes the data making the results available  
12 for review by Sam's physician who can make dose  
13 adjustments as needed.

14 So what -- what is the try object of the contract  
15 here? What's -- what does Sam's doctor see when the  
16 results are tested? The true object of the contract or  
17 the real object that is sought -- certainly, the real  
18 object that we believe that is sought by Sam are the  
19 reports that are made available to the doctor because of  
20 Sam testing his blood, reading the INR result, and  
21 reporting that information to other Alere. That  
22 information allows the doctor to keep the patient's  
23 coagulation levels within reasonable ranges to prevent  
24 harmful blood clots and to prevent internal hemorrhaging,  
25 either one of which can result in death.

1           Now, exhibit 29 is the video that shows the  
2 reports that are available to the doctor as a result of  
3 Alere's data management service. We were informed that  
4 everyone has reviewed that video. So rather than show it,  
5 we just wanted to focus on a few slides that we made from  
6 the video, and we have asked Ben to just pass those out.

7           There are a total of 9 slides in the package. We  
8 don't want to go through all of them. The first few  
9 slides show the home page, the results pending page, Sam  
10 Pepper's chart and his listed diagnoses. We want to first  
11 turn to slide 5, which would be the fifth page in the  
12 package.

13           JUDGE BROWN: And I will note, I did watch the  
14 video, but I don't have a photographic memory of it. I'm  
15 going to take your word for it that these are just  
16 printouts from the video.

17           MR. DEMILLE: Yes, they are.

18           JUDGE BROWN: They're not new information.

19           MR. DEMILLE: They are not new information. I  
20 sat there with my phone with the video and clicked the  
21 pictures.

22           JUDGE BROWN: Okay. Thank you. Go ahead. And I  
23 will note I am keeping an eye on the time. I think we're  
24 getting up near your time. But, yeah, you know, just keep  
25 an eye on it and, you know --

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MR. DEMILLE: We have a --

JUDGE BROWN: -- obviously --

MR. DEMILLE: We're -- we're getting there.

JUDGE BROWN: Right. Right. Okay.

And I will ask, does CDTFA have any objection to us looking at these printouts of Exhibit 29?

MS. JACOBS: No objection.

JUDGE BROWN: Okay. Thank you.

Go ahead.

MR. DEMILLE: So slide 5 is where the bulk of the information is recorded, such as vital signs, INR dosing, and more. The highlighted area, you'll see there's the INR goal of 3. You can see his warfarin dosage size.

JUDGE BROWN: And I'm sorry. What page are we on again?

MR. DEMILLE: Five.

JUDGE BROWN: Okay. Sorry. Go ahead.

MR. DEMILLE: And -- and just below the highlighted section, you can see a blank INR box. And then at the very bottom of the page, you can see the current warfarin regimen. That would be the daily amount that he takes. If you go to the next page, magically, you see an INR that has appeared in the INR box that is below the INR goal of 3.

Does everybody see that?

1           That is the result of the doctor having pushed  
2           the "read from meter" link, which is somewhat hidden by  
3           the popup box that has appeared in the middle of the  
4           screen. What the doctor does, is he comes in and takes a  
5           look at Sam Pepper's page. He clicks "read from meter,"  
6           and then the 2.7 appears in the box, and then the popup  
7           screen appears. And as a result of the popup screen, a  
8           new therapeutic dose is suggested based upon the American  
9           College of Chest Physician Guidelines. If we go to the  
10          next page, the next page shows the new therapeutic dose  
11          that was suggested. If you take a look at it, it happens  
12          to be exactly the same.

13           If you watch the video, you'll see that the  
14          doctor does, in fact, make manually some adjustments to  
15          Sam Pepper's dose. If we go to the next slide, slide  
16          eight, this is probably one of the more important parts of  
17          the one of features of the program. This is the doctor  
18          after he signs off on the -- on the visit. He prints a  
19          detailed medical record of the encounter. That's for his  
20          records. And then the next slide, this is a detailed  
21          report that is printed for the -- for Sam Pepper, and it  
22          shows the new dosage that is available or that the doctor  
23          wants Sam to take.

24           Now, what I didn't show you in here was the  
25          information that's available to the doctor that shows

1 medication that Sam Pepper is taking and warfarin  
2 interactions and things like that, that the doctor  
3 certainly wants to know to make sure that there aren't  
4 problems; so that Sam doesn't have problems with the  
5 medication interactions. There are over 40 different  
6 reports that are available to the doctor, and we believe  
7 that the slides demonstrate that the true object of the  
8 sale is -- is -- or the true object of the contract is  
9 the -- are these reports.

10 MR. VINATIERI: So the transaction at issue -- so  
11 what is the true object here? And it's pretty clear, if  
12 you look at page 7, 8, 9, it's this information, this  
13 valuable medical information that goes to the doctor so  
14 that his disease can be treated. It's a professional  
15 service. And it's kind of like the payroll tax business  
16 advisory services I referred to in 1501 earlier. You're  
17 getting reports, very detailed important information. So  
18 the question then becomes, was Alere engaged in bundled or  
19 a mixed transaction? Was this a service or a sale?

20 So let's talk about bundled versus mixed. This  
21 is a bundled transaction. Dell tell us, of course, that  
22 it's a bundled transactions are transactions where  
23 services and TPP are inseparably bundled, intertwined  
24 together. And the proper test that apply is found in Reg  
25 1501 where for bundled transactions of goods and services

1 the true object test applies. Entire transactions are  
2 generally taxed or not taxed as a whole. That comes us  
3 further in contrast to mixed transactions where the goods  
4 and services are distinct and not intertwined. Each is a  
5 significant object of the transaction and not incidental  
6 to the other. And the service is not subject to tax, but  
7 the TPP is subject to tax. So I don't -- that all comes  
8 from Dell.

9 So what's the analysis here? This is not a mixed  
10 transaction at all. Alere's life and death blood  
11 monitoring service cannot be separated from the lancets  
12 that we've showed -- I've got here in front of me the  
13 lancets -- from the strips, from the meter. The blood  
14 monitoring service, the lancet test and strips and meters  
15 are all and separably intertwined as a bundled  
16 transaction, as I indicated several times. As it says on  
17 the materials here, the -- this constitutes a single  
18 system. It has -- it's a unitary system that must work  
19 together to get the results that we're showing you here  
20 that gets to the doctor.

21 So the transfer of the supplies was basically  
22 incidental to the performance of the service. In Dell,  
23 once again, it says in Advanced Schools where the court  
24 severed the tuition paid for the nontaxable education  
25 services from the taxable lesson materials, the court

1 found that the materials valued at close to 20 percent of  
2 the total tuition charge could not be deemed an  
3 insignificant aspect of the transaction. So the court  
4 looked at this percentage value of TPP, the books compared  
5 to the educational services, and it kind of reminds us of  
6 Reg 1546, which is installing and repairing  
7 reconditioning.

8 In general, 1553, watches, et cetera, which  
9 provides that if the retail value of replacement parts is  
10 10 percent or less than the total charge -- that's a total  
11 charge of the service plus the parts -- then the tax does  
12 not apply on the sale price of the parts. It's the 10  
13 percent rule that many of us have known for a long time.  
14 So we thought to ourselves, well, we're going to look at  
15 this from the -- that 10 percent rule and see how it runs.  
16 So what we ended up doing, if you compare the cost, Alere  
17 is reimbursed under those Blue Shield agreements -- and  
18 that's its G0489490 -- with the cost of the test strips  
19 right here -- the test strips and the lancets and what  
20 those cost were.

21 If you do a calculation, it actually comes to a  
22 little bit under 3 percent. So that's far less than the  
23 10 percent. Certainly, far less than the 20 percent we  
24 find in Advanced Schools in Reg 1546. So here, even if  
25 you look at it from a cost standpoint, the supplies are

1 incidental to the performance of the service provided by  
2 Alere. And in the words of the Dell court, quote, "It is  
3 an insignificant aspect of the transaction," right out of  
4 Dell.

5 So in conclusion, Alere is engaged in a life and  
6 death blood monitoring service as utilized by millions of  
7 patients in the United States, 94 percent of whom reside  
8 outside California. Even the Department and the auditor  
9 understand and know that this is a service that they're  
10 performing, a very important service. But that service  
11 can't be performed without utilization of the Coag  
12 System -- CoaguCheck system, which includes the use of the  
13 monitor, obviously, once again, back to the strip and back  
14 to the lancet. The meter, the patient's blood on the test  
15 strip, the lancet to procure the patient's blood, and  
16 three items of TPP work together to enable Alere to  
17 provide the specialized information to the physician that  
18 Jason just showed you on this printout.

19 So 1501 and Dell, this is a bundled transaction  
20 where the TPP is inseparably bundled and intertwined  
21 together to effectuate the life and death blood monitoring  
22 service. But the service can only take place based upon  
23 the patient's utilization of the three items together at  
24 the patient's home. The only question is whether Alere  
25 made a use of the three items in California when those



1 system items -- those system items were pulled from the  
2 inventory rack and provided to UPS for shipment to the  
3 out-of-state trainer or the patient.

4 We provided you with several reasons why no use  
5 to took place in California. And we showed you the  
6 auditor's verification comments where she indicated that  
7 pulling a meter in California would be a use, but if the  
8 functional use was going to be outside California, then no  
9 tax due based upon 6009.1, the temporary storage use  
10 exclusion. However, surprisingly, that same thinking did  
11 not apply to the other items in the Coagu system, the test  
12 strips, and lancets because the auditor believe that they  
13 were, quote, "Used when they're pulled from the rack in  
14 California." The illogic is manifest here. Especially,  
15 in light of the fact that the items constitute a single  
16 system that must be utilized together to analyze and  
17 provide the results of a patient's clotting ability to his  
18 or her doctor.

19 The bottom line is here is that the TPP went out  
20 of the state, used out of the state, functionally used out  
21 of state, not subject to tax, and Alere is owed a refund  
22 for the tax it paid on those out-of-state sales.

23 We appreciate -- and we know it was a little bit  
24 long, but we had to get all of this into the record, and  
25 we appreciate your consideration and you're listening

1       closely to what we said.

2               Thank you.

3               JUDGE BROWN: Thank you very much. I anticipate  
4 we may have a few questions for you now but probably will  
5 have most of the questions once we've heard both parties'  
6 presentations. Let me start with just a couple.

7               I had a question about what Appellant reported  
8 for 2013. There's a lot of pages here, so bear with me if  
9 I'm not describing something accurately. You can correct  
10 me.

11              Is it accurate to say that Appellant didn't  
12 report any taxable inventory withdrawals of supplies  
13 shipped in California for the year 2013, but did report  
14 for 2014 and 2015?

15              MR. VINATIERI: Yes.

16              JUDGE BROWN: So then is Appellant seeking a  
17 refund for 2013 -- for tax paid 2013, or just for 2014 and  
18 2015?

19              MR. VINATIERI: I believe this is covered in  
20 Mr. DeMille's filing, January 26, 2023, to the Office of  
21 Tax Appeals where we set forth towards the back. It says,  
22 "Refund request," and we detail our refund number and  
23 where that number comes from. And I'm looking here,  
24 pursuant to the auditor's verification comments, total  
25 sales reported and tax was paid to California 2013 but not

1 in 2014 and 2015.

2 Let me ask Mr. DeMille here, if I could.

3 JUDGE BROWN: I'll tell you what, if you want,  
4 you can hit that in rebuttal. I want to make sure I  
5 understand correctly what your argument is about the claim  
6 for refund.

7 MR. VINATIERI: We'll pull it out and check it  
8 out.

9 JUDGE BROWN: Yeah. Okay. I'll say why don't we  
10 table that, and I will turn to my Co-Panelists and see if  
11 they have any questions for right now.

12 Judge Ridenour, do you want to proceed with any  
13 questions right now?

14 JUDGE RIDENOUR: Yes, please. Just to clarify,  
15 four strips are sent to the patients; correct?

16 MR. VINATIERI: Six strips.

17 JUDGE RIDENOUR: Six strips. Okay. Thank you.

18 MR. VINATIERI: Each Box has 6 strips, and they  
19 normally get two boxes.

20 JUDGE RIDENOUR: Two boxes. And then when they  
21 need new strips?

22 MR. VINATIERI: They -- we monitor it and will  
23 send it to them.

24 JUDGE RIDENOUR: And are they billed?

25 MR. VINATIERI: Are they billed? The patient?

1 JUDGE RIDENOUR: Yes.

2 MR. VINATIERI: No.

3 JUDGE RIDENOUR: Okay. And if they exceed the  
4 amount health that care will provide -- reimburse?

5 MR. VINATIERI: We've had several times, and we  
6 have someone that can speak to it. But several times it's  
7 taken more strips than was necessary because they were  
8 issues, fumbling, et cetera. So they get whatever they  
9 need so that we get the accurate results.

10 JUDGE RIDENOUR: Okay. Thank you. And then also  
11 -- so the strips have a chip in them, if I --

12 MR. VINATIERI: Yes.

13 JUDGE RIDENOUR: And so is there any ability for  
14 a patient to go on the website and order other strips that  
15 are not made specifically by Alere to use in the monitor?

16 MR. VINATIERI: Let me check. I think I know the  
17 answer, but let me check.

18 JUDGE RIDENOUR: Thank you.

19 MR. VINATIERI: The answer is no.

20 JUDGE RIDENOUR: Thank you very much. I have no  
21 further questions at this time.

22 JUDGE BROWN: Judge Lambert, do you have any  
23 questions at this time.

24 JUDGE LAMBERT: I have a couple of questions, I  
25 think, just to clarify a couple of things. So the patient

1 use the test strips, and when it's done, the test strips  
2 they just throw them away after it's put into the meter?

3 MR. VINATIERI: They're disposed of, yes.

4 JUDGE LAMBERT: Okay. And I was reading, it says  
5 the meter gives results and the patient reports the  
6 results through different methods and then Alere uploads  
7 it into the Coag Clinic. And so I'm wondering, so this  
8 information on the meter is the same information that just  
9 shows up on Coag Clinic? Or is there more analysis done  
10 before the doctors look at it? Or does the meter contain  
11 all the same data that the doctor see, basically?

12 MR. VINATIERI: Yes.

13 JUDGE LAMBERT: Okay. And just one more  
14 question. Is the process setup so that the doctors have  
15 to go through Coag Clinic, or could the patient just take  
16 their meter results and go straight to the doctor or just  
17 use it on their own somehow?

18 MR. VINATIERI: No. It has to go through Coag  
19 Clinic and the analysis.

20 JUDGE LAMBERT: Okay. Thanks. That's all the  
21 questions I have.

22 JUDGE BROWN: Let me ask another question  
23 about -- related to Exhibit 18 and the contract with Blue  
24 Shield. Appellant indicated in the arguments that this is  
25 a sample -- an example of a contract that Appellant had

1 for how these, the test strips and lancets, are used, what  
2 they are a part of. Are there other contracts that were  
3 not provided?

4 MR. VINATIERI: Yes. We have -- it's  
5 representative. We have other that we contract with, but  
6 this -- this was the example that was the easiest to pull  
7 out.

8 JUDGE BROWN: Were other contracts produced to  
9 CDTFA during the audit?

10 MR. VINATIERI: Yeah, I'm not sure. What -- what  
11 we see primarily in the audit work papers is reference to  
12 the Medicare. But we were engaged -- I think I saw  
13 Aetna's name somewhere also. So we had Blue Shield, et  
14 cetera.

15 JUDGE BROWN: I'll say I think that's all the  
16 questions I have for Appellant right now, but there may be  
17 more.

18 Why don't we take a short break before CDTFA  
19 begins its presentation. I have 11:04. It's almost 11:05  
20 a.m. So if everyone could come back and be ready to begin  
21 at 11:15, we'll take 10 minutes.

22 MS. JACOBS: Can we request 11:20?

23 JUDGE BROWN: Sure. That's fine.

24 We'll see you all at 11:20.

25 (There is a pause in the proceedings.)

1 JUDGE BROWN: And we're back on the record in the  
2 Appeal of Alere Home Monitoring, Inc.

3 And we have heard Appellant's presentation and  
4 next, we are going to hear CDTFAs' presentation.

5 CDTFAs, if you are ready, you can start whenever  
6 you are ready.

7 MS. JACOBS: Thank you.

8

9 PRESENTATION

10 MS. JACOBS: Appellant provided in-home  
11 blood testing services and patient training during the  
12 liability period of January 1st, 2013, through  
13 December 31st, 2015. During the liability period,  
14 Appellant operated an office and warehouse in Livermore,  
15 California, and was enrolled in the Medicare program as a  
16 fee for service contractor, under which Appellant was  
17 classified as an independent diagnostic test facility and  
18 received payment from the U.S. Government for its  
19 services; Exhibits E, pages 129 through 130, and  
20 Exhibit F, page 1.

21 And if you'd like, I can refer to the hearing  
22 binder pages, but I'll just be referring to the exhibit  
23 pages, unless you ask.

24 As part of its participation in the Medicare,  
25 program, Appellant contracted with health care service

1 plans to provide home-testing services to patients.  
2 Appellant also contracted with registered nurse trainers  
3 who met with patients and trained them on how to  
4 administer the test themselves; Exhibit E, pages 129 and  
5 132, and Exhibit F, page 4. Once trained, Appellant  
6 provided patients with electronic testing meters, which  
7 are not at issue in this appeal, as well as test strips  
8 and lancets, which collectively we'll refer to as testing  
9 supplies; Exhibit E, page 129.

10 Appellant also collected the test results, which  
11 it reported to patients' physicians; Exhibit E, page 130.  
12 Appellant purchased the testing supplies ex- tax from  
13 vendors in and out of state, then withdrew the testing  
14 supplies from resale inventory and shipped them via common  
15 carrier to patients as part of its services; Exhibit E,  
16 page 133. Appellant received payment from the U.S.  
17 Government under the Medicare program based on the number  
18 of tests patients performed, irrespective of the quantity  
19 of supplies Appellant provided. And Appellant did not  
20 directly charge trainers or patients for the testing  
21 supplies or collect sales tax reimbursement on the testing  
22 supplies; Exhibit E. Page 130, and Exhibit F, page 1.

23 Starting in 2014 Appellant reported use tax on  
24 its purchase price of testing supplies shipped to patients  
25 within California, but Appellant did not report use tax on



1 the testing supplies shipped out of state; Exhibit E,  
2 page 132, and Exhibit F, page 5. During the audit, the  
3 Department determined that Appellant's taxable use of the  
4 testing supplies occurred in California when the TPP was  
5 transferred to a common carrier regardless of whether the  
6 testing supplies were then shipped to patients located in  
7 or outside California; Exhibit E, page 134, and Exhibit F,  
8 page 5.

9 The issue in this case is whether adjustments are  
10 warranted to the measure of unreported withdrawals of  
11 inventory of testing supplies. As you know, California  
12 imposes sales tax on a retailer's gross receipts from the  
13 retail sale of tangible personal property or TPP in  
14 California, unless the sale is specifically exempt or  
15 excluded from taxation by statute. Revenue & Taxation  
16 Code sections 6012 and 6051. A sale includes any transfer  
17 of title or possession in any manner or by any means  
18 whatsoever of TPP for consideration; Section 6006  
19 subdivision (a).

20 Sales tax is imposed on the retailer who may  
21 collect reimbursement from its customer, if the contract  
22 of sale so provides; Civil Code 1656.1 and Regulation  
23 1700. Use tax applies to the storage, use, or other  
24 consumption of TPP purchased from any retailer for  
25 storage, use, or other consumption in California, measured

1 by the sales price, unless the use is specifically exempt  
2 or excluded by statute; sections 6201 and 6401. The use  
3 tax is imposed on the person who stores, uses, or  
4 otherwise consumes the TPP; Section 6202.

5 Storage includes any keeping or retention in  
6 California for any purpose, except sale in the regular  
7 course of business or subsequent use solely outside the  
8 state; Section 6008. Use includes the exercise of any  
9 right or power over TPP incident to the ownership of that  
10 property, except sale in the regular course of business;  
11 Section 6009. However, the terms storage and use do not  
12 include keeping retaining or exercising any right or power  
13 over TPP for the purpose of subsequently transporting it  
14 out of state for use thereafter solely outside the state;  
15 Section 6009.1.

16 The liability at issue is based on Appellant's  
17 transfer of testing supplies, which Appellant purchased  
18 ex-tax, stored in its California facility, and then  
19 shipped via common carrier to Medicare patients and  
20 trainers outside California. Appellant provided the  
21 testing supplies pursuant to its contracts with Medicare  
22 Health Care service plans; Exhibit F, page 130 and -- oh,  
23 that might be Exhibit E, page 130 -- sorry -- and  
24 Exhibit F, page 1.

25 Appellant received payment for those services

1 based on the number of tests performed by the patient, not  
2 the quantity of supplies it furnished. And that's the  
3 same exhibits as I just referenced. Appellant did not  
4 charge patients directly for the supplies and uses common  
5 carriers to deliver the testing supplies to the patients  
6 out of the state. Again, those same exhibits. Thus,  
7 Appellant was the consumer, not the retailer of the  
8 testing supplies it used in rendering its service;  
9 Regulation 1501. As such, any tax liability related to  
10 Appellant's consumption of the testing supplies would be  
11 use tax; sections 6201 and 6202. As previously stated,  
12 use includes the exercise of any right or power over TPP  
13 incident to the ownership of that property other than the  
14 sale in the regular course of business; Section 6009.

15 Thus, taxable use may include the withdrawal of  
16 TPP from resale or other ex-tax inventory and subsequent  
17 transfer of that TPP in California to other persons, such  
18 as common carriers, in transactions that do not constitute  
19 sales. See annotation 570.0435. See also annotation  
20 495.0625, and also -- and these relate to sales tax, but  
21 by comparison, the California unified Commercial Code  
22 2401, subdivision(2)(a).

23 Here, Appellant made taxable use of the testing  
24 supplies at issue when it withdrew the supplies from its  
25 resale inventory and shipped them via a common carrier to

1 Medicare patients and trainers pursuant to a contract to  
2 provide the supplies in satisfaction of its services.  
3 Appellant has made a lot of arguments about it being a  
4 service provider. We don't dispute that. We believe that  
5 its use of these items were in furtherance of its  
6 services. Appellant retained title to the meters, which  
7 are not at issue, which patients returned to Appellant  
8 when they were no longer needed. However, after shipping  
9 the testing supplies, Appellant relinquished title and  
10 possession to those testing supplies, which were then  
11 consumed by Appellant in rendering its services. That is  
12 why the testing supplies are treated differently than the  
13 testing meters.

14 To summarize, Appellant was the consumer, not the  
15 retailer of the testing supplies it used in rendering its  
16 blood monitoring services, and its withdrawal from  
17 inventory and shipment of the testing supplies via common  
18 carrier to its trainers and patients outside California  
19 constituted a taxable use. Therefore, Appellant is not  
20 entitled to a refund of tax or further adjustments to the  
21 audit liability for the period of January 1st, 2013,  
22 through December 31, 2015. Since Appellant has not  
23 otherwise disputed the audit methodology or the audit  
24 measure, no adjustment to the Department's audit  
25 determination is warranted. For these reasons we request

1 that this appeal be denied.

2 Thank you.

3 JUDGE BROWN: Thank you.

4 Now, we may have some questions for CDTFA. Let  
5 me start and then I'll turn to my Co-Panelists in a  
6 minute. One second.

7 In both the Appeals Bureau decision and CDTFA's  
8 briefing, CDTFA relies on a backup letter to annotation --  
9 shoot. I don't know if I wrote the number down correctly.  
10 Now it was 280 -- I'm sorry. Sorry. 2800930?

11 MS. JACOBS: 0390. Yeah.

12 JUDGE BROWN: Okay. I just read it incorrectly.  
13 Thank you. 0390.

14 MS. JACOBS: Yes.

15 JUDGE BROWN: Okay. I believe this is the one  
16 that says that the exclusion under Revenue & Taxation Code  
17 section 6009.1 applies only when the person transports the  
18 tangible personal property outside California solely for  
19 that person's own use.

20 MS. JACOBS: Correct.

21 JUDGE BROWN: And that was part of what the CDTFA  
22 relied on in its finding, that Section 6009.1 doesn't  
23 apply. And so my question is, do you know what that  
24 interpretation is based on? Like, is there anything to  
25 support that other than the backup letter. And it's not

1 even in the annotation itself, I will note. It's in the  
2 backup letter.

3 MR. BACCHUS: There isn't a specific statute or  
4 regulation that that supports that. That has been the  
5 Department's interpretation for several decades. And in  
6 the backup letter to annotation 570.0435, the author also  
7 references, at that point in 1995, there were -- that had  
8 been the longstanding interpretation for 40 years at that  
9 point, so now going on 70 years. So the Department uses  
10 that interpretation and has used it for almost 70 years.  
11 But we are not aware of any specific statute or regulation  
12 or case law that that is based on.

13 JUDGE BROWN: Okay. Thank you.

14 Let me ask a different question about a different  
15 topic. I want to focus on the audit work papers, the  
16 verification comments that say that the taxpayer provides  
17 strips and lancets to Medicare patients to use with the  
18 testing meters at no charge, and CDTFA relies on that  
19 language for its finding that there was no consideration  
20 for the supplies at issue. I want to ask, you know,  
21 essentially, how does the audit -- how do we get there?  
22 Why doesn't CDTFA consider the Blue Shield contract that  
23 Appellant produced to be evidence of payment for the  
24 supplies as Appellant has argued? And why -- yeah, let me  
25 start there. Why does CDTFA not accept the Blue Shield

1 contract, and why -- why is CDTFA making the, you know,  
2 the alternate contrary finding about relying -- saying  
3 there was no consideration?

4 MS. JACOBS: So I think, first of all, the -- I  
5 believe Judge Ridenour asked Appellant today whether the  
6 patient was billed for the testing supplies specifically,  
7 and they responded no. That contract seems to suggest  
8 that patient is able to bill based on how many of the  
9 actual tests are administered, not based on the supplies.  
10 So they might give infinite supplies, but they're not  
11 billing based on those supplies. They're billing based on  
12 the actual tests that occurs.

13 And then also, the Blue Shield agreement, while  
14 it appears to cover HMO and PPO and the Medicare Advantage  
15 health plans, the Department has been relying on the audit  
16 work papers for facts regarding Appellant's actual  
17 compensation for its services to Medicare patients. And  
18 there appears to have been other appears other contracts  
19 that we don't have in our possession currently that -- so  
20 we wouldn't hang our hat on the Blue Shield contract per  
21 se. In addition to the fact that, again, the Blue Shield  
22 contract just appears to be compensation for tests, not  
23 for the supplies themselves.

24 JUDGE BROWN: All right. Thank you.

25 I want to give my Co-Panelists an opportunity to

1 ask questions also.

2 Judge Ridenour, do you have questions for CDTFA?

3 JUDGE RIDENOUR: Yes.

4 During its presentation, Appellant mentioned  
5 Dell. I was wondering what CDTFA's position as to its  
6 applicability to this case is?

7 MS. JACOBS: So Regulation 1501, the very first  
8 paragraph of 1501 states that persons engaged in a  
9 business of rendering services are the consumers, not  
10 retailers of the TPP, which they use incidentally in  
11 rendering their service. And, therefore, tax applies to  
12 the sale of the property to them. As we don't consider  
13 this a sale of TPP, we consider this Appellant consuming  
14 the supplies in rendering its services. We don't find the  
15 distinction in Dell between mixed and bundled transactions  
16 relevant.

17 JUDGE RIDENOUR: Thank you. Also, I was  
18 wondering what CDTFA's position is as regard to annotation  
19 570.1140 to this case?

20 MS. JACOBS: Just a minute.

21 JUDGE RIDENOUR: Sure.

22 MS. JACOBS: So I haven't read it, you know,  
23 completely, thoroughly, but just on first glance, it would  
24 appear that this would be distinguishable from the current  
25 case because we don't believe that Appellant was



1 transporting the testing supplies outside of the state for  
2 its own use. We believe that the patient was using the  
3 supplies, and that Appellant was consuming the supplies in  
4 rendering its services by transferring them out of state.

5 JUDGE RIDENOUR: I don't see the requirement of  
6 who uses the items in that annotation, however.

7 MS. JACOBS: Again, I haven't read it all  
8 thoroughly, but just based on the last sentence of the  
9 annotation, notwithstanding the above, the company's  
10 withdraw of such equipment from resale inventory for its  
11 own use outside of state, we don't believe that they were  
12 using it outside the state.

13 JUDGE RIDENOUR: Okay. And one further question.  
14 Should this Panel decide it is a use tax issue, do we have  
15 the taxable measure of shipped within California versus  
16 out?

17 MS. JACOBS: Mr. Parker will answer that  
18 question.

19 JUDGE RIDENOUR: Thank you.

20 MR. PARKER: So the Appellant did report use tax  
21 on the test strips and lancets of almost \$4.5 million for  
22 2014 and 2015, and they didn't report any in 2013. I  
23 believe that their percentage of California was around  
24 6.4 percent. So the use tax, probably if it was just  
25 California we would use the California factor to figure

1 out what should have been reported in 2013 that wasn't.  
2 Do you want me to do a quick calculation to come up with  
3 that amount?

4 JUDGE RIDENOUR: Yes, please.

5 MR. PARKER: Okay. I'll work on that.

6 JUDGE RIDENOUR: Thank you. No further  
7 questions.

8 JUDGE BROWN: Okay. And Judge Lambert, do you  
9 have any questions at this time?

10 JUDGE LAMBERT: Yeah. I think I have maybe a  
11 couple of questions just to clarify a couple of things. I  
12 was just wondering, it was stated by CDTFA that -- back to  
13 what the Panel was saying about it was transported outside  
14 California for that person's use that transported it. And  
15 in the backup letter for 280390, there's an example that  
16 says, "On the other hand, if petitioner transported the  
17 property outside of California in its own facilities and  
18 passed title to donee outside California, the petitioner  
19 would not have been regarded as making it taxable use for  
20 the property in California."

21 So it seems like that is a situation where the  
22 property was used outside California by someone other than  
23 the person's use. And I'm wondering maybe to clarify  
24 that, or is that inconsistent at all?

25 MS. JACOBS: So the -- we're saying that the

1 title passed when they transported it to the common  
2 carrier within California, and the back up we have for  
3 that. And there's a history of title and possession being  
4 transferred in sales, and then also in use tax situations  
5 when someone like Appellant would transfer it to the  
6 common carrier for use by another individual. That's when  
7 title passes is when it's transferred to the common  
8 carrier.

9 JUDGE LAMBERT: Okay. Also, the meters were  
10 determined to be nontaxable because Appellant retained  
11 title to the meters. And so in that case, the patients  
12 that received the meters outside California, they use them  
13 outside California also. So in that case it seems like it  
14 wasn't, you know, for Alere's use of the property. It was  
15 for the, you know, patients outside California. They  
16 still used it outside of California. So I'm wondering if  
17 that's inconsistent with the statement that it has to be  
18 used by Alere in this case?

19 MS. JACOBS: So because the Appellant retained  
20 title to the meters and they were then returned, it was  
21 not -- we don't find that to be inconsistent.

22 JUDGE LAMBERT: Okay. And then also in terms of  
23 backup letter, what level authority should they be given.  
24 You know, does CDTFA say that we should be able to rely on  
25 the backup letter at all? Or what's the position on that,

1 the weight to be given to them?

2 MR. BACCHUS: So the backup letters generally  
3 explain the reasoning behind the language of the  
4 annotation. So it's instructive. That's what I would  
5 say. As far as like what weight to give, I mean, we've --  
6 I know there's case law out there that talks about weight  
7 given to annotations and, obviously, the backup letter is  
8 not the annotation. We understand that.

9 JUDGE LAMBERT: Okay. Thanks.

10 And just to clarify, does CDTFA still argue that  
11 Yamaha applies or -- and that there is a gift?

12 MS. JACOBS: So we understand that in Judge  
13 Yamaha there was a gift. We were never arguing that there  
14 was a gift in this case, so much as it's instructive and  
15 that there was a transfer of TPP with no consideration.  
16 So you could call that a gift. We're not saying it was a  
17 gift. We're just saying that there was a transfer of TPP  
18 with no consideration.

19 JUDGE LAMBERT: Okay. I think I have one more  
20 question. Just in the Parfums case, you know, discusses  
21 functional use but doesn't go into title passing at all,  
22 and you know if the Parfums case was applied? You know,  
23 it seems like not necessarily that we'd be looking to  
24 title passing at all, and I -- I mean, could you discuss  
25 how that case might apply here.

1 MS. JACOBS: I'm sorry. Is that a case that's  
2 discussed in our briefing?

3 JUDGE LAMBERT: Yeah. It's Parfums-Corday versus  
4 State Board of Equalization.

5 JUDGE RIDENOUR: CDTFA mentions it in its  
6 additional brief on page 5, on the bottom.

7 MS. JACOBS: Thank you.

8 And could you repeat your question?

9 JUDGE LAMBERT: Well, just in terms of how the  
10 concept of the functional use applies to this concept of a  
11 title passing.

12 MR. BACCHUS: I think -- so our distinction is  
13 that the functional use that's occurring in this case is,  
14 Appellant's use of the property is when it transfers --  
15 when it delivers it to the common carrier. That's its  
16 use. It's not using it outside of the state. The  
17 patients are using it outside the state. So when we talk  
18 about Appellant's use, they've used it for their intended  
19 purpose when they withdraw it from their inventory and  
20 deliver it to the common carrier.

21 JUDGE LAMBERT: Okay. Thank you. And that's the  
22 questions I have. Thanks a lot.

23 JUDGE BROWN: Thank you.

24 Judge Ridenour, did you have another question?

25 JUDGE RIDENOUR: Yeah. I have a follow up to

1 that. So these are test strips, if I understand  
2 correctly. My friend is diabetic. Same situation, just  
3 different results I'm presuming. I'm getting nods. All  
4 right. I'm curious as to how when you -- the first  
5 functional use of a strip is to get the results. And so  
6 I'm wondering how CDTFA deems the first functional use  
7 being chipped.

8 MS. JACOBS: Well, for that case specifically,  
9 it's as if the property has some functional purpose in  
10 California and in -- we're understanding these contracts  
11 correctly or the situation correctly, Appellant is  
12 contracting with Medicare to provide a service. And  
13 included in that provision of service is providing these  
14 test strips. So they're fulfilling their use of the test  
15 strips by shipping them to the patient.

16 MR. BACCHUS: Right. And just add to that,  
17 Appellant can't use the strips. Appellant is a  
18 corporation. It can't physically use the strips for what  
19 their intended purpose is. So their use of it in  
20 withdrawing from the inventory and shipping it, that's  
21 their use. Their use is to ship it to their patients.  
22 So -- and when they completed the obligation to the common  
23 carrier, that's where their use occurs.

24 JUDGE RIDENOUR: Thank you. No further  
25 questions.

1 JUDGE BROWN: Yes, Mr. Parker.

2 MR. PARKER: I wanted to follow up to  
3 Judge Ridenour.

4 JUDGE BROWN: Yes. Thank you.

5 MR. PARKER: So if we apply a 6.41 percent, which  
6 is based off of the meters within California compared to  
7 all the meters chipped, if we use that percentage to be  
8 the California percentage, the amount that would be  
9 subject to use tax in 2013 is \$847,000 or so in measure,  
10 which would reduce the overall amount by -- if it's only  
11 California that's taxable, it would reduce the assessment  
12 by a little over \$41 million -- almost \$42 million  
13 reduction of measure. So it would be a \$3.758 million  
14 reduction of tax, if we only asses tax on the test strips  
15 and lancets in California.

16 JUDGE RIDENOUR: Thank you.

17 JUDGE BROWN: And is that for the entire  
18 liability period or just for 2013?

19 MR. PARKER: That's for 2013 -- well, no. That's  
20 for the entire liability period. Because they had already  
21 reported use tax on the one shipped into California, we  
22 didn't have an additional assessment for that portion of  
23 it. So, really, anything in 2014 and 2015 were for test  
24 strips and lancets shipped outside California.

25 JUDGE BROWN: Thank you.

1 I think we'll say we can go ahead and proceed  
2 with CDTFA's rebuttal. We may have follow up questions  
3 for either party before we end the hearing, however. I'm  
4 sorry. We've heard CDTFA's presentation. I think we can  
5 go ahead and hear Appellant's rebuttal. We may have  
6 follow-up questions, however, if Appellant is ready.

7 MR. VINATIERI: Can you give us just a couple of  
8 minutes.

9 JUDGE BROWN: Sure. Yes.

10 MR. VINATIERI: Thank you.

11 JUDGE BROWN: We can go off the record just for a  
12 minute.

13 (There is a pause in the proceedings.)

14 JUDGE BROWN: We can go back on the record.

15 And as I was saying, we are now ready to hear  
16 Appellant's rebuttal.

17 And I will give you up to 20 minutes.

18 MR. VINATIERI: Thank you.

19

20 CLOSING STATEMENT

21 MR. VINATIERI: In light of the nature of this  
22 proceeding and as much time that has been spent by us in  
23 trying to mistake a complete record, we are very much  
24 appreciate the CDTFA staff. We appreciate your questions,  
25 and at this point in time, I think you've heard it all.



1 You've seen the tangible personal property in question,  
2 and we will go ahead and say thank you for providing the  
3 opportunity to bring forth all of our information. We  
4 will basically be closed out as far as our rebuttal is  
5 concerned.

6 JUDGE BROWN: Okay. You don't have any further  
7 rebuttal.

8 MR. VINATIERI: That's correct.

9 JUDGE BROWN: That's fine. Thank you.

10 I did want to ask -- actually, let me start by  
11 saying, does Appellant agree with the estimate that CDTFA  
12 just gave a minute ago that we heard from Mr. Parker  
13 about -- let start with -- it was 6 percent? And I  
14 believe that is similar to what Appellant has argued as  
15 well, the 6 percent figure. I guess I want to ask if you  
16 have any -- if you want to say if you agree or disagree or  
17 anything.

18 MR. VINATIERI: We did discuss that, and I  
19 indicated that 94 percent went outside of California, so  
20 it would be 6 percent here. We think the number is pretty  
21 close, but we would need to make sure that we have  
22 opportunity to actually do the calculation ourselves and  
23 check it out before we could actually say yes or no. But  
24 we -- I think it's ballpark.

25 JUDGE BROWN: Okay. Let me just double check to

1 see if I have any questions for either party. All right.  
2 I will ask my co-Panelists if you have any further  
3 questions.

4 No.

5 No.

6 Okay. Then if no one has any further questions,  
7 I will say that we can wrap up this hearing. Thank you  
8 all very much for your participation. One second.

9 And as you all know what will happen is that once  
10 the record is closed that the Panel will meet and confer  
11 and discuss and prepare a written opinion based on the  
12 evidence, arguments, and applicable law. And we will mail  
13 both parties our written decision no later than 100 days  
14 from the date the record closes. And I believe I can say  
15 that the record is now closed. So that will be 100 days  
16 from today.

17 So the hearing is now adjourned.

18 Thank you all very much.

19 (Proceedings adjourned at 12:08 p.m.)  
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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 12th day of August, 2024.

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