

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF, )  
)  
USA HOIST COMPANY INC., ) OTA NO. 20116890  
)  
APPELLANT. )  
)  
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TRANSCRIPT OF PROCEEDINGS

Cerritos, California

Tuesday, March 12, 2024

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

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Transcript of Proceedings,  
taken at 12900 Park Plaza Dr., Suite 300,  
Cerritos, California, 90703, commencing at  
1:04 p.m. and concluding at 3:40 p.m. on  
Tuesday, March 12, 2024, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

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APPEARANCES:

Panel Lead: ALJ ANDREW WONG

Panel Members: ALJ SUZANNE BROWN  
ALJ JOSHUA ALDRICH

For the Appellant: R. BAILEY  
SAMANTHA BRESLOW  
JEFFREY SVEHLA  
E. MAYNARD

For the Respondent: STATE OF CALIFORNIA  
DEPARTMENT OF TAX AND  
FEE ADMINISTRATION  
  
JARRETT NOBLE  
CARY HUXSOLL  
JASON PARKER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-29 were received into evidence at page 8.)

(Department's Exhibits A-D were received into evidence at page 8.)

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Cerritos, California; Tuesday, March 12, 2024

1:04 p.m.

JUDGE WONG: Let us go on the record.

This is the Appeal of USA Hoist Company Incorporated before the Office of Tax Appeals. This is OTA Case No. 20116890. Today is Tuesday, March 12th, 2024. The time is 1:04 p.m., and we're holding this hearing in person in Cerritos, California.

I'm Lead Administrative Law Judge Andrew Wong, and with me today are Judges Suzanne Brown and Josh Aldrich.

We're going to go over some preliminary matters, beginning with an introduction by the parties.

The individuals appearing here for the Appellant USA Hoist Company, could you please introduce yourselves.

MS. BRESLOW: My name is a Samantha Breslow, Counsel for USA Hoist Company.

JUDGE WONG: Good afternoon.

MR. SVEHLA: Jeff Svehla, Counsel for USA Hoist.

JUDGE WONG: Good afternoon.

MS. BRESLOW: And we have two witnesses here today.

Do you want to introduce yourselves?

MR. BAILEY: Robert Bailey, USA Hoist.

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JUDGE WONG: Hello.

MR. MAYNARD: Eric Maynard. I'm with the USA  
Hoist also.

JUDGE WONG: Thank you.

And individuals representing the Respondent tax  
agency, the California Department of Tax and Fee  
Administration, could you please introduce yourselves.

MR. NOBLE: Jarrett Noble with CDTFA.

MR. HUXSOLL: Cary Huxsoll with CDTFA.

MR. PARKER: Jason Parker also with CDTFA.

JUDGE WONG: Thank you.

So we're just going to go over some preliminary  
matters, including exhibits, witnesses, time allocation.  
I also would mention that I issued a minutes and orders on  
February 20th, 2024, and I informed the parties that  
Judges Brown and Aldrich would be joining me on this panel  
as substitutes for two other judges who had been  
previously identified to the parties but then became  
unavailable for this hearing. I gave the parties the  
option to file a written objection or to request recusal  
for good cause within 15 days or by Wednesday, March 6,  
2024. However, OTA did not receive any objections from  
either party.

Is that correct, Ms. Breslow?

MS. BRESLOW: That's correct.

1 JUDGE WONG: And no objections from CDTFA?

2 MR. NOBLE: Also correct.

3 JUDGE WONG: Okay. Judge Brown, Judge Aldrich,  
4 and I will constitute the panel hearing and deciding this  
5 case. We're deciding -- we're considering one main issue  
6 today; whether an adjustment to the determined measure of  
7 unreported taxable leases is warranted.

8 And, Ms. Breslow, you had about four sub-issues  
9 that go to that overall issue statement; is that correct?

10 MS. BRESLOW: That's correct, Your Honor.

11 JUDGE WONG: And that's an accurate summation of  
12 the issue today, CDTFA?

13 MR. NOBLE: Yes, sir.

14 JUDGE WONG: Okay. So let's go to the exhibits.  
15 Appellant has proposed Exhibits 1 through 29 as evidence.

16 There's no other evidence you would like to add;  
17 is that correct.

18 MS. BRESLOW: That's correct. No additional  
19 exhibits.

20 JUDGE WONG: And, CDTFA, did you have any  
21 objections to those proposed exhibits?

22 MR. NOBLE: We have no objections.

23 JUDGE WONG: Okay. Appellant's Exhibits 1  
24 through 29 will be admitted into the record as evidence.

25 ///

1 (Appellant's Exhibits 1-29 were received  
2 in evidence by the Administrative Law Judge.)

3 JUDGE WONG: And CDTFA has identified and  
4 submitted proposed Exhibits A through D as evidence.

5 And you had no additional documents; is that  
6 correct?

7 MR. NOBLE: Correct.

8 JUDGE WONG: Okay. And did Appellant have any  
9 objections to those proposed exhibits?

10 MS. BRESLOW: No objections.

11 JUDGE WONG: Okay. So CDTFA's Exhibits A  
12 through D will be admitted into the record as evidence.

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

15 JUDGE WONG: And then Ms. Breslow you identified  
16 two proposed witnesses. No other witnesses; is that  
17 correct?

18 MS. BRESLOW: That's correct.

19 JUDGE WONG: Okay. And, CDTFA, did you have any  
20 objections to the witnesses?

21 MR. NOBLE: We don't.

22 JUDGE WONG: Okay. So in a minute once -- I will  
23 swear in the witnesses once we get to your presentation.

24 Let's talk about the time allocation. It was  
25 anticipated the oral hearing would take approximately



1 150 minutes. These preliminary matters, introductions,  
2 will take about 5 minutes. Appellant's presentation,  
3 witness testimony, rebuttal, and closing remarks would  
4 take about 105 minutes to be divided however you would  
5 like. And then CDTFA's presentation would take  
6 25 minutes, so 150 minutes, one-five-zero total.

7 All right. Any questions from the parties before  
8 we begin?

9 Ms. Breslow, any questions.

10 MS. BRESLOW: I do estimate that our witness  
11 testimony and the oral argument may take longer than the  
12 105 minutes.

13 JUDGE WONG: Okay.

14 MS. BRESLOW: Maybe 20 to 30 minutes more, not  
15 substantially more.

16 JUDGE WONG: Okay.

17 MS. BRESLOW: Is that acceptable?

18 JUDGE WONG: Yeah. There's no other hearing  
19 after this one. So we, in theory, have the entire  
20 afternoon. I will also mention that unlike court, you  
21 don't necessarily need to lay a foundation for, you know,  
22 for your witnesses and whatnot. So but, yeah, we do have  
23 some leeway.

24 MS. BRESLOW: And -- yeah. I guess that's all at  
25 this point. Thank you.

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JUDGE WONG: Okay. Thanks.

CDTFA any questions?

MR. NOBLE: No, sir.

JUDGE WONG: Okay. All right. Let us begin.

Appellant, please proceed with your presentation.

Did you want to make a presentation first then call your witnesses? Or maybe I should just swear them in now and then however you want to arrange your time?

MS. BRESLOW: Sure. I was planning on doing my oral argument and then doing witness testimony afterwards.

JUDGE WONG: Okay.

MS. BRESLOW: But if you want to proceed with swearing them in now, that works for me. As far as the closing argument goes, would that be after the Department I assume --

JUDGE WONG: Yes.

MS. BRESLOW: -- does theirs? Okay.

JUDGE WONG: So the order would be you would have your main presentation, witness testimony, and then it would go to CDTFA for their presentation. And then you would have rebuttal and closing and then final questions from the Panel. The Panel will also have questions after each presentation or after each witness.

MS. BRESLOW: Okay.

JUDGE WONG: Okay. All right. Let's just swear

1 in the witnesses then.

2 Mr. Bailey and Mr. Maynard, would you please just  
3 raise your right hand.

4

5 R. BAILEY,

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

9

10 E. MAYNARD,

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

14

15 JUDGE WONG: Okay. Thank you.

16 All right. Ms. Breslow, please proceed.

17 MS. BRESLOW: Thank you.

18

19 PRESENTATION

20 MS. BRESLOW: Good afternoon.

21 This case concerns whether USA Hoist was subject  
22 to additional California sales tax during the periods  
23 January 1, 2013, through March 31, 2016, which I'll refer  
24 to throughout as the periods at issue.

25 USA Hoist is a subcontractor that works with

1 general contractors or GCs -- I'll try not to abbreviate,  
2 but if I do, it's GCs -- to provide custom elevators or  
3 hoists for construction projects in several states,  
4 including California. The hoists are used to transport  
5 people and materials up and down a building while it's  
6 being constructed. USA Hoist and its customers enter into  
7 written agreements where customers pay for the operation  
8 of the hoists and other separately stated charges,  
9 including but not limited to enclosures, floor gates,  
10 grillage, communication systems, tie-in attachments, and  
11 jump-tower labor. For the periods at issue, USA Hoist  
12 collected and remitted sales tax on the hoist, but it  
13 didn't collect sales tax on the other separately stated  
14 charges because they were not subject to tax.

15 We're asking this Court to address four primary  
16 issues, including whether: one, certain agreements were  
17 for nontaxable services because USA Hoist directed and  
18 controlled the equipment by providing operators for the  
19 entirety of the jobs; two, whether USA Hoist was not  
20 required to collect sales tax on the rental stream of  
21 communication systems and tie-in attachments because it  
22 paid sales or use tax upfront on the cost of those  
23 materials; three, whether enclosures and grillage are not  
24 taxable because the true object of those transactions is  
25 nontaxable installation labor; and four, whether

1 jump-tower labor is nontaxable installation labor.

2 For the first issue there were four contracts  
3 where USA Hoist provided operators for the entirety of the  
4 jobs. Those jobs were one, Avenue of the Stars, Job No.  
5 9364 --

6 THE STENOGRAPHER: I'm sorry. Can you say that  
7 number again?

8 MS. BRESLOW: Sure. I'll slow down.

9 THE STENOGRAPHER: Thank you.

10 MS. BRESLOW: Number one, Avenue of the Stars,  
11 Job No. 9364. Number two, Wilshire Grand Hotel, and this  
12 job was a two-part. First it was a demolition and then a  
13 construction. And the demolition was Job No. 9179.  
14 Three, the Wilshire Grand Hotel, which was the  
15 construction, 9304. And four, Masonic Temple, Job  
16 No. 9398.

17 What's key here is that for these jobs the  
18 parties agreed that USA Hoist was required to provide an  
19 operator. This was because the general contractors didn't  
20 have access to qualified operators. Why? Because any  
21 individual can't operate a hoist under California OSHA  
22 regulations, which I'll explain later. That's O-S-H-A  
23 regulations. A qualified competent individual must  
24 operate a hoist. Operating a hoist is dangerous. It  
25 requires training. And secondly, during -- due to certain

1 union constraints, the general contractors for the jobs at  
2 issue did not have access to the skilled and qualified  
3 labor required to operate the hoist.

4 The record is abundantly clear that USA Hoist  
5 provided the operators for the entirety of these jobs.  
6 Submitted into evidence are the agreements that include  
7 language confirming that USA Hoist provide an operator,  
8 their employees, time logs of the operators, daily time  
9 tickets for several jobs. And additionally, for Job Nos.  
10 9398 and 9364, USA Hoist customers also provided  
11 affidavits stating that USA Hoist, quote, "Did not  
12 transfer possession and control of the construction  
13 hoist," quote, "to the general contractors."

14 At the prehearing conference, the Department  
15 agreed to the presence of the operators for the entirety  
16 of the jobs. So I'm not going to get into many of the  
17 materials that we provided as part of our evidence. I  
18 want to explain why there are over 2,000 pages of  
19 documents. But, again, the Department has conceded that  
20 the operators were provided for the entirety of these  
21 jobs. So I'm going to move past that evidentiary issue.

22 Transitioning into USA Hoist legal position. The  
23 first issue and the most impactful to the assessment is  
24 whether USA Hoist provided a nontaxable service by  
25 operating and controlling the hoist. Because USA Hoist,

1 not the general contractor, controlled the hoist during  
2 the entirety of the jobs, USA Hoist provided a service,  
3 not a lease. And if the OTA agrees with the taxpayer on  
4 this, then the subsequent issues that we're going to  
5 discuss today are moot for the jobs at issue, those four  
6 jobs. But the other issues are still relevant for the  
7 other jobs, the other jobs where an operator was not  
8 provided by USA Hoist.

9 I'm going to start with the statute and  
10 regulation because those are the only legislative and  
11 quasi-legislative guidance on the treatment of leases in  
12 California. Pursuant to California Revenue & Taxation  
13 Code section 6006(g), California sales tax is imposed on a  
14 sale which includes a quote, "lease." The statute does  
15 not define a lease, so we have to look to the regulation,  
16 which is at Section 1660. And 1660 defines a lease as,  
17 quote, "A contract under which a person secures for a  
18 consideration the temporary use of tangible personal  
19 property, which although not on his or hers premises, is  
20 operated by or under the direction and control of the  
21 person or his or her employees."

22 Applying the statute and the regulation, there is  
23 no mandatory requirement that the Department inserts. The  
24 focus is instead on who operates or has direction and  
25 control of the hoist. To the extent that USA Hoist

1 employees were the operator, the hoist was both operated  
2 by and under the direction and control of USA Hoist, not  
3 the lessee. The operator was present at all times that  
4 the hoist was in use. And, again, the Department doesn't  
5 dispute this. Therefore, USA Hoist clearly operated the  
6 hoist.

7 Again, the issue is direction and control. The  
8 hoist is a specialized piece of equipment. It allows  
9 construction workers to maneuver up and down a building as  
10 it's being constructed. It's dangerous. And, for  
11 example, a worker were to stick his arm outside of the  
12 hoist as it's going up and down, there would be a serious  
13 risk to bodily harm. And for these reasons, a qualified  
14 union operator was required to use the hoist. And USA  
15 Hoist employees were specifically qualified in its  
16 operation. Per the affidavits provided by several of USA  
17 Hoists customers, the general contractors did not have  
18 access to a licensed and qualified union operator and  
19 could not take control of the hoist.

20 I'd like to point you to my first exhibits, which  
21 are 8 and 11, lines 4 through 7. The exhibits, these  
22 affidavits are very similar, so the lines are similar.  
23 But what they say by the general contractors' own  
24 admission, USA Hoist did not transfer possession and  
25 control of the construction hoist to the general



1 contractor. Under the plain language of the regulation,  
2 the taxpayer did not lease the hoist. We should stop  
3 there because the statute and regulation are clear. They  
4 support the taxpayer.

5 There's no support there for the Department, but  
6 they attempt to locate support within an annotation. They  
7 cite to 330.2465, but it carries no authoritative weight.  
8 There's a regulation that states just that, that  
9 annotations don't carry weight. It's 18 CCR 35101(a)(1),  
10 which defines annotations as nothing more than conclusions  
11 reached by the administrative agency's counsel. The  
12 regulation expressly states that annotations, quote, "Do  
13 not have the force and effect of law," end quote. Again,  
14 that's in 35101(a)(1) of the California Code of  
15 Regulations.

16 And elsewhere they clarify that annotations are,  
17 quote, "A research tool to help provide guidance regarding  
18 the interpretation of statutes and regulations, which are  
19 the real or actual authority." Again, that's in  
20 35101(c)(2). The California Supreme Court addressed the  
21 authoritativeness of an annotation relative to other  
22 authority in the Yamaha case. It's still the leading case  
23 on this point and its findings and its reasoning  
24 demonstrate that the annotations carry no weight.

25 The Court in Yamaha distinguished generally

1 between two things; one, a quasi-legislative rules, like a  
2 regulation, which are the product of the legislature's  
3 delegated authority and, for that reason, carry weight;  
4 and two, interpretive authority. And the Court found in  
5 Yamaha that annotations are interpretive, noting that an  
6 annotation is just a single administrative attorney's,  
7 quote, "Brief statement as to a hypothetical business  
8 transaction." The Court made clear that an annotation's  
9 authoritativeness is fundamentally situational and it  
10 depends on the contextual merit. Considered alone and  
11 apart from context, annotations are, quote, "Not binding  
12 or necessarily even authoritative." Again, that's from  
13 Yamaha.

14 A common sense assessment of the annotation's  
15 contextual merits depends on several factors, which I'm  
16 going to go through: One, the thoroughness evident in its  
17 consideration; two, the validity of its reasoning; three,  
18 its consistencies with earlier and later pronouncements;  
19 and four, any other factors that might suggest its power  
20 to persuade.

21 Applying the first factor, the annotation is  
22 anything but thorough in its analysis. The portion of the  
23 annotation that the Department references cites to just  
24 one statute in one case, neither of which relate or  
25 address the issue here, which is whether it's a service or

1 a lease. The statute it cites to is Revenue & Taxation  
2 Code section 6094, which is about resale certificates.  
3 6094 says nothing about leases as distinguished from  
4 services. And it's not a matter of timing because that  
5 section was codified long before the annotation in 1994.  
6 It was codified in 1980.

7 And more important than all of that, is what the  
8 annotation doesn't consider in its analysis. The  
9 annotation doesn't consider the statute that's at play  
10 here, which is Section 6006. And it doesn't consider the  
11 regulation 1660. The one case that the annotation cites  
12 to is Entremont, a decision --

13 Is it helpful if I spell that? Entremont.

14 THE STENOGRAPHER: Yes, it would be. Thank you.

15 MS. BRESLOW: E-n-t-r-e-m-o-n-t. I'm going to  
16 say it a little French. I don't know.

17 It's a decision from 1939 about whether a private  
18 carrier charged the state's Department of Public Health  
19 the correct rate required by the state's Railroad  
20 Commission. The annotation has a block quote from  
21 Entremont where -- it's in context about the specific  
22 contracts at issue, whether they were for the  
23 transportation of property over public highways or for the  
24 leasing of trucks. And it was all within the context of  
25 the Highway Carriers Act.

1           In concluding that the contract was not for the  
2 lease of equipment, the court determined that because the  
3 lessor provided an operator, quote, "Possession and  
4 control of the trucks did not pass to the Department  
5 because that control didn't pass. It wasn't a lease."  
6 And also a factor of some importance was the Department  
7 had, quote, "No power to discharge or select the drivers."  
8 Entremont then has nothing to say about distinguishing in  
9 the sales and use tax context leases from services. But  
10 even applying the decision, it supports the taxpayer's  
11 position. There is nothing in the decision about the  
12 option to operate the trucks with or without a mandatory  
13 operator. Instead the focus was on who, under the  
14 agreement, provided the drivers and who had control over  
15 their work.

16           Here, under the agreements, USA Hoist, again,  
17 provided the operators and had complete control over their  
18 selection and discharge. They decided who hired the  
19 operators. They decided who fired them. But also, they  
20 indemnified the general contractor from any sort of harm  
21 that would happen because of the trucks. And I'd like to  
22 point to a section of the exhibits, page 391, which  
23 includes an example of an indemnification clause. This is  
24 an example of where USA Hoist indemnified the general  
25 contractors from any harm. This is, again, similar to how

1 it functioned in the Entremont decision where Entremont  
2 indemnified the Department from any sort of harm from the  
3 trucks.

4 Applying the second factor of Yamaha, the  
5 annotation's reasoning is hallmarked by flawed premises  
6 and flawed logic. Its analysis distinguishes between  
7 three situations: One, in which no operators provided; a  
8 second in which an operator is always provided; and a  
9 third in which the person desiring to use the property has  
10 the option to take the equipment with or without an  
11 operator. The annotation's author, like everyone here,  
12 considered the first, obvious, as a lease, and the second  
13 as a service. It's the third situation that gave the  
14 annotation's author difficulty, and which created the  
15 problem that we're dealing with here.

16 The annotation's author reason that because in  
17 this third situation the counter-party can rent equipment  
18 without an operator or has, quote, "Power of selection."  
19 The lessee has control over the operator rendering the  
20 transaction a lease. The annotation pulls the term power  
21 of selection from Entremont, but it puts it in the wrong  
22 context. It uses it out of context. And I'm going to  
23 read a long block quote from Entremont because I think  
24 it's important to understand where the annotation is  
25 pulling this from and how it was used in the context of

1       that case.

2                 Quote, "Although the solution of the problem is  
3       not entirely free from doubt, it's our opinion that the  
4       contract did not constitute the renting or the leasing of  
5       equipment to the Department, but was a contract calling  
6       for the transportation of property by motor vehicle by  
7       Entremont. This conclusion follows from the fact that  
8       under the contract, the possession and control of the  
9       trucks and the operators thereof, did not pass to the  
10       Department. The operators did not become the employees of  
11       the Department. But such possession and control remained  
12       in Entremont. The chief characteristic of renting or  
13       leasing is the giving up of possession to the hirer, so  
14       that the hirer and not the owner uses and controls the  
15       rented property."

16                 The record is clear that the only supervision  
17       exercised by the Department over the operators of the  
18       trucks was to direct them where to load and unload  
19       materials hauled, when to go on or leave the job, and to  
20       inform the operators whether the load should be dumped or  
21       spread. The Department had no power to discharge the  
22       drivers. That power and the power of selection rested in  
23       Entremont. That is a factor of some importance in  
24       ascertaining whether Entremont or the Department  
25       controlled the operators.

1           Again, the Department has misconstrued in its  
2           annotation Entremont's reference to power of selection.  
3           They consider it to be a mandatory requirement that the  
4           provider of the equipment always provide an operator. But  
5           in Entremont the power of selection was about who could  
6           hire these people, who could fire them, who employed them.  
7           And USA Hoist employs the operators. They hire them.  
8           They fire them. They have all control over their  
9           operation and their employment. But even so, the  
10          Department's reasoning in the annotation doesn't follow  
11          logically. Just because an operator can be negotiated to  
12          be included with the equipment doesn't mean necessarily  
13          that it's the counter-party that has the power of  
14          selection. It could be that due to timing there's  
15          operator availability issues, or maybe the parties could  
16          not reach what would be otherwise considered a fair price.  
17                 Instead, the terms of the agreement itself and  
18          the reality of working at a job site decide who control  
19          over the equipment. This, if anything, is the true lesson  
20          of Entremont that whether it's a lease or a service  
21          depends upon who has control of the property, meaning who  
22          can fire, who can hire, who's responsible if the operator  
23          makes a mistake, that indemnification clause that I  
24          pointed to earlier.  
25                 The nature of a sales tax suggests another

1 problem with the Department's reading of the annotation's  
2 reasoning. To the extent it implies a mandatory  
3 requirement, the Department seems to look outside the  
4 agreement to determine whether it's mandatory. Whether an  
5 operator is mandatory is simply a function of the parties'  
6 agreed terms. The parties decide whether an operator is  
7 required. And if they decide one is required, then they  
8 include an operator in the terms of their agreement. In  
9 other words, the taxpayer's interpretation of mandatory  
10 turns on the terms of a given transaction or agreement.  
11 Again, this is the most practical way to read Entremont.  
12 Here, the parties agree that USA Hoist would provide an  
13 operator, and we know that because of the charges for an  
14 operator included within the agreements which, again, the  
15 Department doesn't contest.

16 Finally, the last factor in Yamaha is that the  
17 annotation has not authoritative weight because it lacks  
18 consistency with quasi-legislative guidance in case law.  
19 30 years ago an attorney for the Department published this  
20 informal letter, this annotation, stating her opinion  
21 which contradicts the regulation. Giving this annotation  
22 weight would allow the Department to contravene a  
23 regulatory body with expressly delegated authority from  
24 the legislature. And this is the frustrating feature of  
25 this litigation is that a tax attorney in the Department



1 can speak a hypothetical litigation position into  
2 existence without really understanding the Entremont case  
3 without thorough reasoned or consistent analysis, and then  
4 30 years later the Department cites to it as controlling  
5 authority.

6 The annotation should be given no weight so that  
7 it doesn't contradict the quasi-legislative authority, the  
8 regulation, and the statute. Alternatively, even if it's  
9 determined that an operator must be mandatory to treat a  
10 transaction as a taxable -- as a nontaxable service rather  
11 than a taxable lease, USA Hoist operators were, for all  
12 intents and purposes, mandatory for the jobs at issue.  
13 Because construction hoists are dangerous and complicated  
14 machinery, there are strict OSHA-type laws regulating the  
15 operation of construction hoists. Under 8 CCR  
16 1604.26(c)(1), which we provided as Exhibit 29, we  
17 provided this as an exhibit because it's a nontax statute.  
18 So we wanted to make sure you had a copy of it.

19 It says that, quote, "Hoist shall be operated  
20 only by a competent authorized operator in the car or  
21 stationed adjacent to the driving machine." Therefore,  
22 not anybody could just operate the hoist. Only a  
23 specifically authorized or trained individual can control  
24 the hoist. And importantly, the general contractors don't  
25 have access or didn't have access to a competent

1 authorized operator.

2 If you again see the affidavits that we  
3 referenced to earlier, Exhibits 8 and 11, line 7 -- which  
4 we turned to earlier -- the general contractors did not  
5 have access to a licensed or qualified union operator and  
6 couldn't take control of the hoist. Why did the general  
7 contractors not have access to operators? The short  
8 answer is union requirements. In the California  
9 construction industry, it's very onerous or even  
10 impossible to obtain construction permits or to compete in  
11 bidding for a significant construction project without  
12 being a signatory to the California Operating Engineers  
13 Union. I'll refer to as the union.

14 Becoming a signatory to the union means agreeing  
15 to comply with union guidelines, include using only union  
16 employees for a job. At the same time to avoid being  
17 limited by the restrictions of the union, some general  
18 contracts prefer not to be a signatory. And that's what  
19 happened for the jobs at issue. The general contractors  
20 wanted to be able to represent that it was a union job in  
21 the bidding process which helps their chances of winning.  
22 But they also didn't want to be under the restrictions of  
23 being signatory to the union.

24 So how did the general contractors get around  
25 this? They used union subcontractors for some jobs, and

1 even signed a project labor agreement with Union 12 or 39,  
2 where they agreed to use union subcontractors. Therefore,  
3 due to these union constraints, the general contractors  
4 did not have access to a, quote, "Competent authorized  
5 operator that's required under the California regulation,"  
6 and had no option but to use USA Hoist union operators for  
7 the jobs at issue. However you want to phrase it,  
8 mandatory, required, necessary, the general contractors  
9 had to use USA Hoist operators.

10 When USA Hoist and the general contractors  
11 entered into the agreements for the jobs at issue, the  
12 parties explicitly agreed that USA Hoist was providing a  
13 turnkey solution that included an operator because the  
14 general contractors didn't have access to one. The  
15 general contractors relied upon USA Hoist to provide that  
16 operator. The general contractors for job numbers 9364  
17 and 9398 even attested to that, which is again in the  
18 exhibit that you've already referenced, 8 and 11 in  
19 line 5. USA Hoist provided the general contractor a  
20 construction hoist with a mandatory operator.

21 The Department assumes that the general  
22 contractors couldn't have obtained an operator -- sorry --  
23 could have obtained an operator from someone else, but  
24 there's no factual support for this. And even if it were  
25 true, it doesn't make these jobs leases. To constitute a

1 taxable lease, the property must be, again quoting the  
2 Regulations section 1660(a)(1), "Operated by or under the  
3 direction and control of the person or his or her  
4 employees." This means that for a transaction to  
5 constitute a taxable lease, a lessee's employees must have  
6 direction and control. And if USA Hoist general  
7 contractors had hired some third party, then the hoist  
8 wouldn't be operated or under the direction and control of  
9 their employees.

10 We disagree with the Department's insertion of a  
11 mandatory requirement that doesn't exist in the statute or  
12 regulation. But even if it does imply, it is satisfied  
13 for the jobs at issue because USA Hoist was required to  
14 provide an operator by the agreement and duty union  
15 restrictions. In determining taxability, each agreement  
16 or job should be considered separately. This is one of  
17 the issues with the Department's interpretation, and this  
18 is a basic tenant of indirect taxes. Here, each job has a  
19 separate agreement. They're separate invoices. They are  
20 with different customers or general contractors. The jobs  
21 at issue, they're separate and independent transactions  
22 and should be considered as such.

23 The Department takes the position that taxability  
24 depends upon the entirety of the taxpayer's transactions.  
25 In other words -- and I'm quoting from the Appeals

1 Bureau's determination -- "If USA Hoist did not always  
2 provide its hoist rental customers with an operator," end  
3 quote, then all jobs, including jobs where the operator  
4 was provided, are treated as a lease of tangible personal  
5 property. The practical application of this is untenable.  
6 You could have, for example, a job, three different  
7 contracts starting in 2018, '19, and '20 where a lessor  
8 engages in three separate transactions to provide  
9 equipment to three different lessees.

10 So three different contracts. Three different  
11 general contractors each starting at different points in  
12 time. And under the Department's interpretation, even if  
13 the agreements for the first two indicate that an operator  
14 is mandatory, the agreement says it. It's obvious that a  
15 mandatory operator had to be provided. If in this third  
16 agreement with a different customer, the lessee provided  
17 its own operator, then suddenly the taxability of those  
18 earlier transactions that happened years before now  
19 change. This interpretation has no basis in law, and it  
20 creates significant compliance issues for a taxpayer.

21 A taxpayer, again, could fully intend in 2018  
22 that it was going to provide an operator for all future  
23 agreements and then suddenly in 2020, maybe they don't  
24 have access to an operator anymore. And so now the  
25 general contractor has to provide it, and the tax

1 treatments of those earlier transactions that were fully  
2 completed, tax was not collected, now changes. If the  
3 Department were audited for this three-year period, it  
4 would face a potential assessment for the first two leases  
5 simply because the third allowed the lessee to provide an  
6 operator.

7 This is an unreasonable interpretation of the  
8 law. Instead it should be any sort of analysis with  
9 taxability should be performed on a job-by-job basis.  
10 Viewing the transactions on a job-by-job basis, USA Hoist  
11 provided the operator for the jobs at issue. It was not  
12 under -- it was directed completely under their control  
13 for the jobs at issue. So that's the first issue. We've  
14 identified four. That's the first issue.

15 Let's move onto the next argument, and this is an  
16 alternative position to that one. So it's an alternative  
17 to the lease service issue. And this and all the  
18 following issues I'm going to address here are only  
19 relevant if you determine that this is, in fact, a lease.  
20 But it's also relevant to all the other jobs where USA  
21 Hoist did not provide an operator. To the extent that USA  
22 Hoist paid upfront sales or use tax on the cost of an item  
23 lease in substantially the same form, it was not required  
24 to collect and remit sales tax on the lease stream.

25 And this is true for several ancillary items,

1 including communication systems and tie-in attachments.  
2 The California statute clearly provides that a taxable  
3 sale, quote, "Or purchase does not include a lease of,"  
4 quote, "tangible personal property leased in substantially  
5 the same form as acquired by the lessor," end quote, if  
6 the lessor paid sales tax reimbursement or use tax  
7 measured by the purchase price of the property. And  
8 that's in California Revenue & Taxation Code  
9 section 6006(g)(5) and section 6010(e)(5) and then the  
10 California Code of Regulations 1660(c)(2).

11 There's, therefore, no sales and use tax due on  
12 the lease stream if two requirements are met. One, the  
13 lessor paid sales tax on the items, and two, they are  
14 leased in substantial the same form. There's no dispute  
15 here as to the first requirement. By the Department's own  
16 admission, USA Hoist paid sales tax when purchasing  
17 communication systems and tie-in attachments. And that  
18 support is available at Exhibit 12. So at issue is  
19 whether they were leased in substantially the same form.  
20 Let's focus on what the legislature intended when they  
21 adopted this exclusion.

22 The legislature wanted to ensure that a lessor  
23 doesn't evade tax on most of the tax base. They don't  
24 want taxpayers buying parts, fabricating them into  
25 something that's worth way more, and then evading the tax

1 by not paying tax on the subsequent lease stream. And  
2 this was explained in the 1973 case of Ladd versus Board  
3 of Equalization. It focused on a lessor that constructed  
4 and rented houseboats. In that case, the taxpayer bought  
5 materials, manufactured it into a houseboat, paid sales  
6 tax on the materials, but then leased it and didn't pay  
7 sales tax on the lease stream. There, there was obviously  
8 a new item of substantially increased value. They built a  
9 houseboat. They turned these materials into something of  
10 way more value and of different form.

11 Even using the Department's published guidance,  
12 the focus is on whether there's a change in value and  
13 function. Per CDTFA Publication 46 from 2020, property is  
14 not leased in substantially the same form when one, the  
15 lessor makes significant changes to the property after  
16 acquiring it that effect the functional capabilities of  
17 the property; two, there's a relatively significant amount  
18 of fabrication labor performed on the property; and three,  
19 there's an appreciable change in value accompanying by  
20 that change. Again, our focus for this issue is on the  
21 tie-in attachments and the communication systems, which  
22 USA Hoist purchased from third-party providers, shipped to  
23 the job site for use by the general contractor.

24 I think to better understand this, I'd like to  
25 point you to a couple of the exhibits that show photos of



1 these items so you can better understand them. So if you  
2 could turn to Exhibit 13, there's an image of tie-in  
3 attachments there. Tie-in attachments are metal or steel  
4 anchors that attach the hoist to the building during  
5 construction and allow the cage of the hoist to be  
6 positioned at a maximum height. For example, if the  
7 building slants aren't flushed with the travel of the  
8 hoist, additional installation might be required and you  
9 would use these tie-in attachments.

10 The other item, again, is communication systems.  
11 And if you turn to Exhibit 14, the next exhibit, you can  
12 see an image of that. The communication systems are call  
13 boxes. They allow the operator of the hoist to be able to  
14 talk, to be able to communicate with the base and the  
15 floors of the building as the construction goes on. As  
16 part of the communication system, a call box wire runs  
17 along the side of the hoist from the different floors to  
18 the base. Although the wires of the communication systems  
19 may have been assembled into different configurations to  
20 fit inside the hoist, it didn't change the functional  
21 capabilities or the characterization of the communication  
22 systems.

23 The issue with the Appeals Bureau's determination  
24 is that they assumed a key fact incorrectly. The tax  
25 counsel assumed that by configuring the wires, USA Hoist

1 cut the wires, and this is wrong. There was no cutting  
2 involved. Cutting would have even rendered them unusable.  
3 They would have had to get a new communication system if  
4 they cut them. USA Hoist did not manufacture a new  
5 communication system. They just configured it to fit  
6 within the hoist.

7 I'd like to think of these as like a landline  
8 telephone that you would have in your house, the wires  
9 running from your kitchen phone through the living room.  
10 This is a same sort of function here. When you install a  
11 landline telephone in your house, you don't change the  
12 function of the phone. You're just rearranging it so that  
13 it fits within the space. And the same thing is true with  
14 these communication systems on the hoist. They're inside  
15 the hoist. Yes, they have to be able to fit, but the  
16 function of them is still the same just like the landline  
17 telephone of your house.

18 The Appeals Bureau determined that there was an  
19 increase to the functional capabilities of the property  
20 because they allowed the hoist to be used at different  
21 heights. Same with the tie-in attachments. But the  
22 question isn't whether the functional capability of the  
23 hoist changed. The question for this issue is whether the  
24 functional capabilities of the leased materials, the  
25 communication systems, and the tie-in attachments changed

1 after they are purchased and before they are leased.

2 Getting back to the requirements of Publication  
3 46, there was no change in the value of the communication  
4 systems. And this is clear from the CDTFA's guidance. In  
5 a March 1991 information bulletin, the Department stated  
6 that scaffolding is, quote, "Considered to be leased in  
7 substantially the same form in which it was acquired, even  
8 though the component may be assembled into different  
9 configurations for different customers," end quote. Like  
10 scaffolding, communication systems are just a temporary  
11 structure used to support a general contractor during the  
12 construction of the building.

13 USA Hoist didn't manufacture it, and they just --  
14 they just configured these wires to be able to fit the  
15 height of the hoist just like scaffolding is used in order  
16 to fit the configuration of the building. For these  
17 reasons, because USA Hoist paid upfront sales tax, which  
18 isn't in dispute, because these items were used in  
19 substantially the same form. They were not required to  
20 collect sales tax on the lease stream.

21 The next issue that I'll get into is specifically  
22 the grillage and the enclosures and whether those items  
23 are not subject to tax because the true object was  
24 installation labor. This is the third issue. If you look  
25 at USA Hoist agreements or payment detail, you'll see

1 separately stated charges for enclosures, grillage, and  
2 floor gates. And at first blush, an enclosure or  
3 grillage, it might sound like property, but these are  
4 bundled charges for property and installation. And this  
5 is obvious when you compare to the charges for floor gates  
6 where in the agreements there were two separate charges,  
7 one, for floor gates and another for installation and  
8 removal.

9 In contrast with the enclosures and the grillage,  
10 there's just one charge in the agreements or in the  
11 invoices, which includes both the installation and the  
12 materials. If you see exhibit page -- Exhibit 2,  
13 Appellant page 331, is an example there where you'll see  
14 that there's just one line for the enclosures and the  
15 grillage but, again, two separate lines for the floor  
16 gates, one for the installation and one for the materials.  
17 This is also present in Exhibit 3 at page 1151 and also  
18 for a different job, Exhibit 4, 437. You'll see the same  
19 thing for each of these jobs that there's one line for  
20 enclosures, one line for grillage, but two lines for the  
21 floor gates, one for installation and one for the  
22 materials themselves.

23 Because there were no separate charges for  
24 installation, obviously, that had to be included within  
25 the charge for the grillage and the enclosures. And

1 installation is not taxable under California statute.  
2 According to California Revenue & Taxation Code section  
3 6011(c) (30), 6012(c) (3), and California Code Regulation  
4 1546(a), sales prices or gross receipts excludes the  
5 amount charged for labor or services rendered in  
6 installing or applying property.

7 The Department concedes that installation isn't  
8 taxable. The auditor didn't treat separately stated  
9 installation charges as taxable in the audit.  
10 Accordingly, we have a bundled transaction here. We have  
11 the enclosures and the grillage that include both  
12 nontaxable installation and taxable lease of property.  
13 And for bundle transactions, California Regulation section  
14 1501 clearly provides that we apply a true object test.

15 To understand why the true object of these  
16 charges is clearly the labor, not the property, we have to  
17 explore these items in more detail. So I'd like to direct  
18 you, again, to some images so you can see what these items  
19 are. So if you turn to Exhibit 15, that's an image of the  
20 enclosures which are foot-high walls on each of the  
21 landing gates that are made of sheet metal. California  
22 law requires that these be here, that there be no access  
23 to the hoist within 30 inches of the travel of the hoist  
24 to ensure that, you know, no one is sticking their arms,  
25 again, outside as the hoist goes up and down. They're

1 installed on the sides of the hoist to prevent harm and,  
2 again, any sort of touching the hoist during travel.

3 For these jobs, the enclosures were anywhere  
4 between \$2,200 and \$25,000. I can -- I can point you to  
5 the pages of the agreements where those amounts are shown.  
6 The \$25,000 in my hypothetical or example is for  
7 Job No. 9304, which is at Exhibit 4, page 430. Clearly  
8 Turner Construction, who is the general contractor for the  
9 Job 9304, did not pay \$25,000 for some temporary sheet  
10 metal. They're paying for these enclosures to be  
11 installed at the job site.

12 The other item, again, at play here is grillage.  
13 So if you turn to Exhibit 16, you can see an image of what  
14 grillage is. Grillage is a custom steel. It's an  
15 I-shaped beam that sits under the hoist during  
16 construction. It's necessary to spread the weight of the  
17 load to allow it to move more easily. And, again, the  
18 charges for grillage are significant. Even \$85,000 for  
19 Job No. 9304, which is Exhibit 4, page 431. Again, the  
20 general contractor, Turner Construction, did not spend  
21 \$85,000 for steel beams.

22 Here, the true object of these items is not the  
23 sheet metal of the enclosures or the steel that comprises  
24 the grillage. The true object of these transactions is  
25 nontaxable installation labor provided by USA Hoist to

1 install these items at the job site. By comparing the  
2 significant cost of union hourly labor to the value of the  
3 actual physical items, which are little more than sheet  
4 metal or steel, the true object is clearly the nontaxable  
5 installation labor and not the property.

6 The Appeals Bureau only addressed the issue by  
7 concluding that the true object test doesn't apply because  
8 USA Hoist did not actually provide its customers with the  
9 labor that it performed in producing the property that it  
10 provided to its customers. This finding misconstrues  
11 taxpayer's position for two reasons. First, it's  
12 factually incorrect. USA Hoist was responsible for  
13 assembling the sheet metal into the enclosures, but they  
14 did it at their warehouse in Illinois decades before. But  
15 even more substantively -- and this is the point of  
16 taxpayer's argument -- which is that installation labor is  
17 what they're paying for here. These charges represent the  
18 installation labor associated with installing these  
19 property to the real property or structure at the job  
20 site.

21 The final issue that we're going to address is  
22 whether the jump-tower labor is nontaxable installation  
23 labor. Certain agreements include a separately stated  
24 charge for, quote, "Jump-tower labor," which should be  
25 treated as a nontaxable installation of hoist. As we just

1 discussed, the taxable sales price doesn't include, quote,  
2 "The amount charged for labor or services rendered or  
3 installing or applying the property sold," which is at  
4 California Code section 6011(c) (3) and in the Regulations  
5 1546(a).

6 The hoist moves vertically along the building  
7 using a tower, and I'd like to point you to Exhibit 18,  
8 which is images of what jumping is. This is an action.  
9 So it's sort of tough to show you in images what's  
10 happening here. So we have a couple of images to show the  
11 process. But the idea is that for these multi-floor  
12 buildings, USA Hoist provided a jumping service, which  
13 means adding tower sections to the building as it's being  
14 constructed to allow the hoist to reach additional floors.  
15 We often refer to it as like stacking LEGOs with these  
16 tower sections. Because of USA Hoist installation of the  
17 tower, it can move materials and men to higher floors that  
18 have not yet been built.

19 And the dispute here is not whether the charge is  
20 for property. The Department agrees that these charges  
21 are for labor. At issue is whether these charges are for  
22 the installation of the property, which is taxable, or  
23 fabrication labor for consumers who furnish the materials  
24 used, which is taxable. A sale includes fabricating of,  
25 quote, "Tangible personal property for a consideration for



1 consumers who furnish, either direct or indirectly, the  
2 materials used in the fabricating." That's California  
3 Code section 600(B).

4 And this is reiterated in the Regulation section  
5 1526(a), which that section is even called "Producing  
6 Fabricating and Processing Property Furnished By  
7 Consumers." Therefore, the statute and Reg don't state  
8 that fabrication labor is taxable. The law provides that  
9 fabricating property for consumers who supply the  
10 materials is taxable.

11 So let's start with whether USA Hoist performed  
12 fabrication labor. Fabricating or fabrication, that term  
13 is not defined by California Statute or Regulation, so we  
14 have to look to the commonly understood meaning of it,  
15 which in Black's Law Dictionary is to manufacture. And  
16 USA Hoist -- generally, a third-party can provide these.  
17 But even if they did manufacture them, the tower pieces,  
18 they were done at their job site -- or sorry -- at their  
19 warehouse in Illinois far before reaching the job site,  
20 maybe even decades before. USA Hoist's role was to  
21 install these additional tower sections at the job site.  
22 That's what the general contractor is paying for here.

23 Second, again, there's two requirements. So  
24 fine. Even if this is fabrication labor, it has to be  
25 fabrication for consumers who furnish the materials used.

1 Its customers, the general contractors, don't furnish  
2 materials used in jumping or installing the tower. An  
3 example of taxable fabrication labor I think of  
4 reupholstering a couch. You bring a couch to  
5 reupholsterer who cuts and sews fabric to cover the  
6 furniture that's provided by the customer.

7 And this is a very different situation. Not only  
8 does USA Hoist not manufacture the tower at the job  
9 site -- that happens back at their warehouse, if they  
10 manufacture it at all -- but the material is not supplied  
11 by the customer. Accordingly, these are not taxable  
12 fabrication services. The Department has conceded again  
13 that installation isn't taxable, and the installation of  
14 the hoist tower should be treated consistently.

15 For these reasons, we respectfully request that  
16 the OTA withdraw the Department's assessment.

17 And now in factual support, again, we've given  
18 you lots of documents, but we'd like to have a couple of  
19 individuals from the company provide some testimony. So  
20 we would like to move forward with that now.

21 JUDGE WONG: Let me just --

22 MS. BRESLOW: Go ahead with --

23 JUDGE WONG: -- pause for a second.

24 MS. BRESLOW: Yeah.

25 JUDGE WONG: Let's go off the record.

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(There was a pause in the proceedings.)  
JUDGE WONG: All right. Let's go back on the record.  
Please proceed.  
MS. BRESLOW: Ready?  
JUDGE WONG: You could just testify just like narratively, or you can do a question and answer.  
MS. BRESLOW: Okay.  
JUDGE WONG: At your option.

DIRECT EXAMINATION

BY MS. BRESLOW:

Q Robert, please state and spell your name for the record?  
A Robert Bailey, R-o-b-e-r-t B-a-i-l-e-y.  
Q And where are you currently employed?  
A I am employed at USA Hoist company.  
Q How long have you been employed by USA Hoist?  
A Since 2004.  
Q And what is your current job title?  
A I am the president and CEO.  
Q Can describe your duties as president and CEO?  
A I am essentially the general manager of the company. I am in charge of every aspect of the company from operations to sales to accounting, engineering, et

1 cetera.

2 Q Do you sign agreements with general contractors?

3 A Yes. One of my specific duties is I sign almost  
4 every contract that goes through our company.

5 Q And have you held any other titles with USA  
6 Hoist?

7 A Yes. Prior to this, I was vice president and  
8 general manager from 2010 until a year ago. I held the  
9 identical duties. And before that, I was the branch  
10 manager for our West Coast branch.

11 Q And can you tell me generally about USA Hoist  
12 business in California? What does it do?

13 A USA Hoist supplies construction hoists to general  
14 contractors. We provide vertical transportation on mid to  
15 high-rise buildings. We have -- we provide typically,  
16 relatively, turn-key operations where we do everything  
17 from the sales. We sell -- we sell the hoist, sign the  
18 contract. We do all of the engineering. We do the  
19 installation, the jumping, the service, the maintenance,  
20 the dismantles.

21 And then in many of our agreements, we also  
22 provide what we call the turn-key operation, which is we  
23 do all of that and we operate the construction hoist. So  
24 from start to finish everything a general contractor needs  
25 to get men and material up the building in order to build

1 the building.

2 Q And just correct one thing, you don't sell the  
3 hoist; correct? You provide them as part of a --

4 A No. We provide them as part of the contract.  
5 Once the hoist goes to a job, and then the hoist and its  
6 tower and all of its appurtenances comes back to us, it's  
7 cleaned up and goes on to the next job, hopefully.

8 Q I referred to earlier periods in issue. Are you  
9 familiar with the Department's Notice of Determination and  
10 the periods that it covers, January 1st, 2013, through  
11 March 31st, 2016?

12 A I am.

13 Q And during those periods in issue, did USA Hoist  
14 perform jobs as a subcontractor in California?

15 A Yes.

16 Q For those periods in issue, was USA Hoist  
17 required to provide an operator for certain jobs?

18 A Yes.

19 Q If I name some of those job numbers and the  
20 projects, can you confirm whether they provided an  
21 operator?

22 A Yes.

23 Q So for Wilshire Grand Hotel, the demolition and  
24 the construction, which was with the general contractor,  
25 Turner, Jobs Nos. 9179 and 9304, did you provide an

1 operator for those?

2 A Yes, we did.

3 Q Masonic Temple, which was with the general  
4 contractor, W.E. O'Neil Construction Company, Job No.  
5 9398, did you provide an operator for that job?

6 A Yes.

7 Q Avenue of the Stars, Westfield, Century City, is  
8 that the building, which was with the general contractor,  
9 NorthStar, Job No. 9364, did you provide an operator for  
10 that job?

11 A Correct.

12 Q And for the entirety of these jobs, for the  
13 length of the job from start to finish, did USA Hoist  
14 provide operators?

15 A Yes.

16 Q What would happen if USA Hoist operator didn't  
17 show up for work?

18 A The construction hoist would not run.

19 Q And did you ever use, like, a roving operator?

20 A If an operator didn't show up for work, we would  
21 have a roving operator. If we had some notice, we could  
22 hire another operator to come in and takeover for them  
23 during the interim they were not going to be at work.

24 Q These individuals who are operating the hoists,  
25 were they USA Hoist employees?

1 A They were USA Hoist employees.

2 Q Even the rovers?

3 A Even the rovers, yes.

4 Q So USA Hoist would hire and terminate if they  
5 needed to, the operators?

6 A Absolutely yes.

7 Q Would the general contractor ever have the  
8 ability to fire or hire an operator?

9 A No. They weren't employed by the general  
10 contractor. They were our employees. So they couldn't  
11 hire or fire them.

12 Q Did the employees of the general contractor ever  
13 operate the hoist for these jobs at issue?

14 A No. That was expressly forbidden.

15 Q And to be clear, if I didn't already, when I  
16 refer to jobs at issue for this testimony, it's in  
17 reference to, again, those jobs that we identified at the  
18 beginning.

19 Why did the general contractors hire USA Hoist to  
20 operate the hoists? What was the benefit.

21 A The general contractors were not signatory to the  
22 International Union of Operating Engineers, and so they  
23 needed union operators to operate the hoists. So they  
24 hired us to supply the operators. They also had --  
25 there -- there was also indemnification easements. So if

1 I supplied the operators, then we have care, custody, and  
2 control of the hoists. We're able to indemnify the  
3 general contractor to a greater amount than if it was the  
4 type of job where they're the ones who supply the  
5 operators. And a lot of the general contractors choose  
6 the safer option of, hey, this is all USA Hoist's  
7 responsibility. Anything that goes wrong, it's USA  
8 Hoist's problem.

9 Q Let's say someone was injured on the job site  
10 because of the hoist, would USA Hoist be responsible?

11 A That's our general liability insurance. That's  
12 our responsibility, yes.

13 Q And was USA Hoist a member of the union you  
14 referred to earlier?

15 A Yeah. Well, we're signatory to the International  
16 Union of Operating Engineers in Southern California and  
17 Northern California, which means we cannot supply anyone  
18 besides an operating engineer to run the construction  
19 hoist because the operating engineers claim that work.  
20 And so we've made an agreement with them that the only  
21 people that we will hire to run those construction  
22 elevators are operating engineers, licensed-trained  
23 operating engineers.

24 Q I'll come back to the union in little bit more in  
25 a minute.



1           A    Okay.

2           Q    But let's stick with the operators for a second.  
3           So what were the duties of the operators?

4           A    The operators were -- their main duty is to run  
5           the hoist during the day.  If people show up to the bottom  
6           of the construction site, they're in charge of taking them  
7           up and down.  They would schedule deliveries, when there  
8           was more material-focused equipment.  They were in charge  
9           of minor maintenance of the hoist, you know, actual  
10          mechanics; but making sure things were clean; making sure  
11          there was no debris on top of the hoist; reporting any  
12          service issues.

13                  And they were ultimately responsible if there was  
14          a malfunction with the hoist.  They were in charge of  
15          shutting it down until we could get a technician to repair  
16          it, and daily checklist just to ensure the safe operation  
17          of the hoist at the start of the shift and any time there  
18          was a shift changeover.

19          Q    So who directed and controlled the hoist?

20          A    USA Hoist.  The operators directed and control  
21          the hoist.

22          Q    And how did USA Hoist direct and operate the  
23          hoist?  Did the operators have to complete any sort of  
24          documents like time tickets or checklists?

25          A    Operators were required to do daily or weekly

1 time tickets, which we used to -- for payroll purposes and  
2 for billing purposes. And they were also required to do  
3 daily checklists, which said, hey, let's check to make  
4 sure the hoist is working with safe operation. So, yes.

5 Q And if there were some sort of issue with the  
6 hoist, how would it be handled?

7 A If there's a malfunction with the hoist, the  
8 operator would shut the hoist down. If it was a minor  
9 malfunction, lots of our operators were capable of  
10 repairing the small malfunction. If a gate cable was  
11 broken or a switch was out of whack, they could repair  
12 that. Otherwise, they were responsible for shutting the  
13 hoist down, take the keys out of the hoist. Nobody can  
14 use it until we get one of our technicians out to do the  
15 repairs.

16 Q You've already indicated that USA Hoist was a  
17 signatory to the California Operators Union. To your  
18 knowledge, was the general contractor a signatory to a  
19 California union?

20 A No. Otherwise, they wouldn't have hired me to do  
21 this.

22 Q For the jobs at issue, could the general  
23 contractor have used a non-union operator for the jobs at  
24 issue?

25 A No.

1 Q And what would happen if the general contractor  
2 had used a non-union operator for the jobs at issue?

3 A Well, it was primarily union labor on the job.  
4 And so our expectation is that none of the other union  
5 trades would use the construction hoist, and construction  
6 would stop on there.

7 Q When USA Hoist bid on the jobs at issue, when  
8 they entered into these agreements, did the parties know  
9 whether the general contractor could provide its own  
10 operator?

11 A Yes. When we bid, we were -- we bid with the  
12 intention of, hey, you will supply operators on this  
13 contract or not.

14 Q So when you signed the agreements for the jobs at  
15 issue, the parties agreed that USA Hoist was required to  
16 provide an operator?

17 A Yes.

18 Q And could anyone other than USA Hoist union  
19 operators have operated these jobs per the agreements?

20 A No, not per our agreements.

21 Q Were the operators mandatory in your view --

22 A Yes.

23 Q -- for these jobs?

24 A For these jobs, yes.

25 Q So that's all with respect to the hoist. I'd

1       like to talk a little bit about the communication systems.  
2       When you purchase the communication systems, did USA Hoist  
3       pay sales or use tax on those items?

4             A     Sales tax.

5             Q     Can you describe the appearance and function of  
6       the communication systems when you purchase them?

7             A     The communication systems are usually these  
8       orange boxes, about this big, plastic enclosures. You  
9       can't even take them apart. And they have a couple of  
10      plugs on the bottom where you plug one of the wires from  
11      the bottom floor in, and then plug another wire that's  
12      going to go up to the top floor. And they are waterproof.  
13      And they have one little button on them where you press  
14      the button and talk, and all the other call boxes can hear  
15      what you're saying.

16            Q     Did you cut the wires of the communication  
17      systems as part of the setup?

18            A     No. They are actually like a coax-type wire. So  
19      if you cut them, they're broken. They have these special  
20      little connectors on the end that plug into the call boxes  
21      themselves. So if someone cut the wires, we had to buy  
22      more wires.

23            Q     Did you make any other changes to the  
24      communication systems after purchase?

25            A     No. The call boxes are setup so they literally

1 just hang on a screw at each floor, and then you plug one  
2 wire in from the bottom -- from the floor below and plug  
3 another wire in. And sometimes you would bundle up the  
4 cable and put a little zip tie on it. That's it.

5 Q So then did you perform any labor on the  
6 communication systems after purchasing them?

7 A No fabrication labor. All we performed was the  
8 labor of hanging them up on the building and --

9 Q Installing them?

10 A -- installing them. Yes.

11 Q Did the value or the function of these  
12 communication systems change after purchase until lease?

13 A No.

14 Q So let's talk enclosures now?

15 A Okay.

16 Q Can you describe for our benefit what an  
17 enclosure is? I know we went a little bit over it  
18 earlier.

19 A The enclosures are on each side of the  
20 construction hoist gate. You have to protect people from:  
21 A, just falling out of the building, obviously; but also  
22 from reaching their hands over or accidentally backing up  
23 with a two-by-four so as the hoist travels next to the  
24 building it doesn't whack someone. And, you know, if --  
25 the hoist travel pretty fast, about 300-foot a minute.

1 And you have a hand out and you -- it hit your hand, your  
2 hand is gone, you know. So they're intended as just  
3 protection.

4 Q So I'd like to point you to an exhibit. It's  
5 Exhibit 2.

6 MS. BRESLOW: For everyone's benefit, at  
7 page 345 -- Bates Stamp page 345.

8 BY MS. BRESLOW:

9 Q Just to refresh your memory, Robby, so are those  
10 your signature down there?

11 A Yes.

12 Q Are you familiar with this --

13 A You know what, potentially, that's my father's  
14 signature because he was the president of the company at  
15 the time. But it would have been reviewed by me and then  
16 his signature.

17 Q Are you familiar with this job?

18 A Yes.

19 Q And if we look to page 345, do you see the  
20 different charges here for -- yup, four gates and  
21 enclosures? And you see that there are separate charges  
22 for the floor gates versus the enclosures?

23 A Yes.

24 Q I'm sorry. Did the agreements, that include  
25 charges for enclosures?

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A Yes.

Q And were there separate charges for the installation of the enclosures?

A No.

Q So did the charges for the enclosures include labor?

A Yes, that was the intention.

Q And what type of labor?

A Installing them.

Q How much of the charge for the enclosures was for the physical property versus the installation?

A The majority of it is for the installation labor. A lot of these enclosures can be anywhere from, you know, 20, 30 years old to built a month ago. But they're still enclosures and, for the most part, they last forever. So they go up to one job get -- spend their time on that one job, leave the job, go back to our yard, get cleaned off, and go back to the another one. So the cost of the enclosures is minimal in comparison. The cost we propose on those is supposed to capture the installation.

Q So you reuse the enclosures then?

A Over and over and over again.

Q And did USA Hoist manufacture or put them together?

A Yes. We manufactured them at our plant in

1 Illinois.

2 Q And do you have any idea of timing of when you  
3 manufactured those?

4 A No. We have hundreds of construction elevators  
5 and every construction elevator gets 10 to 90 floors, and  
6 each floor gets two of these. And so we have tens and  
7 thousands of them, and they're kind of the same thing.  
8 And so we use them over and over. So as I said, it could  
9 have been built in 1994. It could have been built in  
10 2012. We don't know. So --

11 Q And let's move on to the grillage. Again, we  
12 gave a description earlier of what the grillage is, but  
13 can you provide some insight as to what grillage is?

14 A On taller buildings, the construction hoist get  
15 pretty heavy. Each of the five-foot tower sections, like  
16 little LEGO pieces, weigh about 500 pounds. And so if  
17 you're going 500 feet, that's 100 tower sections. Now  
18 you're 50,000 pounds plus the weight of the hoist, things  
19 get heavy. And lots of times directly underneath the  
20 hoist, the load starts getting substantial.

21 So the grillages are essentially just some steel  
22 beams to spread the load out over whatever concrete pads  
23 or foundations they have at the base of the hoist. That  
24 way we don't get the concentrated point loads. We get to  
25 spread them out over a larger distance.



1           Q    So, again, the agreements included charges for  
2 grillage?

3           A    Correct.

4           Q    And you just looked at that exhibit.  Were there  
5 separate charges for the installation of the grillage?

6           A    No.  The same thing with the enclosures.  It was  
7 envisioned as the one charge is -- captures the entire  
8 enclosure, installation and supply.

9           Q    So the charges that you saw there on the invoices  
10 were agreements for grillage included labor?

11          A    Yeah, primarily labor.

12          Q    And like the enclosures, did USA Hoist reuse the  
13 grillage on multiple jobs?

14          A    Yeah.  They are essentially just standard I-beams  
15 of different lengths, and we reuse them over and over  
16 again.  You go to our yard, you'll see a giant 24-foot  
17 tile -- tall 40-foot long pile of these beams.  So when a  
18 contractor needs them, we go out, look.  What beams do we  
19 have?  Okay.  We have these.  Will those work?  Let me  
20 check with the engineering and pluck them out of the pile  
21 and send them off.  Every once in a while, if we're fancy,  
22 we paint them.  So --

23          Q    So did USA Hoist manufacture or put together the  
24 grillage?

25          A    No.  There's no manufacturing.  The most we would

1 do is cut them to length.

2 Q And any sort of manufacturing or cutting, where  
3 would that have occurred?

4 A Primarily at our Illinois, outside of Chicago  
5 plant.

6 Q So the floor gates -- again, those agreements,  
7 they had charges for floor gates that we just went  
8 through. Did the agreements for the jobs at issue include  
9 charges for installation of floor gates?

10 A The floor gates are separated, so they have a  
11 charge for the installation. They have a charge for the  
12 supply of them.

13 Q Why? Why were there separate charges for the  
14 installation of the floor gates but not the grillage or  
15 the enclosures?

16 A Originally with construction hoists when they  
17 first started getting used back, apparently, in the 70s,  
18 the floor gates and the enclosures and the grillages were  
19 all generally supplied by other people, the contractors.  
20 And they would make them out of plywood or they --  
21 whatever they had. And as the industry has grown and come  
22 about, I think practices changed. And the general  
23 contractors first found that, hey, instead of us making  
24 plywood gates, would you guys supply us these metal gates  
25 and we'll just put them in? And so, you know,

1 construction hoist companies started doing that.

2 And then the next step was a request to, hey,  
3 would you guys put these gates in for us? And so we put  
4 the gates in. And this was honestly a little before my  
5 time. And then they didn't want us to do the enclosures  
6 because it involved removing some of the perimeter  
7 protection that was existing. You know, like, they'd have  
8 little handrails up on the side of the building so you  
9 don't fall out. But then the methodology changed, and  
10 they said, well, we'd like you guys to supply and install  
11 enclosures that attach to the gates. And so that started.

12 And, similarly, the grillages were originally --  
13 you know, and sometimes the contractor would supply it.  
14 Sometimes the construction hoist would supply it. And  
15 then it got more formal as people started getting,  
16 actually, engineered and stamped drawings. Well, you want  
17 to make sure that your structural engineer knows exactly  
18 what size you're going to supply to verify that the loads  
19 are applied appropriately to the foundation. And so it  
20 was kind of an evolution of what was supplied. And  
21 because of that evolution, I don't think it got split up  
22 on the kind of standard template that is offered.

23 Q So it's just an evolution of the bidding  
24 templates?

25 A Yes.

1           Q    So let's move on to the last item, which is  
2 jumps. Did the agreements for the jobs at issue include  
3 charges for, quote, "Jump-tower labor?"

4           A    Yes.

5           Q    And can you describe what jump-tower labor is?

6           A    They're just jumps. And with those, you know,  
7 once you get a building up to the like fifth, sixth,  
8 seventh floor, nobody wants to walk anymore. And so we  
9 come in and we install the construction hoist. And maybe  
10 depending on the logistics of the building, we install it  
11 to 40-foot or 6-foot, somewhere there. But if you're  
12 building a 500-foot tall building, well, they keep  
13 building eventually the construction hoist has to catch up  
14 to it.

15                    So once every -- once they build up three or four  
16 or five floors -- and that just kind of depends on what  
17 the contractor has requested during the bid time -- we  
18 come out and do what's called a jump, which is almost the  
19 identical thing to the installation. We do a bunch of  
20 prep work. You know, we un-rope the counter-weight, we  
21 put the cat-head. We do a couple of other things, and  
22 then we stack the tower up.

23                    You know, a typical floor is 10-foot. And so if  
24 they're going three floors, we'll stack 30-foot of tower  
25 up. And then we go back and we hook the counter weights

1 back up. We hook the power cable back up. We do all the  
2 ancillary work to put the hoist back into service.

3 So during the bid process, the contractor says,  
4 hey, I think I will need six, nine, whatever number of  
5 jumps they need, and so we give them a price for that  
6 amount of jumps. They could theoretically ask for, hey,  
7 just give us a price for the entire installation where  
8 everything is inclusive taking us all the way to the top.  
9 But what we found over the years is we split it out as a  
10 jump price, a unit price for jumps, because they may say,  
11 hey, we want you to come out and jump us every four floors  
12 during the bid process.

13 And we would say, okay. Well, that's 10 trips  
14 out to the job. That's fine. We could give them a price  
15 to do the whole installation. But, frequently, halfway  
16 through the job they decide, oh, we'd like to have you  
17 come out every two floors. And that increases the number  
18 of trips, substantially increases the amount of labor we  
19 have to perform. So we make it a unit price of jumps, but  
20 it's separate thing than the installation to make sure,  
21 hey, we bid that we would make a certain number of trips  
22 out to your job, and this is what we're going to perform.  
23 No more or no less. Does that make sense?

24 Q It does. So the jump-tower labor is separated  
25 from the installation to ensure that you're going to get

1 compensated if there is a variable number of times you  
2 have to jump the tower --

3 A Correct.

4 Q -- or install it?

5 A Or if it diverges from that set amount that we  
6 spell out in the contract.

7 Q So did the agreements for the job at issue  
8 include separate charges for installation of the tower?  
9 And I could show you.

10 A That's the --

11 Q It just says jump-tower labor?

12 A It's -- it's jumps. That's what -- that's what  
13 the installation is.

14 Q So how much of that charge then for jump-tower  
15 labor was for the physical property versus installation?

16 A It was only for the installation.

17 Q And did the customer provide the tower or the  
18 materials?

19 A No. That all comes from USA Hoist.

20 Q I think we've covered this already, but did USA  
21 Hoist manufacture the tower sections?

22 A Similar to the floor enclosures, we manufacturer  
23 a lot, not all of them. But we manufacturer a lot of them  
24 at our plant outside of Chicago. And we have tower  
25 sections that are still in service from the late 1970s on.

1 We're in the mist of fabricating some today. So they're  
2 constantly getting fabricated.

3 Q So you did not manufacture any tower sections in  
4 California?

5 A No.

6 Q The agreement includes separate charges for the  
7 installation of the hoist. What's the difference between  
8 the installation hoist versus the jump -- jumping or the  
9 jump-tower labor?

10 A The installation is almost identical except you  
11 get to do it on the ground for the most part instead of 2  
12 or 300 feet in the air. And the installation -- the only  
13 difference is you actually have to put the construction  
14 hoist on the tower and put the two counter-weights.  
15 Typically, they're counter-weighted construction hoist on  
16 the tower as well. So it's an additional labor to do the  
17 installation, and -- and it's a little more complicated  
18 because you're lifting these big pieces of equipment onto  
19 the tower.

20 Q And Robby, just all this we spoke into today  
21 is -- is based on your experience. You've worked on these  
22 job sites?

23 A From 2004 to 2011, I was branch manager. But it  
24 was a smaller branch, so I was also on the field. I did  
25 installations, dismantles, service, maintenance, even --

1       you know, all of it. So -

2               MS. BRESLOW: That's all the questions I have.

3               MR. BAILEY: Okay.

4               JUDGE WONG: Thank you.

5               I will turn it over to CDTFA and also the Panel  
6 for any questions they might have for Mr. Bailey.

7               CDTFA, did you have any questions for Mr. Bailey?

8               MR. NOBLE: We do not.

9               JUDGE WONG: Thank you.

10              I'll turn to my co-Panelists for any questions  
11 for Mr. Bailey, starting with Judge Aldrich.

12              JUDGE ALDRICH: Good afternoon, Mr. Bailey.  
13 Thank you for being here. So I do have a few follow-up  
14 questions for you.

15              First, if you could direct him to Exhibit 16, the  
16 grillage photo.

17              MS. BRESLOW: Yeah.

18              JUDGE ALDRICH: So are you there?

19              MR. BAILEY: Yes.

20              JUDGE ALDRICH: Thank you. I see on the side of  
21 the photo that -- there's two photos. I'm referring to  
22 the top one. There's -- it looks like four I-beams, two  
23 of which are smaller in the middle and attached to the two  
24 other longer pieces.

25              MR. BAILEY: Like an H.



1           JUDGE ALDRICH: Like an H. And so it looks like  
2 there's bolts going between the longer pieces and the  
3 shorter pieces. Is that accurate? How are those affixed,  
4 I guess, is my question?

5           MR. BAILEY: Yeah. I would say those are --  
6 those are bolted together. Same with the ones at the  
7 bottom. Kind of a standard configuration of these.

8           JUDGE ALDRICH: And where would that happen?  
9 Would that at the construction site or at the USA Hoist --

10          MR. BAILEY: That's -- that would have happened  
11 at USA Hoist site.

12          JUDGE ALDRICH: And then are those grillages  
13 affixed to any sort of foundation in that photo?

14          MR. BAILEY: Yeah. What you do is they have  
15 little clips that -- I'm sorry -- that go over the web of  
16 the beam, and then you just anchor them to the concrete  
17 with standard wedge anchors or, like, Hilti anchors. Big,  
18 big wedge anchors, though. So you drill into the  
19 concrete, pound the wedge anchor in, and tighten it up.

20          JUDGE ALDRICH: Okay. And would this shape be  
21 negotiated during the contract phase? How would USA Hoist  
22 come to know of, like, how big of a grillage to prepare?

23          MR. BAILEY: That would be during the engineering  
24 phase post-contract. They would say, hey, we will need a  
25 grillage. And then during the engineering, we get a copy

1 of their plans and architectural drawings and structural  
2 drawings. And part of our engineering process is to lay  
3 the hoist out in relation to the building in its optimal  
4 location. So --

5 JUDGE ALDRICH: Okay. And the size and its  
6 capacity might be a little bit dependent on how high that  
7 building is going to be?

8 MR. BAILEY: Yeah. And it's also dependent on  
9 what's underneath. I mean, obviously, if you had concrete  
10 going 20 feet down, you could just put the hoist right on  
11 there. But like on the top picture you see they have a  
12 little bay of who knows what was under there. I mean,  
13 we've had some where it's just, well, we have planters  
14 that are going underneath there, and we want to be able to  
15 fill it with soil so we can start the things growing  
16 early, right. So --

17 JUDGE ALDRICH: Okay. And could a general  
18 contractor say -- let's say, you know, you enter into a  
19 contract and there's a proposed location for the grillage  
20 and hoist, but that later becomes a problem for the  
21 general contractor. Could they move it from the north to  
22 the south side of the building?

23 MR. BAILEY: You try to catch this, obviously, in  
24 engineering because any move would be extra-ordinarily  
25 expensive because you'd have to take the entire

1 construction hoist down to move it.

2 JUDGE ALDRICH: I guess I'm referring like prior  
3 to the hoist coming in but after the contract is formed,  
4 could they say, like, no, we want it on the north side  
5 versus the south side versus the eastside? Like, could  
6 they direct where that hoist was going to be?

7 MR. BAILEY: They give us a general location of  
8 like, you know, hey, we'd like it around here, right. And  
9 then my engineers go through, and they take all the  
10 architectural and structural buildings and they check for  
11 obstruction. And they check for everything they can  
12 possibly do. And they also check, well, we can tie the  
13 hoist here and here and here. And they say here's the  
14 location we've picked out. And then we actually send it  
15 to the general contractor. And the general contractor  
16 says, yes, that location will work.

17 We're actually on the hook to make sure that we  
18 haven't created any obstructions in the -- in the general  
19 job site and that we're missing everything they plan to  
20 install, you know. And, if -- if for instance, they  
21 had -- at the 53rd floor they had one, you know, one  
22 special floor that poked out and we didn't catch it,  
23 that's our fault. We'd have to move the hoist and create  
24 a solution to supply that.

25 But they can certainly say, oh, well, we looked

1 at it. We don't really like it there. Could you try  
2 moving it over here. But it's more of a general  
3 guideline. But there is one part of the process where we  
4 say this is where we have selected. We guarantee that it  
5 dodges all obstructions. You have to check to make sure  
6 your building could withstand the loads imposed by the  
7 hoist. And if they come back and say, well, our steel  
8 going up the building isn't strong enough, then we have to  
9 find another place to move it. So does that make sense?

10 JUDGE ALDRICH: Yeah. Thank you. With respect  
11 to the communication devices, you said that you couldn't  
12 open them. They are kind of sealed up?

13 MR. BAILEY: Yeah. They are. I mean, you could  
14 open them with a -- with a screwdriver, but by necessity  
15 they're completely waterproof, right, 'cause you're just  
16 out there. I mean, it doesn't rain a lot in California,  
17 but when it rains, I mean, it rains. And so they're  
18 standing right at the edge of the building. They have  
19 like a wire mesh expanded metal enclosure in between them  
20 and the environment, so you could. Inside of those boxes  
21 are just like little, like, PC boards, like, micro  
22 controller -- micro processor boards --

23 JUDGE ALDRICH: Okay.

24 MR. BAILEY: -- you know, with soldered  
25 components and all that stuff. So --

1 JUDGE ALDRICH: How are they powered? Are they  
2 battery operated? Are they getting power from that --

3 MR. BAILEY: No. You can't --

4 JUDGE ALDRICH: -- cable?

5 MR. BAILEY: You plug them into a regular outlet  
6 at the bottom of the building.

7 JUDGE ALDRICH: And they are daisy chained from  
8 the bottom all the way up?

9 MR. BAILEY: Yeah.

10 JUDGE ALDRICH: Okay. And you said it was that  
11 coaxial style cable?

12 MR. BAILEY: Yeah. It's -- it's kind of this  
13 round cable with what they call M8 or M12 connection. So  
14 it kinds of plugs in and then screws on to make it  
15 watertight. So --

16 JUDGE ALDRICH: It's not capable of being  
17 spliced? Is that --

18 MR. BAILEY: No. If you splice it, you -- you  
19 don't get -- since it's sending just a voice signal all  
20 the way down. Yeah, you could splice your -- you know,  
21 Sam's analogy of the landline phone, you could splice your  
22 phone cable probably, but then it would always be a little  
23 more staticky and messed up. So -- so we don't splice  
24 them.

25 JUDGE ALDRICH: Okay. I guess I'm just

1 wondering, like, what's the useful life of that  
2 communication device?

3 MR. BAILEY: 10, 15, 20 years. Like, they're --  
4 they have an extremely long life.

5 JUDGE ALDRICH: Okay.

6 MR. BAILEY: We use them over and over. The real  
7 killer of those call boxes is construction sites are not  
8 clean. Eventually, they're just so corroded in concrete  
9 and stickers from the guys and other stuff that you  
10 can't -- you know, they can't use them. But I'm certain  
11 there are 20-year old call boxes out on jobs in Southern  
12 California right now. So --

13 JUDGE ALDRICH: Okay. And on the tie-ins -- so  
14 that's Exhibit 13, I think.

15 MR. BAILEY: Okay. I can get you to 13. Okay.  
16 Tie-ins.

17 JUDGE ALDRICH: So are all the parts of a tie-in  
18 reusable?

19 MR. BAILEY: Yes.

20 JUDGE ALDRICH: So none of it ends up destroyed?  
21 It's all --

22 MR. BAILEY: No. No. We reuse them over and  
23 over and over again. We -- even the bolts.

24 JUDGE ALDRICH: Okay.

25 MR. BAILEY: I mean, sure, they destroy them.

1 But that's our guys like treating them too roughly or  
2 doing whatever, but it's not -- it's not intended to be  
3 disposable whatsoever.

4 JUDGE ALDRICH: Okay. And so with respect to  
5 like a hypothetical scenario where I'm a general  
6 contractor and you're USA Hoist, like, can I direct the  
7 operator, hey, I want to go floor five?

8 MR. BAILEY: You -- it's kind of like getting  
9 into a taxi, right, or something like that. You say, hey,  
10 I'd like to go here and --

11 JUDGE ALDRICH: And they take you?

12 MR. BAILEY: Yeah. They take you. And same  
13 thing. All your workers come up and they say, hey, I'd  
14 like to go to floor 7. I'd like to go to floor 13. But  
15 the operator is the one is deciding who gets dropped off  
16 when, where they go. You know, not where they go,  
17 obviously, who gets dropped off, what order he's dropping  
18 off people. If there's a big crowd at the loading dock,  
19 which is at the base, and this gang of guys have a bunch  
20 of toolboxes and materials they have to get up, and this  
21 is, you know, a gang of guys who are just going up after  
22 lunch.

23 Well, they may say, hey, I'm going to take these  
24 lunch guys first because that's the most guys. I can get  
25 in. You guys are going to have to wait. So the operator

1 is directing who goes when and where. But if you're the  
2 general contractor and says, hey, take me to floor 7,  
3 well, yeah. Of course we're going to take you to floor 7.  
4 That's what we're there for.

5 JUDGE ALDRICH: Okay. And then so the general  
6 contractor would be aware of any weight limitation and --  
7 or would that be the operator?

8 MR. BAILEY: No. The operator is in charge of  
9 the weight limitations. We also have over -- overweight  
10 devices on these things. So, honestly, if you put more  
11 than the rate of capacity, they just don't go. But the  
12 operator is also in charge of one of the concerns is  
13 distributing load appropriately. So if you have a really  
14 heavy object, the operator is in charge of, okay, I want  
15 the really heavy object right at the center of the  
16 construction hoist. We don't leave it just hanging off  
17 one end or another end, right. So how the hoist is  
18 loaded, how it's safely operated, that's all the  
19 operator's purvey.

20 JUDGE ALDRICH: Okay. Thank you.

21 I'll refer back to Judge Wong.

22 JUDGE WONG: Thanks.

23 Judge Brown, any questions for Mr. Bailey?

24 JUDGE BROWN: Not at this time. Thank you.

25 JUDGE WONG: Thank you.



1 I did have a few questions. You had testified  
2 early on, I believe, that it was expressly forbidden for a  
3 general contractor to supply their own operator; is that  
4 correct?

5 MR. BAILEY: The intention there was, once the  
6 contract is signed and we're out there, and our operator  
7 started using -- nobody else is allowed to drive the  
8 hoist. If it's pre -- just to clarify it. If it's  
9 pre-bid or if it's pre-contract signing, they could have  
10 chosen to have a non -- they could have chosen to supply  
11 their own operators. But once we were the operators and  
12 sign the contract, we said, hey, these are our  
13 construction hoists. We have care, custody, and control  
14 completely. We're indemnifying you for anything that  
15 happens with these hoists. And by doing so, you guys  
16 agree that we're the exclusive operators of the hoists,  
17 right.

18 JUDGE WONG: So were those terms included in the  
19 contracts that were signed?

20 MR. BAILEY: I'm not certain how those terms are  
21 framed out, but it was a very clear understanding that  
22 nobody but USA Hoist operators operated the hoist. They  
23 were also practically implied because we were the only  
24 ones with the keys.

25 JUDGE WONG: Got it.

1 MR. BAILEY: And we didn't give anyone else the  
2 keys to the hoists. So --

3 JUDGE WONG: Okay. I had a question about the  
4 communication system following up on Judge Aldrich's  
5 questioning. Appellant's counsel had mentioned that these  
6 were -- Appellant configured them, but they didn't cut the  
7 wires and whatnot. And could you just expound on what --

8 MR. BAILEY: By configured --

9 JUDGE WONG: Yeah.

10 MR. BAILEY: I -- I don't mean to tell my counsel  
11 that she was wrong, but that's not what we -- they're not  
12 really configured. They're just installed. It's kind of,  
13 you know, similar. To use her analogy, you go to  
14 Walgreens. You buy the landline phone when we were all  
15 kids, and you would hang it on the little thing on the  
16 wall and plug the jack in, right.

17 And the most configuring we do is typically we  
18 buy the -- the cables that go between the call boxes in  
19 16-foot lengths. And so if a floor is only 12 foot, you  
20 kind of wrap up the cable and to put a tie wire to make  
21 sure it wasn't just dangling in the wind. And -- but  
22 they're just installed. You go, and you hang them on a --  
23 on a nail on the wall or a little piece of wire, and then  
24 you plug in the cables. And then go up to the next floor  
25 and do it, right. So --

1 JUDGE WONG: And so if you were jumping a tower  
2 and you needed more cable, how would that work?

3 MR. BAILEY: You -- you -- when you jump the  
4 tower, you would send out -- you know, say you were  
5 jumping up six floors, you would send out six call boxes  
6 and six cables. And so at the end of the jump, you would  
7 go and hang six call boxes and just string one cable  
8 between each call box going up; kind of daisy chain floor  
9 to floor to floor.

10 JUDGE WONG: So each floor had their own call  
11 box?

12 MR. BAILEY: Yes.

13 JUDGE WONG: Okay.

14 MR. BAILEY: Each floor has its own call box  
15 and --

16 JUDGE WONG: Okay. And these weren't inside the  
17 enclosure? These were just per floor, or am I --

18 MR. BAILEY: Yeah. Each -- well, actually, each  
19 hoist -- well, each -- they are kind of inside the  
20 enclosures because the enclosures protect the -- the kind  
21 of edge of the building. So if you imagine I'm the  
22 construction hoist and my glasses are the workers, well,  
23 there has to be a gate between the construction hoist and,  
24 you know, the floor. Because if the construction hoist  
25 isn't there, it's just empty air to go fall out. So the

1 call boxes were usually just mounted right to the  
2 enclosure, you know, near the gates. Does that make  
3 sense?

4 JUDGE WONG: Yeah. So it doesn't go up and down  
5 with the enclosures?

6 MR. BAILEY: No. The enclosures are -- stay on  
7 the floor too.

8 JUDGE WONG: I got it. Okay.

9 MR. BAILEY: And so you'd have, you know, here's  
10 your enclosure. I'm the construction hoist. A guy walks  
11 up, there's a call box right there, right. Does that  
12 make -- I'm doing bad diagrams.

13 JUDGE WONG: No. No. No.

14 MR. BAILEY: I apologize.

15 JUDGE WONG: That makes sense.

16 MR. BAILEY: Yeah.

17 JUDGE WONG: I'm glad you're here in person  
18 testifying.

19 MR. BAILEY: Okay.

20 JUDGE WONG: Thank you very much. I did not have  
21 any other questions.

22 Ms. Breslow, did you have any other things for  
23 this witness?

24 MS. BRESLOW: No, I don't think so.

25 MR. BAILEY: Okay.

1 MR. SVEHLA: Do you mind if I ask a couple of  
2 questions?

3 MR. BAILEY: Yeah. Go for it, Jeff.  
4

5 REDIRECT EXAMINATION

6 BY MR. SVEHLA:

7 Q Do you have an engineering degree?

8 A Yes. I have a Masters in Structural Engineering  
9 from UCSD, a couple of hours off.

10 Q And ballpark years, how much time have you spent  
11 on or working on sites?

12 A On -- I have been in the elevator and  
13 construction business since 1990 -- or elevator and  
14 construction elevator business since 1992. I took a  
15 four-year break to get my under-grad degree, and I took  
16 another 3-year break to get my Master's Degree. But I've  
17 been -- done everything in those two businesses.  
18

19 REDIRECT EXAMINATION

20 BY MS. BRESLOW:

21 Q One more follow up that addresses, I think,  
22 Judge Aldrich's question maybe about the grillage. The  
23 grillage, any sort of materials were supplied by USA  
24 Hoist; correct? Did the general contractor provide  
25 anything with relation to the grillage?

1           A    No.  They provide the concrete underneath the  
2 grillage, but all the steel, all the bolts, everything is  
3 us -- from us.

4           MS. BRESLOW:  Thank you.

5           JUDGE WONG:  Okay.  All right.  Thank you,  
6 Mr. Bailey.

7           Ms. Breslow, you have one more witness.  How much  
8 time do you think you need for the one remaining witness?

9           MS. BRESLOW:  Probably 25 minutes.  It'll be  
10 shorter testimony than what Mr. Bailey just did.

11          JUDGE WONG:  Okay.  Let's go off the record real  
12 quick.

13                   (There is a pause in the proceedings.)

14          JUDGE WONG:  Let's go back on the record.

15                We're going to take a 10-minute break in the  
16 proceedings.  And then when we come back, we will have  
17 Mr. Maynard testify, and then we will turn it over to  
18 CDTFA, and then we'll close it out from there.

19                So we will take a 10-minute break.  Come back at  
20 3:37.

21                   (There is a pause in the proceedings.)

22          JUDGE WONG:  Let's go back on the record.

23                Ms. Breslow, please call your next witness.

24          MR. MAYNARD:  Good afternoon.

25   DIRECT EXAMINATION

1 BY MS. BRESLOW:

2 Q Can you please state and spell your name for the  
3 record?

4 A Yeah. It's Eric Maynard, E-r-i-c M-a-y-n-a-r-d.

5 Q And where are you currently employed?

6 A I'm currently employed with USA Hoist,  
7 California.

8 Q And you are an employee, not an independent  
9 contractor; correct?

10 A Yes. Just employee.

11 Q And how long have you been employed by USA Hoist?

12 A I've been employed for USA Hoist for nine years.

13 Q What's your current title?

14 A Operator -- hoist operator and foreman attached  
15 to that when needed.

16 Q How long have you been in that role for?

17 A Almost nine years.

18 Q Can you describe your duties as an operator and  
19 foreman?

20 A Operator, I get to the job sites. I perform my  
21 pre-task inspection on the equipment. I make sure we have  
22 power to the hoist. I make sure that all the switches,  
23 all the emergency stops, all the safety equipment of the  
24 hoist is working properly. I look at the power cord. I  
25 look at the tower, anything that might look, you know, out

1 of place, and just general fill out that paperwork and  
2 then start bringing people, tools, and material up the  
3 building to the floors they need to go.

4 Q And what training have you had to be an operator?

5 A I went through the apprenticeship with Local 12.  
6 That was 6,000 hours of --

7 Q Is Local 12 a union?

8 A Oh, yes. Sorry. Local 12 Operating Engineers  
9 Union. I did 6 years -- 6,000 hours of on-the-job  
10 training, and then 6 semesters of in-classroom studies,  
11 which got me to the point of being an operator engineer  
12 journeyman.

13 Q And are you a member of the International Union  
14 of Operating Engineers Local 12?

15 A Yes, I am.

16 Q What's the process for becoming a member of the  
17 union?

18 A The process of becoming an operator is you must  
19 be 18 years old or able to be 18 when you're called up and  
20 then apply. To me, I was already 18. Have a valid  
21 driver's license. Be a US citizen or appropriate  
22 documentations that you're able to take a test. I had to  
23 take a written test and a practical exam and oral review  
24 board I had to sit in front of. And I had to have  
25 transportation, and I think that's about it.



1 Q And are there regular meetings of the union?

2 A Yes. We have monthly meetings and then two --  
3 two meetings a year for -- where all the districts get  
4 together, semiannual meetings.

5 Q So let's move on and talk about your role as an  
6 operator, specifically for the job at issue? So did you  
7 work on USA Hoist job for the construction of the Wilshire  
8 Grand Hotel, which for our purposes is Job 9304?

9 A Yes. I was on that job for two years.

10 Q Was Wilshire Grand a union job?

11 A Yes, it was.

12 Q So was Turner a signatory to the union?

13 A Turner was not signatory to the union.

14 Q So they -- why did they need USA Hoist then to  
15 perform the role of the operator?

16 A To my understanding, the job needs a project  
17 labor agreement when dealing with the unions. I don't  
18 speak for the union, nor do I want to try and speak for  
19 the union. But as far as I know, they need a project  
20 labor agreement, which allows other companies to come in  
21 that have union workers that are signatory with the union  
22 that can do the union work.

23 Q And did you work on any non-union jobs in  
24 California?

25 A No, I have not.

1 Q What was your role on the Wilshire Grand job?

2 A The Wilshire Grand, I was an operator first when  
3 I first started. And then we got to enough employees  
4 where I became the foreman and was in charge of -- we had  
5 six man lifts on the job site, and to make sure that  
6 everyone showed up, that everybody had their dispatch,  
7 everybody performed their work duties. And that's -- I  
8 got with the contractor, and they let me know if there was  
9 anything out of the ordinary for that day or any  
10 deliveries that was needed or necessary. And then I  
11 just -- I would give the guys breaks and lunches and do  
12 any safety paperwork that was required and gather time.

13 Q Why is the role of the operator important for the  
14 job?

15 A We're skilled trade that is safety trained and  
16 years of experience, you know, vast experience. We are  
17 knowledgeable on many different facets of the work site  
18 and potential hazards and working with the other trades  
19 and the other union representatives there that's -- we  
20 unify and get the job done. That's why we're all  
21 brother -- union brothers and sisters 'cause we can get  
22 the job done safely and on time and hopefully ahead of  
23 schedule to where they can make some money.

24 Q And is operating a hoist dangerous?

25 A It can be. It falls under the dangerous

1 category. It's moving equipment that goes up and down a  
2 building that, like Robby said, 300 feet, sometimes faster  
3 sometimes slower with people that you have no control over  
4 other than to tell them to keep their fingers and hands  
5 inside the moving equipment. And then if there's any  
6 unsafe items that might happen, a breakdown, there's many  
7 different things that can happen to the hoist, you know,  
8 while you're operating on a normal day. It's -- it's  
9 equipment that needs to be maintained and inspected and --

10 Q And who maintains and inspects the hoist?

11 A Well, daily the operator supposed to -- we have a  
12 checklist that, you know, there's OSHA regulations and  
13 ANSI regulations that it's supposed to be a standard.  
14 There's a standard for us. And then any other safety  
15 factors that USA Hoist might deem is on that paperwork and  
16 we just -- we do the inspections. And sometimes we do  
17 light maintenance or light troubleshooting or light  
18 mechanical work, you know, just to get the hoist back up  
19 and operation safely. And that's about it.

20 Q And you mentioned a daily checklist. Can you  
21 tell me a little bit about that? What's the point of the  
22 daily checklist?

23 A That's to ensure that the equipment is safe to  
24 operate. We -- we have to go climb up on a ladder and  
25 check the gate switches, which are mechanical device that

1 when you open and close the gate that the hoist will shut  
2 down. You check the emergency stop switch to make sure  
3 that it will run. You check the wire rope, which you make  
4 sure that there's no abrasions. You make sure there's no  
5 broken wires. You make sure that the power cord has no  
6 cuts or rips or tears and is not blown out of place by the  
7 wind because it's windy out here.

8 And you check the pit access. We have controlled  
9 access to the pit, and you walk in under there and make  
10 sure that the trailing wheel -- electrical trailing wheel  
11 for the power cord is not bound up and that there's  
12 nothing unusual. It takes about 15 minutes to 20 minutes  
13 to do a thorough inspection. And then you go up and down  
14 on the hoist and check out the tie-ins and the gates and  
15 the comm system and everything. There's a lot to it.

16 Q Was Wilshire Grand a normal job in your opinion?

17 A My understanding was on the different hoist jobs  
18 that I was on, this one was a bigger hoist. It was a  
19 prototype hoist. They were 10,000 pounds, which I've  
20 never been in a 10,000-pound capacity hoist before. And  
21 we were running on an incline, which at the bottom of the  
22 hoist on Level 1 it was 16 feet out from where we landed  
23 on the top. So we -- we -- Robby had to design -- his  
24 team had to design a hoist that would be able to run on  
25 basically an incline.

1           And the -- and these hoists were -- and we were  
2           1,000 feet up in the air. So if something dropped off, we  
3           had to make sure everything was very tight and secure and  
4           that these gates and enclosures were safe. It was a lot  
5           of responsibility.

6           Q    So could anyone on the job site, like for me for  
7           example, could I operate the hoist?

8           A    Not -- no. We have the keys. Operators -- the  
9           Local 12 Operating Engineers, Robby's employees, we're the  
10          only ones that were allowed to operate these hoists on the  
11          job site.

12          Q    In your experience, did the general contractor  
13          ever enter or operate the hoist?

14          A    Well, they would enter the hoist to give them a  
15          ride, but they could not operate. That's why we scheduled  
16          hoist operators. That job had around the clock operators  
17          so we would -- I would have to work on a schedule. And it  
18          was just operating engineers only, Robby's employees, that  
19          were signatory with the union operating that equipment.

20          Q    And why did the general contractors not operate  
21          the hoist?

22          A    They -- they hired Robby to supply a Local 12  
23          Operating Engineer from that agreement, the project labor  
24          agreement that says that you must have union operators  
25          join this claim to work, that is operating hoist, 'cause

1 it falls under the heavy equipment, which is in the union  
2 book for Local 12 Operating Engineers Operators work.

3 Q And to your knowledge, the general contractor on  
4 this job Turner Construction, they were not signatory to  
5 the Operators Union?

6 A No. They were just the general contractor, and  
7 they hired USA Hoist, which is signatory to the union to  
8 hire the Local 12 Operating Engineer workers.

9 Q Why, for example, would a general contractor want  
10 to use union labor? What's the advantage of union  
11 workers?

12 A Well, on this specific job it was required. But  
13 I bring -- for someone like me, Robby having me as an  
14 employee, I have over 20 years union experience. I've  
15 operated a hoist for nine years. I know every part of the  
16 hoist and know, you know, the ins and outs of the hoist  
17 and what could go wrong and potentially go wrong. You  
18 know how to deal with people.

19 We had 900 employees on that Wilshire Grand job  
20 going up and down the building all day. So you got to be  
21 customer relations, and it was very -- it can be very  
22 challenging. And you're on your feet all the long, so  
23 it's a physically demanding job even though it doesn't  
24 sound like it would be physically demanding. You're  
25 standing in the same place all day long opening the gate,

1 closing the gate, opening the outer gate, closing the  
2 outer gate, and trying to have people communicate with you  
3 where you need to go.

4 And it's -- all the people that we've hired, that  
5 Robby has hired that's Local 12 has all been mostly --  
6 90 percent, I'd say excellent employees, able to fulfill  
7 the job requirements that's -- that was needed to get the  
8 task at hand done and the job finished.

9 Q And were you or another USA Hoist employee always  
10 present in the hoist during this job?

11 A Always.

12 MS. BRESLOW: Your Honors, you have Exhibit 10,  
13 which is an example of time tickets.

14 BY MS. BRESLOW:

15 Q I'm -- I don't think -- unless you'd like me too,  
16 I'm not going to pull them for you Eric, but you're  
17 familiar with what a time ticket is?

18 A Yes.

19 Q Can you tell me a little bit about why time  
20 tickets are completed --

21 A Well, it document --

22 Q -- or how often?

23 A It documents for the employee and for the  
24 employer the amount of time that you are on the project  
25 for that day or for that week, and it -- we would get it

1 signed. So you'd have to have it signed by the  
2 appropriate people to verify that, yes, you were there,  
3 and you did the work at hand. So it's a record for you  
4 and the employee and the general contractor that hired  
5 Robby to provide the work. So --

6 MS. BRESLOW: Thank you.

7 That's all I have.

8 Jeff, did --

9 MR. SVEHLA: I have a couple of questions.

10 MS. BRESLOW: Okay. Sorry.

11 Is that okay?

12 JUDGE WONG: Go ahead. Yeah.

13

14 REDIRECT EXAMINATION

15 BY MR. SVEHLA:

16 Q So I want to pick up on -- did you listen to  
17 Robby's testimony?

18 A Yes, I did.

19 Q Did you hear what Judge Aldrich asked about  
20 someone on the general contractor side asking to be taken  
21 to a specific floor?

22 A Yes.

23 Q You said 900 people or so were on the job?

24 A That job was 700 to 900 people on a daily basis  
25 at one point or --



1           Q    To your knowledge of those 700, 800, 900 folks,  
2   some of them were other subcontractors; right?

3           A    Yes.

4           Q    And when they asked to be taken to a certain  
5   floor, they would never tell you how to operate the hoist?

6           A    No.

7           MR. SVEHLA:   That's all.

8           JUDGE WONG:   Thank you.

9                   I'll turn it over to CDTFA for any questions for  
10   Mr. Maynard.

11           MR. NOBLE:   We have no questions.

12           JUDGE WONG:   Thank you.

13                   Judge Aldrich, any questions for Mr. Maynard?

14           JUDGE ALDRICH:   No questions.   Thank you.

15           JUDGE WONG:   Judge Brown, any questions for  
16   Mr. Maynard?

17           JUDGE BROWN:   No questions.   Thank you.

18           JUDGE WONG:   Thank you.

19                   I just had one question.   You had gone over your  
20   qualifications.   Do you have to periodically re-qualify or  
21   continually train as an operator?

22           MR. MAYNARD:   With -- yes.   And -- yes, you do.  
23   Like OSHA, I've had to redo my OSHA 30, which is 30 hours  
24   of OSHA training.   I know there's click safety, which is  
25   an online education and certification program that you get

1 different certifications that are required on different  
2 jobs. But, yeah, it's ongoing training. You know,  
3 there's -- there's always upgrades and changes to the  
4 equipment that we're operating. So, yeah, we're always  
5 updating our skills just like any other job these days.

6 JUDGE WONG: Thank you, Mr. Maynard. I have no  
7 further questions.

8 All right. I will now to turn to my co-Panelists  
9 for any general questions for Appellant about their case  
10 or arguments, starting with Judge Aldrich.

11 JUDGE ALDRICH: I have no questions. Thanks.

12 JUDGE WONG: Judge Brown?

13 JUDGE BROWN: Not at this time.

14 JUDGE WONG: Okay. Thank you.

15 Let me check if I have any questions. At this  
16 point, I just have one general question for the Appellant.

17 You had mentioned -- you had made an argument  
18 based in Yamaha regarding how much weight the Panel should  
19 give to CDTFAs' annotation. And then you also had cited  
20 to CDTFAs' publication -- Publication 46, I believe. How  
21 much weight should we give to the publication as opposed  
22 to the annotation? Or relatively speaking, should we give  
23 them equal weight, no weight whatsoever based on Yamaha or  
24 otherwise?

25 MS. BRESLOW: Yeah. My understanding is it's

1 based on those four factors in Yamaha, which is their  
2 consistency with other authority, thoroughness, the  
3 reasoning. With respect to the publication, it seems to  
4 be consistent with the regulation, the statute, other  
5 guidances available. The thoroughness and reasoning of it  
6 is logical. So I think perhaps it should be given some  
7 weight.

8 Frankly, I'd be fine if it was given no weight in  
9 this circumstance. The annotation in comparison and the  
10 publication, that publication was from 2020. The  
11 annotation is 30 years old. It seem to be premised on a  
12 case that had very little do with what we're discussing  
13 here today. And the analysis that was in the case  
14 supports our position because USA Hoist controlled the  
15 operators. They hired them. They fired them. They  
16 really had all intents and purposes control of their  
17 activity. So the annotation applying those factors should  
18 have no weight or authority.

19 JUDGE WONG: The fact that the annotation has  
20 been on the books for several decades, should that go into  
21 the Panel's consideration of how much weight to give the  
22 annotation if it's like a long-standing interpretation of  
23 CDTFA's?

24 MS. BRESLOW: Potentially, yes. But I think  
25 there's a point in time where if an annotation has been on

1 the books for 30 years but is premised in bad law, then we  
2 shouldn't give it weight no matter how old it is.

3 JUDGE WONG: Thank you.

4 All right. I will now turn it over to CDTFA for  
5 their presentation.

6 You have 25 minutes. Thank you.

7 MR. NOBLE: Thank you.

8

9 PRESENTATION

10 MR. NOBLE: With regard to Appellant providing  
11 operators with some of the equipment, as you know  
12 Regulation 1660 subdivision (a)(1), provides that a lease  
13 includes a contract in which a person secures for  
14 consideration the temporary use of tangible personal  
15 property, which although not on their premises is operated  
16 by or under the direction and control of the person. Any  
17 lease of tangible personal property for consideration is a  
18 sale, as defined by section 6006, and a purchase as  
19 defined by section 6010. And as such, is required to be  
20 included in the measure of tax.

21 Now, there's no dispute in this appeal that  
22 Appellant's transfers of hoists and ancillary equipment  
23 were generally structured like leases. The question is  
24 whether Appellant transferred sufficient possession and  
25 control of the hoist when it provided an operator such

1 that they would be considered leases of property.

2 There are five sales and use tax annotations that  
3 address operators in the context of leases. All of them  
4 begin with 330, and they are as follows: .2302, .2321,  
5 .500, .2463, .2465, and .2473. All five annotations date  
6 back approximately 30 years and are consistent in stating  
7 that when an operator is mandatory, that is where an owner  
8 of property requires a customer to use its operator, the  
9 transaction is not a lease because possession and control  
10 of the property is not transferred.

11 However, when the person has the option to obtain  
12 the property with or without an operator, the transaction is  
13 a lease, even when the owner of the property also ends up  
14 providing the operator. This is because the person  
15 contracting with the owner of the property has the power  
16 of selecting the operator which establishes sufficient  
17 possession and control over the equipment. Notably  
18 specific to this appeal is annotation 330.2465. As its  
19 back letter states, the transfers of equipment with  
20 optional operators are still considered leases, even when  
21 the person selection is limited to hiring an operator that  
22 is licensed.

23 I'd also like to note that under the Yamaha  
24 decision, as well as OTA's precedential decision in the  
25 Appeal of Praxair, that while annotations do not have the

1 force or effect of law, they are nonetheless entitled to  
2 great weight, especially, when as here, the Department is  
3 construing a statute it is charged with administering, and  
4 that statutory interpretation is longstanding.

5 Applying these annotations to the case at hand,  
6 there's no dispute that Appellant leased hoists and  
7 related equipment without operators. It doesn't matter  
8 that some customers opted for Appellant's operator if they  
9 did not have access to their own because it was not  
10 mandatory that it be Appellant's operator. It was only  
11 required that the operator be licensed. In other words,  
12 Appellant's customers had the power to select the operator  
13 of the hoist and thus, had possession and control over the  
14 property.

15 This is also consistent with terms in Appellant's  
16 contracts. For example, Exhibit A, page 50, under the  
17 section "Safety and Control of the Equipment," it states  
18 that it is agreed that the lessee will operate and use the  
19 equipment in accordance with safe practices and in  
20 compliance with the latest requirements of the  
21 Occupational Safety and Health Act. And it further states  
22 that it shall be the responsibility of the lessee to  
23 ensure that the hoist is operated in accordance with these  
24 instructions at all times.

25 Furthermore, while Appellant contends that its

1 leases with operators were not subject to tax, in  
2 reviewing the contracts at issue, it appears Appellant  
3 collected tax measured by the hoists and floor gate  
4 rentals. For example, see Exhibit A, pages 48 through 50  
5 of the Department's exhibits. While it now appears that  
6 Appellant asserts that none of its leases were subject to  
7 tax, Appellant's treatment of these leases, at least as  
8 far as it went with the hoists as taxable, is consistent  
9 with the aforementioned authorities. Accordingly,  
10 Appellant provided operators for its hoists on an optional  
11 basis, and its transfers of those hoists and equipment are  
12 considered leases of tangible personal property, which are  
13 subject to tax measured by the rentals payable.

14 With respect to the ancillary equipment,  
15 generally leases are considered a continuing sale and  
16 purchase for the duration of any rental, unless the lease  
17 is excluded from the definition of sale and purchase. As  
18 relevant here, subdivision (b)(1)(E) provides that leases  
19 excluded from the definition include leases of property in  
20 substantially the same form as acquired -- as relevant  
21 here so long as tax reimbursement has been paid.

22 With regard to whether there has been a  
23 substantial change in form, annotation 330.4120 provides  
24 that where there is an increased value to the leased  
25 property or increased functionality if there has been a

1 substantial change in form. And annotation 330.3900  
2 specifies that an increase in value alone is enough to  
3 show that property is not leased in the same form as  
4 acquired, or if there's a change in form between what the  
5 lessor acquired and what the lessor leased.

6 All of the ancillary property Appellant provided  
7 with the hoists increased the value as evidenced by the  
8 added rental payables from the leases. For example,  
9 Exhibit A, page 67, is a lease invoice showing charges for  
10 a hoist totaling \$26,000 for four months at \$6,500 a  
11 month. The invoice also shows charges for tower  
12 extensions of \$30,000 for four of them. In addition, the  
13 ancillary property increased the functionality of the  
14 hoist by allowing increased construction and operation  
15 height, and changed the form of the actual hoist by adding  
16 various components. In this respect, it's important to  
17 note that all of this equipment is part of the fixture of  
18 a hoist -- or the hoist. Meaning it literally changes the  
19 form of the leased property.

20 Indeed Appellant has stated that the jump tower  
21 extensions include engineering and assembly labor, which  
22 are performed off site before installation, and that this  
23 labor greatly exceeded the value of the property itself.  
24 This engineering and assembly labor is fabrication of the  
25 jump tower extensions -- and as I'll explain at the end --



1 is a service that is included in the definition of sale.  
2 The labor also further establishes that the form of the  
3 property acquired by Appellant was changed by this.

4 With respect to Appellant's assertion that only  
5 fabrication labor is taxable when the materials are  
6 furnished by the consumer, we disagree. Gross receipts  
7 means the total amount of the sale price or lease price of  
8 a retailer's sales of TPP, including the cost of labor as  
9 well as any services that are a part of the sale. The  
10 fabrication is include -- includes any operation which  
11 results in the creation or production of tangible personal  
12 property.

13 I'd also like to note, to follow up on that.  
14 With regard to the enclosures and the other things that  
15 they admit were fabricated, that labor is taxable. And we  
16 don't accept that the charges and the leases were solely  
17 for installation and that the actual TPP was, in essence,  
18 provided gratis.

19 I'd also like to note that under the true object  
20 of the contract test provided in Regulation 1501, it is  
21 clear that the customers needed Appellant's hoists and  
22 related components, otherwise they would not be leasing  
23 the fixtures. The same applies to this ancillary  
24 equipment. For example, Appellant stated today that the  
25 importance of the enclosures was to ensure the safety of

1 the occupants, to prevent dismemberment and other things  
2 they were talking about. I would say under the true  
3 object of the contract test, having that enclosure to  
4 prevent potential dismemberment shows that that TPP was  
5 far more than incidental to the installation of it.

6 You know, for all the foregoing reasons, no  
7 adjustments are warranted and this appeal should be  
8 denied.

9 That concludes my presentation.

10 JUDGE WONG: Thank you. I'll now turn to my  
11 co-Panelists for any questions for CDTFA, starting with  
12 Judge Aldrich.

13 JUDGE ALDRICH: I don't have any questions.  
14 Thank you.

15 JUDGE WONG: Judge Brown, any questions for  
16 CDTFA?

17 JUDGE BROWN: I don't have any questions right  
18 now. Thank you.

19 JUDGE WONG: And let me just check my notes. I  
20 do not have any questions as well for CDTFA.

21 So we will now turn it back to Appellant for your  
22 rebuttal and closing remarks.

23 MS. BRESLOW: Thank you.

24

25

CLOSING STATEMENT

1 MS. BRESLOW: I'd like to start with kind of  
2 going backwards from where we discussed previously,  
3 starting with some of what I'll view as kind of the sub-  
4 issues to the primary issue, which is with whether this is  
5 a service or a lease for the jobs at issue.

6 So, again, there were four jobs where USA Hoist  
7 provided the operator, and that's the service or lease  
8 issue. All of these other issues, the enclosures, the  
9 grillage, the jump tower, the communication systems, those  
10 issues apply to all jobs, not just the jobs at issue. For  
11 these jobs, I'd like to quickly go through those four  
12 issues and then circle back to the service lease.

13 For the enclosures and grillage, what's at issue  
14 here is primarily installation. I -- I understand where  
15 the Department is suggesting that this is fabrication  
16 labor. But as Mr. Bailey attested today, any sort of  
17 fabrication would have occurred at Crest Hill in Illinois  
18 where USA Hoist warehouse is located. The only activity  
19 that's happening on-site is the installation of those  
20 materials.

21 For the communication systems and the tie-in  
22 attachments, again, the primary issue there is whether  
23 upfront use tax or sales tax was paid and then, whether  
24 they are used in substantially the same form. We don't  
25 seem to be in dispute here as to whether sales or use tax

1 was paid upfront. At issue is whether they were used in  
2 substantially the same form. I -- I haven't heard  
3 anything suggesting why maybe tying with a zip tie some  
4 wires, stringing them up and down is changing their  
5 functional capabilities or changing their value. Whether  
6 there is any change in function or value to the hoist  
7 isn't the way that that statute or regulation functions.  
8 It's whether there's a change in value or function to the  
9 material themselves.

10 For the jump-tower labor, we feel adamantly that  
11 this is installation labor. There is really no difference  
12 between the installation of the hoist, which the  
13 Department has not treated as taxable, and the  
14 installation of the jump towers. The Department has,  
15 again, indicated that fabrication labor is taxable. But  
16 if you look to whether it's the statute or the regulation,  
17 fabrication is only taxable in the context of materials  
18 being provided by the consumer, which here, USA Hoist is  
19 the one providing the materials. They're the one  
20 providing the towers, not the general contractor.

21 Finally, our -- our main issue here as we  
22 discussed is, whether for those four jobs at issue, this  
23 is a service or a lease. I've read to you the statute and  
24 the regulation, which are entirely based on direction and  
25 control. Who is controlling this hoist? Who is

1 controlling whether it's run safely if it's a windy day?  
2 USA Hoist is the one that's going to decide that this  
3 thing needs to shut down. If it's malfunctioning, USA  
4 Hoist and their operator is going to be the one that fixes  
5 it.

6 The general contractor does not have the  
7 knowledge. They don't have the training. They don't have  
8 the people to do that. It's USA Hoist and their employees  
9 that are going to be performing all of that sort of labor  
10 that controls and directs the proper functioning of the  
11 hoist.

12 The annotations, I think, are just a red herring  
13 here. I understand the Department has now presented  
14 additional annotations -- we've reviewed those as well --  
15 that are somewhat consistent with the other annotation  
16 that they've referenced previously. But if you look to  
17 the history of these and -- and annotation 330.1860 kind  
18 of talks about how this got started. And Elizabeth Abreu  
19 was an attorney for the Department 30 years ago. She put  
20 out this annotation that suggested that maybe there was  
21 this mandatory or optional requirement. And so, at that  
22 point, the Department realized maybe they'd messed up and  
23 clarified some prior annotations.

24 But it's important that that annotation and, I  
25 guess, the four that come after that be based on good law.

1 They have to be consistent with the statute and  
2 regulation. And again, the regulation is all about  
3 direction and control. The annotation that's the primary  
4 one that they're relying upon here, 330.2465, is based on  
5 a case, Entremont, which was about trucks. It was about  
6 whether Entremont provided a lease or a service when  
7 trucks moved from direction A to direction B.

8 Judge Aldrich's question earlier about the hoist  
9 being able to move to different floors, I don't view that  
10 any differently than these trucks when Entremont maybe was  
11 told by the Department we're gonna -- truck is going to  
12 start here, and truck is gonna end here. Same sort of  
13 analysis applies with these hoists. Perhaps individuals,  
14 subcontractors, other folks get inside the hoist and may  
15 ask it move from floor to floor, but it's USA Hoist  
16 employee, the operator, that's dictating how this thing is  
17 ultimately controlled.

18 For these reasons, this is a service. This isn't  
19 a lease. For all intents and purposes, it's USA Hoist  
20 that's hiring the employees. They're the ones that are  
21 firing them. They're the ones that are indemnifying from  
22 any sort of harm or damage that might occur. All of that  
23 is present within agreements. And it's consistent, again,  
24 with the case law that supports the annotation that the  
25 Department has put forth here. And for these reasons, I

1 would request that the OTA defer to a statute and a reg,  
2 which is are legislative and quasi-legislative authority,  
3 not on an annotation that seems to have been based on  
4 maybe a misunderstanding 30 years ago.

5 JUDGE WONG: Thank you.

6 I'll now turn to my Co-Panelists for any final  
7 questions for either party, starting with Judge Aldrich.

8 JUDGE ALDRICH: Sorry. Just a moment.

9 So this question is for Appellant's counsel.  
10 Could you tell me who David Hughes is?

11 MS. BRESLOW: Yeah. David Hughes is one of my  
12 colleagues at -- or HMB formally, now Kilpatrick Law, yes.

13 JUDGE ALDRICH: Thank you. And so I was  
14 reviewing the file, and in CDTFAs combined exhibits  
15 there's a submission from January 14th, 2019. And I guess  
16 I'm just a bit confused because in that submission it  
17 describes the grillage, and it notes that the grillage is  
18 built for each project and is destroyed as part of the  
19 construction. Further, in 4, it says tie-in attachments.  
20 It also notes that the tie-in attachments are destroyed as  
21 part of the construction, but I've heard testimony today  
22 that that's not true. There's a big stack of grillage or  
23 at least I-beams at -- somewhere on Appellant's premise.  
24 So I'm trying to understand which is it?

25 MS. BRESLOW: I think that perhaps that was a

1 misstatement by my colleague in that letter, as Mr. Bailey  
2 has attested to today. Maybe some screws might be  
3 destroyed, but the beams are generally reused as part of  
4 the grillage.

5 JUDGE ALDRICH: Okay. Thank you.

6 JUDGE WONG: Thank you, Judge Aldrich.

7 I just want to follow up on the grillage really  
8 quick. So it was in Exhibit -- let's see -- 16, I believe  
9 it was, where we had two images of the grillage. So --  
10 they are shaped like an H. So those were transported in  
11 that shape from wherever to the job site; is that correct?

12 MR. BAILEY: They are transported as four beams  
13 and assembled.

14 JUDGE WONG: Okay. So there was some assembly at  
15 the job site; is that correct?

16 MR. BAILEY: Yes.

17 JUDGE WONG: Okay. Thanks. That's all the  
18 follow up I had on Judge Aldrich's question.

19 I'll now turn to Judge Brown for any questions  
20 for either party.

21 JUDGE BROWN: I don't think I have any questions.  
22 Thank you.

23 JUDGE WONG: Okay. I do have a few questions.

24 MS. BRESLOW: Judge Wong, I forgot to make one  
25 additional point in my closing argument, if that's okay.



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JUDGE WONG: Sure. Go ahead.

ADDITIONAL CLOSING STATEMENT

MS. BRESLOW: Even if we're going to give these annotations the force and effect of law, for all intents and purposes, this mandatory was required for the jobs at issue for the reasons we discussed with the general contractor not having access to a union operator, the nature of how these jobs functioned. There was a, for all intents and purposes, a required operator for these jobs. And where I struggle with the Department's analysis here and where it could have ill effects going forward, is they seem to be doing this analysis where if -- if a taxpayer -- when you're determining taxability for a taxpayer's transactions, you're viewing all transactions over the history of time as opposed to viewing each separate transaction and agreement separately.

It's untenable what is being proposed here for the reasons I mentioned earlier. You could have several jobs being negotiated and have a certain taxability and then years later that could change. Instead, when reviewing this question of mandatory and optional, if we are going to treat that as the law, which again is not in the statute or regulation. But if we're going to treat that as the law, you should be viewing each of these jobs

1 and agreements separately when determining whether an  
2 operator was, in fact, required because that's consistent  
3 with how transaction tax work. And it's the only real  
4 pragmatic way that this could function.

5 MR. NOBLE: Judge Wong, if I may?

6 JUDGE WONG: Thank you.

7 Sure.

8

9

CLOSING STATEMENT

10 MR. NOBLE: They say that this may be untenable  
11 moving forward, but we've been applying these annotations  
12 for the last 30 years and it's been tenable. We haven't  
13 encountered major issues with leases and lessors. So I  
14 disagree that there is an issue moving forward. And while  
15 this is a hypothetical where we don't have any situations  
16 addressing this, if a taxpayer was able to establish that  
17 for two years all of their leases were mandatory and that  
18 there was a change in business operations or a change in  
19 how they handled things and it became optional after that  
20 or vice versa, not going to retroactively say during the  
21 first two-year period where everything was mandatory, that  
22 it was optional because at a later date the nature of the  
23 business changed.

24 Thank you.

25 JUDGE WONG: Thank you.

1           So I'll just continue with my questions. So for  
2 Appellant, CDTFA had indicated that there were some  
3 contracts where USA Hoist Company collected sales tax on  
4 leases; is that correct?

5           MS. BRESLOW: That is correct.

6           JUDGE WONG: Okay. And so there is a -- I'll  
7 just quote the language. It was from your supplemental  
8 opening brief dated August 10th, 2021. It says, quote,  
9 "While USA Hoist was not required to collect sales tax on  
10 the hoists, it provided an operator" -- "if it provided an  
11 operator" -- excuse me -- "USA Hoist is not seeking a  
12 refund of the tax collected and remitted on the hoists.  
13 Instead, the only items at issue in this appeal are the  
14 charges for the ancillary items." I was just wondering,  
15 could you expand on that or explain what that line in your  
16 brief means?

17           MS. BRESLOW: Yeah. Thank you for that question  
18 because I think it allows me to explain how this would  
19 function if the OTA agrees with our position, which is  
20 that if this -- these agreements are service agreements,  
21 meaning that they are not for a taxable lease. So the USA  
22 Hoist would be subject to use tax on any sort of materials  
23 used as part of that agreement. So any sort of services  
24 that would be provided along with it, like the jumping,  
25 the installation, engineering, all those would be treated

1 as nontaxable. And there wouldn't be any sales tax due on  
2 the lease stream of something like grillage or enclosures.  
3 Instead, they would be subject to use tax on the up-front  
4 cost price of those items.

5 JUDGE WONG: Thank you.

6 MS. BRESLOW: To the extent they haven't already  
7 paid it.

8 JUDGE WONG: Okay. Thank you.

9 THE STENOGRAPHER: I'm sorry. Can you say that  
10 again?

11 MS. BRESLOW: To the extent that they have  
12 already not paid use tax on those items.

13 THE STENOGRAPHER: Thank you.

14 JUDGE WONG: So you had mentioned -- you had  
15 referenced four, I guess, contracts in the record for  
16 various jobs. And there is a fifth contract that hasn't  
17 been referenced for Job 9395 with customers KPRS  
18 Construction Services, Inc. And so that's a little  
19 different from these other four contracts; is that  
20 correct?

21 MS. BRESLOW: It is. And we didn't want to  
22 confuse the discussion today. Whereas the four agreements  
23 we discussed, it's abundantly clear that an operator was  
24 provided for the entirety of those jobs. There were some  
25 language within the agreement for 9395 that maybe

1 suggested otherwise. So we didn't want to sort of poison  
2 the bigger issue here.

3 JUDGE WONG: Okay. But your argument is for, I  
4 guess, sub-issues I'll refer to them. 2, 3, and 4 still  
5 apply to that contract; is that correct?

6 MS. BRESLOW: That's correct.

7 JUDGE WONG: Okay.

8 MS. BRESLOW: Or any other job at issue.

9 JUDGE WONG: Got it. Okay.

10 And just for the record, was there any language  
11 in any of these five contracts -- I guess in one contract  
12 there was no language -- as to the mandatory nature of the  
13 operator provided by USA Hoist. Is there anything in  
14 those other four contracts that you can point to that  
15 would suggest that? Or is your argument more like  
16 effectively speaking based on union agreements and  
17 whatnot. Practically, they could not. Is there anything  
18 contractually that USA Hoist mandated to their general  
19 contractor customer is that, we have to provide the  
20 operators?

21 MS. BRESLOW: There are specific charges within  
22 those agreements for an operator. As Mr. Bailey attested  
23 to earlier, throughout the bidding process and the  
24 drafting of these agreements, they -- they discuss the  
25 fact that the general contractor did not have access to a

1 union operator. So those -- those charges were  
2 specifically included in the agreement. There is not  
3 necessarily -- you're not going to find the word mandatory  
4 within those agreements. But what we're trying to  
5 articulate today is that there was, in effect, no choice.

6 The general contractor didn't have access to a  
7 union operator. That was discussed among the parties.  
8 They were required to use USA Hoist employee because  
9 otherwise, the hoist can't function without a qualified  
10 under -- again, California regulation has to have a  
11 qualified union operator.

12 JUDGE WONG: Thank you. And also there's some  
13 language in some of these agreements that seem -- they  
14 basically say that these are hoist rental agreements. Why  
15 were they framed that way instead of -- if they are indeed  
16 service agreements, why aren't they just drafted as such?

17 MS. BRESLOW: Yeah. I think this was just a  
18 business decision at the time. Yeah. I mean, as -- as  
19 Mr. Bailey attested to earlier, the way that they've  
20 written out the different charges within these agreements  
21 just sort of changes or evolves over time. We understand  
22 that that can be maybe a little confusing, that they are  
23 referred to as lease agreements. But I would -- I would  
24 ask that we apply substance over form here.

25 You know, if these said service agreements, I

1 don't think the Department would concede that these are  
2 service agreements. So I think we should look behind what  
3 they say, but I do acknowledge that.

4 JUDGE WONG: Did USA Hoist ever provide just an  
5 operator to a job without providing a hoist, someone else  
6 provide the hoist? Or did they actually hire out the  
7 services of an operator employee?

8 MS. BRESLOW: No. And for these jobs, again,  
9 they were only employees of USA Hoist, not a third party,  
10 the operators.

11 JUDGE WONG: Okay. Thank you. That's -- let me  
12 see. Oh, I did have a one question for CDTFA regarding  
13 Entremont. Appellant's counsel had indicated that there's  
14 language in there talking about selecting an employee, the  
15 power to select and discharge. And Entremont has language  
16 in there talking about this should be given some regard.  
17 I think that's the basis for CDTFA's distinction of  
18 mandatory versus optional operator.

19 Drawing that distinction, does CDTFA have --  
20 could they address that Entremont argument from Appellant.  
21 How much weight should we give to the power to select or  
22 discharge an operator?

23 MR. NOBLE: I think that all of the annotations  
24 that were written after Entremont, I think it's the  
25 Department's interpretation that when services are

1 mandatory or optional, you know, that indicates possession  
2 and control. If OTA were to find that Entremont differs,  
3 it would be up to you to decide how much weight to give to  
4 it. I do think the annotations are accurate and work in  
5 conjunction or accordance with Entremont.

6 JUDGE WONG: Thank you.

7 All right. I have no further questions.

8 Co-Panelists, any final questions? No. No.

9 Okay. All right. With that then, this concludes  
10 the hearing. The record is closed, and the case is  
11 submitted today. The Judges will meet and decide the case  
12 based on the exhibits presented and admitted as evidence,  
13 as well as the witnesses' testimony. We will send both  
14 parties our written decision no later than 100 days from  
15 today.

16 The oral hearing in this case is now adjourned.

17 There are no more hearings today. And oral  
18 hearings and other matters will commence tomorrow at  
19 9:30 a.m.

20 Thank you to both parties for your time and  
21 presentation.

22 Thank you to the witnesses for appearing today.

23 And we will go off the record. Thank you.

24 (Proceedings adjourned at 3:40 p.m.)  
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HEARING REPORTER'S CERTIFICATE

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

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

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

I have hereunto subscribed my name this 29th day of March, 2024.

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