S252796

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOSE M. SANDOVAL,
Plaintiff, Respondent and Cross-Appellant,

v.

QUALCOMM, INC.,
Defendant, Appellant and Cross-Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D070431
JUDGE JOEL WOHLFEIL, CASE NO. 37-2014-00012901-CU-PO-CTL

COMBINED ANSWER TO AMICI CURIAE BRIEFS

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INTRODUCTION

Plaintiff Jose Sandoval submits this joint response to the Amicus Curiae briefs filed by (1) the Chamber of Commerce of the United States of America, American Property Casualty Insurance Association, and the Civil Justice Association of California (collectively "The Chamber"); (2) Western States Petroleum Association ("WSPA"); and California Association of Realtors ("CAR").

In their briefs, Amici echo the position asserted by defendant Qualcomm that the hirer of an independent contractor is shielded from liability when (as here) (1) the hirer does not delegate to the contractor a critical task that must be performed before the contractor could perform its task; (2) the hirer negligently performed that task before turning the property over to the contractor; and (3) the hirer's negligence is a cause of injury to an agent of the contractor. It appears to be Amici's position that the hirer's negligence under these circumstances does not meet the affirmative contribution standard under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, because the work performed by the hirer preceded the work performed by the contractor. Amici are mistaken.

Amici agree that the policy rationale of *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny is that a portion of the fee paid to an independent contractor delegated to perform certain tasks is to reimburse the contractor for its workers' compensation premiums. Accordingly, if an employee of the contractor can both obtain compensation benefits and tort recovery, he or she is obtaining a windfall. However, an essential premise of this rationale is that the hirer delegated the activity that injured the employee to the contractor.

If the employee is injured by activity not delegated to the contractor, this rationale has no application. That is why, in *Hooker*, this Court

concluded that "if an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an unwarranted windfall." (*Hooker*, *supra*, 27 Cal.4th at p. 214.) This Court reasoned: "While it is true that the cost of workers' compensation insurance coverage is as likely to have been calculated into the contract price paid by the hirer in a retained control case as it is in peculiar risk or negligent hiring cases, the contract price could not have reflected the cost of injuries that are attributable to the hirer's affirmative conduct. The contractor has no way of calculating an increase in the costs of coverage that are attributable to the conduct of third parties, which is why the employee, despite the existence of the workers' compensation system, is not barred from suing a third party who proximately causes the employee's injury. (See Lab. Code, § 3852.)" (*Id.* at p. 213.)

That is precisely the case here – regardless whether Qualcomm's negligent conduct preceded TransPower's (the contractor's) negligence in time. (1) Qualcomm affirmatively performed a partial shutdown which was necessary for the contractor to perform its work; (2) Qualcomm could have but chose not to delegate the responsibility to perform the partial shutdown to the contractor and (3) expert testimony explained that (a) Qualcomm was negligent in its affirmative conduct partially shutting down the switchgear and (b) this negligence was a cause of plaintiff's injuries.

As described in plaintiff's Answering Brief and elaborated upon below, under these circumstances, the Court of Appeal correctly concluded that Qualcomm's negligence affirmatively contributed to plaintiff's injures under *Hooker*. The jury heard ample evidence that Qualcomm took it upon itself to control the manner in which current breakers in the switchgear room were to be de-energized. The jury also heard ample evidence that the

manner in which Qualcomm affirmatively undertook to perform this task was negligent because it failed to use available safeguards to protect individuals (such as plaintiff) who were working in the switchgear room. This negligence is the personification of "affirmative contribution" under *Hooker*. Nothing Amici argue warrants a contrary conclusion by this Court.

FACTUAL BACKGROUND

In reviewing the defense Amici briefs, the following facts should be kept in mind:

1. According to Kirk Redding, the Qualcomm senior facility manager, although Qualcomm could have delegated authority to de-energize the switchgear, it decided to retain that control itself. Thus, Qualcomm retained and exercised the exclusive authority to de-energize the switchgear and to implement the necessary safety measures associated with that procedure. (10 RT 952.)

2. The switchgear room where the inspection was going to occur is a complex system. (7 RT 568-569; 9 RT 889-890.) The switchgear system has two sources of power: power that Qualcomm generated on its own and power that is provided to Qualcomm by the utility. (6 RT 364; 7 RT 569; 10 RT 928.) The breaker providing the Qualcomm-generated power is referred to as the main generator breaker or the cogen breaker. (10 RT 928-929.) It is this breaker that Qualcomm needed 's Sharghi to inspect. (8 RT 659; 4 AA 796.) As a result, Qualcomm needed to de-energize that cogen breaker as well as the breakers in proximity to allow for safe inspection. (8 RT 659; 4 AA 796.)

3. In addition to being a complex system, the switchgear room can be confusing because it is "a sea of sameness." (8 RT 736.) It is very easy to lose your place and become disoriented because the cubicles containing the breakers look alike. (8 RT 736-737; 9 RT 801; see also 2 AA 405.) One Qualcomm plant operator would count the cubicles to maintain his orientation. (9 RT 801.)

4. While Qualcomm's plant operators were de-energizing the breakers for TransPower's Sharghi to perform his inspection, Sandoval was in the corner of the room and could hear them working but could not see

what they were doing. (10 RT 1070.) When the Qualcomm plant operators finished, one of them explained to Sharghi that they transferred all the loads to the utility side, but he did not specify which breakers remained energized. (7 RT 597; 8 RT 738.) None of them communicated to Sandoval which breakers remained energized. (10 RT 1071.) The Qualcomm plant operators left no signage indicating which areas were still energized, either. (11 RT 1097.) Qualcomm's plant operators then left to work on their other jobs for the morning. (8 RT 738-739.)

5. Qualcomm's expert agreed that Qualcomm had a duty to tell Sandoval what remained "hot and what is not." (Joint Motion to Augment Record, Exhibit D, p. 92.)

6. When a breaker is disconnected, its green indicating light goes out; as a result of Qualcomm's lockout/tagout procedure, the green indicating light on GF-5 was out, even though GF-5 remained energized, and the breaker appeared to be disconnected or in test position. (8 RT 626-628.) This is because the breaker's utility source of power had been disconnected, but only the breaker's line side was de-energized; its load side remained energized. (10 RT 1014-1015; see also 10 RT 1017 [GF-5's line side was de-energized, but the load side was still energized].)

7. At trial, Sandoval presented expert evidence that his injury would not have occurred if Qualcomm had followed its own policies and industry standards when it partially de-energized the control room. (9 RT 841.) Specifically, Sandoval's expert noted that there was no one present to supervise the work, and that Qualcomm's Higuera testified that it was his policy to supervise work. (9 RT 842; see 8 RT 680 [Higuera testimony]; see also 8 RT 694 ["They did exactly what they were supposed to for their job for what the plant operator is. They didn't do mine."].) Second, Sandoval's expert noted that Qualcomm failed to identify—whether by direct communication or by signage—which areas were de-energized and

which remained energized. (9 RT 843-846; see also 7 RT 597; 8 RT 738; 10 RT 1071.) Third, Sandoval's expert testified that, pursuant to industry standards, no one should have been allowed in the switchgear room without PPE. (9 RT 847, 850-851; see also 7 RT 592 [Sandoval was not wearing PPE].) Sandoval's expert also explained that Sandoval was not qualified to independently verify whether or not a particular circuit breaker was energized, as he was not a qualified electrical worker, but was merely participating in the inspection to measure the busbars. (9 RT 852.)

8. Sandoval's expert further explained that Qualcomm violated the industry standard for electrical safety in the workplace by failing to develop protections when workers will be working with "look-a-like equipment," such as Qualcomm's switchgear, which looks similar from the front and the back and from one piece of equipment to the other. (9 RT 854.) The industry standard explains that, in such a situation, Qualcomm should have done at least one of three things: (1) have clear safety signs indicating what is energized and what is not energized; (2) barricade off the side of the equipment that is energized; (3) provide an attendant for the room to make sure no one enters the energized area. (9 RT 854-857; see also 8 RT 736 [Qualcomm plant operator describing the switchgear room as a "sea of sameness"].)

9. The jury also heard testimony from Qualcomm's expert (John Loud), concluding that Qualcomm retained control over the switchgear in regard to what parts were energized and which were not. (10 RT 952.) Qualcomm's expert also testified that Qualcomm owed Sandoval a duty to tell him what was energized and what was not energized, and that if Qualcomm did not train their operators according to their policy that would fall below the standard of care. (10 RT 955, 968.) Further, Qualcomm's expert acknowledged there was no warning label on the GF-5 breaker at the

time of the incident and he had no criticism of Sandoval for going around the back to look at the load side busbars. (10 RT 1011, 1020.)

ARGUMENT

WHEN, INSTEAD OF DELEGATING AN ASPECT OF WORK TO AN INDEPENDENT CONTRACTOR, THE HIRER ELECTS TO PERFORM THAT WORK ITSELF AND THEN AFFIRMATIVELY AND NEGLIGENTLY PERFORMS THAT WORK CAUSING INJURY TO THE PLAINTIFF, IT IS NOT SHIELDED FROM LIABILITY UNDER *PRIVETTE*.

A. Since Qualcomm Did Not Delegate The Partial Shutdown To TransPower, The Contract Price Did Not Subsidize For Workers' Compensation Insurance Due To Injuries Caused By The Manner In Which The Shutdown Was Performed.

The principal theme throughout the Amici briefs is that application of workers' compensation here is necessary to avoid a windfall because the costs of workers' compensation insurance is built into the price the hirer of an independent contractor pays for the work to be performed. (See Chamber AC 9.) While that may be true with respect to the work that the independent contractor actually performs, it is not the case as to the work the hirer performs itself and which it has not delegated to or paid the contractor for. That is precisely why plaintiff's claims against Qualcomm are not barred here.

In *Hooker*, *supra*, 27 Cal.4th 198, this Court did *not* hold that when the hirer actually creates the very physical condition that causes the plaintiff's injuries, there is affirmative contribution if that activity preceded the separate negligence of the contractor. As explained in plaintiff's Answering Brief (at pages 24-26), numerous cases illustrate that where the

hirer actually creates the condition that causes the plaintiff's injuries then "affirmative contribution" is satisfied (or at least a question of fact exists). For instance, when a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225.) Nowhere do Amici explain why the negligent supplying of equipment that affirmatively contributes to the plaintiff's injuries is any different than the hirer's negligent performing of an aspect of the work that likewise affirmatively contributes to those injuries.

This primary rationale that the cost of workers' compensation insurance is built into the contract price does not justify precluding liability here. As this Court explained: "While it is true that the cost of workers' compensation insurance coverage is as likely to have been calculated into the contract price paid by the hirer in a retained control case as it is in peculiar risk or negligent hiring cases, the contract price could not have reflected the cost of injuries that are attributable to the hirer's affirmative conduct. The contractor has no way of calculating an increase in the costs of coverage that are attributable to the conduct of third parties, which is why the employee, despite the existence of the workers' compensation system, is not barred from suing a third party who proximately causes the employee's injury. (See Lab. Code, § 3852.)" (*Hooker*, *supra*, 27 Cal.4th at p. 213; *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 599 ["the hirer likely paid indirectly for the workers' compensation insurance as a component of the contract price."].)

Here, since Qualcomm could have delegated the task of preparing the jobsite – but did not do so –the price Qualcomm paid was less than it would have been absent such a retention. In other words, the contractor

(TransPower) was paid nothing to safely de-energize the switchgear room and therefore Qualcomm was not subsidizing for workers' compensation premiums for those services. Thus, to borrow the words from *Hooker*, the contract price paid to TransPower did not reflect the cost of injuries that are attributable to the Qualcomm's affirmative conduct in the manner it partially de-energized the switchgear room. Of note, it is now Qualcomm's policy to delegate that responsibility. (9 RT 781-782.)

Nevertheless, as with Qualcomm, Amici seek to shift blame to TransPower based on the fact that it told TransPower (but not plaintiff about the partial shutdown) and it was TransPower that directed plaintiff to go beyond the scope of the contracted for work. (Chamber AC 11.) Thus, Amici assert that it became the responsibility of the independent contractor to inform its employees of hazards. (Chamber AC 13-14.)

However, this argument begs the issue here. Plaintiff does not dispute that a rationale of *Privette* is that, when an independent contractor is hired to perform a particular task, there is a delegation of responsibility to that contractor to perform the work in question in a safe manner. However, here Qualcomm did not delegate the power shut down – a critical aspect of the task TransPower was performing. Rather, to repeat, Qualcomm retained entire control of that task itself. Having done so it retained potential liability for injuries resulting from the negligent performance of that task.

B. Plaintiff Is Not Relying On A Mere Omission To Act.

The Chamber next references this Court's footnote in *Hooker* which stated:"[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." (27 Cal.4th at p. 212, fn. 3.) According to the Chamber, plaintiff seeks to stretch this footnote to apply whenever the hirer passively fails to act. That is not plaintiff's position and it is not what the Court of Appeal held.

Rather, it is plaintiff's position that under this footnote active direction by the hirer is not always required. As one example of where active direction is not needed, this Court referenced a promise to undertake particular safety measures. That example applies here. By not delegating the aspect of the project to partially de-energize the switchgear room and instead performing that work itself, Qualcomm at least impliedly promised that it would perform the work in a safe manner. "[A] promise to perform includes an implied promise to perform properly." (*Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal.App.4th 937, 972.)

Thus, contrary to the Chamber's argument (at p. 18) this is not simply a case where liability is sought based entirely upon the failure of Qualcomm to act. It is based on Qualcomm's affirmative retention of the obligation to safely perform the partial power shutdown.

For the same reason, the Chamber's argument that Qualcomm did not "exercise" any retained control because an omission alone cannot be such an exercise (at pages 21-22), fails. According to the Chamber "[t]he word exercise has meaning: an omission is not enough unless coupled with an affirmative act, such as a promise to the contractor." (Chamber AC 21.) The Chamber continues that "'[p]assively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution'" (at page 22) citing to *Tverberg v. Fillner Const., Inc.* (2012) 202 Cal.App.4th 1439, 1446. But an examination of *Tverberg* proves the

Chamber wrong. There, the owner ordered that certain holes be created and required the workers to conduct work nearby. Further, the owner's determination that there was no need to cover or barricade the holes was sufficient on summary judgment to allow "an inference that the [owner] affirmatively assumed the responsibility for the safety of the workers near the bollard holes, and discharged that responsibility in a negligent manner, resulting in injury." (*Id.* at 1448.) The hirer's creation of the holes in *Tverberg* is equivalent to the manner in which Qualcomm affirmatively performed the partial shutdown here.

C. None Of Amici's Remaining Arguments Have Merit.

The Chamber's argument that Qualcomm safely de-energized the aspect of the plant on which the work was to be performed (Chamber AC 23) simply ignores the evidence in this case. As described in the Answer Brief (at pages 10-19) , the jury heard evidence from expert witnesses that the manner in which Qualcomm affirmatively implemented the partial de-energizing of the switchgear room was negligent.

Further, the Chamber's argument that it was TransPower that "created the hazard by exceeding the scope of authorized work" ends where its brief begins. It ignores that Qualcomm retained exclusive responsibility for the manner in which the work site was to be de-energized. Liability under these circumstances is not an all or nothing proposition. TransPower was assigned fault and in fact the trial court granted a new trial based on its conclusion that the jury's assignment of fault to TransPower was too low. The fact that TransPower was also negligent does not necessarily absolved Qualcomm from liability for its independent negligence.

Amici WSPA argues that petrochemical refineries are dependent upon employing contractors to "perform shutdown, maintenance and

expansion work." (WSPA 11.) It then continues that "Under Sandoval's theory, even though the refinery has turned over the jobsite with clearly defined boundaries, the landowner would still be considered to have 'retained control' of the specific jobsite." (WSPA 13.) But once again this argument simply ignores the evidence of this case. To the extent Qualcomm turned over the job site to TransPower it was only after Qualcomm had negligently performed a necessary task in that jobsite partially de-energizing the switchgear. Nothing in the rationale of *Privette* or its progeny supports insulating Qualcomm from liability under these circumstances.

According to WSPA "in cases were liability against a hirer is imposed on the hirer's omission to act, there is always a precedent promise to act in a certain way." (WSPA 18.) And this case is no different. As already explained, by retaining complete control over the manner on which the switchgear room was partially de-energized, Qualcomm promised that they would act reasonably.

It is also the case that, if Qualcomm had warned plaintiff directly which circuit breakers remained energized, then plaintiff could have taken steps to avoid contact with them and would not have been injured. These facts serve to distinguish *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 666, on which WSPA relies. There, the Court of Appeal rejected a retained control claim brought by an employee of a demolition subcontractor against Pomona College and a general contractor remodeling a residential dormitory on campus. The subcontractor employee was injured when, during the demolition of an overhead drainage pipe, a portion of the overhead pipe broke loose and struck and broke a pressurized (PVC) water pipe, thereby releasing a force of water that knocked the worker from the ladder on which he was working resulting in his injuries. (*Padilla, supra*, 166 Cal.App.4th at pp. 664-665.) In his action against Pomona

College and the general contractor, Padilla asserted that they had a duty to ensure that the PVC pipe was protected from damage during the demolition process. (See *Ibid.*)

Pomona College and the general contractor successfully moved for summary judgment, relying on evidence that the general contractor had warned plaintiff's employer, prior to the demolition, that the PVC pipe had been pressurized and needed to be protected during the course of the demolition work.

On the basis of the undisputed evidence, the trial court found that neither Pomona College nor the general contractor affirmatively contributed to plaintiff's injuries. (*Padilla, supra*, 166 Cal.App.4th at p. 665-666.)

The Court of Appeal affirmed, holding that the defendants' retention of control over the PVC pipe did not affirmatively contribute to the plaintiff's injuries. The Court found no evidence of affirmative contribution because defendants in fact delegated safety measures to Padilla's employer, and that subcontractor made no request that the defendants turn off the water nor was the subcontractor prevented from "setting up an emergency valve on the water pipe." (*Padilla, supra*, 166 Cal.App.4th at p. 671.)

Here, on the other hand, as already discussed, Qualcomm affirmatively assumed the responsibility of deactivating the switchgear but did so in a negligent manner in direct derivation of the duty testified to by its own employee, its own expert and by plaintiff's expert. It is this negligent conduct that "affirmatively contributed" to the plaintiff's injuries. This is not a case, such as in *Padilla*, where TransPower assumed complete responsibility for the work site safety. As already described, the jury heard ample evidence – including from Qualcomm's own witnesses – that Qualcomm retained a duty to take safety measures to protect workers

including plaintiff because it had assumed the responsibility to de-energize some but not all of the switchgear.

Next, WSPA supposed nightmare scenario of requiring "refineries to tell each contractor's individual employees which pipes are pressurized and which are not . . . ." (WSPA 21) presumes that there must be a one size fits all standard as to the duty owed by a hirer when it retains a certain level of control over aspects of the work being performed. That is not the case. Rather, the standard of care that must be met when a refinery operator partially depressurizes its pipes is a matter subject to expert testimony. If the experts opined that a refinery that depressurizes certain pipes but not others does not have to alert workers on the job site which pipes are pressurized and which are not, then that would mean the refinery has no such duty. However, as already explained, that is not the case here. Plaintiff submitted expert testimony that when the operator of a power plant such as Qualcomm, partially de-energizes the switch gear, the standard of care requires the operator to perform the partial shutdown far different than how Qualcomm performed.

So long as refineries who perform partial shutdown in accordance with the safety standards applicable to them, then they will not face liability. If they perform that partial shutdown in a negligent manner and if that negligence injures an employee working at the facility, then the refinery operator should not be able to shield itself from liability under *Privette*.

Next, Amici CAR dramatically argues that the "theory espoused by Plaintiff would result in the exception swallowing the rule." (CAR AC 4.) CAR goes so far as to argue that it could be asserted "in all instances of injury to employees of independent contractors." (*Ibid.*) This hyperbole bears no relation to plaintiff's actual position. Plaintiff is not seeking to expand the exceptions this Court has already recognized to the *Privette*

doctrine. Rather, plaintiff is simply arguing that the exception this Court has already recognized in *Hooker* applies here without the arbitrary limitations advocated by Qualcomm and its amici supporters. Under their position, the fact that Qualcomm never delegated responsibility for the partial shutdown as it could have and therefore never paid a contractor to perform the partial shutdown, should play no role in the analysis simply because the contractor was also negligent and its negligence was also a cause of plaintiff's injuries.

But this Court has never ruled that *Privette* applies unless the hirer is 100% at fault for the plaintiff's injuries. Rather, this Court developed a straightforward standard under which the hirer's liability is determined by examining the nature of its own negligence (without regard to whether the contractor is also negligent).

CAR further argues that an owner of property who negligently prepares the property for work to be performed by a contractor has no liability under *Privette*. But CAR can cite no cases creating such a hard and fast rule. If an owner of property assumes responsibility that it could otherwise delegate to a contractor to affirmatively perform a certain aspect of work and then delegates the remainder of the work to the contractor, then, if an employee of the contractor is injured because of the negligent manner in which the owner performed the work, the rationale underlying *Privette* does not apply.

The hypotheticals proposed by CAR only serve to illustrate the overreaching nature of its position. In one hypothetical a "mom and pop" owner of a fourplex move boxes to clear a path so that an electrician can have access to an electrical panel. The electrician's apprentice is injured when he acts upon the electrician's sarcastic suggestion to insert a knife into a wall outlet to determine whether the electricity is out. According to CAR, since the owners cleared the path they could be liable under

plaintiff's position. (CAR AC 9-10.) No they cannot. The fact that they moved the boxes was not negligent. Further, it is difficult to see how that activity could possibly be a legal cause of the apprentice's injuries. Finally, the owners could not possibly be liable for the alleged negligence of the contractor in making the sarcastic suggestion since they played no role in that.

The same is true as to CAR's other hypothetical concerning a worker slipping on a ladder presumably because he had walked on wet grass. (CAR AC 8.) Once again nothing in this hypothetical suggests that the property owner was negligent or that any negligence was a cause of injury.

CONCLUSION

For the foregoing reasons and for the reasons explained in plaintiff's Answering Brief, plaintiff urges this Court to affirm the Court of Appeal.

Dated: December 6, 2019

THON BECK VANNI CALLAHAN & POWELL

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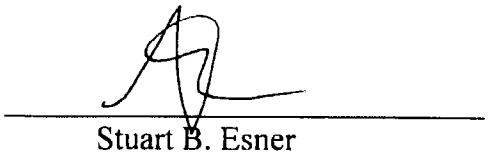
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 4,467 words as counted by the word processing program used to generate the brief.



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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **COMBINED ANSWER TO AMICI CURIAE BRIEFS**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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Marina Maynez

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Jose M. Sandoval v. Qualcomm Incorporated
(D070431 | 37-2014-00012901-CU-PO-CTL)

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Hon. Joan M. Lewis SAN DIEGO COUNTY SUPERIOR COURT 330 West Broadway, Dept. C-65 San Diego, CA 92101	***Trial Court (Via Mail)***