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IN THE  
SUPREME COURT OF CALIFORNIA

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JOSE M. SANDOVAL,  
*Plaintiff and Appellant,*

*v.*

QUALCOMM INCORPORATED,  
*Defendant and Appellant.*

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AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL,  
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE No. D070431

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PETITION FOR REVIEW

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**PETITION FOR REVIEW**

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**ISSUES PRESENTED**

1. Whether a hirer of an independent contractor may be liable to a contractor’s employee under a retained-control theory based *solely* on the hirer’s failure to undertake measures to ensure the safety of the contractor’s employees, where the hirer did not direct the contractor’s work, induce the contractor’s reliance, or otherwise affirmatively interfere with the contractor’s delegated responsibility to provide a safe worksite.

2. Whether the statewide pattern jury instruction on hirer retained-control liability, CACI No. 1009B, should be judicially corrected because it omits the “affirmative contribution” element required by this Court in *Hooker v. Department of*

*Transportation* (2002) 27 Cal.4th 198 (*Hooker*), creating havoc and inconsistency in the lower courts.

## INTRODUCTION

In a series of cases beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*), this Court has established that contractors and their employees generally may not sue the contractor's hirer for workplace injuries. In *Hooker*, the Court recognized a narrow exception: A hirer may be liable for negligently exercising retained control over worksite safety, but only "insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra*, 27 Cal.4th at p. 202.) Yet here, relying on a pattern jury instruction, the Court of Appeal held in a published decision that *Hooker's* "affirmative contribution" requirement adds nothing to the analysis, effectively overruling *Hooker*. Contradicting a long line of cases, the court affirmed a jury verdict based solely on a hirer's "failure to act" to ensure the safety of the contractor's employees—without any finding that the hirer directed the contractor, induced the contractor's reliance, or in any way interfered with the contractor's ability to provide a safe worksite. Review is warranted to restore uniformity of decision on this key issue and to correct a seriously flawed pattern jury instruction that, if not corrected, will continue to infect jury verdicts in *Privette* cases throughout the state.

The relevant facts have never been in dispute. Qualcomm hired TransPower Testing, a licensed and highly experienced electrical contractor, to upgrade parts on an electrical switchgear.

TransPower's principal, Frank Sharghi, then hired plaintiff Martin Sandoval to help him inspect parts inside just one of the switchgear's compartments—the main cogeneration (“cogen”) cell.

Before the inspection, a Qualcomm crew properly powered down the main cogen circuit and locked and tagged out the necessary breakers to ensure the area to be inspected was deenergized. Other circuit breakers in the switchgear remained energized, but they were shielded by bolted-on protective covers and so it was safe to touch any exposed surface in the room with bare hands. Before leaving the room, one of the Qualcomm engineers explained to Sharghi which enclosed circuit breakers were still live. But the explanation was unnecessary. As the onsite expert with decades of experience working with the switchgear, Sharghi already knew precisely which circuits remained live. With the area to be inspected safely deenergized, Qualcomm then turned the worksite over to Sharghi with no restrictions on the safety measures he could undertake nor any promise by Qualcomm that it would continue to play any role in the inspection.

Sharghi, on his own, then did the unthinkable. Without telling Sandoval or Qualcomm, he surreptitiously instructed one of his workers to go to the back side of the switchgear and remove the bolted-on protective cover over a live, high-voltage circuit so he could retake photographs he needed for a prior, unrelated job. Sharghi knew the circuit was live, and he knew Qualcomm had not authorized him to exceed the scope of work and expose a live circuit. Worse still, Sharghi simply left the circuit exposed and unattended. Sandoval, not suspecting what Sharghi had done,

then approached the open circuit and was seriously burned by an arc flash. No one from Qualcomm was in the room during these events.

Under the *Privette* doctrine, the undisputed facts entitle Qualcomm to judgment as a matter of law. Qualcomm did nothing to *affirmatively contribute* to Sharghi's extreme and unexpected misconduct. Qualcomm never directed Sharghi, induced Sharghi's reliance, or otherwise interfered with Sharghi's responsibility to provide a safe worksite. By hiring a licensed contractor, Qualcomm as a matter of law delegated to Sharghi any tort law duty it may have owed Sandoval—including any duty to warn Sandoval about a hazard that Sharghi himself created.

The trial court nonetheless denied Qualcomm's motions for summary judgment and nonsuit on the ground that Qualcomm may have "affirmatively contributed" to the accident, yet then refused to instruct the jury on affirmative contribution. The trial court rejected any proposed instruction that included *Hooker's* core requirement because the CACI instruction's directions for use advised, contrary to this Court's holdings, that "affirmative contribution" simply means "substantial factor" causation and so a hirer can affirmatively contribute by merely failing to act.

The Court of Appeal adopted the CACI advisory committee's reasoning, agreeing that "'affirmative contribution'" may consist of a simple "failure to act." (Typed opn. 53.) The court thus concluded that the trial court correctly refused to give any instruction on affirmative contribution and held that Qualcomm could be held liable on Sandoval's retained-control claim based

solely on its supposed failure to warn Sandoval personally that a safely enclosed circuit was energized. In so holding, the court rejected Qualcomm's argument that it was entitled to judgment as a matter of law under *Privette* and *Hooker*.

By treating "affirmative contribution" as a superfluous element, the Court of Appeal's published decision clearly conflicts with more than a dozen Supreme Court and Court of Appeal decisions. Until now, the vast majority of courts have recognized that a hirer who retains control over safety conditions may not be held liable for mere passive omissions. As *Hooker* put it, "something more" is required. (*Hooker, supra*, 27 Cal.4th at p. 209.) A hirer may not be held liable on a retained-control theory without evidence that the hirer contributed to the contractor's negligence "by direction, induced reliance, or other affirmative conduct.'" (*Ibid.*) This Court should grant review to resolve the conflict in the lower courts over the definition of "affirmative contribution."

Review is also warranted to clarify whether juries should be instructed on *Hooker*'s affirmative-contribution requirement. In direct contravention of *Hooker*, CACI No. 1009B directs courts *not* to instruct juries that affirmative contribution by the defendant is an essential element of a hirer retained-control claim. In the committee's view, the term "affirmative contribution" is misleading and is adequately covered by the standard "substantial factor" element.

Until recently, lower courts have generally followed this Court's holding in *Hooker*. But now two panels of the Court of

Appeal have joined ranks with the CACI committee in published decisions, making the CACI committee's commentary the controlling authority for trial courts throughout the state on the elements of a retained-control claim, in derogation of *Hooker*. CACI No. 1009B has created sharp conflicts among the lower courts, and has not yet been subject to this Court's review. The facts here present a clear case for the Court to address this highly divisive issue.

The issues raised in this petition go to the core of the *Privette* doctrine. If the Court of Appeal is correct, then untold numbers of homeowners and businesses that hire licensed contractors will face new and unexpected liability far beyond the scope this Court has deemed appropriate. This Court's review is urgently needed to restore uniformity to *Hooker*'s vital rule and to prevent a defective pattern jury instruction from continuing to taint jury verdicts statewide in *Privette* cases.

Finally, while outright review is fully warranted, this Court should at a minimum either grant and transfer the case with instructions to reconsider in light of *Hooker* (Cal. Rules of Court, rule 8.528(d)) or grant and hold the case pending the Court's decision in *Gonzalez v. Mathis*, review granted May 16, 2018, S247677, in which this Court will address the circumstances in which a hirer may be held liable for injuries caused by a dangerous condition known to a contractor (Cal. Rules of Court, rule 8.512(d)(2)). The *Gonzalez* decision could in many ways bear on the proper resolution of the issues in this case, where Sandoval's

injuries were undisputedly caused by a dangerous condition known to Sharghi, the contractor who employed Sandoval.

## STATEMENT OF THE CASE

### A. Factual Background

1. In 2013, Qualcomm hired TransPower Testing, a licensed electrical contractor, to upgrade electrical switchgear equipment at a power plant on its San Diego campus. (Typed opn. 3.) TransPower's president, Sharghi, had decades of experience as an electrical engineer and had worked on Qualcomm's switchgear literally hundreds of times. (*Ibid.*)

Before the upgrades could be made, Sharghi needed to inspect one of the switchgear's cells to determine whether the bus bars could handle additional amperage. (Typed opn. 4.) But he could not access the bus bars on his first attempt, so he asked Sandoval, a technician with ROS Electrical Supply, to assist him in a second inspection. (*Ibid.*) Sandoval was not an engineer, but he understood how all the components worked and had worked with Sharghi around electrical gear for many years. (*Ibid.*)

When Qualcomm authorized the inspection, the approved work request provided that the inspection would be limited to just one of the switchgear's compartments, the cell housing the main cogen breaker. (Typed opn. 16; 7 RT 449-450, 597.) Sharghi understood that he was not authorized to inspect other enclosed cells, which he knew would remain energized. (Typed opn. 9.)

2. On the morning of the inspection, Sharghi and Sandoval met up with Omid Sharghi (Frank Sharghi's son) and

TransPower employee George Guadana. (Typed opn. 5.) After arriving at the power plant, the four attended a safety briefing in which Qualcomm engineer Mark Beckelman warned everyone, including Sandoval, that certain portions of the switchgear would remain energized. (Typed opn. 22, 54.)

Beckelman and two other Qualcomm engineers then deenergized the main cogen cell by locking and tagging out the main cogen breaker while Sharghi closely observed to make sure “they [didn’t] miss anything.” (Typed opn. 6.) After testing with a voltage meter, one of the Qualcomm employees used his hand to inform Sharghi, “this side is hot, this side is not.” (*Ibid.*) But Sharghi already knew which cells were energized, having studied the schematics himself and knowing the switchgear intimately from his decades of experience. (8 RT 626-628.)

All Qualcomm employees then left the room, turning the job over to Sharghi. (Typed opn. 6.) Sharghi never expected any Qualcomm employee to remain in the room. (Typed opn. 9.) He believed no monitor was necessary because he “knew what [he was] doing.” (*Ibid.*)

With TransPower in control, Guadana tested the main cogen cell himself to confirm it was deenergized and then attached grounding cables. (Typed opn. 6.) Once Guadana had done so, Sandoval, believing all exposed components safe to touch, climbed into the main cogen cabinet and began his inspection. (Typed opn. 7.)

At this point, Sharghi did something that, as the trial court put it, “Qualcomm had no reason to think” he would ever do. (2 AA

325.) In violation of the approved scope of work, Sharghi secretly told Guadana to go to the back side of the switchgear and open a cabinet to expose the GF-5 circuit—one of the *live* circuits that Qualcomm had left safely enclosed by a bolted-on protective cover. (Typed opn. 9.) Sharghi knew the GF-5 circuit was energized, and he knew that Qualcomm had never (and would have never) authorized him to remove the cover of any live circuit. (*Ibid.*) He chose not to tell Sandoval and Omid he was exposing a “hot” circuit, however, because he “didn’t want to scare everybody.” (8 RT 667.)

Sharghi ordered Guadana to expose the GF-5 circuit because he wanted to retake photos that had not come out well in a prior inspection. (Typed opn. 8, 11.) He admitted that the photos were just for his “‘own protection’” (typed opn. 12) and were completely “‘unrelated to the inspection being performed by Mr. Sandoval at the main cogen breaker’” (typed opn. 8).

After removing the GF-5 panel, Guadana walked back to the front side of the switchgear and saw Sandoval inside the main cogen cubicle, inspecting it. (Typed opn. 13.) After coming out, Sandoval called out for Guadana to help him with something on the back side of the switchgear. (*Ibid.*) Sandoval handed Guadana a flashlight, walked with Guadana around the switchgear, and then approached the exposed GF-5 circuit with a metal tape measure in hand. (*Ibid.*) As he did so, the tape measure triggered an arc flash, causing Sandoval to sustain serious burns. (Typed opn. 30.)

## B. Procedural History

1. Sandoval sued TransPower and Qualcomm, asserting negligence and premises liability claims. (1 AA 17-22, 35-40.) Qualcomm then moved for summary judgment, invoking the *Privette* rule, but the trial court denied the motion, finding a triable issue whether Qualcomm “affirmatively contributed” to the accident. (1 AA 33.)

Before jury selection, Qualcomm objected to CACI No. 1009B—the pattern jury instruction on hirer retained control—because it lacked the affirmative-contribution element required by *Hooker* (the very element on which the trial court had denied summary judgment). (Typed opn. 39.) Qualcomm proposed several instructions to remedy the issue, ranging from a modified version of the CACI instruction requiring the jury to find that Qualcomm “affirmatively contributed” to the accident, to several proposed definitions of “affirmative contribution.” (1 AA 216, 222-223.) The trial court denied all of Qualcomm’s proposals. (3 RT 123; 4 RT 180.)

On Sandoval’s failure-to-warn claim, however, the trial court agreed that this Court’s decision in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*) required the court to instruct the jury that Qualcomm had no duty to warn Sandoval of a hazard known to TransPower. (Typed opn. 39.) Sandoval promptly withdrew his proposed failure-to-warn claim against Qualcomm (4 RT 174), but at trial he sought to elicit testimony that Qualcomm owed a duty to warn (e.g., 9 RT 844-845, 856-857, 885-887, 890). And in closing arguments, his counsel argued that

Qualcomm should be held liable under the retained-control theory for failing to inform each person in the switchgear room “what was hot and what was not.” (13 RT 1517.)<sup>1</sup>

The jury found Qualcomm liable (and 46 percent at fault, compared to TransPower’s 45 percent and Sandoval’s 9 percent) and awarded more than \$7 million in damages. (1 AA 184-187.) Qualcomm moved for JNOV and a new trial.

In the JNOV motion, Qualcomm argued that Sandoval’s retained-control claim failed because there was no evidence that Qualcomm affirmatively contributed to the accident by directing TransPower, inducing TransPower’s reliance, or interfering with TransPower’s responsibility to provide a safe worksite for Sandoval. (1 AA 236-250.) In the new trial motion, Qualcomm argued that the trial court erred by rejecting any instruction on affirmative contribution, and at a minimum should grant a limited retrial based on the jury’s allocation of more fault to Qualcomm (46 percent) than to TransPower (45 percent). (1 AA 212-214.)

The trial court denied JNOV, but granted a limited new trial on allocation of fault. (2 AA 317-320.) Both sides appealed.

2. The Court of Appeal affirmed. Starting with the instructional-error issue, the panel agreed with its division’s prior decision in *Regalado* that “CACI No. 1009B is an accurate statement of the law.” (Typed opn. 52, citing *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582 (*Regalado*)). “Like *Regalado*,”

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<sup>1</sup> Sandoval’s counsel also argued to the jury that Qualcomm should be held liable for not supervising the inspection to prevent TransPower from doing “something stupid.” (13 RT 1498.)

the court read the term “‘affirmatively contributed’” in *Hooker* to simply “require causation between the hirer’s retained control and the plaintiff’s resulting injury.” (*Ibid.*) There was thus no need, the court concluded, to instruct the jury on “the requirement in *Hooker*” that, to be liable under the retained-control exception, “a defendant must have ‘affirmatively contributed’ to a plaintiff’s injury.” (*Ibid.*)

The court also rejected Qualcomm’s special instructions defining affirmative contribution. (Typed opn. 53.) The instructions’ suggestion that Qualcomm must have engaged in “some sort of ‘active conduct’” was “somewhat misleading,” in the court’s view, because Qualcomm could be liable simply for its “failure to act.” (*Ibid.*)

To resolve Qualcomm’s JNOV argument, the court turned again to CACI No. 1009B—which it had just concluded need not have any affirmative-contribution element—and asked whether there was substantial evidence to satisfy each of *the instruction’s* elements. (Typed opn. 53-57.) As a result, the court did not address whether there was any evidence of affirmative contribution—the sole issue on which the trial court had denied summary judgment. Indeed, no form of the words “affirmative contribution” appears in the court’s JNOV analysis. (See *ibid.*)

On the instruction’s first element—whether Qualcomm exercised retained control over worksite safety—the court concluded that although Qualcomm “was not responsible for the actual inspection of the main cogen breaker,” Qualcomm was “responsible to ensure the switchgear was in an electronically safe

condition before that inspection went forward.” (Typed opn. 54.) But the court found no evidence that Qualcomm failed in that task. To the contrary, the court acknowledged, Sharghi admitted “the equipment was in an electr[ically] safe condition.” (Typed opn. 8.) The court also affirmed the trial judge’s finding that, once Qualcomm completed the lockout/tagout, “all of the components in the switchgear room could be touched with bare hands because they were either de-energized or covered by a panel.” (Typed opn. 60.)

Even so, the court found that Qualcomm negligently exercised its retained control by failing to directly warn Sandoval (as opposed to Sandoval’s employer, Sharghi) which safely shielded components were live when it turned the worksite over to TransPower:

Although Beckelman during the safety briefing told everyone, *including Sandoval*, that certain segments of the switchgear remained energized and later, after the lockout/tagout procedure, used his hand to show Sharghi which breakers remained energized and which were de-energized, there is no record evidence that Beckelman specifically gave Sandoval this information once they were all inside the mezzanine.

(Typed opn. 54-55, emphasis added.) “[T]his evidence alone,” the court concluded, was substantial evidence requiring denial of JNOV. (Typed opn. 55.)

Qualcomm had a duty to warn Sandoval personally, the court reasoned, because Sandoval’s expert, Brad Avrit, opined that National Fire Protection Association (NFPA) standards required Qualcomm to warn workers which portions of the switchgear were still live. (Typed opn. 55.) Although Qualcomm’s expert disagreed

with Avrit's reading of the NFPA standards and opined that Qualcomm had a duty to warn only Sharghi, the court responded that "it is not our role as a court of review to reweigh the evidence." (*Ibid.*)<sup>2</sup>

Without citing or addressing *Hooker*, *Kinsman*, or any of the dozen or more on-point decisions cited by Qualcomm, the court concluded that Qualcomm's failure to warn Sandoval personally which components were energized satisfied CACI No. 1009B's elements. The court made no finding that Qualcomm directed any aspect of Sharghi's inspection, directed Sharghi to expose a live circuit without telling Sandoval, misled Sharghi about which components were live, induced Sharghi's reliance by promising to take a particular safety measure, or in any way interfered with Sharghi's ability to take safety precautions. The court thus affirmed the trial court's rulings across the board.<sup>3</sup>

3. Qualcomm filed a timely petition for rehearing, which the Court of Appeal summarily denied.

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<sup>2</sup> Elsewhere in its opinion, the court acknowledged that NFPA 70E requires the "host employer" (here, Qualcomm) to inform the "*contractor employers*" (such as TransPower) about known hazards related to the work. (Typed opn. 33-34, emphasis added.) Each contractor is then required to "ensure that each of [its] employees is instructed in the hazards communicated to [it] by the host employer.'" (Typed opn. 34.)

<sup>3</sup> The court rejected Sandoval's arguments on cross-appeal that the trial court failed to adequately specify its reasons for granting a new trial on allocation of fault. (Typed opn. 57-68.)

## LEGAL ARGUMENT

**I. This Court should grant review to establish that a hirer of a contractor cannot be held liable under a retained-control theory based solely on the hirer's failure to undertake a safety measure it never promised the contractor it would perform.**

**A. The decision below nullifies *Hooker's* “affirmative contribution” requirement and violates *Privette's* very strong policy of delegation.**

The Court of Appeal rejected any definition of “affirmative contribution” that even “suggest[s]” a hirer “must have engaged in some sort of ‘active conduct’—such as being “‘involved in, or assert[ing] control over, the manner of performance of the contracted work,’” or “‘interfer[ing] with the means and methods by which the work [was] to be accomplished.’”” (Typed opn. 53.) The court dismissed such definitions because, it wrote, a hirer “could also be liable . . . for its failure to act.” (*Ibid.*) This conclusion badly misreads *Hooker* and upends settled law.

1. In *Hooker*, a crane operator was killed when he retracted his crane's outriggers to let vehicles by on a narrow overpass, causing his crane to topple and throw him to the pavement. (*Hooker, supra*, 27 Cal.4th at p. 202.) The decedent's widow sued Caltrans, which had hired the decedent's employer as general contractor for the project, claiming Caltrans had

negligently exercised its retained control over worksite safety. (*Id.* at pp. 202-203.)

Caltrans undisputedly retained a high degree of control over worksite safety. Its own safety policies required Caltrans to be responsible for overseeing construction zone traffic management and recognizing and anticipating unsafe conditions created by the contractor's operation. (*Hooker, supra*, 27 Cal.4th at p. 202.) The resident Caltrans engineer on the project agreed that had Caltrans simply flagged off the overpass and given the crane operator priority, "he wouldn't have had to retract his outriggers" and "the crane wouldn't have become unstable and tipped over." (*Id.* at p. 203.) Another Caltrans representative admitted that he had observed crane operators retracting their outriggers, and he allowed the practice to continue even though he knew it was unsafe and even though Caltrans had retained authority to stop it. (*Id.* at pp. 202-203.)

This Court granted review to decide whether *Privette* bars a contractor's employee from asserting a claim against the hirer for negligent exercise of retained control. (*Hooker, supra*, 27 Cal.4th at p. 203.) The Court held that such claims might be asserted, but with a major caveat. Rejecting some states' approach of "broadly" allowing a hirer to be held liable for exercising retained control without reasonable care, the Court instead chose the "more nuanced position" of other states holding that a retained-control claim must be based on "affirmative" conduct, not "passivity or nonaction." (*Id.* at p. 207.)

The Court agreed with the First District’s decision in *Kinney* that *Privette* requires a higher standard: A hirer “ ‘owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the [hirer] did not contribute by direction, induced reliance, or other affirmative conduct.’ ” (*Hooker, supra*, 27 Cal.4th at p. 209, quoting *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 39 (*Kinney*); see *ibid.* [*Kinney* “correctly applied the principles of . . . *Privette*”].) Just as the hirer in *Kinney* was not liable for exercising “a high degree of control over safety conditions at the jobsite” where “there was no indication the hirer contributed to the accident by an affirmative exercise of that control,” Caltrans was not liable because it “did not direct the crane operator to retract his outriggers to permit traffic to pass.” (*Id.* at pp. 211, 215, emphasis omitted.)

In a footnote, the Court clarified that “affirmative contribution need not always be in the form of actively *directing a contractor*.” (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3, emphasis added.) A hirer may also be liable for actively *inducing the contractor’s reliance*: “For example, if the hirer *promises* to undertake a *particular safety measure*, then the hirer’s negligent failure to do so should result in liability if such negligence leads to an employee injury.” (*Ibid.*, emphases added.) At least in that narrow circumstance, the Court explained, “[t]here will be times when a hirer will be liable for its omissions.” (*Ibid.*)

Until now, most lower courts have properly understood what this Court meant in its discussion of omissions in *Hooker*’s footnote 3. The Court did *not* mean that a hirer may be liable purely for

failing to act to protect a contractor's employee. If that were so, Caltrans could have been liable for failing to close the overpass. Rather, consistent with *Hooker's* holding that a hirer owes no duty to a contractor's employee "to prevent or correct unsafe procedures or practices to which the [hirer] did not contribute by direction, *induced reliance, or other affirmative conduct*" (*Hooker, supra*, 27 Cal.4th at p. 209, emphasis added), most courts have recognized that footnote 3 simply explained that a hirer may be liable for affirmatively inducing the contractor's reliance with a specific promise and *then failing to act*. (See, e.g., *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 (*Khosh*) [recognizing that although "*Hooker* does not foreclose the potential for liability based on the hirer's omission," there must be evidence that the hirer induced the contractor's reliance by making a "specific promise" to undertake a particular safety measure]; see also pp. 31-32, *post* [citing additional cases].)

2. Although most courts have properly interpreted *Hooker's* footnote 3, other courts, taking their cue from the CACI advisory committee's erroneous directions rather than this Court's holding in *Hooker*, have misinterpreted footnote 3 to strip out any requirement of affirmative conduct. According to the advisory committee, "affirmative contribution" and the much broader term "substantial factor" are simply interchangeable:

[T]he affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative

contribution” might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard “substantial factor” element adequately expresses the “affirmative contribution” requirement.

(Sources and Authority to CACI No. 1009B (2018) p. 627.)

*Regalado*, in 2016, was the first Court of Appeal decision to approve the CACI advisory committee’s comments in a published decision. After quoting the committee’s comments, the *Regalado* court agreed “that CACI No. 1009B adequately covers the affirmative contribution requirement set forth in *Hooker*.” (*Regalado, supra*, 3 Cal.App.5th at pp. 594-595.) No petition for review was filed in *Regalado*, however, so this court did not have the opportunity to consider whether CACI No. 1009B and the Court of Appeal’s decision in *Regalado* reflected adherence to—or defiance of—this Court’s binding precedent in *Hooker*.

The appellate court’s published decision in this case adopted *Regalado*’s rejection of *Hooker*’s affirmative-contribution test and then used CACI No. 1009B’s incomplete list of elements as the sole test for deciding whether Qualcomm was entitled to judgment as a matter of law. (Typed opn. 53.) Rejecting language taken straight from *Hooker*, the court cited footnote 3 for the proposition that Qualcomm “could be liable” under the retained-control exception merely “for its failure to act.” (*Ibid.*, citing *Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.) The court then concluded that Qualcomm could be liable for the omission of failing to warn Sandoval personally that the GF-5 circuit was still live, but made no finding—as required by Supreme Court and Court of Appeal precedents—that Qualcomm directed Sharghi, induced Sharghi’s

reliance, or in any way interfered with Sharghi's legally delegated duty to provide such a warning to Sandoval. (See typed opn. 53-56.)

3. The Court of Appeal's precedential holding that a hirer may be held liable under a retained-control theory based *solely* on a *failure to act* is directly contrary to *Hooker's* holding and analysis. *Hooker* unambiguously held that a hirer "is not liable . . . merely because the hirer retained control over safety conditions at a worksite," but may be liable only "insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra*, 27 Cal.4th at p. 202.) This Court rejected the approach of other jurisdictions allowing hirers to be held liable simply for negligently exercising retained control and instead approved *Kinney's* holding that a hirer "'owes no duty . . . to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct.'" (*Id.* at pp. 207, 209.)

*Hooker* explained repeatedly that "active" or "affirmative" conduct is essential. (See, e.g., *Hooker, supra*, 27 Cal.4th at p. 209 [agreeing with *Kinney* that "something more, something like the Utah Supreme Court's concept of *active participation*, must be shown"]; *ibid.* [agreeing that "[t]he mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff"]; *id.* at pp. 209-210 [disapproving a lower court decision holding that, by retaining control over safety conditions, the hirer was obligated "'to see that reasonable precautions are taken to eliminate or

reduce the risk of harm to the employees of its independent contractors’” (quoting *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1394, disapproved by *Hooker*, at p. 198, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235].)

If these repeated statements were not enough, *Hooker*’s application of the standard to the facts thoroughly refutes the notion that “affirmative contribution” requires no “affirmative contribution.” Even though Caltrans negligently exercised its retained control over construction zone traffic by failing to close the overpass, this Court was “not persuaded that Caltrans, by *permitting* traffic to use the overpass while the crane was being operated, *affirmatively contributed* to Mr. Hooker’s death.” (*Hooker, supra*, 27 Cal.4th at p. 215.) “There was, at most, evidence that Caltrans’s safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it.” (*Ibid.*)

Here too, even if Qualcomm retained control over some aspects of worksite safety, the Court of Appeal pointed to no evidence that Qualcomm *affirmatively* contributed to the accident. Review is necessary to reaffirm that “affirmative contribution” means something more than a bare failure to act.

4. The decision below is also contrary to this Court’s decisions holding that a hirer presumptively delegates to its contractor any tort law duty it owes toward the contractor’s workers to provide a safe workplace. The Court of Appeal concluded that Qualcomm could be liable under the retained-

control exception because it supposedly “admi[tted]” it owed a duty to warn Sandoval personally about the GF-5 circuit. (Typed opn. 56.) Qualcomm made no such admission.<sup>4</sup> But even if the Court of Appeal were correct, any such duty would have been delegated to Sharghi. (See *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 597 (*SeaBright*) [holding that even assuming US Airways owed a duty toward a contractor’s employees, US Airways “implicitly delegate[d] to that contractor its tort law duty, if any, to provide the employees of that contractor a safe workplace”].)

And this delegation of duty (and assignment of liability) specifically includes any duty to discover a hazard and warn the contractor’s employees of the danger. (*Kinsman, supra*, 37 Cal.4th at p. 671 [“a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to [warn about or protect against a worksite hazard] to the contractor, and is not liable to the contractor’s employee if the contractor fails to do so”—regardless of whether “the safety hazard is caused by a preexisting condition on the property” or “the method by which the work is conducted”].)

Thus, even if the Court of Appeal were correct that Qualcomm owed a duty to warn each person in the room about energized circuits that were safely shielded by bolted-on metal

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<sup>4</sup> Sandoval relied on opinion testimony by Qualcomm witnesses, but no Qualcomm witness testified that Qualcomm had a duty to warn of *enclosed* circuits beyond the scope of the inspection. (See, e.g., 6 RT 352, 354; 10 RT 955.) Even if they had, such opinion testimony would be legally irrelevant because duty is a legal question. (See, e.g., *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 .)

covers, *SeaBright* and *Kinsman* make clear that any such duty would have been delegated to Sharghi as a matter of law. This Court’s review is needed to reaffirm *Privette*’s strong policy of delegation.

**B. Review is necessary to restore uniformity of decision.**

The Court of Appeal’s decision conflicts with at least a dozen published decisions. Qualcomm cited these cases *passim* to the Court of Appeal, yet the court’s JNOV analysis does not address even one of them. This Court’s intervention is now required to bring back uniformity of decision on this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

1. The Second District’s decision in *Padilla* is squarely on point. (See *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661 (*Padilla*).) *Padilla*, the employee of a demolition subcontractor, was hurt while dismantling an unpressurized cast-iron pipe. (*Id.* at p. 665.) As he was working, a piece of the metal pipe fell and broke a pressurized PVC pipe, causing a gush of water that knocked *Padilla* off his ladder. (*Ibid.*) *Padilla* claimed that Pomona College (the premises owner) and Gordon & Williams (the general contractor) failed to warn him personally that the PVC pipe would be pressurized. (*Id.* at p. 676.) But the Court of Appeal rejected his failure-to-warn claim. Although the defendants retained control over which pipes would be pressurized, the defendants did not affirmatively contribute to the accident, the court held, because they “worked with TEG/LVI”—the demolition subcontractor that

employed Padilla—“to ensure TEG/LVI understood the scope of the demolition, including the pipes not subject to demolition, and those which would remain pressurized.” (*Id.* at p. 674.)

*Padilla* follows *Kinsman*. Because the contractor (TEG/LVI) knew which pipes would remain pressurized, it was the contractor’s delegated responsibility to warn the plaintiff and take any other necessary safety measures. “Under *Privette*, defendants could and did delegate safety measures to TEG/LVI.” (*Padilla, supra*, 166 Cal.App.4th at p. 671.) Here, too, because the contractor (Sharghi) knew which circuits would remain energized, it was his delegated responsibility to warn Sandoval. *Padilla* and the Court of Appeal’s decision here are in direct conflict.

2. The Court of Appeal’s holding that affirmative contribution does not require any sort of active conduct, but can be satisfied by a simple “failure to act” (typed opn. 53), is contrary to a long line of Supreme Court and Court of Appeal decisions:

In *Khosh*, Staples (a general contractor) failed to provide a work plan for a switchgear shutdown, failed to supervise the plaintiff’s work, and failed to prevent the plaintiff from accessing a switchgear while it was still energized. But “[e]vidence of Staples’s omissions d[id] not create a triable issue of fact regarding affirmative contribution.” (*Khosh, supra*, 4 Cal.App.5th at p. 718.) The court reasoned that although “*Hooker* does not foreclose the potential for liability based on the hirer’s omission,” the omissions identified by *Khosh* did not constitute affirmative contribution because “there was no specific promise” to undertake particular safety measures. (*Ibid.*)

In *Ruiz*, HWI (hirer SDG&E’s agent) failed to ensure that an electrical tower was adequately grounded or to ensure the crew took into account the risk of induction from working near a tie-line that remained energized. (*Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 56-57 (*Ruiz*.) But HWI’s “failure to institute particular safety measures at the jobsite [was] not actionable absent some evidence that either HWI or SDG&E had agreed to implement such measures.” (*Id.* at p. 66.)

Still more cases have reached the same conclusion:

- In *Gonzalez*, a homeowner’s omission of failing to fix dangerous conditions on the roof was not affirmative contribution because there was no evidence that the homeowner “ever agreed to remedy the conditions.” (*Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 271 (*Gonzalez*), review granted May 16, 2018, S247677.)
- In *Delgadillo*, Television Center’s omission of failing to provide anchor points was not affirmative contribution because “while [it] arguably ‘provided’ the inadequate anchor points to [the contractor] CBS, it did not suggest or request that CBS use the anchor points.” (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093, review denied June 13, 2018, S247418.)
- In *Brannan*, Lathrop’s omission of failing to remove scaffolding and “fail[ing] to call a rain day” was not affirmative contribution because Lathrop never refused a request from the contractor to remove the scaffolding and nothing prevented the contractor from halting work. (*Brannan v. Lathrop Construction Associates, Inc.* (2012) 206 Cal.App.4th 1170, 1180.)
- In *Madden*, Summit View’s omission of failing to protect the plaintiff from a fall hazard was not affirmative contribution because “[t]here [wa]s no evidence whatsoever that [the contractor] w[as] in

any fashion induced to rely on the mistaken belief that Summit View had removed that hazard from the worksite.” (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1277 (*Madden*).

- In *Millard*, Biosources’ omission of failing to conduct a safety meeting or post a warning sign was not affirmative contribution because it “did not control the means and methods of [the contractor’s] work.” (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348.)
- In *Sheeler*, Greystone’s omission of failing to clean debris from a stairway was not affirmative contribution because it never promised the contractor it would do so. (*Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 920-921.)
- In *Kinney*, CSB’s omission of failing to provide adequate fall protection was not affirmative contribution because “there [wa]s no evidence that the hirer’s conduct contributed in any way to the contractor’s negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise.” (*Kinney, supra*, 87 Cal.App.4th at p. 36.)

In each of these cases, the hirer “failed to act.” In each of these cases, the hirer’s failure to act caused the accident. And in each of these cases, that was not enough. Some evidence of actual direction, induced reliance, or other active conduct by the hirer was required. If the Court of Appeal here were correct that “affirmative contribution” simply means “substantial factor” causation, and that a mere “failure to act” is enough to impose liability on a retained-control claim, cases like *Hooker*, *Khosh*, and *Padilla* would have come out the other way. This Court should step in now to restore uniformity and clarity to the law.

**II. This Court should grant review to clarify whether CACI No. 1009B should be modified to include an “affirmative contribution” element.**

**A. The CACI committee and now two published decisions have wrongly concluded that CACI No. 1009B need not include *Hooker’s* “affirmative contribution” element.**

Besides granting review to clarify what “affirmative contribution” means, this Court should also grant review to clarify whether (and how) the jury should be instructed on that element. Because the Court of Appeal used CACI No. 1009B as the litmus test for deciding whether Qualcomm was liable as a matter of law, these issues go hand in hand. This Court can and should grant review on both issues.

1. Trial litigants in this State are entitled to appropriate instructions of their choosing: “A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party’s theory to the particular case.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).

Here, the trial court denied summary judgment based solely on a supposed triable issue of fact whether Qualcomm “affirmatively contributed” to the accident. (1 AA 33.) Yet at trial, Qualcomm was denied any instruction that mentioned the

affirmative-contribution element required by *Hooker* even though Qualcomm attempted to defend itself based on Sandoval's inability to point to evidence of any affirmative misconduct by Qualcomm. Qualcomm was entitled to an instruction that explained the affirmative-contribution element to the jury in "specific terms." (*Soule, supra*, 8 Cal.4th at p. 572.)

Qualcomm proposed a variety of instructions, any one of which would have required the jury to find that Qualcomm affirmatively contributed to Sandoval's injuries:

- Qualcomm first proposed simply modifying CACI No. 1009B to require an additional finding that "Qualcomm's negligence affirmatively contributed to an unsafe condition." (1 AA 64, 216, 222-223; see *Hooker, supra*, 27 Cal.4th at p. 202 [holding that a hirer is liable under a retained-control theory only if the "hirer's exercise of retained control *affirmatively contributed* to the employee's injuries"].)
- Qualcomm then proposed instructing the jury that Qualcomm affirmatively contributed "if it contributed to the accident by direction, induced reliance, or other affirmative conduct." (1 AA 108; see *Hooker*, at p. 209 [agreeing with *Kinney* that "'direction, induced reliance, or other affirmative conduct'" is the proper test].)
- Qualcomm next proposed an alternative definition, instructing the jury that affirmative contribution occurs where the hirer "is actively involved in, or asserts control over, the manner of performance of the contracted work," such as "when the hirer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished" or when "the hirer promises to undertake a particular safety measure" but then negligently fails to do so. (1 AA 106, 216, 226-227; see *Hooker*, at p. 215 [applying this test

to conclude that Caltrans did not affirmatively contribute as a matter of law].)

- Qualcomm finally proposed modifying its third proposed instruction to add that a “hirer can be liable for an omission, but only if the omission is coupled with some affirmative conduct by the hirer that contributes to a worker’s injury.” (1 AA 109-110; see *Hooker*, at p. 212, fn. 3 [noting that a hirer can be liable for an omission *if* the hirer (affirmatively) “promises to undertake a particular safety measure” and then fails to do so].)

The Court of Appeal rejected all of Qualcomm’s proposed instructions—including the first that simply added an affirmative-contribution element to CACI No. 1009B—deeming them all to be “somewhat misleading in that they strongly suggested Qualcomm must have engaged in some sort of ‘active conduct.’” (Typed opn. 53.)

2. The Court of Appeal doubled down on its prior decision in *Regalado*, which endorsed CACI No. 1009B and the CACI advisory committee’s conclusions that (1) *Hooker*’s ““affirmative contribution” requirement simply means that there must be causation,” and (2) the jury should not be instructed on affirmative contribution because the word “affirmative” might mislead the jury into thinking that “‘active conduct rather than a failure to act’” is required. (*Regalado, supra*, 3 Cal.App.5th at p. 594.)

The CACI advisory committee was wrong. To begin with, *Hooker* was very clear that affirmative contribution requires something more than the standard “substantial factor” element. Under *Hooker*, a hirer is liable only “when *affirmative conduct* by

the hirer . . . is a proximate cause contributing to the injuries of an employee of a contractor.” (*Hooker, supra*, 27 Cal.4th at p. 214, emphasis added; accord, *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 977 [*Hooker*’s “affirmative contribution requirement is a *limitation* on the liability that the hirer would *otherwise* have” under the common law, which permitted liability if “the hirer’s exercise of its retained control was a *substantial factor* in *bringing about* the employee’s injuries”].)

And “active conduct” is precisely what *Hooker* meant by *affirmative* contribution. (See, e.g., *Hooker, supra*, 27 Cal.4th at p. 209 [agreeing that a hirer is liable only to the extent it contributed to a worker’s injury “by direction, induced reliance, or other *affirmative conduct*” (emphasis added)]; *id.* at p. 214 [liability must be based on “the hirer’s own affirmative conduct”]; *Madden, supra*, 165 Cal.App.4th at p. 1276 [“Under *Hooker*, the issue is whether there is any evidence in the record that [the hirer] contributed to that condition by its affirmative conduct”].) To be sure, sometimes a hirer may be liable for an omission. (*Hooker*, at p. 212, fn. 3.) But to trigger liability, an omission must be coupled with active conduct inducing the contractor not to take a particular safety measure. (See *ibid.*; e.g., *Khosh, supra*, 4 Cal.App.5th at p. 718 [a “passive omission” does “not constitute an affirmative contribution” absent a “specific promise” to undertake a safety measure].)

If proof of a hirer’s affirmative contribution were not an element of a retained-control claim, *Hooker* would have come out the other way. There was evidence in *Hooker* that Caltrans

negligently exercised its retained control over construction zone traffic by failing to close the overpass even though it had the power to do so. And that omission was a substantial factor leading to the accident: A Caltrans engineer admitted that had Caltrans flagged off the overpass, there would have been no need to retract the crane's outriggers and the crane would have never tipped over. (*Hooker, supra*, 27 Cal.4th at p. 203.) Thus, if the facts in *Hooker* had been submitted to a jury instructed on CACI No. 1009B, Caltrans could easily have been found liable.

The same would be true in *Kinney, Ruiz, Madden, Padilla*, and *Khosh*. In each case, the hirer negligently exercised its retained control by failing to undertake some safety measure, and that failure to act led to the accident.

If a pattern jury instruction leads to the wrong result in case after case, it must be corrected. This Court should grant review to clarify that CACI No. 1009B must be brought in line with *Hooker*.

**B. This Court's immediate intervention is necessary to prevent this erroneous pattern jury instruction from infecting jury verdicts throughout the state.**

This Court's review is especially needed because the error is baked into a CACI model jury instruction used by trial courts throughout the state. CACI No. 1009B is erroneous, and that error is being replicated in scores of jury trials every year. This case is the Court's first and best opportunity to address the issue.

Although CACI No. 1009B has been challenged often in lower courts, it has evaded this Court’s review until now. *Regalado* was the first published decision to address whether CACI No. 1009B correctly states the law, but neither side filed a petition for review. The instruction has been repeatedly challenged in other cases but, for varying reasons, appellate courts frequently do not reach the issue. (See, e.g., *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 23, 27 & fn. 4 [declining to reach Ford’s argument that CACI No. 1009B must be modified to require the plaintiff to prove affirmative contribution because Ford owed no duty of care regardless of the *Privette* doctrine], disapproved on another ground in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Bison Builders, Inc. v. Thyssenkrupp Elevator Corporation* (Sept. 5, 2012, A131622, A131623) 2012 WL 3835095, pp. \*5-\*8 [nonpub. opn.] [trial court agreed to modify CACI No. 1009B to include an affirmative-contribution element, but then instructed the jury so as to suggest “that a failure to act, without more, amounts to an affirmative contribution”; defendant’s challenge to the latter part of the instruction rejected by the Court of Appeal under the invited-error doctrine]; *Barry v. Twentieth Century Fox Film Corp.* (Sept. 20, 2011, B221785) 2011 WL 4360994, p. \*9 [nonpub. opn.] [noting that Fox argued in the trial court that “CACI No. 1009B was incorrect because it allowed the jury to impose liability on Fox without finding that Fox affirmatively contributed to Barry’s

injuries,” but on appeal Fox challenged only the sufficiency of the evidence].)<sup>5</sup>

Now that two published decisions have concluded that CACI No. 1009B is a correct statement of the law, trial judges will be bound to follow those precedents even if they disagree. And with two published decisions against them, defendants will be less likely to fight the issue through to the Supreme Court. This Court should grant review now before the CACI instruction’s error is compounded many times over in jury trials and trial court rulings across the state.

**III. At minimum, this Court should either grant and transfer this case to the Court of Appeal with instructions or grant and hold this case pending this Court’s decision in *Gonzalez v. Mathis*.**

This Court should grant review outright because this Court’s intervention is necessary “to secure uniformity of decision” and “settle an important question of law.” (Cal. Rules of Court, rule 8.500(b)(1).) But if the Court does not grant review outright, it should at a minimum either grant and transfer the case with instructions (Cal. Rules of Court, rule 8.528(d)) or grant and hold the case pending the Court’s decision in *Gonzalez v. Mathis*, review granted May 16, 2018, S247677 (Cal. Rules of Court, rule 8.512(d)(2)).

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<sup>5</sup> We cite these unpublished opinions not as persuasive authority (see Cal. Rules of Court, rule 8.1115), but as evidence that the issue is often litigated in the lower courts yet escapes this Court’s review.

1. The Court of Appeal's opinion addresses none of the key Supreme Court precedents foreclosing that theory as a matter of law. Because the Court of Appeal's published decision sharply undercuts *Hooker*, *SeaBright*, and *Kinsman* without even addressing them, this Court should at minimum grant review and transfer this case to the Court of Appeal with instructions to reconsider its decision in light of these authorities.

2. If the Court does not grant review outright or grant and transfer, the Court should grant and hold this case pending its decision in *Gonzalez v. Mathis*. The Court of Appeal in *Gonzalez* reaffirmed that “ ‘passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution.’ ” (*Gonzalez, supra*, 20 Cal.App.5th at p. 271.) Correctly applying this standard, the court held that the defendant homeowner did not affirmatively contribute to the accident because it never agreed to remedy any dangerous condition. (*Ibid.*)

If this Court affirms that holding on the affirmative-contribution issue, then it can vacate the Court of Appeal's decision here and transfer the case to that court for further consideration in light of *Gonzalez*. If this Court does not reach the affirmative-contribution issue in *Gonzalez*, then it can grant review in this case outright after *Gonzalez* is decided. Either way, it would be efficient and appropriate for the Court to grant and hold this case if it does not grant review outright.

**CONCLUSION**

For the reasons explained above, the Court should grant review.

November 28, 2018

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**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, rule 8.504(d)(1).)**

The text of this petition consists of 8,397 words as counted by the Microsoft Word version 2016 word processing program used to generate the petition.

Dated: November 28, 2018

  
\_\_\_\_\_  
Joshua C. McDaniel

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOSE M. SANDOVAL,

Plaintiff and Appellant,

v.

QUALCOMM INCORPORATED,

Defendant and Appellant.

D070431

(Super. Ct. No. 37-2014-00012901-  
CU-PO-CTL)

APPEALS from a judgment and posttrial orders of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Horvitz & Levy, Stephen E. Norris, Jason R. Litt and Joshua C. McDaniel; Wingert Grebing Brubaker & Juskie, Alan K. Brubaker and Colin H. Walshok for Defendant and Appellant.

Thon Beck Vanni Callahan & Powell and Daniel P. Powell; Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Appellant.

Plaintiff Jose M. Sandoval was severely burned by an "arc flash" from a live circuit breaker while working with contractor TransPower Testing, Inc., and its principal,

Frank Sharghi (sometimes collectively, TransPower),<sup>1</sup> at a cogeneration plant owned by defendant Qualcomm Incorporated (Qualcomm). The jury returned a special verdict finding that Qualcomm retained control over the safety conditions at the jobsite; that it negligently exercised such control; and that its negligence was a substantial factor in causing Sandoval's harm. The jury found Sandoval's employer, ROS Electrical Supply (ROS), not liable, and apportioned fault as follows: 46 percent to Qualcomm; 45 percent to TransPower; and 9 percent to Sandoval.

Following the verdict, Qualcomm moved for judgment notwithstanding the verdict (JNOV) and for a new trial. The trial court denied the JNOV motion but granted the motion for new trial on the theory the jury had improperly apportioned liability.

Qualcomm appeals from the order denying its JNOV motion, arguing Sandoval failed to proffer any evidence to show that Qualcomm, as the hirer of an independent contractor, "affirmatively contributed" to Sandoval's injury under the "retained control" exception to the general rule that a hirer is not liable for the injuries of an independent contractor's employees or its subcontractors; from the order only partially granting its new trial motion; and from the original judgment. Sandoval appeals from the order granting Qualcomm a new trial on the apportionment of fault issue.

As we explain, we conclude substantial evidence supports the jury's finding that Qualcomm negligently exercised retained control over the safety conditions at the jobsite. We thus conclude the court properly denied Qualcomm's JNOV. We further conclude

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<sup>1</sup> Neither TransPower nor Sharghi is a party to this appeal.

the court properly exercised its discretion when, sitting as an independent trier of fact, it granted Qualcomm a limited new trial *only* on the issue of apportionment of fault as between Qualcomm and TransPower. Affirmed.

## FACTUAL BACKGROUND

### *The Cogeneration Plant/Switchgear*

To power its facilities, Qualcomm at the time of the accident operated a cogeneration plant at its Morehouse "campus" in San Diego. The cogeneration plant generates electricity from two sources: a utility (i.e., San Diego Gas & Electric) and Qualcomm's own on-site gas turbine generator. Qualcomm used this system, sometimes referred to as a "switchgear," to ensure it had an "[u]ninterruptable [p]ower [s]upply"; that is, if the utility supply stopped, Qualcomm had a system in place to ensure its facilities, equipment, and data remained "powered up." Qualcomm's switchgear was manufactured in 1982.

### *Sharghi*

Qualcomm in 2013 was in the process of upgrading its power generation system. As part of that upgrade, Qualcomm hired TransPower, an electrical engineering service company. Sharghi testified that he began working on the switchgear in 1993, before it was owned by Qualcomm; that he thus was very familiar with the switchgear, as he estimated he had worked on it "hundreds of times" over the years; that beginning in about 2013, TransPower typically was at Qualcomm's facility about two or three times per week, during the upgrade; that Qualcomm's "old" generator could generate electricity at 1200 amps, but that, once installed, its "new" generator could generate electricity at 2000

amps; and that TransPower was asked among other things to evaluate whether Qualcomm's breaker system, and in particular the "bus bars," could accommodate 2000 amps that would be generated by the new gas turbine.

Regarding Sandoval, Sharghi testified that they had known each other for 20 years; that Sandoval was "safe" in his work and very reliable; that Sandoval and the company he worked for, ROS, helped TransPower locate certain parts it needed for its customers including Qualcomm, as specified by TransPower; that although Sandoval was not an engineer, he nonetheless understood how "all the components" worked and "what kind of ampacity the equipment can take or not"; and that TransPower thus hired Sandoval for a lot of jobs, including on August 3, 2013, when TransPower inspected Qualcomm's breaker system to determine if it could handle the additional amperage.

TransPower on June 15, 2013, had inspected the bus bars after Qualcomm had shut down, or "de-energized," a portion of the switchgear while moving some cables. Sharghi testified that during the June 15 inspection, he could not determine whether the "bus bar that goes out of the breaker on the bottom of the breaker" could support the additional amperage that would be generated by the upgrade. As a result, Sharghi asked Sandoval to accompany him to Qualcomm's cogeneration plant to look at the bus bars, as this analysis was a "big responsibility" for TransPower because if Sharghi was wrong about the bus bars, the "whole thing" could melt.

Sharghi recalled telling Sandoval during a phone conversation before August 3 that they could safely do an inspection on that particular day because the main cogeneration (or cogen) breaker of the switchgear would be "de-energized." During that

same telephone conversation, Sharghi did not tell Sandoval to bring personal protective equipment (PPE) to conduct the inspection. Sharghi testified he always carried his PPE with him, but only used it when a job involved "high voltage stuff" in order to prevent or minimize injury due to arc flash. Sharghi recalled telling Sandoval during this particular phone conversation he would bring PPE and another TransPower employee, George Guadana, who also would be doing the inspection, would also have PPE.

Regarding arc flash, Sharghi testified that electricity is in a copper conduit; that air acts as a partial insulator; and that, when the "electricity gets out of the copper conduit" or there is a "short" or "fault" "somewhere in [a] . . . system downstream," the breaker is "trip[ped] . . . and turns the power off." Sharghi noted electrical engineers used certain software to calculate the "arc flash zones of safety." Once factors such as the size of the conductor and the amount of load that is carried are determined, a computer model provides the "caliber [of] clothing" a person must wear when working around a breaker and the distance that must be kept from the breaker when the system is energized. This information is then printed out and placed on each individual breaker, as it varies from breaker to breaker. Sharghi testified that neither he nor his company had ever worked on energized equipment, even with PPE; and that energized equipment was "inherently dangerous."

On the day of the accident, Sharghi recalled neither he, nor his son Omid Sharghi (Omid), nor Sandoval wore PPE. Sharghi, Omid, and Sandoval drove from Irvine and met TransPower employee Guadana at Qualcomm's campus at about 7:00 a.m. After signing in and a brief discussion, they accompanied three Qualcomm employees to the

mezzanine area, where the switchgear was located. Sharghi testified that the 1200-amp "main cogen breaker" already had been unplugged and was resting on the floor; and that the three Qualcomm employees were all dressed in PPE and "were ready to do [the] switching of the power." The three Qualcomm employees then went through what Sharghi described as a "lockout/tagout procedure."

Sharghi testified that he observed the Qualcomm team going through this procedure to ensure "they [didn't] miss anything"; that they pulled, or "racked out," certain breakers and put locks on them; and that the Qualcomm employees told him "everything . . . on the turbine control panel [was] de-energized," after conducting a test using a voltage meter. Sharghi then heard one of the Qualcomm employees say they needed to "transfer all the load" from the cogeneration side to the utility side. Sharghi noted that all three of the Qualcomm employees then left the room. Before doing so, one of them informed Sharghi, "this side is hot, this side is not."

After the Qualcomm employees left, Guadana, while wearing his PPE, removed a panel over the cogen breaker to get to the bus bars, and then retested the bars and confirmed they had been de-energized by the Qualcomm team. Guadana then grounded the breaker using another device to ensure there was no residual "static power." While Guadana performed this task, Sharghi, Omid, and Sandoval stood watching at a safe distance. The TransPower team then proceeded to the front of the cogen breaker, which was de-energized. At some point, however, Sharghi asked Guadana to remove the GF-5 panel, which was *not* de-energized.

Sharghi testified that, although he had been able to determine during the June 15 inspection that the line-side bus bars were rated 2000 amps "going to the breaker on the top," on that day he had been unable to see the bus bars on the "bottom part of the breaker," the "load side," and thus, was then unable to determine whether they also were rated 2000 amps and could handle the additional power that would be generated by the new gas turbine. It was precisely for this reason that Sharghi asked Sandoval to join him on August 3 for an additional inspection of the bus bars on the bottom of the breaker. Sharghi noted there were six bus bars in this particular breaker, three for the "line side" and three for the "load side."

Sharghi further testified that there was an "empty cell underneath the breaker." Sandoval physically got inside the lower cabinet but could not see the bus bars because of some plates. Once Guadana removed the plate from the de-energized breaker, Sandoval went back into the cabinet and confirmed the load bus bars were rated 2000 amps. Sharghi stated a 2000-amp bus is about six inches wide, while a 1200-amp bus is about four inches wide. Sharghi felt relieved by their discovery, as it would have been expensive and a "lot of work" to convert the bus bars to 2000 amps. After confirming the amperage of the load side bus bars, Sandoval exited the cabinet, and Sharghi then got inside the cabinet to take some photographs of the bus bars.

Because Sharghi was in the process of preparing a bid for Qualcomm to convert or "retrofit" the system from 1200 to 2000 amps, he asked Sandoval to get some paper from a shelf so Sharghi could list some of the parts they would need. A few seconds later, while Sharghi remained in the cabinet, Sandoval called out to Guadana, asking, "[C]an

you help me [with something]?" Sharghi instructed Guadana to go see what Sandoval wanted. A few seconds later, Sharghi heard a "bang" and felt the ground shake, which he immediately recognized was a response to a breaker being tripped.

Sharghi initially thought someone from Qualcomm's control room had purposely tripped the breaker. A few seconds later, however, Sharghi heard Guadana screaming for help. Sharghi testified he and Omid turned a corner and saw Sandoval standing near GF-5 with his shirt on fire. Guadana, standing against a wall, appeared "paralyzed." Sharghi and Omid then pulled Sandoval's shirt off to get the heat away from his body.

Sharghi admitted that when the Qualcomm employees removed the main cogen circuit breaker to allow Sharghi to inspect the load side of the bus bar, the equipment was in an electronically safe condition; that the Qualcomm employees told each of Sharghi's team, including Sandoval, that "other panels were energized and to be cautious"; that the power plant was still operating on utility power while Sharghi and his team inspected the de-energized main cogen cell; that after the Qualcomm employees had left the room, Sharghi directed Guadana, who was wearing his PPE, "to remove the back cover of the main cogen breaker to test and ground the three-phase cogen breaker to ground"; that Sharghi *further* directed Guadana to "remove the adjacent back cover of the GF-5 feeder breaker as [Sharghi] needed to take a picture from the rear of both panels to document [his] report accurately"; that the photograph Sharghi wanted to take was "unrelated to the inspection being performed by Mr. Sandoval at the main cogen breaker"; that Sharghi had the rear covers of the cogen and the GF-5 breakers "removed after Qualcomm personnel left the area and without Qualcomm's knowledge"; that "[n]o reason existed for

Mr. Sandoval to inspect, take measurements at or view the GF-5 breaker" that morning; that "Mr. Sandoval's inspection was to be performed in front of the main cogen breaker"; and that Sandoval had completed his inspection of the front of the main cogen breaker and "he was simply asked to make a list of parts that were going to be ordered from ROS . . . , his company, to do the necessary work in this increasing amperage for the Qualcomm switchgear."

Sharghi also testified that he witnessed the Qualcomm employees use their own "hot stick" and voltage meter to test for the absence of electricity in the front of the main cogen cell after they had removed it; that after Qualcomm completed its own testing, Sharghi directed Guadana to confirm independently using TransPower's own "hot stick" and voltage meters "there was no live energy in the main cogen cell to be inspected"; that after the Qualcomm employees removed their PPE and went on to other duties, Sharghi was "left . . . in charge of the inspection," which was to be "limited"; and that in doing that inspection, TransPower did not use any Qualcomm equipment.

Sharghi knew the GF-5 was energized when he asked Guadana to remove the bolted-on panel. Sharghi admitted that he neither asked a Qualcomm employee to remain in the room during the inspection, nor did he believe that such a monitor was necessary, as he "knew what [he was] doing"; that he had not anticipated any Qualcomm employee to remain in the room while his TransPower team inspected the main cogen cell, as planned; and that he had not asked for permission from Qualcomm to inspect GF-5, nor had Qualcomm authorized him to remove the panel on GF-5. Sharghi knew GF-5 was

live on August 3 because all the load in the Morehouse campus was then being powered "on the utility side of the bus."

Before the arc flash incident, Sharghi did not tell Sandoval that GF-5 was "hot." Sharghi testified he had no reason to pass this information on to Sandoval because Sharghi did not believe Sandoval had any reason to be near GF-5. Sharghi also did not tell his son Omid or Guadana GF-5 was "hot" because his "focus was to take a picture of GF-5 and the cogen breaker together" for his report. Sharghi stated he wanted to make this report "[b]ecause Qualcomm [had] two more 2000-amp on the system which [was] the sync tie and the utility so I didn't want five years later, three years later, somebody comes out [and] sa[ys], 'We have a problem on that 2000-amp bus here.' [¶] So I wanted to have a picture with my report to prove it, that the only section I work[ed] was this. Nothing else. To clear myself."<sup>2</sup>

The record shows Sharghi was then questioned about his August 9, 2015 postaccident report to Qualcomm. In that report, Sharghi claimed he removed the back panel of GF-5, which was the cell or "cubicle next to the main gas turbine breaker," in order to obtain "another view of the bus bar" because the "bus bar [was] located in an isolated area and [there was] very limited space." Sharghi admitted on the witness stand

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<sup>2</sup> The sync-tie breaker was also de-energized for TransPower's August 3 inspection. The sync-tie was located about four cabinets or cells away from the main cogen breaker, which was the subject of TransPower's limited August 3 inspection. De-energizing the sync-tie prevented power from going into the load side of the breaker. Specifically, because the switchgear had two power sources, the utility side and the generator side, the sync-tie breaker was "what splits the two," as it allowed Qualcomm either to "synchronize" with the utility power or to go "independent with [its] own generators."

that this statement was "false," claiming at the time he prepared the report he was "mentally . . . paralyzed" by Sandoval's accident.

On further questioning about this statement, Sharghi stated, "Well, [Mr. Sandoval] was invited to come and look at the load side of the main cogen breaker. That was [the] only thing we want[ed] him over there [*sic*]. Nobody asked him to go to the back" of GF-5. Sharghi then added, "[T]here's—three of us are standing there. When I asked Martin [Sandoval] to get paper, write down what you need as parts, and he took [*sic*] on his own to do something different. Why be responsible for that? [¶] I mean, that action, when you're working in the critical system like that, you're not familiar with the Qualcomm operation or equipments [*sic*] and this and that, as much as I was involved—I didn't even tell my son and George [Guadana] that GF-5 is hot because I didn't want to *scare everybody*. [¶] My point was to snap a picture. When Martin is making the list of parts that he needs, I go back there, take a picture, and I had my PPE to put on and then that's the end of it. I had no clue Martin was on the back. And, besides, the GF-5 buses are 1200. It wasn't to be anything to help us in a situation for the GF-5 for the cogen breaker." (Italics added.)

Sharghi noted his photograph of the back of the GF-5 breaker taken during his June 15 inspection had not come out well. For this reason, he testified *he* decided to take the cover off of GF-5 during the August 3 inspection and photograph the inside to avoid any responsibility downstream, stating: "Well, [the] June inspection, we didn't take the cover off of GF-5 and the camera reflection on the—on the panel, it was just you couldn't see anything. I mean, because of the light above and this and that. [¶] So when second

time that I—August the 3rd, I decided to take the cover off and I can—it will be easier for anybody who wants to make a judgment later on, these are related together, because one will show it's 1200 [amps] and the picture shows exactly what it is, and the one that is next to it, separate, they're not separate from each other. [¶] So just for my own protection of the—doing a job like that which was very, very high responsibility, if we made one mistake, Qualcomm will lose I don't know how many millions of dollars, the bus bar will melt, and the whole plant will go down so I have to be very cautious and careful."

*Guadana*

Guadana testified that he was employed as an electrical engineer with TransPower on August 3, 2015; that he did not feel qualified to work around energized equipment; and that a few days before the accident, Sharghi informed him that they were going to the Qualcomm campus on August 3 to check the load side of the main cogen breaker and that Guadana would be responsible for opening the main cogen panel once it was de-energized, test it with a volt stick, and ground it.

Guadana testified that on August 3 he knew the cogeneration plant would remain on utility power while TransPower inspected the front side of the main cogen breaker. For safety reasons, he and the TransPower team watched from afar as Qualcomm employees Arthur Bautista, Jason Potter, and Mark Beckelman, Jr., whom Guadana knew as a result of his work at the Qualcomm site, did their "lockout/tagout of the breakers that were supposed to be racked out." After the Qualcomm team performed the lockout/tagout procedure, Guadana, wearing his PPE, at the request of Sharghi opened

the rear panel of the de-energized cogen breaker. The rear panel had a top and bottom panel. Once opened, Guadana used a TransPower volt stick to confirm it was de-energized. He then attached a "grounding cable" as a safety precaution "in case there [was] feedback from accidental energy."

After completing this task, Guadana testified that Sharghi asked him to open the GF-5 panel, which Guadana "assume[d]" was "hot." Based on his training and experience, Guadana always assumed something was "hot" until proven otherwise. Sharghi then did not tell Guadana *why* he wanted the back panel of GF-5 removed. Nor had Sharghi mentioned he wanted the GF-5 panel removed during their telephone conversation a few days earlier, when they had discussed the scope of the August 3 inspection. Although Guadana knew removing the panel to GF-5 was dangerous, he felt protected by his PPE. Even at trial, Guadana could not explain why Sharghi asked him to remove the GF-5 panel from the live circuit.

After removing the GF-5 panel, Guadana went back to the front side of the main cogen breaker and saw Sandoval "physically inside the box" or "cubicle" of the breaker, inspecting it. Sandoval then asked Guadana to remove a panel from the lower box, which Guadana did. After Sandoval went back inside the cubicle, he then announced the "job was done." Guadana testified he next saw Sharghi and later, his son, get into the cubicle and take pictures. As this was taking place, Sandoval called out for Guadana to help him with something from behind the switchgear. Guadana encountered Sandoval at the corner. Sandoval asked Guadana to hold a flashlight for him, and then walked to the back of the main cogen breaker and GF-5. It was then Guadana saw a "flash," a

"silhouette of a man in a blue flame," and, after regaining his "composure," Sandoval on fire.

*Redding*

Kirk Redding testified that at the time of the accident, he was the senior facilities manager, and that Brian Higuera was the plant supervisor, of the Qualcomm campus. When Higuera was absent, Qualcomm employee Bautista acted in a supervisory capacity as a plant engineer.

Redding testified that Higuera trained Bautista, Potter, and Beckelman to inform outside vendors what part of the switchgear remained hot and what part was de-energized after the lockout/tagout procedure; that after a lockout/tagout had been performed by a Qualcomm team, Redding believed it was "critical that those persons, outside vendors, who were going to be working on the equipment, be told what's hot and what's not"; that such information was important to reduce or eliminate an arc-flash event; and that "*everybody* who's going to be working on the equipment" should be told what is hot and what is not hot. (Italics added.)

Redding testified he had known Sharghi for about 21 years, as Sharghi over the years had provided engineering service, support, and maintenance to Qualcomm's cogeneration power plants and data locations. Redding considered Sharghi to be Qualcomm's "go-to-guy" in connection with such services and support.

Regarding the GF-5 panel that had been bolted in place, Redding testified Sharghi did not have Qualcomm's permission to remove it. According to Redding, before any portion of the switchgear could be inspected or worked on, a written procedure had to be

prepared and approved; opening the GF-5 panel was not part of the written procedure for the August 3 inspection by TransPower. Until the day of Sandoval's accident, Sharghi had never gone beyond the scope of work authorized by Qualcomm.

In early 2012, Qualcomm employees including Higuera, Bautista, and Potter participated in a National Fire Protection Association (NFPA) lockout/tagout training course provided by a third-party vendor. Redding testified this course, as well as a similar course in 2008, lasted a full day and covered such subject matters as lockout/tagout procedures; electrical safety standards including updates to those standards; how to be safe around electrical equipment including the assumption that "electrical equipment has to be proven not to be hot before someone approaches it or inspects it"; and arc-flash issues and boundaries. This same third party also assisted Qualcomm in reviewing and updating its electrical safety programs.

Qualcomm's safety manual, dated January 22, 2013 (i.e., before the August 3 accident), included a discussion of lockout/tagout procedures. Redding testified the manual, which was admitted into evidence, included Qualcomm's policy "that all maintenance and servicing on equipment shall be done with the equipment in a locked-out status"; that because the switchgear had two power sources and a lot of different cells, each time the switchgear was worked on Qualcomm followed its "general lockout/tagout policy" in "conjunction with a customized, step-by-step procedure for whatever the proposed scope of work [was to] create[] the lockout/tagout procedure for a certain proposed inspection or work that [was to] take place"; that Qualcomm followed a step-by-step written procedure for a lockout/tagout because the "configuration change[d]"

depending on the scope of work to be done; and that the plant operators and supervisors together created this detailed step-by-step written procedure in advance of the lockout/tagout of breakers. As a result of the 20-plus-year relationship between Sharghi/TransPower and Qualcomm, Redding testified TransPower was aware of, and understood, these policies and protocols of Qualcomm.

On August 1—two days before the accident, Bautista sent an e-mail to Redding and Higuera regarding the step-by-step procedures that would be followed in locking out/tagging out the main cogen breaker for TransPower's August 3 inspection. At the bottom of the e-mail, Bautista stated, "Your thoughts and blessings if this is doable so I can submit an RFC [i.e., request for change]." Redding testified he personally never received a response to this e-mail from Higuera.

According to Redding, if the scope of a project changed, so too would the RFC because the RFC process "ultimately determine[s] what work is authorized." Redding explained this procedure was in place to ensure any changes to the scope of work were vetted beforehand as those changes could impact a business unit, data centers, not to mention raise safety issues. Redding noted the RFC for the limited inspection on August 3 to be done by TransPower did not include opening or inspecting GF-5.

Redding felt "very comfortable" that the August 3 inspection could be done safely without him being on-site. Redding reiterated that it was only an inspection of, and not physical work to, the cogen breaker; that Sharghi and his TransPower company had been working on the switchgear in various capacities for more than 20 years; that Bautista, who at that time had worked for Qualcomm about 15 years, had agreed to participate in

the lockout/tagout procedure with Potter, who had worked for Qualcomm for about 10 years, and with Beckelman; that these three Qualcomm employees were very experienced and had done this procedure hundreds of times; and that based on the approved RFC and the limited scope of work, Redding did not believe it was necessary for him to be on-site for the inspection, nor did he have any concerns that the lockout/tagout process could be done safely.

Redding testified that Qualcomm followed its policy on August 3 requiring energized equipment to be "guarded"; that "guarded" meant the equipment was protected by large metal doors that were bolted in place with four bolts; and that to remove those doors required an electrical drill or similar tool.

The day before the inspection, Bautista sent an e-mail to Redding and Higuera providing an update about the weekend work at the plant, including by TransPower. Redding testified he could not recall Higuera commenting on the August 2 e-mail, including providing input that the inspection should not go forward.

#### *Higuera*

Higuera testified that, at the time of the accident, he was Qualcomm's senior plant engineer who supervised another plant engineer (i.e., Bautista) and eight plant operators (i.e., including Potter and Beckelman). Higuera, in turn, was supervised by Redding. According to Higuera, Redding's responsibilities went beyond the cogeneration plant and included "critical spaces" on the Morehead campus.

As senior plant engineer, Higuera's responsibilities included "anything and everything to do within those four walls of the cogen and anything related to or that was

outside of the four walls of the cogen. Supervising employees, contractors." Higuera testified that from time-to-time the switchgear system had to be partially shutdown, including for breaker maintenance. However, Higuera noted shutting down the switchgear for construction was "much different" than for maintenance. According to Higuera, Qualcomm was in the process of making the "[b]iggest upgrade the Building P cogen ha[d] ever seen" when Sandoval was injured.

Higuera confirmed that when work needed to be done on the switchgear, Qualcomm used the "lockout/tagout" procedure. This procedure meant that for an individual to get into the cogeneration room, that individual had a "log" assigned to him or her and a "tag" with his or her picture, which was used to ensure the individual was qualified to be in that room. Without a "lock and tag," Higuera testified a person would not be able to access the room and "touch [the] machine."

Higuera testified that when the switchgear was "inspected," as was the case on August 3 when the accident occurred, it was "definitely" *his* policy that "somebody from Qualcomm be present at all given times when there's a possibility during a live electrical break." However, Higuera added that Qualcomm had no policy, either written or by "custom and habit," requiring a manager or supervisor to be present during such an inspection. Qualcomm also had no policy, again either written or by "custom and habit," informing anyone who would be working on or near the switchgear "what parts of the switchgear [were] off and what parts of the switchgear [were] still hot"; and that he personally was never instructed by Redding to teach Bautista, Potter, or Beckelman "that after they perform a lockout/tagout procedure . . . they shall notify every single person

who's going to work on that gear or be near that gear after the lockout/tagout what parts are hot and what parts are not."

On the day of the accident, Higuera was out of town. Higuera testified that before he left town, he was involved in the "process" of "setting up the inspection" so that it could be completed safely. Even though he was out of town, Higuera was still "talking with Mr. Redding and [Higuera's] crew about that inspection."

Higuera testified as follows with respect to whether, in his absence, the August 3 inspection should have gone forward: "My opinion was that the shutdown should wait because of the sheer volume of work. And I'm not so much of what was going on in the switchgear room but the fact that they had—I believe it was two or three other contract[ors] on site where they would have to abandon the switchgear room and go out and [shutdown] the other trades which just to me—usually, you don't have that much work going on and only three people, you know—and I knew there was only going to be three people at the time. [¶] And that's when I said, 'Hey, can you postpone it two weeks. I should be back within two weeks.' Man, it was—from there, [the] decision was made. You know, I gave them my \$0.02 about it, I guess, you could say and that was the reason. Just there was—there was a lot more work scheduled that day than I was comfortable with."

On further questioning, Higuera testified he was "concern[ed]" about the August 3 inspection because he was out of town; that he deemed it "prudent" to have a Qualcomm employee in the switchgear room "to be sure only the scope of work is done and done in a safe manner"; that because of the "volume of people and the trades" that were going to

be on-site on August 3, he did not believe that Bautista, Potter, and Beckelman would be "enough to handle the situation"; and that he "knew" three people "couldn't cover the shutdown."

Higuera testified he expressed these concerns to Redding before he left town. Redding in turn checked with others on the team who would be responsible for shutting down the main cogen breaker and was told they were comfortable going forward in Higuera's absence. Higuera concluded that, while "they were comfortable doing their jobs," that did not mean they could do his job, which was "supposed to be in the—overseeing certain portions of it." Higuera added: "And even then, if they were—they know if there [were] four of them and even another operator, that you stay here. You're—you look after this portion of the work, what's going on, and what work is being done."

Higuera testified he was under the impression that Redding would be present during the August 3 inspection in a "supervisory role." Higuera testified that while the three Qualcomm employees did "exactly what they were supposed to for their job[s]," they "didn't do [his]."

*Beckelman*

Beckelman testified that he was employed by Qualcomm as a plant operator on the day of Sandoval's accident. At the time of the accident, Qualcomm was in the process of "replacing antiquated equipment and upgrading the generation process"; that he was part of the "kickoff team" in planning this upgrade, which was a large project as it consisted of replacing turbines that were "gross polluters" and also re-piping the plant; and that to

accommodate the new gas turbine generator, Qualcomm needed to upgrade its "old switchgear."

Beckelman recalled the planning for the August 3 shutdown began about two months earlier, as the shutdown involved "a long list of paperwork." Before the scheduled shutdown, Beckelman participated in a conference call with Higuera and Redding in which they discussed Higuera being out of town on August 3.

Beckelman recalled during this call that Higuera expressed "reservations" about the shutdown going forward and suggested the inspection be conducted when he returned.<sup>3</sup> Beckelman further testified that Redding did not believe there was any reason to postpone the shutdown, as Redding was "confident in [the] team," believed Qualcomm "could carry [the shutdown] out," and said "he [i.e., Redding] would be on[-]site that day." Redding, however, did not arrive at Qualcomm's campus until after Sandoval's accident.

Beckelman testified Bautista typically did not work on Saturdays but had come in on August 3 to help him and Potter do the lockout/tagout procedure. Beckelman knew Sharghi and his company TransPower, as they often were working at the cogeneration plant performing inspections and maintenance. Beckelman also had met Sandoval through Sharghi a few times before the accident.

Beckelman stated he got to work at about 5:00 a.m. on August 3 because he had a "lot on [his] plate" that day. In addition to the lockout/tagout for TransPower's

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<sup>3</sup> As noted *ante*, Redding could not recall having such a meeting or conversation with Higuera and/or Beckelman before the accident.

inspection, Beckelman was slated to assist a contractor with the inspection of the turbine itself; another contractor with the hot water shutdown "for a piping reconfiguration"; and yet another contractor with work on the cooling towers. Beckelman estimated there were about 15 people from various vendors or trades at Qualcomm's campus that day.

Beckelman testified that Sharghi, Omid, Sandoval, and Guadana arrived at Qualcomm at about 7:00 a.m., as scheduled; that they brought all the vendors—including TransPower—into the control room and did a mandatory safety briefing, outlining "who was going to be working where," the scope of work each vendor would be performing, and what to do in case of an emergency. During the safety briefing, the Qualcomm team discussed with the TransPower team—including Sandoval—the "scope of work, what panels [the Qualcomm team] would be locking out, . . . what panels [they] were not going to lock out . . . [and] what panels [they] were going to remove breakers from. So [they] got into the specifics of what [their] evolution [was] going to be." Beckelman reiterated they went through this detail with the TransPower team to "make sure [they] we're [sic] not missing anything."

Although the Qualcomm team did not identify during the safety briefing which panels would remain energized, they specifically told the TransPower team—again including Sandoval—that "there [were] other energized panels . . . and that [TransPower was] only to work on the panels that are isolated and confirmed safed off." Also during the briefing, Beckelman and his team specifically told the TransPower team not to "open anything." Once the briefing was done, the three Qualcomm employees got into their PPE for the lockout/tagout procedure.

Before performing the lockout/tagout procedure that day, Beckelman testified he, Bautista, and Potter had done "walk-throughs," or "kind of a dry[]run of what [they] were going to do," to ensure they were all on the same page and understood each other's responsibilities in case something happened. Beckelman noted it was important to prepare in advance for the shutdown because of the "voltages and amperages" involved. Also, before they did the lockout/tagout on August 3, they did a more in-depth safety briefing, which included "who [they] need[ed] to have in the room, who need[ed] to witness that"; and they then selected "door guards," who kept out those people who did not need to be in the room.

The record shows after the three Qualcomm employees finished the lockout/tagout procedure on the main generation breaker, a process Beckelman described in detail, Guadana then applied the grounding cable to the breaker. Once completed, Beckelman then checked the cables to make sure they were properly installed. Beckelman then made sure that "everyone in the space [was] satisfied with the voltage testing procedure and everyone [felt] that it [was] safe to proceed." To accomplish this task, Beckelman spoke with Sharghi and confirmed Sharghi was satisfied that the voltage had been properly checked; that the "proximity sensor was working correctly"; and that the "grounds were installed correctly."<sup>4</sup>

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<sup>4</sup> We note Beckelman's testimony regarding "who did what" after the lockout/tagout procedure had been completed varied somewhat from the testimony of Guadana and Sharghi.

Beckelman also told Sharghi "where the safe zone" was and "where the no-safe zone was." In connection with this latter information, Beckelman testified he used his "hand in the front of the switchgear to create a delineation of where there [was] no voltage present and where there [would] be voltage present." Even after this conversation and demonstration, Beckelman testified he "made sure" Sharghi "understood where the safe area was." During this conversation and demonstration with Sharghi, Beckelman could not recall where Sandoval was standing. Beckelman, however, testified he had "no doubt" that he communicated this information to Sharghi, as it was "very easy to lose your place" in the switchgear when looking at the machine from the backside, describing it as a "sea of sameness."

Even though Beckelman had other duties that morning, he testified his job with respect to TransPower was not done after the lockout/tagout procedure had been safely completed, as he intended on returning to the switchgear room to ensure "things [were] getting done" and to see if TransPower needed "further assistance." Beckelman left the cogeneration room just short of 8:00 a.m. that morning to take "plant readings," which was done on "even hours." At 8:09 a.m., while in the control room Beckelman heard a "loud bang and a lot of alarms going off." After checking the "telemetry," Beckelman determined the problem had not occurred on the utility side, but noticed the voltage had dropped and then had been restored. He then headed up to the room to "get TransPower out of the switchgear so [he] could take remedial action."

After exiting the control room, Beckelman encountered Bautista. They began jogging upstairs to the switchgear. While on their way, they encountered a representative

from a third-party vendor, who stated the "electrician [was] on fire." Beckelman told Bautista to call 911, asked the representative to grab the automatic electronic defibrillator, and then in a full sprint, went upstairs to the switchgear.

On entering the room, Beckelman noted a "[h]eavy smell of ozone," saw a lot of smoke, and came upon Guadana, who appeared to be in shock. After rounding the edge of the gear, Beckelman saw Sandoval, who was "smoldering." As he got closer, Beckelman saw Sandoval's subcutaneous fat "had saponified," or melted and turned liquid. Sandoval's skin came off in Beckelman's hands as Beckelman attempted to treat Sandoval. Sandoval kept repeating, "Why was it live," "It shouldn't be live." Although badly burned from his head to his waistline, Beckelman observed Sandoval was oriented.

As they waited for paramedics to arrive, Beckelman saw smoke coming out of GF-5, which was "outside of [the] safe zone." Beckelman saw the panel to GF-5 had been removed and was leaning against the breaker next to it. Beckelman immediately instructed another contractor to "close that switchgear as quickly as possible and to safe off any other panels, get them closed." Beckelman then coordinated the medical evacuation of Sandoval.

Beckelman testified he was "surprise[d]" to see the panel to GF-5 off that day, as that was "not in the scope of work" and was "outside the zone of safety that [they] had created." Beckelman further testified that he had "no idea how or why that panel" from GF-5 had been removed, and that, when he left the mezzanine level, the switchgear was in an electronically safe condition, such that "anyone wearing civilian clothing could put [their] hands on any aspect of this gear because it was all protected by the steel cabinet

enclosures in place," with the exception of the "limited scope inspection area, the main cogen cell," which had been de-energized.

Beckelman testified that he and his team performed their work "methodically and safely" in de-energizing a portion of the switchgear in connection with TransPower's August 3 inspection of the main cogen breaker; that the pre-planning and walk-throughs before, and the lockout/tagout procedure on, August 3, "created a safe environment to do the inspection"; that he was "confident" the TransPower team—including Sandoval—witnessed the lockout/tagout work completed by him and the Qualcomm team; and that when he returned to the operation center just before 8:00 a.m. that day, "there was no question in [his] mind that the gear was in an electronically safe condition" for the limited inspection to go forward.

Beckelman confirmed that TransPower—including Sharghi—never asked him or any member of his team for permission to inspect the GF-5 breaker on August 3; that TransPower never asked him or the Qualcomm team to de-energize GF-5; that TransPower never asked him or his team for permission to remove the GF-5 cover; that TransPower never asked him or any member of his team to stay and monitor TransPower's inspection of the main cogen breaker; that neither he nor his team directed TransPower on how to conduct the limited inspection of the main cogen breaker; and that he and his team were aware that at the time of the accident, Sharghi had been providing "services, maintenance, monitoring inspection . . . for a couple of decades at that Qualcomm plant," and thus, he considered TransPower "highly competent" to inspect the switchgear in a safe manner. Beckelman noted that although he had other duties that

morning, he did not believe it was necessary for him or a team member to monitor TransPower's inspection because exposing "extraneous personnel" to a space where "electrical work" is being conducted was not recommended.

*Potter*

Potter testified he received no training from Qualcomm regarding a policy requiring outside vendors working on the switchgear to wear PPE. Nor did he receive any training from Qualcomm that required him or his team to tell "all outside vendors . . . what remain[ed] energized after the lockout/tagout" procedure was completed, or that required a Qualcomm supervisor, such as Higuera or Bautista, to remain in the switchgear room to ensure the work was performed in a safe manner.

On the day of the accident, Potter recalled they performed the lockout/tagout procedure in their PPE, but unlike Beckelman, he could not recall specific details about that process. Potter, however, confirmed that once the lockout/tagout procedure had been completed, TransPower could safely inspect the main cogen breaker; that anything which remained live or "hot" was protected by the bolted-in-place steel panels in front of each of the breakers; and that when he and the Qualcomm team left the mezzanine and returned to the control room, there was "no exposure to live electricity." Potter also confirmed the Qualcomm team had additional duties that day other than the lockout/tagout procedure for the TransPower inspection.

While in the control room, Potter heard a "loud sound," saw the lights "flicker[]," and observed the plant equipment "changing state." Next, alarms started sounding. When he, Bautista, and Beckelman left the control room to find out what had happened, a

representative from a third-party vendor informed them of the accident. While Beckelman went to assist Sandoval, Potter stayed downstairs and called 911. At one point, he went upstairs to assess the situation and passed that information on to the 911 operator.

Potter recalled that TransPower's inspection on August 3 was to be limited to the main cogen panel, which had been "isolated and grounded." Like Beckelman, Potter confirmed that TransPower's inspection did not include GF-5; that Sharghi never indicated to him or the Qualcomm team that Sharghi intended to take the cover off of GF-5 or to inspect it; that Sharghi did not ask him or another member of the Qualcomm team to monitor TransPower's inspection of the main cogen breaker; that Sharghi knew the switchgear better than anyone and also knew the busing was live; and that neither he nor any other member of the Qualcomm team directed TransPower on how to conduct the inspection of the main cogen breaker.

*Sandoval*

Sandoval testified that at the time of the accident, he had been in the "electrical business" for about 20 years, including as a "breaker technician"; that the company he worked for specialized in upgrading and reconditioning circuit breakers, selling new and used equipment, and had a "switchgear division," which at one point he managed; that although he managed this division, his role was to assemble and test parts called for by an engineer, as he himself was not an engineer; and that he met Sharghi in the late 1990's, as Sharghi used to purchase parts from Sandoval's employer.

Sandoval recalled talking with Sharghi about the inspection at the Qualcomm campus about a month before the August 3 accident. A few days before August 3, Sandoval and Sharghi had another conversation in which Sharghi informed Sandoval that Qualcomm would be shutting down its switchgear, which would allow TransPower to conduct an inspection of certain equipment. During this call, Sandoval was not told to bring his PPE or otherwise advised about any safety precautions they would have to undertake to conduct the inspection. Sharghi also did not provide Sandoval with any specifics regarding the shutdown.

On the day of the accident, Sandoval, Sharghi, and Omid met Guadana at the Qualcomm campus. Sandoval could not recall participating in any safety meeting before they went upstairs to the mezzanine, where the switchgear was located. Once upstairs, Sandoval recalled at least two Qualcomm employees, who were wearing PPE, told the TransPower team they were going to rack out the breaker and to stay back. Sandoval saw the Qualcomm employees rack out the cogen breaker and place it on the floor.

Sandoval testified neither Sharghi, nor Omid, nor Guadana, nor any of the Qualcomm employees said anything about what remained "hot" after the lockout/tagout process had been completed. Sandoval's "mindset" then was that the entire switchgear had been de-energized. He had no recollection of anyone from Qualcomm informing him that a portion of the switchgear remained live; of anyone from TransPower saying the inspection of the main cogen breaker had been completed because they could see the bus bars were 2000 amps; or of Sharghi asking him to get a piece of paper and pencil so they could write down the parts that would be needed to upgrade the main cogen cell (other

than the bus bars). Nor could Sandoval recall asking Sharghi if he could go to the back of the switchgear to look at the bus bars or seeing the cover of GF-5 removed.

Sandoval testified Guadana removed the top panel to the main cogen breaker that had been racked out. They all then moved to the front of the main cogen breaker. At this point, nobody had told Sandoval that the utility line side of the switchgear was still live. After doing a preliminary inspection of the de-energized main cogen breaker, Sandoval asked Guadana to remove a panel inside the breaker, which he did. Sandoval testified he could see some of the bus bars, but claimed he could not see their sizes. He thus told Guadana he wanted to take a look from the back.

Sandoval testified he made this statement in front of Sharghi, who was busy talking to his son Omid. Sandoval, holding a flashlight and tape measure, then handed the flashlight to Guadana, proceeded to the back of the switchgear, and approached what he described as an "open cabinet." At that point, Sandoval saw everything turn "blue" and then he started screaming.

*Avrit*

Sandoval's expert Brad Avrit testified he was president of a construction management and safety consulting company that provided "forensic engineering" services, which included reconstructing events after an accident to determine how the accident had happened and whether proper policies and procedures had been followed. To conduct this analysis, Avrit used codes and regulations, industry standards, and what the owner of a facility did because typically such an owner "has even more specific requirements that need to be met for [its] own facility['s] safety."

Avrit opined that Sharghi's negligence in ordering the removal of the back panel of GF-5 was a violation of safety standards; that Sharghi's failure to erect a barricade around energized GF-5 was a further violation of safety standards; and that these violations were a substantial factor in causing Sandoval's injury. Avrit further opined that before Sharghi ordered the panel removed, he should have informed Qualcomm.

Regarding Guadana, Avrit opined he was negligent in removing the cover of GF-5, in also not placing a barricade around GF-5, and in not warning Sandoval that GF-5 was energized. Regarding the latter point, Avrit noted Guadana held a flashlight given to him by Sandoval just before the arc flash, which light Guadana was shining into GF-5 as Sandoval approached the cell holding a metal tape measure.

Regarding Qualcomm, Avrit opined that it did not follow its own policies in three respects. First, he opined Qualcomm failed to supervise the work in the electrical room "to ensure that only the work that is specified that is going to be done is done and that none of the other equipment is tampered with, used, modified, or exposed in any way" because some of the equipment was still live. In reaching this opinion, Avrit relied on the testimony of Higuera. Avrit concluded Qualcomm's failure to adhere to this policy was a substantial factor in causing Sandoval's injury, which he believed was entirely preventable.

Second, Avrit opined Qualcomm failed to follow its policy of "making sure anybody that was going to be doing work in that room, that it was clearly identified to them what areas were energized and [what] areas were not energized, and there's no confirmation that that information [was received by] Mr. Sandoval . . . that he did not

recognize or realize what was energized and what was not energized." To support this second opinion, Avrit relied on Redding's testimony that "it was the responsibility of Qualcomm to tell everybody who was going to be working on that switchgear what remains hot and what is not."

Avrit noted a member of the Qualcomm team should have met with each person on the morning of August 3 and specifically identified what was and was not energized. In addition, he noted Qualcomm should have used signage to highlight further this same information, because the mezzanine was a "big room with a lot of equipment that looks very similar, one piece of equipment to the other." According to Avrit, such signage, which costs a "couple bucks" and had a magnetic back, could easily have been attached directly to the equipment to identify what was on and what was off.

Third, Avrit opined Qualcomm failed to follow its own policy of requiring outside vendors working on the switchgear to wear PPE, particularly when a person such as Sandoval is working in a room where there is both live and de-energized equipment. As before, he further opined the violation of this policy was a substantial factor in causing Sandoval's injury.

Avrit testified Qualcomm also failed to follow industry standards, including under NFPA. Under NFPA, if there is "look-alike equipment" (i.e., equipment that looks similar from the front and back and/or from one piece to another), and some of that equipment remains energized, then according to Avrit the standard at a minimum required one of three things, or a combination thereof: provide clear safety signs indicating the equipment that is energized; erect a barricade of some sort indicating the

equipment to avoid; or have an attendant remain in the room making sure nobody enters the area of the energized equipment.

*Loud*

Qualcomm's expert, John Loud, reached three main conclusions in this case: first, that the cause of the accident stemmed from Guadana's removal of the GF-5 cover, as instructed by Sharghi, which in turn "created a hazard that did not exist previously," and which "was in violation of all standards and all accepted good practices." Second, that "there [was] nothing that Qualcomm did or did not do that caused or contributed to this accident," inasmuch as when Qualcomm finished the lockout/tagout procedure on the main cogen breaker, "it was in an electronically safe work condition" allowing the switchgear to be touched with "bare hands," as any portion of the switchgear that remained energized was covered by steel doors or panels.

And third, that Qualcomm properly passed control of the switchgear inspection "to its qualified contractor, and that was TransPower, Mr. Frank Sharghi," as it was customary for a business such as Qualcomm to hire an electrical engineer such as Sharghi and his company to work on the switchgear and to delegate the responsibility to do so safely to the contractor, particularly in the instant case given Sharghi's familiarity with this equipment.

Loud relied on NFPA 70E, including the 2012 edition, to support his opinions. Specifically, he relied on section 110.1A, which provided: "The host employer [i.e., Qualcomm] shall inform contractor employers [i.e., TransPower] of the following: Known hazards that are covered by the standard and that are related to the contract

employer's work." Loud noted this section meant that, if Qualcomm were bringing in TransPower to do an inspection and Qualcomm was "aware of hazards, [it] need[ed] to say that there's energized equipment here, and [it] need[ed] to explain to [TransPower] the lockout/tagout that [it's] doing and how [it's] going to be doing [its] work and how to make sure that the hazards are communicated." Loud opined Qualcomm in this case did exactly that.

Next, Loud relied on section 110.1B of NFPA 70E, entitled "Contract Employer Responsibilities." This section provided: "The contract employer [i.e., TransPower] shall ensure that each of [its] employees is instructed in the hazards communicated to the contract employer by the host employer." Loud opined this section required Sharghi/TransPower "to take the information that was received in the communication from the host employer and make sure that each and every employee is told about the hazards so that they can safely do their work."

In this case, Loud noted there was testimony about a safety meeting before the Qualcomm and TransPower teams went upstairs to the switchgear room. During that safety meeting, Qualcomm communicated that the switchgear was a "live plant"; that it "would be de-energizing a very specific piece of equipment for inspection but that other parts remained energized"; and that both teams then went upstairs and the TransPower team observed the Qualcomm team execute the lockout/tagout procedure, as required by the standard. Loud noted that Qualcomm also communicated the fact that parts of the switchgear remained live—even after the main cogen breaker was racked and locked out/tagged out—"by the presence or the absence of covers. The steel covers tell the story

because if it's covered, it's not safe. If it's exposed, it's de-energized, and it was verified to be de-energized so everything was in an electrically safe work condition."

Loud had no criticism of Qualcomm's logout/tagout procedure on August 3. He was, however, critical of Sharghi's decision to remove the metal cover from GF-5, noting: "Qualcomm had no information [about opening GF-5]. They were never told about it. Mr. Sharghi testified that he just decided to do it. He never informed Qualcomm. And, in fact, he didn't tell anybody. He just decided to do—to take a picture, as I understand it. But Qualcomm never knew about that, no."

Loud noted that if TransPower wanted to inspect GF-5 that day, GF-5 would have had to been de-energized first, as there was "no justification for inspecting it energized." To de-energize it "was not a big deal" according to Loud, but Qualcomm would have had to include GF-5 in its "plan" and then have done a lockout/tagout procedure on the GF-5 cubicle, as was done on the other breakers to allow for the inspection of the main cogen breaker.

Even if, for whatever reason, TransPower had wanted to inspect GF-5 while energized, then according to Loud Annex J of NFPA 70E required there be an "energized electrical work permit." To obtain this permit would have required the "manufactured manager's approval, the safety manager's approval, the general manager's approval, the maintenance engineering manager's approval, and then the electrically knowledgeable person's approval," or "five different signatures that you have to get before you're allowed to do energized work because it's hazardous and you want everybody to say . . . the risks are justified."

According to Loud, Article 130 of NFPA 70E required TransPower to invoke "alerting techniques" once Guadana removed the GF-5 metal cover and exposed others to an electrical hazard. This would include putting up safety signs, or a barricade, or having an attendant stand watch to ensure nobody got near the live breaker. Loud opined these requirements did not apply to Qualcomm, however, because "[t]here was no electrical hazard when they finished their lockout/tagout. Article 130 is specifically targeted for energized work. There was no energized work when Qualcomm left" the mezzanine.

Loud disagreed with Avrit's testimony that Qualcomm had an obligation to oversee TransPower's inspection of the main cogen breaker on August 3. Loud noted that was "not standard practice." Loud testified neither OSHA nor Cal/OSHA required a hirer to observe a contractor, noting: "If you're hiring a contractor, it's because . . . they have specialized skills and knowledge and you don't, which is why you're hiring them. And, therefore, they should be allowed to get their work done and that you can transfer responsibility for the work that they're doing and they will take it and run with that."

Loud opined Qualcomm did not "retain control" over the inspection of the main cogen breaker, as opposed to the switchgear itself, on August 3. In his view, Qualcomm transferred that control to TransPower. Loud explained, "[Qualcomm] put it into an electronically safe work condition, they finished their lockout/tagout, and they transferred control for the inspection of that equipment to their qualified contractor, Mr. Frank Sharghi and TransPower." In further support of his opinion, Loud noted that Qualcomm had no control over what TransPower was doing in connection with its inspection of the cogen breaker; that TransPower never asked Qualcomm to monitor that inspection; that

TransPower never asked Qualcomm for "input" regarding the "specifics" of the inspection; and that the scope of work that day really involved a "simple inspection" of de-energized equipment.

Regarding Avrit's testimony that Qualcomm should have insisted that Sandoval wear PPE on August 3, Loud testified that made no sense: "It's not required under NFPA 70E. The whole idea is that you're preparing the equipment for somebody who's not a qualified worker, not a qualified person, so that anybody can do the work and you put it into an electronically safe work condition. There is no requirement to have PPE."

Loud also disagreed with Avrit's testimony that the switchgear was not properly labeled. Loud noted the switchgear had permanent warning labels attached to the equipment and that such labeling met "all applicable standards." Loud rejected Avrit's testimony that Qualcomm should have placed a "magnetic warning label" on GF-5, noting doing so "would provide no additional information. If you had . . . labels on the equipment, all the covers that are in place tell you, if there's a cover, it's not safe. If it's exposed, it's safe. That would be—that was the planned work. [¶] And, in fact, it wouldn't have provided any information whatsoever to Mr. Sharghi because he knew GF-5 was energized. When he took the cover off, it wasn't a mistake. He intentionally removed that cover knowing that it was energized behind that. [¶] So what good would a label have done on the GF-5 cover? You tell Mr. Sharghi, [']Oh, by the way, this is energized?['] He already knew that. [¶] So the label would have told him nothing. He acted because he made a decision, a bad one, but he made a decision with information knowing the hazard that was there."

Loud opined that after the lockout/tagout procedure, for purposes of NFPA 70E Qualcomm properly communicated "what was hot and what was not" hot. Qualcomm did so through Beckelman, who testified he used his hand to show "them" this information on the actual switchgear. Loud further opined that it was Sharghi's responsibility to inform his TransPower team—including Sandoval—what was energized and what was not; and that the Qualcomm team's removal of the covers from the equipment that was de-energized, while the rest of the energized breakers remained covered by the metal doors, was another "form[] of communication," noting "[a]nything that had a cover was not confirmed safe."

Loud concluded that Sandoval did not adhere to the requirement in NFPA 70E of being attentive during the lockout/tagout procedure of the main cogen breaker. Loud explained this requirement existed because it communicated to a person what equipment was safe to work on and what equipment was not safe, noting that if the equipment was not locked out/tagged out, then a person "shouldn't be touching it." Loud also concluded Sandoval did not fulfill the duty imposed by NFPA 70E to confirm GF-5 was de-energized before he approached the breaker. In support of this conclusion, Loud found Sandoval's testimony that he did not see GF-5 locked out/tagged out "significant" because without that knowledge, Sandoval could not verify the breaker was de-energized and, thus, should not have approached it.

#### PROCEDURAL BACKGROUND

Sandoval sued Qualcomm, TransPower, and his employer, ROS, which did not have worker's compensation insurance. Qualcomm moved for summary judgment based

on *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny, which bars a contractor's employee from suing a hirer on either a direct or vicarious liability theory. In denying summary judgment, the court found a triable issue of material fact regarding whether Qualcomm "affirmatively contributed" to Sandoval's injury. Affirmative contribution is part of the test under the "retained control" exception to the *Privette* doctrine, as discussed by the high court in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*) and *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219.

Both shortly before, and during, trial, Qualcomm proposed several special jury instructions on the issue of whether Qualcomm "affirmatively contributed" to Sandoval's injury. The court, however, refused to give these special instructions, noting they used language that was not included in the standard Judicial Council of California Jury Instruction (CACI) No. 1009B, as discussed in the Directions for Use part of the instruction, and they were, in any event, argumentative.

Based on CACI No. 1009A and its reading of *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, the court at the same time noted it intended to instruct the jury that Qualcomm had no duty to warn Sandoval of a dangerous condition when that condition was known to TransPower. As a result, Sandoval withdrew his failure to warn claim against Qualcomm.

At or near the conclusion of testimony, Qualcomm moved for nonsuit based on *Privette* and its progeny. Qualcomm argued that under this line of cases, plaintiff's claims failed as a matter of law based on the following undisputed facts: "1. Qualcomm

hired Transpower, a qualified electrical contractor, to inspect components in the co-generation main cell in the mezzanine room of Building P on the Qualcomm campus.

[¶] 2. The scope of work did not include opening or de-energizing a component known as GF-5. [¶] 3. Transpower's principal (Frank Sharghi) did not request that Qualcomm open or deenergize GF-5. [¶] 4. Sharghi admits that opening GF-5 was beyond the scope of work. He admits that Qualcomm did not authorize the removal of the GF-5 panel by anyone, including Sharghi and his employee George Guadana. [¶] 5. Sharghi admits that Qualcomm told him parts of the plant were energized and that he was personally aware that GF-5 was energized. [¶] 6. Sharghi admits that he ordered Guadana to open GF-5, knowing it was a live circuit and knowing it was dangerous. Sharghi admits that Qualcomm was unaware of this. [¶] 7. Sharghi admits that Qualcomm did not control the manner in which he did his work, did not instruct him how to do his inspection, and did not control safety conditions. [¶] 8. Qualcomm did not promise Sharghi it would supervise the job; and Sharghi testified he did not ask for, expect, or need Qualcomm's supervision. [¶] 9. Qualcomm did not promise Sharghi it would provide [PPE] for Sandoval nor did Qualcomm direct Sharghi not to let his employees and agents wear PPE. [¶] 10. PPE is not required by any code or regulation, nor is it common in industry practice, for an inspection of de-energized equipment."

The court denied the motion. In so doing, the court noted there was sufficient evidence, including from the experts, to allow the case to go to the jury.

As noted *ante*, the jury found that Qualcomm retained control over safety conditions of the worksite, that it negligently exercised that control, and that its

negligence was a substantial factor in causing Sandoval's injury. The jury awarded Sandoval \$1,094,003.42 in economic damages (i.e., past and future medical expenses) and \$6 million in noneconomic damages. As also noted *ante*, the jury assigned 46 percent fault to Qualcomm, 45 percent fault to TransPower, and 9 percent fault to Sandoval.

As already noted, Qualcomm moved for JNOV and for a new trial. Although the court denied JNOV, it granted a new trial limited to the jury's allocation of fault, relying on Code of Civil Procedure section 657, subdivision (5), which is limited to "[e]xcessive or inadequate damages." In so doing, the court relied on the evidence showing that even though the main cogen cell had been shut down via the lockout/tagout procedure, Sharghi on behalf of TransPower knew other parts of the cogeneration plant remained live, including GF-5.

As discussed in more detail *post*, in granting a new trial limited to the issue of apportionment of fault, the court found that Sharghi knew GF-5 was energized when he instructed his employee Guadana to remove the panel; that Sharghi removed the panel without authorization from Qualcomm; that Qualcomm could not have known Sharghi intended to remove the panel and expose others to a live cell; that Sharghi's only purpose in removing the GF-5 panel was to take a picture because he ostensibly was worried about future liability; that Sharghi never informed Sandoval a live circuit had been exposed, in disregard of industry standards; that even though Guadana knew GF-5 was live, he never informed Sandoval of such, even as Guadana shone a flashlight on the electrified bus bars as Sandoval approached GF-5 holding a metal tape measure; and that

Qualcomm relied on Sharghi, who had worked on the switchgear "hundreds of times" for more than two decades, to stay within the scope of the work approved by Qualcomm.

## DISCUSSION

### I

#### QUALCOMM'S APPEAL

##### *A. Additional Background*

As noted *ante*, Qualcomm requested the court modify CACI No. 1009B to require the jury to resolve whether Qualcomm "affirmatively contributed" to Sandoval's injuries. Specifically, Qualcomm requested the following instruction be given regarding liability to employees or subcontractors of an independent contractor for unsafe conditions under the "retained control" exception to *Privette*:

"Martin Sandoval claims that he was harmed by an unsafe condition while working on Qualcomm's property. To establish this claim, Martin Sandoval must prove all of the following: [¶] 1. That Qualcomm owned the property; [¶] 2. That Qualcomm retained control over safety conditions at the worksite; [¶] 3. That Qualcomm negligently exercised its retained control over safety conditions; [¶] 4. *That Qualcomm's negligence affirmatively contributed to an unsafe condition*; [¶] 5. That Martin Sandoval was harmed; and [¶] 6. That Qualcomm's negligent exercise of its retained control over safety conditions was a substantial factor in causing Martin Sandoval's harm.

*"Affirmative contribution occurs where the hirer (here, Qualcomm) is actively involved in, or asserts control over, the manner of performance of the contracted work. Such an assertion of control occurs, for example, when the hirer directs that the*

*contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. Likewise, if the hirer promises to undertake a particular safety measure, the hirer's negligent failure to do so constitutes affirmative contribution."* (Italics added.)

The court instead gave CACI No. 1009B without the italicized language *ante*, instructing the jury as follows:

"Martin Sandoval claims that he was harmed by an unsafe condition while employed by ROS Electrical and working on Qualcomm's property. To establish this claim, Martin Sandoval must prove all of the following: [¶] 1. That Qualcomm owned the property; [¶] 2. That Qualcomm retained control over safety conditions at the worksite; [¶] 3. That Qualcomm negligently exercised its retained control over safety conditions concerning the main co-gen cabinet inspection; [¶] 4. That Martin Sandoval was harmed; and [¶] 5. That Qualcomm's negligent exercise of its retained control over safety conditions was a substantial factor in causing Martin Sandoval's harm."

Because the jury was not required to find Qualcomm's alleged negligence "actively contributed" to Sandoval's injury, and because Qualcomm on appeal claims there was no such substantial evidence, it argues it cannot be liable to Sandoval as a matter of law.

### B. *Guiding Principles*

" 'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.] [¶] . . . As in the

trial court, the standard of review [on appeal] is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion.' (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770 (*Cabral*); *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639 [noting the denial of a JNOV motion "is essentially the same as appealing the judgment itself for a lack of substantial evidence"].)

Moreover, a "party is entitled upon request to correct, nonargumentative instructions in every theory of the case advanced by [the party] which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) However, " [i]nstructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] [Citation.] Finally, '[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given.' " (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 359–360; see also *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 593-594 (*Regalado*).)

In addition, a court is "not required to instruct in the specific words requested by a party so long as the jury is adequately instructed on the applicable law." (*Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1332 (*Traxler*).) As a court of review, [w]e

independently review claims of instructional error viewing the evidence in the light most favorable to the appellant." (*Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333.)

Our opinion in *Regalado* informs our analysis on this issue. There, defendant homeowner, himself a licensed concrete subcontractor, wanted to build his dream home. Acting as the owner-builder for the project, he obtained the permits for the construction, served as the person responsible for the job, much like a general contractor, and was at the job site daily. The defendant hired a pool contractor to build a pool and spa at his home. The defendant wanted the pool heater installed underground to reduce noise. The defendant obtained a pre-engineered concrete vault that he then buried in the ground. Because the defendant's property did not have natural gas service, he hired a plumbing subcontractor to run propane lines, including to the location of the proposed pool heater. (*Regalado, supra*, 3 Cal.App.5th at p. 587.)

About a year after the vault was installed, the defendant in *Regalado* hired a different pool contractor and requested the pool equipment be installed in the underground vault. The defendant then did not know that placing a propane-fueled heater underground was dangerous. The pool contractor purchased the natural gas heater and converted it to propane, using a kit. The pool contractor also designed the layout of the equipment to fit inside the vault, including where the propane line would enter the vault and where to place the joint for purging air out of the propane line before starting the heater. Although the defendant as owner-builder was responsible for obtaining all permits, he did not obtain separate permits for the vault and propane line or have the

County of Riverside (County) inspect the vault, despite representations otherwise. The County and plaintiff's expert testified the vault required a permit. The defendant's expert testified a permit was not required because the vault was "precast, pre-engineered." (*Regalado, supra*, 3 Cal.App.5th at pp. 587–588.)

The pool contractor's employees, including the plaintiff, installed the pool equipment in the vault. The plaintiff had never installed a propane heater in a vault. Neither the plaintiff nor his supervisor read the instruction manuals for the spa heater or the propane conversion kit that was used to convert the heater from natural gas to propane. The instruction manuals warned of a risk of explosion if a propane heater was installed in a pit or low spot, where propane gas could potentially collect. (*Regalado, supra*, 3 Cal.App.5th at p. 588.) After installation, plaintiff was asked by his supervisor to turn on the pool equipment in preparation for the County's final inspection. The supervisor mistakenly believed the County already had inspected the pressure in the propane line.

The plaintiff entered the vault, bled the propane line until he smelled gas, and, after conferring with his supervisor, turned on the filter pump and heater. As the plaintiff was climbing out of the vault, there was an explosion caused by the residual propane the plaintiff had bled from the line. The plaintiff was thrown into the air, landing outside the vault. He was severely burned and suffered other substantial injuries. (*Regalado, supra*, 3 Cal.App.5th at p. 588.)

The plaintiff in *Regalado* sued defendant homeowner for negligence and premises liability, alleging that the defendant negligently installed the underground vault and the

unventilated propane heater in that vault. At trial, the plaintiff argued the defendant was liable because the defendant retained control over the project by submitting plans and pulling permits, calling for inspections, furnishing the vault and propane line, and by failing to obtain the necessary permits for the vault and propane line while representing to the pool contractor that he had done so. (*Regalado, supra*, 3 Cal.App.5th at pp. 588–589.) The jury found the defendant negligent, assigned 40 percent of fault to him, and the court entered judgment against the defendant in the amount of about \$3 million. (*Id.* at p. 586.)

Much like Qualcomm in the instant case, the defendant in *Regalado* argued the jury should have been specifically instructed that, to be liable, the defendant must have " 'affirmatively contributed' " to the plaintiff's injury. (*Regalado, supra*, 3 Cal.App.5th at p. 586.) The defendant in *Regalado* thus sought a modification to CACI No. 1009B as follows: " 'An owner-builder owes no duty of care to an employee of a contractor to prevent or correct unsafe procedures or practices. An owner-builder's mere failure to exercise a power to compel the contractor to adopt safer procedures does not, without more, violate any duty. An owner-builder can only be held liable for injuries to the employee of its contractor if the owner-builder affirmatively contributed to the unsafe procedures or practices by direction, induced reliance, or other affirmative conduct.' (Special Instruction No. 2.)

" 'An owner-builder "hirer" who hires an independent contractor to perform work is not liable for a work-related injury suffered by the independent contractor's employee, unless two criteria are met: [¶] (1) the hirer retains the ability to control some aspect of

the employee's safety, and [¶] (2) the hirer's retention of control affirmatively contributed to the employee's injuries.' (Special Instruction No. 7.)

" 'Passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution.' (Special Instruction No. 8.)" (*Regalado, supra*, 3 Cal.App.5th at pp. 590–591.)

The trial court in *Regalado* refused to give the special instructions regarding "affirmative contribution" proposed by the defendant, and instead gave CACI No. 1009B (modified only by filling in the blanks per that instruction). (*Regalado, supra*, 3 Cal.App.5th at pp. 590–591.) Although the defendant agreed that CACI No. 1009B "was an accurate statement of the law" (*Regalado*, at p. 591), he "continued to argue that the court should give an additional instruction that in order for him to be liable, he must have 'affirmatively contributed' to Regalado's injury. [The defendant] focused on Special Instruction No. 8 and urged the court to use that instruction to define 'affirmative contribution' for the jury. The court declined to give the special instruction, reasoning that although it was an accurate statement of the law, the concept was covered by CACI No. 1009B. Specifically, the court noted that CACI No. 1009B required the jury to find that [the defendant] '*negligently exercised* his retained control,' which required affirmative conduct rather than 'just passively allowing something to exist.'" (*Regalado*, at p. 591.)

On appeal, the defendant in *Regalado* claimed that the trial court erred in failing to instruct the jury using his proposed special instructions regarding *Hooker's* "affirmative contribution" requirement. In rejecting this argument, we first analyzed the *Privette*

doctrine, noting that " ' "when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work. . . . [¶] By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." [Citation.] One of the doctrine's underpinnings is the availability of workers' compensation to the injured employee: "[W]hen the person injured by negligently performed contracted work is one of the contractor's own employees, the injury is already compensable under the workers' compensation scheme and therefore the [law] should provide no tort remedy, for those same injuries, against the person who hired the independent contractor." [Citation.] . . . [¶] Thus, subject to certain exceptions, when a general contractor hires a subcontractor, the general contractor is not liable for injuries that occur to the subcontractor's employees.' [Citation.]" (*Regalado, supra*, 3 Cal.App.5th at p. 589.)

"One exception is set forth in *Hooker*[, *supra*,] 27 Cal.4th 198 . . . . 'In *Hooker*, the court considered whether the hirer of an independent contractor could be held liable for injuries to the contractor's employee resulting from the contractor's negligence under the theory the hirer retained control of the work but negligently exercised that control. The high court held in *Hooker* "a hirer of an independent contractor was not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but was liable to such an employee insofar as its exercise of retained control *affirmatively contributed to the employee's injuries*." [Citation.] In such cases, the liability of the hirer is not "vicarious" or "derivative" in the sense that it derives

from the act or omission of the hired contractor, but is direct.' [Citation.]" (*Regalado, supra*, 3 Cal.App.5th at p. 590.)

Significantly, in *Regalado* we noted that *Hooker* also recognized that "affirmative contribution" could also be by omission: "[A]ffirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.) Further, "[a]ffirmative contribution" occurs where a general contractor "is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer *directs* that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished." [Citation.]" (*Regalado, supra*, 3 Cal.App.5th at p. 590.)

In rejecting the defendant's instructional error argument regarding "affirmative contribution," we found that, although the defendant's special instructions were "drawn directly from case law," the instructions were "somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct." (*Regalado, supra*, 3 Cal.App.5th at p. 594.) We noted the proposed instructions ignored *Hooker's* direction that a hirer also could be liable for its omissions. (*Ibid.*)

In *Regalado*, we supported our decision that there was no instructional error by relying on the use notes of the Advisory Committee on Civil Jury Instructions (Committee), which state in relevant part: "The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.)" (*Regalado, supra*, 3 Cal.App.5th at pp. 594–595.) We thus agreed with the Committee that CACI No. 1009B "adequately cover[ed] the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado, supra*, 3 Cal.App.5th at p. 595.)

We concluded in *Regalado* there was sufficient evidence to support the jury's findings that the defendant homeowner retained control over safety conditions and exercised that control in a manner that was a substantial factor in causing the plaintiff's injuries. (*Regalado, supra*, 3 Cal.App.5th at p. 597.) We noted the record in *Regalado* showed that, without obtaining permits for the vault and propane line, the defendant installed the vault, modified its entry and exit point, and ran a propane line that would eventually be connected to the vault. According to the plaintiff's expert, it was below the standard of care for an owner-builder such as the defendant to fail to obtain permits for

the vault and propane line. In the expert's opinion, the failure to adhere to the proper permitting and inspection process was a substantial factor in causing the accident. Based on this and other evidence, we concluded in *Regalado* that a reasonable trier of fact could conclude that the defendant negligently exercised his retained control over safety conditions in a manner that affirmatively contributed to the plaintiff's injuries. (See *id.* at p. 597.)

In reaching our decision in *Regalado*, we recognized that the defendant also presented conflicting evidence on many points, including whether a permit was even necessary given the vault was prefabricated. We noted, however, our task was "not to reweigh the evidence or substitute our judgment for that of the trier of fact. Rather, based on our standard of review, we resolve all conflicts in the evidence in favor of *Regalado* and give him the benefit of every reasonable inference. [Citation.] Based on that standard and the record before us, there is substantial evidence [in] support of the judgment." (*Regalado, supra*, 3 Cal.App.5th at p. 597.)

### C. Analysis

We agree with the reasoning of, and the conclusion in, *Regalado* that CACI No. 1009B is an accurate statement of the law regarding the "retained control" exception to *Privette* and its progeny, including the requirement in *Hooker* that to be liable under this exception, a defendant must have "affirmatively contributed" to a plaintiff's injury. Like *Regalado*, we read this language to require causation between the hirer's retained control and the plaintiff's resulting injury. (See *Regalado, supra*, 3 Cal.App.5th at p. 594; *Traxler, supra*, 12 Cal.App.4th at p. 1332.)

We conclude the proposed special instructions proffered by Qualcomm regarding "affirmative contribution" were somewhat misleading in that they strongly suggested Qualcomm must have engaged in some sort of "active conduct"—such as being "involved in, or assert[ing] control over, the manner of performance of the contracted work," or "interfer[ing] with the means and methods by which the work [was] to be accomplished"—in order to be liable under this exception. As noted, however, Qualcomm also could be liable under this exception for its failure to act. (See *Hooker*, *supra*, 27 Cal.4th at p. 212, fn. 3; *Regalado*, *supra*, 3 Cal.App.5th at p. 594.)

Turning to CACI No. 1009B and viewing the evidence in the light most favorable to Sandoval (see *Regalado*, *supra*, 3 Cal.App.5th at p. 596), we conclude substantial evidence in the record supports the jury's finding that Qualcomm was liable to Sandoval under the retained control exception to *Privette*. The record shows that Qualcomm owned the property where Sandoval was injured (see CACI No. 1009B) and that it retained control over the safety conditions at the worksite.

As to the latter element, the record shows that Qualcomm, and not TransPower or ROS, conducted the lockout/tagout procedure on several breakers in order for TransPower to conduct its limited inspection of the bus bars in the main cogen breaker generator; that Qualcomm required the TransPower team to witness this procedure and then confirm the main cogen was in fact de-energized; that just prior to the lockout-tagout procedure, Qualcomm held a safety briefing with all of the vendors/contractors on site that day, including TransPower, informing each where they would be working, the scope of their work, and what to do in case of emergency; that a few days before the August 3

inspection, Qualcomm employee Bautista sent an e-mail to Redding and Higuera outlining the step-by-step procedures Qualcomm would follow to de-energize the main cogen breaker; that also before the August 3 inspection, Bautista, Potter, and Beckelman conducted "walkthroughs" regarding the sequence of events to shutdown the main cogen breaker; and that, although it was not responsible for the actual inspection of the main cogen breaker, Qualcomm nonetheless remained responsible to ensure the switchgear was in an electronically safe condition before that inspection went forward.

There is also substantial record evidence supporting the jury's finding that Qualcomm negligently exercised retained control over the safety conditions of the inspection. Senior facilities manager Redding testified that senior plant manager Higuera trained Bautista, Potter, and Beckelman to inform *anyone* working in the switchgear room what was hot and what was not hot; that after a lockout/tagout procedure, it was "critical" for members of the Qualcomm team to inform outside vendors what equipment had and had not been de-energized; that such information needed to be given not only to the contractor or subcontractor, but *also* to its respective employees who would be working in the switchgear room; and, thus, that Sandoval (and Guadana and Omid), as opposed just to Sharghi, needed to be specifically told by a member of the Qualcomm team "what is hot and what is not hot," a view also shared by Qualcomm's own expert Loud and by plaintiff's expert Avrit.

Although Beckelman during the safety briefing told everyone, including Sandoval, that certain segments of the switchgear remained energized and later, after the lockout/tagout procedure, used his hand to show Sharghi which breakers remained

energized and which were de-energized, there is no record evidence that Beckelman specifically gave Sandoval this information once they were all inside the mezzanine, just prior to TransPower's inspection. We conclude this evidence alone is substantial, supports the jury's finding Qualcomm negligently exercised its retained control over the safety conditions at the worksite, and warranted denial of Qualcomm's JNOV.

But that's not all. The record also shows that the switchgear that was de-energized was located in the same general area as the portion of the switchgear that remained energized; that from the back, the switchgear looked like a "sea of sameness," which Qualcomm's own employees found confusing to navigate; that once Qualcomm de-energized certain breakers, the light panels on those breakers went dark even though they remained energized, making it even more difficult to tell which cells were and were not energized; and that Sandoval's expert, Avrit, opined that when there was "look-alike" equipment such as the switchgear at issue in this case, Qualcomm had a duty under NFPA to post a guard, issue a warning, and/or erect a barricade highlighting the segments of the switchgear that remained energized.

Although Qualcomm presented conflicting evidence showing it allegedly had no duty under NFPA to provide such a warning, or that, even if such a duty existed, it fulfilled that duty when Beckelman used his hand to demonstrate to Sharghi what was live and what was not, just as in *Regalado* we note it is not our role as a court of review to reweigh the evidence or substitute our judgment for that of the trier of fact. (See *Regalado, supra*, 5 Cal.App.3d at p. 597.)

Next, there clearly is more than sufficient evidence that Sandoval was harmed. (See CACI No. 1009B.) Finally, there is also sufficient evidence to support the jury's finding that Qualcomm's negligent exercise of its retained control over safety conditions at the jobsite was a "substantial factor" in causing Sandoval's harm. The court instructed the jury with CACI No. 430 as follows with respect to this particular element: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

The jury also was instructed with a modified version of CACI No. 431 as follows: "A person's negligence may combine with another factor to cause harm. If you find that Qualcomm, TransPower Testing/Frank Sharghi, [ROS's] negligence was a substantial factor in causing Martin Sandoval's harm, then Qualcomm, TransPower Testing/Frank Sharghi, [and] ROS . . . is responsible for the harm. Qualcomm, TransPower Testing/Frank Sharghi, [and] ROS . . . cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Martin Sandoval's harm."

Here, Sandoval testified he believed, albeit incorrectly, that the entire switchgear had been de-energized. Qualcomm knew otherwise. Given its admission that it owed a duty to anyone working in the switchgear to inform him or her which breakers or portions of the equipment were live and which were not, and given its failure to provide Sandoval such information after the Qualcomm team performed the lockout/tagout procedure on

the main cogen breaker, we conclude the record contains more than sufficient evidence to support the jury's finding that Qualcomm's negligent exercise of its retained control over the switchgear safety conditions was a substantial factor in causing the very harm to Sandoval that such a warning could have prevented.

In sum, viewing the evidence in the light most favorable to plaintiff, disregarding conflicting evidence, and drawing all reasonable inferences in his favor, we conclude substantial evidence supports the jury's determination that Qualcomm was liable to Sandoval under the retained control exception to *Privette*. (See *Cabral, supra*, 51 Cal.4th at p. 770; *Regalado, supra*, 3 Cal.App.5th at pp. 595–597.)<sup>5</sup>

## II

### SANDOVAL'S CROSS-APPEAL

As noted, the trial court granted Qualcomm's motion for a new trial on the limited ground of excessive damages and in particular, apportionment of fault. We now turn to Sandoval's contention that the trial court erred in granting a limited new trial on this issue. As we explain, we conclude the court properly granted Qualcomm such relief, although, as we discuss, for the wrong reason.

#### A. *Guiding Principles*

"The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of '[e]xcessive . . . damages' or

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<sup>5</sup> For the same reasons, we reject Qualcomm's contention that the case should be remanded for a new trial based on the court's alleged error in refusing to instruct the jury with Qualcomm's "affirmative contribution" special instructions.

'[i]nsufficiency of the evidence,' [Code of Civil Procedure] section 657 provides: '[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . or upon the ground of excessive or inadequate damages, . . . such order shall be reversed as to such ground[s] only if there is no substantial basis in the record for any of such reasons.' (Italics [omitted].) Thus, we have held that an order granting a new trial under [Code of Civil Procedure] section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached. . . .' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' (*Neal* [*v. Farmers Ins. Exchange* (1978)] 21 Cal.3d [910,] 932 [(*Neal*)).)

"The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' (*Neal, supra*, 21 Cal.3d at p. 933.) Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. [¶] The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad

discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons. [Citation.]" (*Lane, supra*, 22 Cal.4th at pp. 411–412.)

A trial court is required to specify its reasons for granting a new trial. (Code Civ. Proc., § 657 ["When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason for granting the new trial upon each ground stated.].) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (*Ibid.*) A statement of reasons assists in "promot[ing] judicial deliberation before judicial action" (*Mercer v. Perez* (1968) 68 Cal.2d 104, 113) and in making "the right to appeal from the order more meaningful" (*ibid.*).

#### B. *Analysis*

The record shows Qualcomm moved for a new trial including, as relevant here, under subdivisions (5) and (6) of Code of Civil Procedure section 657. The court denied Qualcomm's motion under subdivision (6), "insufficiency of the evidence to justify the *verdict or other decision*" (italics added), but granted it under subdivision (5) "excessive or inadequate damages," finding "defendant has established that the damages awarded is erroneous only to the extent it reflects an improper apportionment of liability. As a

result, a new trial is ordered limited to that issue." To support its finding, the court cited the case of *Schelbauer v. Butler Manufacturing* (1984) 35 Cal.3d 442 (*Butler*). The court then went through a detailed summary of the evidence to support its finding there was an improper apportionment of liability.

Despite Sandoval's argument to the contrary, we conclude the trial court complied with the requirement that it state its reason in granting a limited new trial and that its reason was supported by substantial evidence. (See *Lane, supra*, 22 Cal.4th at pp. 411–412.) Indeed, the court, sitting as "an independent trier of fact" (*Neal, supra*, 21 Cal.3d at p. 933), cited to evidence that TransPower, along with Sandoval, attended a safety briefing on August 3 before the lockout/tagout procedure; that after Qualcomm completed the lockout/tagout procedure on certain breakers, including the main cogen breaker that was to be inspected, Qualcomm employee Beckelman advised Sharghi what portions of the switchgear remained energized, a fact confirmed by Sharghi; that the TransPower team conducted its own test to ensure the main cogen breaker was in fact de-energized; that when the Qualcomm team left the mezzanine, "there was no live power in any of the open cells in the switchgear room" and thus, "all of the components in the switchgear room could be touched with bare hands because they were either de-energized or covered by a panel"; that TransPower "was aware that[,] other than shutting down the main cogen cell, the power to the facility would remain live"; that "Sharghi testified that he understood that GF-5 was energized when he had his employee Guadana take the panel off"; that despite "knowing that the other switchgear cells were live, Sharghi, without authorization, instructed his employee to open the panel guarding the live GF-5 circuit

breaker"; that "Sharghi never told Qualcomm that he planned to remove the panel[] from the GF-5 circuit or any of the other live circuits"; that the proposal submitted by TransPower referenced only an inspection of the main cogen breaker, which had been racked out; that because "GF-5 was not included within the scope of the work proposed by TransPower," Qualcomm "could not have known that it should de-energize the GF-5 cell" as well; that "Sharghi did not tell Sandoval that the GF-5 circuit was live because Sharghi's only purpose was to take a picture"; and that as a result, after Sandoval inspected the load side bus of the main cogen breaker, he walked to the back of the switchgear and was severely injured when he approached the live, exposed GF-5 circuit.

In addition, the court also noted in support of its order granting a limited new trial that Guadana, at Sharghi's direction, removed the GF-5 cover despite knowledge that doing so was dangerous; that Sharghi "disregarded industry standards" when "he failed to place a barricade or warning sign to prevent someone like Sandoval from triggering an arc flash"; that although Guadana had removed the cover and knew the cell was live, he too "failed to warn Sandoval of the danger—even as he [i.e., Guadana] was shining a flashlight on the electrified bus bars while Sandoval approached GF-5 with his metal tape"; and that "Qualcomm had no reason to think its expert electrical contractor—who had done work on the switchgear 'hundreds of times' [citation]—would go beyond the approved scope of work and expose a live circuit."

On this record, we conclude the trial court properly exercised its discretion when it explained why the apportionment of fault by the jury between Qualcomm and TransPower was "improper." (See *Lane, supra*, 22 Cal.4th at p. 412.) However, we

further conclude the court relied on the wrong subdivision of section 657 of the Code of Civil Procedure to support its decision.

Indeed, the court did *not* find Sandoval's damages were "excessive or inadequate," as set forth in Code Civil Procedure section 657, subdivision (5), when the jury awarded him about \$1.094 million in economic loss and \$6 million in noneconomic loss. Rather, in granting the new trial motion, the court found the damages award was "erroneous *only* to the extent it reflects an improper apportionment of liability." (Italics added.) It thus appears the court actually relied on subdivision (6) of Code of Civil Procedure section 657 in granting Qualcomm a limited new trial. The *Butler* case cited by the trial court guides our analysis on this issue.

In *Butler*, a jury verdict was entered in favor of the plaintiff construction worker in a personal injury action, after the plaintiff slipped and fell while installing steel roofing panels manufactured by defendant Butler that were coated in oil. The defendant moved for a new trial on the grounds of excessive damages and insufficiency of the evidence to support the jury's finding of no contributory negligence. The trial court conditionally granted the motion; it ordered that the motion would be denied if the plaintiff consented to a 15 percent reduction of the award, to adjust for contributory negligence. (*Butler, supra*, 35 Cal.3d at pp. 448–449.) The plaintiff consented to the remittitur and the defendant appealed from the judgment and the denial of the motion for new trial. (*Id.* at p. 449.)

The defendant in *Butler* contended Code of Civil Procedure section 662.5<sup>6</sup> authorized use of a remittitur only when it would be proper for the court to grant a new trial on the issue of damages. Because the trial court used the order to correct the insufficiency of the evidence to justify the jury's apportionment of liability, the defendant contended the trial court abused its discretion. (*Butler, supra*, 35 Cal.3d at p. 452.) The *Butler* court agreed, reasoning: "Section 662.5 specifically states that the procedural device of remittitur is to be utilized only when a new trial is warranted solely on the grounds of [inadequate or] excessive damages . . . . [¶] The statutory requirement that use of remittitur be limited to those cases where jury error is confined to the issue of damages is express and unequivocal." (*Butler*, at pp. 452–453.) Accordingly, it found "[a] remittitur may not be used to condition a new trial order if a damage award is excessive only because it reflects an improper apportionment of liability." (*Id.* at p. 454, fn. omitted.)

Key to the instant case, however, the *Butler* court went on to conclude the court's order granting a limited new trial on the apportionment issue was, in any event, proper.

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<sup>6</sup> This statute provides in relevant part: "(a) In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion: [¶] (1) If the ground for granting a new trial is inadequate damages, issue a conditional order granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable.

(2) If the ground for granting a new trial is excessive damages, issue a conditional order granting the new trial unless the party in whose favor the verdict has been rendered consents to the reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable." (Code Civ. Proc., § 662.5.)

The *Butler* court first looked to the trial court's reason(s) for granting a limited new trial, noting: "the trial court found that there was insufficient evidence to justify the verdict 'with respect to the issues of Plaintiff's contributory negligence and the negligence of Plaintiff's employer . . . .' In the trial court's view, the damages were excessive 'in the sense (*but not otherwise*)' that they reflected the jury's finding of no negligence on the part of [plaintiff] Schelbauer or [his employer] Pre-Fab. (Emphasis [in original].) In its statement of reasons, the court further expressed its opinion that Butler was at least partially liable for Schelbauer's damages by stating that the jury 'clearly should have apportioned fault among plaintiff, the employer and the defendant Butler . . . .' The statement of reasons expressly declared that the damages were excessive 'only in the sense that the error with respect to contributory negligence and the employer's negligence affected the amount of the damages.' [¶] The order clearly indicates that the trial court (1) concurred with the jury's special verdicts that Butler was liable to some extent and that the total damages sustained by Schelbauer were \$865,000, and (2) disagreed only with the jury's apportionment of liability.

"Upon review of the evidence, there is ample support for the lower court's conclusion that Butler was liable to some extent for Schelbauer's injuries. The record reflects that the metal panels were covered with enough oil to make them slippery, that the method of affixing the panels to the buildings required workers to walk on them, that Butler did not adequately inspect the panels for excessive oil, and that the panels were sold without any warning cautioning consumers as to their dangerousness.

"There was also sufficient evidence to support the trial court's determination that both Schelbauer and Pre-Fab were also negligent. In his testimony, Schelbauer admitted that he was fully aware of the thick oil coating on the panels, their resultant slipperiness, and the likelihood that he might fall. Nonetheless, he took no safety precautions other than walking carefully on the panels. Nor did he request any safety equipment or express to his employer any concern about the danger.

"Similarly, the record shows that Pre-Fab had previous experience with the panels and was well aware of the thick oil coating and of the danger of this condition to employees. However, Pre-Fab neither wiped the panels nor employed any safety methods to protect its workers from further accidents. There was testimony that Pre-Fab failed to instruct Schelbauer on a method for fastening the panels to the roof which was safer than the somewhat risky method he learned by imitating fellow workers.

"Also, the record supports the jury's special verdict as to the total amount of damages suffered by Schelbauer. The damage award was fully supported by the testimony of Schelbauer's expert witness. The record adequately supports the trial court's determination that the jury properly decided all the issues it addressed with the exception of the apportionment of liability." (*Butler, supra*, 35 Cal.3d at pp. 455–457.)

Our high court in *Butler* thus concluded there was "no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence. Where, as here, the trial court has reviewed the jury's special verdicts and has properly concluded that the jury's apportionment of damages is erroneous but that the damage award is incorrect only to the

extent that it reflects an improper apportionment of liability, the trial court should have limited its new trial order to that issue. Accordingly, the new trial order is modified to limit the new trial to the issue of apportionment of liability." (*Butler, supra*, 35 Cal.3d at p. 457.) In reaching its decision the *Butler* court relied on Code of Civil Procedure section 43<sup>7</sup> to "modify the trial court's order to provide for a new trial limited to the issue of the proper apportionment of liability." (*Butler*, at p. 458.)

Similar to the circumstances in *Butler*, the new trial order in the instant case shows the damages were excessive " 'in the sense (*but not otherwise*)' that they reflected the jury's finding" (see *Butler, supra*, 35 Cal.3d at p. 456) that Qualcomm was 46 percent liable, or 1 percent more liable than TransPower, for plaintiff's injuries. Also like the trial court in *Butler*, the court in the instant case went into detail and cited to substantial evidence—which is borne out by the record—to support its decision to grant Qualcomm a limited new trial on the issue of apportionment of fault.

Following *Butler*, we conclude the court in the instant case properly granted Qualcomm a limited new trial on the issue of apportionment of fault not because the damages were excessive, but because there was insufficient evidence to justify the verdict regarding apportionment of fault. We thus conclude there is "no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury

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<sup>7</sup> This statute provides in relevant part: "The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had."

and the trial court agreed and which are supported by the evidence" (see *Butler, supra*, 35 Cal.3d at p. 457), including the *amount of damages* the jury awarded Sandoval.

Sandoval nonetheless contends the new trial order was deficient because apportionment could not have been properly evaluated by the trial court because of the alleged dearth of evidence in that order granting a limited new trial regarding Qualcomm's degree of fault. We find this contention unavailing.

The record shows that, while sufficient evidence supports the order denying JNOV based on the finding that Qualcomm negligently exercised retained control of the worksite by failing to warn everybody—including Sandoval—what was live and what was not, after the lockout/tagout procedure had been completed, the evidence, as summarized by the trial court in granting the new trial motion, strongly suggests that TransPower's degree of fault leading to Sandoval's injury was not less than Qualcomm's, even by a mere 1 percent, but rather more than Qualcomm's, as the trial court found in granting Qualcomm relief. (See *O'Kelly v. Willig Freight Lines* (1977) 66 Cal.App.3d 578, 583 [rejecting the defendants' contention that the trial court erred in granting a new trial after finding the evidence did not support the jury's apportionment of fault of 50 percent to the plaintiff and 50 percent to the defendants when the evidence showed that the defendant was more at fault than the plaintiff, as the plaintiff merely "pulled up and stopped her car parallel and close to the curb, that her car was struck from behind by defendant Wade and moved ten to twelve feet forward, and that immediately after the accident the defendant Wade said in substance, 'I'm sorry. It was my fault'"].)

Here, we conclude the trial court provided this court with sufficient information "to enable [us] to review in a meaningful way the order granting the new trial." (See *Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 38; see also *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 367, 370 [noting that to "comply with [Code of Civil Procedure] section 657 'the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he [or she] undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment,' " but that the "trial judge [is required] to briefly identify the deficiencies he [or she] finds in 'the evidence' or 'the record' or [citation] 'the proof'—rather than merely in 'the issues' or 'the ultimate facts' "].)

#### DISPOSITION

The order denying Qualcomm's JNOV is affirmed. The order granting Qualcomm's new trial motion on the limited issue of apportionment of fault is

affirmed, but under subdivision (6) of Code of Civil Procedure section 657. In the interests of justice, the parties are to bear their own costs on appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

**PROOF OF SERVICE**

***Sandoval v. Qualcomm Inc.***  
**Court of Appeal Case No. D070431**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On November 28, 2018, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

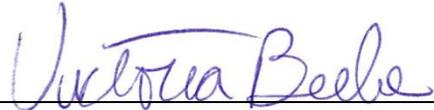
**SEE ATTACHED SERVICE LIST**

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**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 28, 2018, at Burbank, California.

  
\_\_\_\_\_  
Victoria Beebe

**SERVICE LIST**  
*Sandoval v. Qualcomm Inc.*  
Court of Appeal Case No. D070431

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<p>Hon. Joan M. Lewis            San Diego County Superior Court            330 West Broadway, Dept. C-65            San Diego, CA 92101            (619) 450-7065</p>	<p>Trial Judge            Case No. 37-2014-00012901-CU-PO-CTL             Via U.S. Mail</p>
<p>Office of the Clerk            Court of Appeal            Fourth Appellate District            Division One            750 "B" Street, Suite 300            San Diego, CA 92101-8196</p>	<p>Case No. D070431             Via TrueFiling</p>

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11/28/2018

Date

/s/Joshua McDaniel

Signature

McDaniel, Joshua (286348)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm

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