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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LYNN GRANDE, *Plaintiff and Respondent*,

v.

EISENHOWER MEDICAL CENTER, *Defendant,*

FLEXCARE LLC, *Intervenor and Appellant*.

On Review From The Court Of Appeal For the Fourth Appellate District,
Division Two; Civil No. E068730, E068751

After An Appeal From the Superior Court,
County of Riverside, Case Number RIC1514281
Hon. Sharon J. Waters

APPELLANT FLEXCARE LLC'S REPLY BRIEF

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I. INTRODUCTION

FlexCare, LLC ("FlexCare"), a staffing agency, relied on its client Eisenhower Medical Center ("Eisenhower") to track and verify the time worked by FlexCare's employees who were temporarily assigned to work at Eisenhower. Eisenhower's responsibilities in this regard – and FlexCare's ability to control Eisenhower's exercise of those responsibilities – were enshrined in their staffing agreement. Contrary to Plaintiff Lynn Grande's ("Grande") assertion, the undisputed facts regarding that agreement and the practical relationship between FlexCare and Eisenhower establish, as a matter of law, that Eisenhower was FlexCare's special agent for two critical purposes – tracking employee time and ensuring FlexCare's compliance with its wage and hour obligations to the employees assigned to Eisenhower. As an agent of FlexCare, Eisenhower was thus necessarily released by the settlement agreement and judgment in Grande's first wage and hour class action against FlexCare.

Grande is also incorrect that Eisenhower was not in privity with FlexCare. California law establishes that Eisenhower and FlexCare shared such a close, interdependent relationship regarding the subject matter of Grande's first action that FlexCare acted as Eisenhower's "virtual representative" in that action. Thus, res judicata bars Grande's instant wage and hour class action against Eisenhower. The Court should therefore reverse the judgment below.

II. STANDARD OF REVIEW

A. Because the Essential Facts Regarding Agency Are Undisputed, the Issue of Whether an Agency Relationship Exists Is a Legal Question that This Court Reviews De Novo.

Grande accuses both FlexCare and Eisenhower of failing to discuss all the evidence relevant to the trial court's determination of whether Eisenhower was FlexCare's agent. According to Grande, FlexCare and

Eisenhower have thus forfeited their "challenge that the evidence was insufficient to support the trial court's findings." Grande, however, deliberately ignores that FlexCare and Eisenhower do not make – and did not make below – a sufficiency of the evidence challenge. Rather, the essential facts in this case were not in conflict, and thus the agency question was one of law, not of fact. (See *Troost v. Estate of DeBoer* (1984) 155 Cal.App.3d 289, 299.) This Court reviews questions of law de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2015) 55 Cal.4th 1185, 1191.)

Here, the following essential facts were not in dispute and, as discussed below, Eisenhower was thus FlexCare's agent as a matter of law:

- FlexCare and Eisenhower entered into a Supplemental Staffing Agreement by which FlexCare agreed to provide Eisenhower with temporary, supplemental personnel, including nurses. (2 *Appellant's Appendix* ("AA") 495:16-17; 4 AA 1090 ¶ 1.1.)
- Pursuant to the terms of the Supplemental Staffing Agreement, Eisenhower assigned duties, shifts, units, and assignments to the nurses provided to Eisenhower by FlexCare. (4 AA 1092-1093 ¶ 4.1, ¶ 4.3.)
- Eisenhower was empowered by the Supplemental Staffing Agreement to terminate nurses assigned to Eisenhower by FlexCare. (4 AA 1092 ¶ 4.2.)
- Eisenhower was responsible for providing a comprehensive, general orientation to nurses assigned to Eisenhower by FlexCare. (4 AA 1093 ¶ 4.5.)
- Nurses assigned by FlexCare to Eisenhower under the Supplemental Staffing Agreement were "employees of [FlexCare] and [were] not employees or agents of" Eisenhower. (4 AA 1093 ¶ 5.1.)
- Pursuant to Eisenhower's and FlexCare's agreement, FlexCare "has, retains and will continue to bear sole, exclusive and total legal responsibility as the employer of" nurses assigned to Eisenhower by FlexCare. (4 AA 1093 ¶ 5.2.)
- In this regard, FlexCare's responsibilities included "the obligation to ensure full compliance with and satisfaction of (1) all state and

federal payroll, income and unemployment tax requirements, (2) all state and federal wage and hour requirements, (3) all workers' compensation insurance requirements, (4) overtime, premium pay and all employee benefits, and (5) all other applicable state and federal employment law requirements arising from [FlexCare's] employment of Staff, the assignment of Staff to [Eisenhower] and/or the actual work of Staff at [Eisenhower]." (4 AA 1093 ¶ 5.2.)

- FlexCare processed payroll for nurses at Eisenhower on a weekly basis based on the hours a nurse worked at the facility. (*Reporter's Transcript of Proceedings* ("RT") 66:7-9.)[1]

- Eisenhower and FlexCare agreed that nurses assigned to Eisenhower by FlexCare were required to use Eisenhower's Time & Attendance system. (4 AA 1095 ¶ 6.8.2.)

- Eisenhower paid FlexCare agreed-upon rates based on hours worked and the category of supplemental personnel provided by FlexCare. (4 AA 1095-1097 ¶¶ 7.1.1-7.1.10; 4 AA 1101.)

- Either party to the Supplemental Staffing Agreement could terminate the agreement at any time, with or without cause, with 30 days' written notice. (4 AA 1097 ¶ 9.4.)

- The Supplemental Staffing Agreement provided that "*[FlexCare]* is performing the services and duties hereunder as an independent contractor and not as an employee, agent, partner of or joint venture with [Eisenhower]. [Eisenhower] retains professional and administrative responsibility for the services rendered." (4 AA 1099 ¶ 14.1 [emphasis added].)

- A contemporaneous amendment to the Supplemental Staffing Agreement provided that when Eisenhower used the ShiftWise Vendor Management System to assign locum tenens staff, "time slips and invoices will be created by the ShiftWise VMS system and will be reviewed and approved by" Eisenhower and FlexCare. (4 AA 1102.)

- FlexCare's Travel Nurse Agreement with its nurses, including Grande, required a signature from Eisenhower personnel on the

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[1] All citations to the Reporter's Transcript are to the February 6, 2017, transcript unless otherwise noted.

nurse's time sheet before FlexCare would make payment to the nurse. (5 AA 1227.)

- FlexCare's Travel Nurse Agreement also required Eisenhower's pre-approval for any overtime to be worked by an assigned nurse. (5 AA 1226.)

Indeed, the *only* factual conflict at all in this case related to the parties' unexpressed intent about the scope of the release in the Erlandsen action. But as the trial court recognized, that evidence was of little value in interpreting the settlement agreement and judgment in the Erlandsen action.

B. Grande's Summary of the Evidence at Trial in This Case Ignores the Trial Court's Findings in the Statement of Decision and Makes Inferences Not Warranted by the Evidence in the Record.

1. The Trial Court Did Not Consider Extrinsic Evidence in Ruling that Eisenhower Was Not a Released Party in the Judgment in the Erlandsen Action.

Grande's summary of the evidence at trial begins with a crucial misstatement. Grande states that "[t]he trial court admitted *and considered* substantial extrinsic evidence concerning the ***factual*** issues of whether Eisenhower was FlexCare's 'agent' or a 'related or affiliated entity' as those terms were used and intended by the parties in the Judgment and whether the parties intended Eisenhower to be a 'Released Party' under the Judgment." (Lynn Grande's Answering Brief on the Merits ("AB") at 11 [first emphasis added, second emphasis in original].) Although FlexCare does not contest that the trial court *admitted* extrinsic evidence regarding factual issues, the trial court expressly did not consider much of this evidence, instead finding "the extrinsic evidence and, in particular, the testimony regarding the parties' intent of little value." (7 AA 1859:14-15.) Indeed, the trial court went on to conclude that, in interpreting the settlement and judgment in the underlying action, it was "left largely, if not solely, with the words themselves and [was] asked to decide whether the

release is reasonably construed to include Eisenhower." (7 AA 1859:28-1860:1.)

As to the agency issue, the trial court, although admitting some extrinsic evidence, emphasized that the interpretation of Eisenhower and FlexCare's written agreement (i.e., a legal issue) would define its decision on agency. (See RT 6:11-8:19 [trial court discussion with parties at pre-trial conference regarding agency, undisputed facts, and contract between Eisenhower and FlexCare] [February 3, 2017, transcript].) In keeping with this emphasis, the trial court's statement of decision focused exclusively – and erroneously – on the one paragraph of the Supplemental Staffing Agreement that stated that *FlexCare* was not an agent of Eisenhower in ruling that *Eisenhower* was not an agent of FlexCare. (7 AA 1865:2-13.)

Thus, this case was decided below on undisputed facts, and the trial court simply did not consider the extrinsic evidence it admitted at the bench trial in this matter.

2. Grande's Summary of the Evidence at Trial Makes Unwarranted Inferences Not Supported by the Record.

Grande's summary of evidence (AB at 12-15) makes broad statements that amount to factual inferences unsupported by the record. For instance, Grande claims as a "fact" that "Eisenhower is nowhere mentioned as a 'Released Party' by description" in the settlement agreement and judgment in the Erlandsen action. (AB at 13.) But this statement ignores that "agents" of FlexCare are released by the settlement agreement and judgment, and it ignores the legal question (on undisputed facts) of whether Eisenhower was FlexCare's agent.

Grande also presents a series of facts regarding communications between FlexCare and Grande (or their counsel) without the qualification that was repeatedly made at trial that the statements (or lack thereof) were outside the mediation context. (See AB at 14-15 [citing Reporter's

Transcript but leaving out qualification that witnesses were only testifying as to communications outside the context of mediation].) Perhaps most importantly, all of the broad "factual" statements made by Grande in her brief – especially those concerning each party's reasons for entering into the settlement agreement and judgment in the Erlandsen action – were expressly not considered by the trial court in its statement of decision. (See 7 AA 1858:24-1860:1.)

III. LEGAL ANALYSIS

A. Eisenhower Was FlexCare's Special Agent and Representative for the Purpose of Complying With California's Wage and Hour Laws and Was Thus Released By the Settlement Agreement and Judgment in the Erlandsen Action.

1. The Trial Court Did Not Decide That Eisenhower Was Not FlexCare's Agent "As a Matter of Fact."

Grande repeatedly claims that the trial court determined, "as a matter of fact," that Eisenhower was not FlexCare's agent. (See, e.g., AB at 29.) The trial court's statement of decision, however, says nothing of the sort. Rather, the statement of decision references only the law regarding agency and a single undisputed fact – the Supplemental Staffing Agreement provision that states that *FlexCare* is not Eisenhower's agent – when concluding that *Eisenhower* was not FlexCare's agent. (7 AA 1864:6-1865:13.) Nowhere does the trial court weigh disputed facts. As discussed above, there were none. Nor did the trial court state that it was concluding that Eisenhower was not FlexCare's agent as a "matter of fact." (See *ibid.*) Thus, as discussed above regarding the standard of review, the question of Eisenhower's agency is a legal one decided on undisputed facts.

Moreover, because the question of Eisenhower's agency is a legal one, Grande is incorrect that FlexCare and Eisenhower waived an appellate challenge to this issue by failing to discuss all evidence presented on the

issues. As set forth above, the evidence relevant to this issue – which is almost entirely the plain language of the Supplemental Staffing Agreement between FlexCare and Eisenhower and the Travel Nurse Agreement between FlexCare and its nurses – is entirely undisputed and the trial court did not weigh any "disputed" facts in reaching its conclusion that Eisenhower was not FlexCare's agent. In any event, Grande is incorrect. FlexCare set forth the evidence related to the agency question in its opening brief. (See Appellant FlexCare LLC's Opening Brief ("FAOB") at 8-11.)

2. ***Castillo v. Glenair, Inc.*** Does Not Run Afoul of California Law Regarding Agency.

Grande's answering brief focuses largely on an argument that *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 was an aberration in agency law and thus should not be applied to find agency in the nearly identical factual situation in this case.[2] Grande's assertions, however, do not comport with the decision in *Castillo* or the state of California law. Simply put, *Castillo* follows long-standing California law on agency. Applying *Castillo* and California's agency law to this case (including law from this Court), it is clear that the trial court erred by not holding that, as a matter of law on undisputed facts, Eisenhower was FlexCare's special agent.

The general parameters of agency law are well established and have been discussed by all parties in their opening and answering briefs. Grande, however, pointedly does not discuss an essential rule of agency embodied in California's Civil Code: "An agent for a *particular act or transaction* is called a special agent. All others are general agents." (Civ.

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[2] Grande's answering brief also perfunctorily argues that the trial court's agency decision is supported by substantial evidence, but tacitly acknowledges that this is a legal issue by focusing her argument primarily on the contention that *Castillo* was wrongly decided. (See AB at 35-39.)

Code, § 2297 [emphasis added].) The difference between special agents and general agents is key, both in placing *Castillo* in the context of California agency law and in this case.

In *Castillo*, the Second District concluded that "Glenair [the client] was an agent for GCA [the staffing agency] *with respect to GCA's payment of its employees*." (*Castillo, supra*, 23 Cal.App.5th at p. 281 [emphasis added].) Thus, the appellate court necessarily concluded that Glenair was a special agent because it found that Glenair was an agent for a particular act (i.e., GCA's payment of its employees). (See Civ. Code, § 2297.) Grande takes issue with this holding, arguing that it runs afoul of California law on the requisite control that is necessary to establish an agency relationship. Grande is mistaken.

First, Grande's assertion that *Castillo* concluded that Glenair was GCA's agent "in the absence of any record evidence showing that GCA has any right to control Glenair" is not supported by the discussion of agency in *Castillo*. The *Castillo* court specifically concluded that the undisputed evidence established that "Glenair was an agent of GCA for the purpose of collecting, reviewing, and providing GCA's employee time records to GCA so that GCA could properly pay its employees." (*Castillo, supra*, 23 Cal.App.5th at p. 281.) The undisputed evidence before the *Castillo* court was that Glenair collected the time of workers placed by GCA at Glenair, that a Glenair "lead" reviewed the time records of workers placed by GCA at Glenair in order to ensure accuracy, and that Glenair did not have a supervisor at the Glenair site.[3] (*Id.* at p. 271.) This evidence amply demonstrated that GCA exercised the requisite control over Glenair.

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[3] Essentially identical evidence is undisputed here. (See *infra* Section IV.A.3.)

Indeed, *Castillo* directly addressed the issue now raised by Grande when the Castillos argued that GCA lacked the requisite degree of control over Glenair. As is the case here, *Castillo* concluded that "[i]t need not be shown that GCA *generally* controlled Glenair." (*Id.* at p. 282 [emphasis added].) The record evidence before the *Castillo* court established that the only reasonable inference was that GCA required Glenair to perform timekeeping-related tasks because GCA could not otherwise pay the employees it assigned to work at Glenair. (See *ibid.*) Thus, *Castillo*'s holding that Glenair was GCA's agent was supported by undisputed, record evidence that established GCA's right to control Glenair with respect to the special agency found by the appellate court. Likewise, the undisputed evidence in this case established that FlexCare had a right to control Eisenhower's tracking of FlexCare's employees' time and Eisenhower was a special agent for FlexCare.

Second, *Castillo*'s holding regarding special agency did not, as suggested by Grande, run afoul of California law regarding control. Grande argues that *Castillo* did not establish that GCA had the right to control the "means and manner" of Glenair's agency. But the cases she cites for the proposition that the ability to generally control the "means and manner" of an agent's performance is required to establish agency all focus on whether the relationship between a franchisor and franchisee establishes a *general* agency. (See *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 52; *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 479; *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1240-1242.)

These cases focus on whether franchisees are *general* agents of franchisors by using a "means and manner" test to determine whether "'the franchisor exercises *complete or substantial control over the franchisee*.'" (See *JTH Tax, supra*, 212 Cal.App.4th at p. 1242, quoting *Cislaw v.*

Southland Corp. (1992) 4 Cal.App.4th 1284, 1288 [emphasis added].) Indeed, as this Court explained in *Patterson v. Domino's Pizza, LLC*, in the franchisor-franchisee relationship, the relevant question is whether a franchisor "has retained or assumed a *general* right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." (*Patterson, supra*, 60 Cal.4th at pp. 497-498.) *Patterson* likewise explained that California law regarding agency in the context of the franchisor-franchisee relationship is necessarily driven by the "contemporary realities" of the franchise business format. (See *id.* at pp. 477-478, 497-499.) Thus, the cases cited by Grande regarding whether a franchisor exercises control over the "means and manner" of a franchisee's day-to-day operations have no application here, as this case does not involve a franchisor-franchisee relationship. Instead, it addresses whether a client is a special agent of a staffing agency for purposes of payment of the wages of the staffing agency's employees.

But even if a "means and manner" test was appropriate in this context, the undisputed evidence before the appellate court in *Castillo* – and, as discussed below, before the trial and appellate courts here – did establish that the staffing agency exercised control over the "means and manner" of the client's performance. As the *Castillo* court explained, the only reasonable inference based on the evidence was that GCA required Glenair to perform timekeeping-related tasks because, if not, GCA would not have been able to pay its employees. (*Castillo, supra*, 23 Cal.App.5th at p. 282.) By the same token, GCA necessarily must have controlled the "means and manner" by which Glenair accomplished its timekeeping tasks, because GCA needed to be sure it got the correct information from Glenair in order to pay its employees and comply with California wage and hour law. Similarly, as demonstrated by the Supplemental Staffing Agreement

here, FlexCare controlled the "means and manner" by which Eisenhower tracked FlexCare's employees' time because the agreement required Eisenhower to use its time and attendance system to track the employees' time.

Grande also takes issue with *Castillo*'s conclusion that GCA would have been unable to pay its employees absent Glenair's agency. (AB at 37.) But the *Castillo* court's conclusion on that front was not an "assumption," but a mere truism: without Glenair tracking the time of the employees assigned by GCA, GCA would not be able to pay its employees, because they would not know how much time the employees worked, whether they received meal and rest breaks, or whether they worked overtime. Grande asserts, without citation to *Castillo* or any other authority, that GCA employees could have reported their own time to GCA, "as is often the case." But Grande's argument is pure supposition unsupported by any factual or legal citation. In sum, *Castillo* is not inconsistent with California's law regarding the control aspect of the agency analysis.

Third, Grande argues that *Castillo* deviates from agency principles regarding the agent's power to bind the principal to third parties. But the law of agency does not require that an agent bind the principal to third parties to establish an agency relationship. Rather, once an agency is established, an agent has the "power to alter the legal relations between the principal and third persons and between the principal and himself." (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 964.) Thus, it is not a prerequisite of an agency that the agent bind the principal to third parties, but rather simply a "characteristic" of an agency relationship. (See *ibid.*) Nevertheless, it is clear that in *Castillo*, Glenair necessarily had the power to alter the legal relations between GCA and GCA's employees. By tracking, managing,

and approving the time worked by GCA employees assigned to Glenair, Glenair necessarily exercised the power to control and alter the amount of wages owed by GCA to its employees.

Finally, Grande attempts to paint *Castillo* as an anomaly in the law that should be ignored or overturned by this Court. But *Castillo* is nothing of the sort. As both Eisenhower and FlexCare explained, *Castillo* follows another case, *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, in concluding that joint employers comprised of a staffing agency and its client employer were agents of each other in their dealings with third party employees. (*Garcia, supra*, 11 Cal.App.5th at pp. 784, 788.) Grande ignores *Garcia* altogether. Moreover, as discussed above, *Castillo* is not outside the norm of California law on agency, and expressly relies on the well-established principles of agency law discussed by the parties in their briefs here. (See *Castillo, supra*, 23 Cal.App.5th at pp. 277-278 [reciting law of agency].) Indeed, Grande is fixated on concepts of complete and general control when such concepts simply do not apply to the special agency in *Castillo* and in this case. If anything, it is the Fourth District's opinion in this case that is the aberration. As discussed immediately below, the Fourth District's opinion did not discuss undisputed evidence that establishes Eisenhower was FlexCare's special agent in accordance with well-established California law.

3. Both *Castillo* and Other California Authorities Establish That, as a Matter of Law, Eisenhower Was FlexCare's Special Agent for the Purposes of FlexCare's Payment of Its Employees and FlexCare's Compliance with California Wage and Hour Law.

As discussed in FlexCare and Eisenhower's opening briefs and in Justice Ramirez's dissent below, there was no apparent reason for the Fourth District to depart from the reasoning of *Castillo* in this case that features "essentially identical" facts. The undisputed evidence here

established that, just as in *Castillo*, Eisenhower acted as a special agent for FlexCare with regard to FlexCare's payment of its employees and its compliance with California wage and hour law.

But even if *Castillo* did not exist, the undisputed facts in this case unequivocally establish a special agency under long-standing principles of California law. "[W]hether an agency relationship has been created or exists is determined by the relation of the parties as they in fact exist by agreement or acts [citation] and the primary right of control is particularly persuasive." (*APSB Bancorp v. Thornton Grant* (1994) 26 Cal.App.4th 926, 932, citing *Malloy v. Fong* (1951) 37 Cal.2d 356, 370.) In that regard, "[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities." (*Malloy, supra*, 37 Cal.2d at p. 370.) Importantly, as repeatedly emphasized in Eisenhower's opening brief, "[i]t is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Ibid.*)

Here, the undisputed facts establishing Eisenhower's special agency for FlexCare are even stronger than the undisputed facts that established a special agency in *Castillo*. There is little doubt that the Supplemental Staffing Agreement between FlexCare and Eisenhower established a special agency between Eisenhower and FlexCare. That agreement required that nurses assigned to Eisenhower use Eisenhower's time and attendance system. (4 AA 1095 ¶ 6.8.2.) Thus, per the Supplemental Staffing Agreement, FlexCare required Eisenhower to track employee time using Eisenhower's time and attendance system and thus established FlexCare's right to control Eisenhower within the bounds of the special agency created by the Supplemental Staffing Agreement. The Supplemental Staffing Agreement also provided that FlexCare could

terminate the agreement at any time, with or without cause. (4 AA 1097 ¶ 9.4.) FlexCare's power to terminate the services of Eisenhower established a further means of control over Eisenhower's activities with regard to tracking FlexCare employees' time. (See *Malloy, supra*, 37 Cal.2d at p. 370.)

Furthermore, the undisputed facts regarding the actual relationship between Eisenhower and FlexCare confirms an agency. (*APSB Bancorp, supra*, 26 Cal.App.4th at p. 932.) FlexCare required its nurses to get approval of their time sheets from Eisenhower and secure pre-approval from Eisenhower before working overtime. (5 AA 1226-1227.) The relationship as it thus existed between Eisenhower and FlexCare necessarily exemplified an agency relationship where FlexCare controlled Eisenhower by requiring it to sign off on FlexCare employees' time and overtime.

Despite this clear special agency relationship, Grande argues that the trial court and Court of Appeal correctly decided that Eisenhower was not FlexCare's special agent. Grande's arguments are unavailing. Grande implies that, even if Eisenhower tracked employee time for FlexCare, FlexCare did not control the means and manner of that tracking. But, as discussed above, the "means and manner" test is irrelevant outside of the franchisor-franchisee relationship. In any event, the Supplemental Staffing Agreement does control the means and manner of Eisenhower's time-tracking by requiring Eisenhower to utilize its internal time and attendance system to track FlexCare employees' time. (4 AA 1095 ¶ 6.8.2.) Likewise, the Supplemental Staffing Agreement controlled the "means and manner" of Eisenhower's scheduling of FlexCare employees, which ultimately allowed Eisenhower to assist FlexCare in its compliance with wage and hour laws. (4 AA 1092 ¶ 3.6 [proscribing the minimum workweek for FlexCare employees assigned to Eisenhower].)

Grande also argues, under the Restatement, that an agency cannot be established if the principal does not have the ability to give additional instruction after the agent has begun performance. But here, the ability for FlexCare to give additional instruction as to Eisenhower's performance is inherent in the Supplemental Staffing Agreement. Indeed, FlexCare specifically gave Eisenhower additional instruction in the contemporaneous amendment to the Supplemental Staffing Agreement. In that amendment, FlexCare directed that "[w]hen [Eisenhower] uses the ShiftWise Vendor Management System (VMS) to assign locum tenens, time slips and invoices will be created by the ShiftWise VMS system and will be reviewed and approved by [Eisenhower] and [FlexCare]." (4 AA 1102.)

Next, Grande falls back on the same erroneous argument endorsed by the trial court and the Court of Appeal here – that the Supplemental Staffing Agreement between FlexCare and Eisenhower disavows an agency relationship. But the provision relied on by Grande is a one-way provision that is clearly designed to delineate responsibilities between the parties and does not say anything about whether the parties intended for Eisenhower to be FlexCare's agent. In a section of the Supplemental Staffing Agreement entitled "Relationship of the Parties," the provision, in full, states:

> 14.1 *Agency* [FlexCare] is performing the services and duties hereunder as an independent contractor and not as an employee, agent, partner of or joint venture with Hospital [Eisenhower]. Hospital retains professional and administrative responsibility for the services rendered.

(4 AA 1099 ¶ 14.1 [emphasis added].) The "Relationship of the Parties" section goes on to require FlexCare to cooperate with Eisenhower as necessary for Eisenhower to meet all requirements imposed on it by law, rules, regulations, and standards (4 AA 1099 ¶ 14.2); require FlexCare to execute a compliance agreement certifying that it has received

Eisenhower's Code of Conduct and cooperate with all compliance related activities of Eisenhower (4 AA 1099 ¶ 14.3); incorporate by reference all applicable equal opportunity and affirmative action clauses as required by federal law (4 AA 1099 ¶ 14.4); and explain that Eisenhower will conduct sanction searches as required by the Corporate Integrity Agreement with the Office of Inspection General and terminate FlexCare if its name appears in a sanction search. (4 AA 1099 ¶ 14.5.)

Clearly, the "Relationship of the Parties" section of the Supplemental Staffing Agreement is meant to define *FlexCare's* relationship to Eisenhower and explain the various requirements – and consequences for failing to meet those requirements – for FlexCare to assist Eisenhower in complying with the strict state and federal laws it is subject to as a public hospital. Paragraph 14 and its subparagraphs say nothing about whether Eisenhower is serving as a special agent of FlexCare for purposes of paying FlexCare's employees and complying with California's wage and hour laws. Contrary to the decision of the appellate court, there is nothing in the plain language of the contract that indicates the parties intended to disavow an agency relationship where Eisenhower served as FlexCare's special agent.[4] All that can be gleaned from paragraph 14.1 is that the parties intended to disavow FlexCare's responsibility for the professional clinical environment.

Furthermore, inherent in Grande's argument regarding agency is a reliance on the fact that FlexCare did not exercise an overarching, generalized control over Eisenhower. (See, e.g., AB 36 [placing particular emphasis on control and citing franchisor-franchisee cases focusing on complete, generalized control to establish agency in franchisor-franchisee

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[4] As discussed immediately above, the plain language of other portions of the contract clearly indicates that the parties intended for Eisenhower to serve as FlexCare's special agent.

relationship]; AB 39 [emphasizing control in discussion of FlexCare and Eisenhower's relationship].) But as emphasized above, general and total control is not a requirement to establish agency in California. Pursuant to Civil Code section 2297, "[a]n agent for a particular act or transaction is called a special agent. All others are general agents." A showing of general control is only necessary to establish a general agency. Thus, so long as the undisputed evidence establishes that FlexCare controlled Eisenhower in the particular act at issue (here, timekeeping to allow FlexCare to pay its employees and comply with California wage and hour law), a special agency has been established.

Finally, Grande's arguments completely ignore the holding of *Garcia v. Pexco, LLC*. Grande has alleged, since the beginning of this case, that FlexCare and Eisenhower were joint employers. For purposes of its decision, the trial court assumed that FlexCare and Eisenhower were joint employers. (7 AA 1858:2-6.) As *Garcia* decided, joint employers are agents of one another in their dealings with third-party employees. (*Garcia, supra*, 11 Cal.App.5th at p. 788.) So too here. Grande's silence on *Garcia* is deafening.

4. Because Eisenhower Was FlexCare's Special Agent, Eisenhower Was Necessarily a Released Party Pursuant to the Settlement Agreement and Judgment in the Erlandsen Action.

Eisenhower was FlexCare's special agent. Thus, as argued in Eisenhower's and FlexCare's opening briefs, Eisenhower was necessarily a released party under the settlement agreement and judgment in the Erlandsen action. The settlement agreement and judgment expressly released all agents of FlexCare. (2 AA 499:1-7; 4 AA 1132:27-1133:6; 4 AA 1140:23-28.) As the trial court concluded, the only evidence of the parties' intent in the Erlandsen action is embodied in the plain language of the settlement agreement and judgment. (7 AA 1859:28-1860:1.) That

plain language establishes that Eisenhower was a released party and that Grande's action against Eisenhower should have been dismissed by the trial court.

Grande claims the substantial evidence rule applies and that the conflicting extrinsic evidence of the parties' intent establishes that Eisenhower was not intended to be a released party. Although the trial court admitted the extrinsic evidence in the bench trial, it expressly did not consider that evidence, finding it to be of little, if any, value. (7 AA 1859:14-1860:1.) Ultimately, the trial court's decision rested only on the plain language of the settlement agreement and judgment in the Erlandsen action, not on any evidence regarding either party's unexpressed subjective intent. Thus, the allegedly conflicting testimony regarding the parties' intent to release Eisenhower is irrelevant. The parties clearly intended to release all agents of FlexCare, and Eisenhower was a special agent of FlexCare.

Grande relies on *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, to argue that, because FlexCare did not specifically name Eisenhower, the released parties cannot be construed to include Eisenhower. *Hess*, however, does not apply to the facts of this case. As FlexCare explained in its opening brief, *Hess* involved extrinsic evidence that was clearly relevant and relied upon by the court. (FAOB at 24.) Based on the considered extrinsic evidence in *Hess*, the boilerplate settlement agreement language in that case was an obvious mutual mistake. (*Hess, supra*, 27 Cal.4th at pp. 523-527.) Here, there was no extrinsic evidence, much less extrinsic evidence considered by the trial court, that the language releasing all agents of FlexCare was a mistake.

Grande also relies on *Cacique, Inc. v. Reynaldo's Mexican Food Co., LLC* (C.D. Cal. Feb. 7, 2014, Case No. 2:13-cv-1018-MDW (MLGx)) 2014 WL 505178, an unpublished federal district court case from the

Central District of California. But much as in *Hess*, the district court in *Cacique* specifically considered extrinsic evidence to determine the meaning of "affiliated entities" and concluded that Cacique was not an affiliated entity.[5] (See *id.*, 2014 WL 505178, at pp. *4-6.) Here, the trial court did not consider extrinsic evidence in (1) determining the meaning of "agent" under the settlement agreement and judgment in the Erlandsen action or (2) determining the parties' intended scope of released parties. In other words, the trial court concluded that the parties to the Erlandsen action intended to release agents, but erroneously concluded that Eisenhower was not a special agent of FlexCare. In *Cacique*, the district court considered extrinsic evidence in determining the meaning of affiliated entities and extrinsic evidence in determining whether Cacique was an affiliated entity. Thus, *Cacique* has no application to the facts of this case.[6]

Next, Grande cites a Texas federal bankruptcy court case, *In re Texas Rangers Baseball Partners* (Bankr. N.D. Tex. 2014) 521 B.R. 134. First, that case is clearly inapplicable because, as even Grande acknowledges, it is based on principles of Texas law. (See *id.* at pp. 170-171.) Second, it is another "affiliate" case, whereas this case concerns

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[5] In the trial court here, Eisenhower and FlexCare argued that Eisenhower was an "affiliate" of FlexCare and was thus released under the settlement agreement and judgment in the Erlandsen action. FlexCare does not here challenge the trial court's conclusion that Eisenhower was not an "affiliate" of FlexCare and such a question is not within the scope of the issue on which this Court granted review.

[6] Even if it did, it is an unpublished federal district court case that is not very persuasive to this Court. (See *Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 726 ["These mostly unpublished and out-of-state [federal trial court] decisions obviously have no binding precedential effect on this court. Further, their ability to provide useful guidance[] is somewhat limited because we do not stand in the trial court's place."] [disapproved on other grounds by *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 986, fn. 15].)

whether Eisenhower was an agent of FlexCare, not an affiliate of FlexCare. (See *id.* at p. 170.) Finally, the decision in *In re Texas Rangers Baseball Partners* regarding the meaning of "affiliate" is merely dicta. The bankruptcy court ultimately rested its holding on a conclusion that the *claims* at issue, not the parties, were not released by the settlement agreement the bankruptcy court was interpreting. (See *id.* at pp. 171-172.) All of the cases cited by Grande to suggest that Eisenhower should have been identified by name in the Erlandsen action's release are inapplicable.

Grande also goes on to insist that the parties to the Erlandsen action would have included specific language releasing Eisenhower or other clients of FlexCare if they had intended to release Eisenhower. But the parties' intent in the Erlandsen action comes through loud and clear from the plain language of the settlement agreement and judgment itself. That other language *could* have been used says nothing about the language that *was* used. As FlexCare explained in its opening brief, the words that *were* used plainly expressed an overarching intent to broadly categorize and release entities, like Eisenhower, that acted as agents of FlexCare.

Finally, Grande asserts that discussion among counsel – outside the context of the mediation in which settlement of the Erlandsen action was actually achieved – did not include communications regarding releases of Eisenhower, suits against Eisenhower, or releases and suits against joint employers. (AB at 34.) But again, the trial court did not consider this extrinsic evidence in interpreting the unambiguous language of the settlement agreement and judgment in the Erlandsen action.

Simply put, there can be no doubt that the parties intended to release all agents of FlexCare as part of the settlement agreement and judgment in the Erlandsen action. Eisenhower was indisputably a special agent of FlexCare. As such, Eisenhower was released.

B. <u>Res Judicata Bars Grande's Claims Against Eisenhower.</u>

As Grande acknowledges, the only element of the res judicata analysis in dispute is whether Eisenhower and FlexCare were in privity with each other such that the final judgment in the Erlandsen action bars Grande's action against Eisenhower here. The relevant law establishes that Eisenhower and FlexCare were in privity and Grande's claims in this action against Eisenhower are barred.

1. Grande Incorrectly Analyzes This Court's Opinion in *DKN Holdings LLC v. Faerber* and Incorrectly Assumes That One Joint Employer Cannot Be Derivatively Liable for the Acts of the Other Joint Employer.

At the heart of Grande's opposition to the application of res judicata in this case is an incorrect interpretation and analysis of this Court's opinion in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813. Grande argues that "[i]n *DKN Holdings*, this Court expressly held that where two defendants were jointly and severally liable to a plaintiff, there was no 'privity' for purposes of the doctrine of *res judicata*." (AB at 20.) This Court held no such thing. Rather, this Court held that "[j]oint and several liability *alone* does not create" the closely aligned interest required to establish privity among co-obligors. (*DKN Holdings, supra*, 61 Cal.4th at p. 826 [emphasis added].) *DKN Holdings* never decided that joint and several liability precludes parties from having a closely aligned interest amounting to privity, but simply that joint and several liability alone does not establish that relationship. (See *ibid.*) Thus, even if FlexCare and Eisenhower were jointly and severally liable, that does not preclude a finding that they were in privity. As argued by FlexCare and Eisenhower in their opening briefs, the relationship between FlexCare and Eisenhower clearly establishes privity. (FAOB at 30-38; Eisenhower Medical Center's Opening Merits Brief at 36-43.)

Moreover, *DKN Holdings* emphasizes: “When a defendant’s liability is entirely derivative from that of a party in an earlier action, claim preclusion bars the second action because the second defendant stands in privity with the earlier one.” (*DKN Holdings, supra*, 61 Cal.4th at pp. 827-828.) Although joint and several liability and derivative liability are not coextensive, as FlexCare explained in its opening brief, they are not mutually exclusive. (FAOB at 32-33.) Grande does not contest this, but instead argues that because FlexCare and Eisenhower are joint employers they cannot be derivatively liable. There is no support for that contention in the law, and it is contradicted by the basis for Eisenhower’s liability alleged by Grande in her complaint.

First, Grande assumes, without any analysis, that joint employers are *always* jointly and severally liable. FlexCare acknowledges that joint and several liability has been found for joint employers, but the law does not support the notion that joint employers are *always* jointly and severally liable. In *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 728, the Second District acknowledged that “under certain circumstances, a joint employer could satisfy its affirmative meal and rest obligations by delegating those duties to a coemployer.”[7] Thus, joint employers can choose, via contract, to order their relationship such that one of the joint employers is responsible for satisfying California’s wage and hour requirements.

Here, the parties clearly ordered their relationship that way in the Supplemental Staffing Agreement. The parties agreed that nurses assigned by FlexCare to Eisenhower were “employees of [FlexCare] and are *not*

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[7] Grande cites *Benton*, but ignores this aspect of the case. The facts before the *Benton* court were not sufficient to support a finding that the defendant delegated responsibility for compliance with wage and hour obligations to its coemployer. That is not the case here.

employees or agents of [Eisenhower].” (4 AA 1093 ¶ 5.1 [emphasis added].) The parties further agreed that FlexCare “has, retains, and will continue to bear *sole, exclusive and total* legal responsibility as the employer” of nurses assigned to Eisenhower, including the responsibility to ensure full compliance with federal and state wage and hour requirements. (4 AA 1093, ¶ 5.2 [emphasis added].) Thus, the parties agreed that FlexCare, as between Eisenhower and FlexCare, was solely responsible for complying with California’s wage and hour requirements with regard to payment of FlexCare’s employees. Thus, any liability on the part of Eisenhower would necessarily have to be derivative of some failure on FlexCare’s part in satisfying its wage and hour obligations to its employees.

Moreover, the cases cited by Grande in arguing that joint and severally liable parties cannot be in privity, do not apply. Thus, while *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 154, explained that “where liability is joint and several, a civil action against one obligor poses no risk to the others,” that is not the case here. As discussed below, the case against FlexCare necessarily presented a risk to Eisenhower because Eisenhower’s liability is derivative of FlexCare’s. Moreover, here, FlexCare has a potential indemnity obligation to Eisenhower. (4 AA 1093 ¶ 5.3.) Thus, an action against Eisenhower necessarily presents a significant risk to FlexCare.

Grande also cites *McCray-Key v. Sutter Health Sacramento Region* (E.D. Cal. Nov. 2, 2015, 2:15-cv-1514-JAM-CKD) 2015 WL 6703585, an unpublished federal district court case. *McCray-Key*, however, relies on the same mistaken analysis of *DKN Holdings* that Grande does, and thus wrongly concludes that parties that are jointly and severally liable can never be in privity. (See *id.*, 2015 WL 6703585 at *2-4.) And, as *Castillo* recognized, *McCray-Key* did not feature a broad release of all claims, like

the release at issue in *Castillo* and in this case. (See *Castillo, supra*, 23 Cal.App.5th at pp. 280-281.)

Second, in claiming that Eisenhower and FlexCare are not derivatively liable, Grande ignores the allegations of her own complaint. Those allegations establish that the entire basis for the liability asserted by Grande against Eisenhower is derivative of FlexCare's liability. Grande first alleges that Eisenhower failed to pay Grande and other class members for all hours worked. (1 AA 23:23-24:18.) But the Supplemental Staffing Agreement provides that payment of wages to nurses assigned to Eisenhower is FlexCare's responsibility. (4 AA 1093 ¶¶ 5.1-5.2.) Thus, any failure to pay was necessarily a failure on the part of FlexCare, and if Eisenhower is liable it is necessarily derivative of FlexCare's liability. Next, Grande alleges that Eisenhower failed to pay for overtime hours worked. (1 AA 24:19-25:16.) The same logic applies: FlexCare was solely responsible for paying Grande's wages and thus if Eisenhower is liable it is as a direct result of *FlexCare's* failure to pay overtime wages.

Grande also asserts meal and rest period violations and alleges that Eisenhower did not pay Grande and class members the required Labor Code section 226.7 penalties. (1 AA 25:17-27:13.) To the extent Grande did not receive meal and rest periods while working at Eisenhower, under the Supplemental Staffing Agreement, it was FlexCare that was responsible for complying with California wage and hour law by paying the Labor Code section 226.7 penalties. (4 AA 1093 ¶¶ 5.1-5.2.) Again, Eisenhower's liability, if it were found to exist, would be entirely derivative of FlexCare's.

Next, Grande alleges that Eisenhower failed to comply with the Labor Code requirement that terminated employees be paid the wages due to them. (1 AA 27:14-28:8.) Once again, the payment of these wages, under the Supplemental Staffing Agreement, was the sole responsibility of

FlexCare, and thus Eisenhower's liability would be derivative. Finally, Grande alleges that Eisenhower failed to provide Grande and class members with accurate wage statements. (1 AA 28:9-31:1.) But because FlexCare was the employer solely responsible for paying its employees and complying with California wage and hour requirement, it was the only party that could have possibly provided wage statements to Grande or other travel nurses assigned to Eisenhower. Thus, Eisenhower can only be liable to Grande as a consequence of FlexCare's liability.[8]

Plainly, there is *no* liability for Eisenhower in this case without FlexCare's alleged failures to comply with California wage and hour law. Thus, Eisenhower's liability would be entirely derivative of FlexCare's. Under *DKN Holdings* and other well-settled California law, this derivative liability establishes that Eisenhower is in privity with FlexCare.

Nor does Grande's cited authority affect this conclusion. Grande's reliance on *Martinez v. Combs* (2010) 49 Cal.4th 35 is misplaced and actually undermines the entire premise of Grande's claim that Eisenhower is liable for any violation of California's wage and hour law. In *Martinez*, this Court held that a produce merchant did not exercise enough control over a strawberry farmer's employees to be considered an employer of the agricultural workers employed by the strawberry farmer even though the merchant supposedly exercised dominant control over the farmer by virtue of the contractual relationship between the merchant and the farmer. (*Id.* at pp. 71-74.) Grande misapplies this precedent by construing it to mean that the existence of a contractual relationship cannot establish derivative

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[8] It is telling that there is absolutely no discussion whatsoever of the allegations of her own complaint against Eisenhower in Grande's answering brief. As even a perfunctory review demonstrates, Eisenhower's alleged liability is derivative of FlexCare's alleged liability.

liability. In doing so, Grande misapplies *Martinez* and misstates FlexCare's derivative liability argument.

Initially, *Martinez* simply holds, quite rightly, that merely because one business relies on the financial benefit that arises from a contract with another business, that does not mean that the other business controls the first business's employees. (See *id.* at p. 72 ["More importantly, plaintiffs' factual assertions do not establish that Apio's business relationship with Munoz allowed the company to exercise control over Munoz's employees' wages and hours."].) Indeed, if *Martinez's* logic applied to this case as suggested by Grande, Eisenhower and FlexCare would not be joint employers and the entire basis of liability espoused by Grande would disappear. If that was the case, the only possible liability for Eisenhower would arise as a result of the derivative liability already discussed above.

More importantly, however, FlexCare has never asserted that Eisenhower is derivatively liable simply because FlexCare has a contractual relationship with Eisenhower whereby Eisenhower pays FlexCare to provide Eisenhower with traveling nurses. Rather, FlexCare has always contended that Eisenhower could only be liable if FlexCare failed to comply with the relevant wage and hour laws. Thus, Eisenhower's liability, such as it may be, is necessarily derivative.

The remaining cases cited by Grande all relate to the same incorrect assertion discussed above. Just because courts have found that joint employers *can* be jointly and severally liable, does not mean that joint employers are *always* jointly and severally liable.[9]

In sum, joint and several liability does not preclude a finding of privity or of derivative liability. Here, privity between Eisenhower and

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[9] And even if they are, a finding of joint and several liability does not preclude a finding of derivative liability or privity.

FlexCare is established because Eisenhower can only be derivatively liable to Grande.

2. Grande's Privity Analysis Ignores the Development of California Law on Privity, Which Is Correctly Discussed and Applied in *Castillo*.

As correctly concluded by *Castillo*, a staffing agency like FlexCare and a client like Eisenhower are also in privity because the client is the special agent of the staffing agency and because they share an identical relationship to the litigation. Here, Grande claims that *Castillo* is contrary to California law. Grande's contentions are unavailing.

First, Grande claims that *Castillo* incorrectly held that privity deals with a person's relationship to the subject matter of the litigation, claiming that such a statement of the law is contrary to *DKN Holdings* and *Bernhard v. Bank of America Nat. Trust & Savings Assn.* (1942) 19 Cal.2d 807, 811. But Grande's argument ignores the long development of the law of privity that was recognized in *DKN Holdings* and discussed in cases like *Castillo* and *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663.

As explained by Witkin, the "modern approach" to privity is to focus on "the practical question of whether the nonparty is sufficiently close to the original case to afford application of the principle of preclusion." (7 Witkin, Cal. Procedure (5th ed. March 2020 Update) Judgments, § 457 [internal quotation omitted].) Thus, Grande's reliance on *Bernhard*, which focused on the traditional concept of privies as those who, after rendition of judgment, acquired an interest in the subject matter affected by the judgment as by inheritance, succession, or purchase, is misplaced. (See *Bernhard, supra*, 19 Cal.2d at p. 811.) To the contrary, and as recognized by *DKN Holdings*, the test is no longer whether the nonparty acquired an interest in the subject matter of the litigation after the judgment, but

whether the party acted as the nonparty's "virtual representative" in the first case. (*DKN Holdings, supra*, 61 Cal.4th at p. 826.)

California's Courts of Appeal have continued to develop this virtual representative test and explain how it should be applied to various scenarios. Thus, in *Cal Sierra Development* (another case not addressed by Grande despite its citation by both FlexCare and Eisenhower), the Third District concluded that the virtual representative test requires an examination of the party's and nonparty's relationship to the subject matter of the litigation that may preclude the subsequent litigation. (*Cal Sierra Development, supra*, 14 Cal.App.5th at pp. 672-674.) In that case, the appellate court concluded that a licensee that litigated the first arbitration proceeding was a virtual representative of the licensor sued in the second action because the licensee and licensor had "an identical interest" to the subject matter of the first litigation (the placement of an asphalt plant that allegedly violated the plaintiff's mining rights). (See *id.* at p. 674.) Contrary to Grande's argument, the subject matter of the litigation analysis does not remove the requirement of an identity of interest between the parties, it merely provides the frame through which courts must determine whether the party in the first case was the virtual representative of the nonparty who is sued in the second case.

Thus, *Castillo* cited *Cal Sierra Development* and explained that the subject matter of the litigation defines the analysis of whether one party acted as a virtual representative of the nonparty. (*Castillo, supra*, 23 Cal.App.5th at p. 277.) *Castillo* then went on to hold that the subject matter of the previous case and the case before the appellate court were the same. (*Id.*at pp. 279-280.) And, unlike Grande would have this Court believe, *Castillo* did not stop there. Rather, the Second District explained that the staffing agency and the client shared the same relationship to the claims at issue because they were both involved in the employees' wages: the client

tracked the employees' time and the staffing agency payed the employees' wages. This relationship caused the staffing agency and the client to be "intertwined" with respect to the subject matter of the litigation. (*Id.* at p. 280.)

That same analysis applies here and is consistent with California law regarding privity. Indeed, California courts and federal courts applying California law have applied both *Castillo* and *DKN Holdings* together when examining privity, demonstrating that other courts do not find the two cases contradictory. (See, e.g., *Atwell v. Rohnert Park* (2018) 27 Cal.App.5th 692, 702-703 [quoting portions of *Castillo* that in turn quoted *DKN Holdings*]; *In re Bondanelli* (9th Cir. 2020) 812 Fed.Appx. 474, 475 [citing and applying *DKN Holdings* and *Castillo* together]; *Turner v. Bank of New York Mellon as Trustee for Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-AL1, Mortgage Pass Through Certificates, Series 2007-AL1* (N.D. Cal. Aug. 26, 2019, Case No. 19-CV-009933-LHK) 2019 WL 4040139, at *5 [same].)

Grande insists, however, that because the subject matter of the litigation in *DKN Holdings* was the lease agreement, if the subject matter "test" from *Castillo* was applied, this Court would have found the party and nonparties in *DKN Holdings* to be in privity. But, as already explained, the subject matter of the litigation is not a test, but a frame through which the party and nonparty's relationship must be examined. In *DKN Holdings*, even though the subject matter of the second litigation was the same, the nonparties did not share the same relationship to the subject matter of the litigation as the party in the first action. Specifically, the lease agreement at issue *expressly* set forth that the parties to the lease agreement had joint and several responsibility to comply with the lease terms. (*DKN Holdings, supra*, 61 Cal.4th at p. 818.) Thus, the nonparties later sued on the lease agreement could not share with the party from the first case the same

relationship to the subject matter of the litigation because the nonparties had a separate responsibility to fulfill the terms of the agreement. In other words, unlike Eisenhower and FlexCare here, the lessees in *DKN Holdings* did not have an interdependent relationship that required each party to take certain actions to satisfy the obligation at issue in the subject matter of the litigation. Each lessee's obligation in *DKN Holdings* was completely independent from the others.

In contrast, FlexCare and Eisenhower, like the staffing agency and client in *Castillo*, had an inextricably intertwined relationship with regard to the subject matter of the Erlandsen action and Grande's action here against Eisenhower. Eisenhower was responsible for tracking Grande's time when she was working at the hospital, and FlexCare was responsible for complying with the wage and hour obligations that arose as a result of the time Grande worked. (See *Castillo, supra*, 23 Cal.App.5th at pp. 279-280.) Moreover, like in *Castillo*, because Eisenhower is FlexCare's special agent and is thus a released party under the Erlandsen action settlement agreement and judgment, Eisenhower is in privity with FlexCare because it is a third-party beneficiary of the contract between FlexCare and Grande in the Erlandsen action. (See *id.* at p. 281.)

In sum, Eisenhower and FlexCare are in privity with one another, and the judgment in the Erlandsen action thus bars Grande's claims against Eisenhower in this action.

3. Labor Code Section 2810.3 Also Supports a Finding of Privity.

Grande dismisses FlexCare and Eisenhower's arguments regarding Labor Code section 2810.3 without analysis because it was enacted after Grande worked at Eisenhower. But Labor Code section 2810.3 is important not because it is applicable to the parties here, but because of what it says about the state of the law in California. Section 2810.3

acknowledges, as a matter of *statutory* law, that joint employers are derivatively liable for one of the joint employer's failure to comply with California wage and hour law. This statutory acknowledgement is consistent with the case authority discussed above.

C. Public Policy Supports a Holding That a Class of Workers Cannot Settle a Wage and Hour Suit With a Stipulated Judgment Releasing a Staffing Agency's Agents and Then Bring a Second Class Action Against the Client Company.

The evidence in this case established that Grande was well aware of a potential claim against Eisenhower when she filed her case against FlexCare in the Erlandsen action. Her choice to settle that action without bringing in Eisenhower represents a choice to redress her grievances from FlexCare only. Grande should not be permitted to double-dip after agreeing to this compromise.

Moreover, public policy supports a holding that allows staffing agencies and their clients to reasonably order their contractual relationships. When a staffing agency assumes all employment responsibility and agrees to indemnify its client in their contract, both the staffing agency and the client should have confidence that a settlement between an employee and the staffing agency will spell the end of the matter in a wage and hour action. If Grande is successful in flipping the established law on its head, staffing agencies and their clients will have no idea how to draft their agreements to adequately protect themselves.

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IV. CONCLUSION

For these reasons, and the reasons set forth in FlexCare's opening brief, the Court should reverse the judgment below.

DATED: November 23, 2020 DOWNEY BRAND LLP

By: */s/ Cassandra M. Ferrannini*
CASSANDRA M. FERRANNINI
Attorneys forIntervener and Appellant
FLEXCARE, LLC

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 9,628 words.

DATED: November 23, 2020 DOWNEY BRAND LLP

By: */s/ Cassandra M. Ferrannini*
CASSANDRA M. FERRANNINI
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FLEXCARE, LLC

PROOF OF SERVICE

Lynn Grande v. Eisenhower Medical Center
Supreme Court of California; Case No. S261247
US Court of Appeal, Fourth District Appellate District, Division Two, Case No. E068730
After An Appeal From the Superior Court, County of Riverside, Case No. RIC1514281

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On November 23 1, 2020, I served true copies of the following document(s) described as **APPELLANT FLEXCARE LLC'S REPLY BRIEF** on the interested parties in this action as follows:

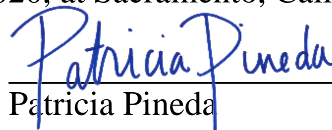
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Downey Brand LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on November 23, 2020, at Sacramento, California.



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STATE OF CALIFORNIA
Supreme Court of California

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Case Name: **GRANDE v. EISENHOWER MEDICAL CENTER (FLEXCARE)**
Case Number: **S261247**
Lower Court Case Number: **E068730**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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3. I served by email a copy of the following document(s) indicated below:

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BRIEF	S261247 - Appellant FlexCare LLC's Reply Brief

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

11/23/2020
Date

/s/Cassandra Ferrannini
Signature

Ferrannini, Cassandra (204277)
Last Name, First Name (PNum)

Downey Brand LLP
Law Firm