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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,

Intervener and Appellant

On Review From The Court Of Appeal For the Fourth Appellate District,
Division Two
E068730

After An Appeal From the Superior Court,
County of Riverside, Case No. RIC1514281
Honorable Sharon J. Waters

PETITION FOR REVIEW

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I. ISSUE PRESENTED

There is currently a split of authority in the District Courts of Appeal regarding the effect of a joint employer relationship on a subsequent action against one joint employer after a judgment has been secured in an action involving the first joint employer. FlexCare, LLC ("FlexCare") presents the following issue for review:

Whether a class of workers may bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agencies' agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?

II. INTRODUCTION AND REASONS TO GRANT REVIEW

Review is necessary to secure uniformity of decision and, in doing so, to settle an important question of law about the res judicata effect of class-action settlements in wage and hour cases. (Cal. Rules of Court, rule 8.500(b)(1).)

In *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, 279-281 (*Castillo*), the Second District Court of Appeal squarely held—on facts essentially identical to the facts in this matter—that a temporary staffing agency and the joint employer at which the staffing agency's employees were placed were in privity with respect to the subject matter of a wage and hour class action. In so doing, the court considered multiple relevant authorities, including this Court's decision in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 (*DKN Holdings*).

Castillo also held that the relationship between the staffing agency and its client (which was identical to the relationship between FlexCare and Eisenhower Medical Center ("Eisenhower")) amounted to an agency relationship where the client-employer was an agent of the staffing agency

for the purpose of collecting, reviewing, and providing the staffing agency's employee time records to the agency so that it could properly pay its employees. Moreover, in another recent case, consistent with *Castillo,* the Court of Appeal held that because a staffing company and its client were joint employers, they were, as a matter of law, agents of each other. (*Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 788 (*Garcia*).)

Yet, the Court of Appeal held here—directly contrary to the decisions in *Castillo* and *Garcia*—that Intervener and Appellant FlexCare and Defendant Eisenhower, although joint employers, were not in privity and did not share any kind of agency relationship (even a limited one). As Justice Ramirez's dissenting opinion in this case recognized, the decision creates a split of authority in this area.

The Court of Appeal justified creating this split of authority by reference to this Court's recent decision in *DKN Holdings*. In that case, this Court explained that "[j]oint and several liability *alone* does not create such a closely aligned interest between co-obligors." (*DKN Holdings, supra*, 61 Cal.4th at p. 826, emphasis added.) This Court's observation was amplified and twisted by the trial court and the Court of Appeal into a holding that this Court did not make and has never made: that joint and several obligors can *never* be in privity. (See Slip op. at 15-16.) As discussed below, that is not the case and thus the split of authority created by the Court of Appeal is not supported by this Court's precedent.

The issue that spawned these conflicting opinions from the Courts of Appeal is a significant question of law that should be settled by this Court. It impacts an important industry in California: temporary staffing companies and the joint employers to whom they assign temporary employees. According to the U.S. Bureau of Labor Statistics' Quarterly Census of Employment and Wages, there were approximately 390,000 Californians employed in the category known as "Temporary help services"

in 2018 (the most recent full year for which data is available). These employees worked for approximately 5,000 separate establishments.[1] This category of workers accounted for over $15 billion in wages in California in 2018. Wage and hour issues affecting temporary staffing companies and their clients have a significant economic impact, both on these businesses and on the workers employed by this industry.

The widespread impact of this issue is further evidenced by three opinions published in just over two years (*Castillo*, *Garcia*, and this case) addressing the joint employer relationship. The legal and factual similarities between *Castillo* and the instant case demonstrate that the problems at issue are recurrent. As such, this case is deserving of review by this Court both to provide uniformity of decision and to provide guidance to a large class of employers and employees in California.

The legal principles raised by this case—privity and agency—are long-standing facets of California and common law. This Court, however, has never addressed these principles in the context of the relationship between temporary staffing agencies and their clients. Without this Court's review, the thousands of California employers who rely on temporary staffing agencies—and the staffing agencies themselves—lack clear guidance as to how the structure of the relationship they choose may ultimately affect their liability in the event they are sued in a wage and hour class action by an employee.

In order to ensure uniformity of decisions among the Courts of Appeal and to ensure this important issue affecting employers and

[1] The Bureau of Labor Statistics defines "establishment" as "The physical location of a certain economic activity—for example, a factory, mine, store, or office. A single establishment generally produces a single good or provides a single service."

employees in this state is settled, the issue raised by this petition is deserving of the Court's review and determination.

III. SUMMARY OF FACTS AND PROCEDURE

As FlexCare argued below, this case involves the application of law to undisputed facts. FlexCare thus sets forth the relevant undisputed facts and procedural background as found in the trial court and as related in the Court of Appeal's opinion.

A. The Relationship Between FlexCare, Eisenhower Medical Center, and Temporary Nurse Lynn Grande

FlexCare is a temporary staffing agency that recruits travel nurses for short-term contracts with hospitals. (Slip op. at 3.) FlexCare works with nearly 200 hospitals in California and Eisenhower is one of its clients. (*Ibid.*) FlexCare and Eisenhower's relationship operates pursuant to a Staffing Agreement. (*Ibid.*)

Under the Staffing Agreement, travel nurses were employees of FlexCare and not employees of Eisenhower. (*Ibid.*) The Staffing Agreement gave FlexCare "exclusive and total legal responsibility as the employer of Staff . . . includ[ing], but not . . . limited to, the obligation to ensure full compliance with and satisfaction of (l) 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]." (*Id.* at 3-4.) FlexCare was also responsible for screening nurse candidates to ensure that they met certain minimum competencies and regulatory requirements. (*Id.* at 4.)

On the other hand, Eisenhower maintained control over the temporary nurses in the performance of their jobs once they were assigned to the hospital. (*Ibid.*) Eisenhower assessed a nurse's competency during an orientation program and might require nurses to take its medication and clinical skills test. (*Ibid.*) Eisenhower was responsible for a nurse's work assignments and could terminate nurses from Eisenhower for poor performance. (*Ibid.*) Moreover, the Staffing Agreement required assigned travel nurses to conform with hospital policies and procedures. (*Ibid.*)

Eisenhower paid FlexCare based on the hours the temporary nurses worked. (*Ibid.*) In turn, FlexCare was responsible for paying nurses under separate travel nurse agreements. (*Ibid.*) The Staffing Agreement required assigned nurses to use Eisenhower's time and attendance system. (*Ibid.*) The individual travel nurse agreements required nurses to report their hours worked to FlexCare after obtaining approval from Eisenhower. (*Ibid.*) Specifically, nurses were required to accurately report actual hours worked and fax or email time sheets weekly with an appropriate signature from an Eisenhower representative. (*Ibid.*)

As is relevant to this matter, the Staffing Agreement purported to define FlexCare and Eisenhower's legal relationship, stating that FlexCare provided services to Eisenhower as an independent contractor and FlexCare was not an agent of Eisenhower. (*Id.* at 5.) The Staffing Agreement also required FlexCare to indemnify Eisenhower under certain circumstances—for claims and losses in connection with any FlexCare breach of the agreement or violation of statute or regulation, except those resulting from FlexCare's negligence, as well as for claims and losses predicated on a finding temporary nurses were joint employees of FlexCare and Eisenhower. (*Ibid.*)

FlexCare employed Plaintiff and Appellee Lynn Grande ("Grande") and assigned her to work at Eisenhower. (*Id.* at 3.) Grande performed

work at Eisenhower for a total of eight days, from February 6 to February 14, 2012. (*Ibid.*)

B. Grande Enters a Class Action Settlement with FlexCare in the First Lawsuit in Santa Barbara

Even before Grande began working at Eisenhower, another plaintiff filed a purported class action against FlexCare in Santa Barbara County Superior Court. (*Id.* at 6.) Filed on January 30, 2012, the named plaintiffs in the Santa Barbara Class Action purported to represent a class of all persons who were nonexempt nursing employees of FlexCare beginning January 30, 2008, who were assigned to work at any health care facility in California. (*Ibid.*) The complaint alleged various Labor Code wage and hour violations and violation of the Unfair Competition Law with the Labor Code violations as the predicates. (*Ibid.*)

Grande joined the Santa Barbara Class Action as a named plaintiff on May 30, 2013. (*Ibid.*; see also 2 AA 496:12-14.) Grande's allegations were based on her employment at Eisenhower, but Grande did not name Eisenhower as a defendant. (Slip op. at 6.)

In January 2014, the parties to the Santa Barbara Class Action entered into a settlement agreement. (*Id.* at 7.) The settlement included a stipulation that Grande and her co-plaintiff represented a certified class of "[a]ll persons who at any time from or after January 30, 2008 through the date of Preliminary Approval were non-exempt nursing employees of FlexCare, LLC employed in California." (*Ibid.*) The settlement agreement was court-approved and incorporated into a final judgment on April 8, 2015. (*Ibid.*)

The final judgment ordered "the Released Claims of each and every Class member and Settlement Class Member, respectively, are and shall be deemed to be conclusively released as against the Released Parties," and "All Class members, as of the Effective Date, are hereby forever barred and

enjoined from prosecuting Released Claims against the Released Parties." (*Ibid.*) The agreement defines the "Released Claims" as "any and all claims . . . which have been or could have reasonably been asserted in the [Santa Barbara] Action or in any other state or federal court, administrative tribunal, or in arbitration or similar proceeding, based upon, or arising out of, or related to the allegations in the [Santa Barbara] Action during the Class Period." (*Id.* at 7-8.)

The settlement named as "Released Parties" FlexCare and the other named defendants, who were affiliates and officers of FlexCare. (*Id.* at 8.) The settlement also included language releasing the named defendants':

> present and former subsidiaries, affiliates, divisions, related or affiliated companies, parent companies, franchisors, franchisees, shareholders, and attorneys, and their respective successors and predecessors in interest, all of their respective officers, directors, employees, administrators, fiduciaries, trustees and agents, and each of their past, present and future officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their counsel of record.

(*Ibid.*) The settlement did not expressly release Eisenhower or any other client of FlexCare by name. (*Ibid.*)

C. Grande Brings a Second Class Action Based on the Same Work and the Same Alleged Wage and Hour Violations in Riverside County Against FlexCare's Client, Eisenhower

Less than two months after the judgment in the Santa Barbara Class Action became final, Grande filed a purported class action against Eisenhower in Riverside County Superior Court. (*Id.* at 6.) In the Riverside Class Action, Grande purported to represent all persons who were "non-exempt employees who were staffed by [Eisenhower] through third party registries, temporary employment services, temporary

employment agencies, staffing agencies and services, or other employment agencies." (*Ibid.*)

Like the Santa Barbara Class Action, Grande's claims were based on her work at Eisenhower. (*Id.* at 6-7.) In the Riverside Class Action, however, Grande brought only a claim based on violations of the Unfair Competition Law. (*Id.* at 5-6.) The Unfair Competition Law claim was based solely on the same alleged predicate violations of the Labor Code that were alleged in the Santa Barbara Action. (*Ibid.*; see also 1 AA 23:19-31:27.) FlexCare was not named as a party in the Riverside Class Action. (Slip op. at 7.) As relevant here, however, Grande alleged that Eisenhower was a joint employer of Grande. (See 1 AA 19.)

Shortly after Grande filed her action against Eisenhower, Eisenhower demanded that FlexCare indemnify it against Grande's claim. (Slip op. at 9.) Thereafter, FlexCare intervened in the Riverside Class Action and sought a declaration that (1) Eisenhower was a released party under the Santa Barbara Class Action settlement and (2) the judgment in Santa Barbara precludes Grande's causes of action against Eisenhower in Riverside. (*Id.* at 9-10.) On Eisenhower's motion, the trial court bifurcated the released party and res judicata issues from all other issues and held a limited bench trial. (*Id.* at 10.)

After trial, the court ruled that Grande's claims against Eisenhower were not barred by res judicata. (*Ibid.*) The parties did not dispute the elements of res judicata and only disputed whether FlexCare and Eisenhower were in privity. (See 7 AA 1855:18-21.) In its statement of decision, the trial court assumed that FlexCare and Eisenhower were joint employers. (See 7 AA 1855:15-1858:5.) The trial court also concluded that joint employers are typically jointly and severally liable. (Slip op. at 10.) The trial court then concluded that this Court's decision in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, stood for the proposition

that "claim preclusion does not apply merely because the liability which plaintiff seeks to establish in the second suit would be joint and several with the defendant in the former action." (*Ibid.*; see also 7 AA 1855:22-26.) Based on this conclusion, the trial court decided that FlexCare and Eisenhower were not in privity and res judicata did not preclude Grande's second lawsuit against Eisenhower. (Slip. op. at 10.)

The court also ruled that Eisenhower was not a released party. (*Ibid.*) As relevant here, the court concluded that Eisenhower was not an agent of FlexCare. (*Ibid.*)

The court entered judgment in favor of Grande and against FlexCare on FlexCare's complaint in intervention. (*Ibid.*)

D. The Court of Appeal Declined to Follow *Castillo*

FlexCare appealed and, at Eisenhower's request, the trial court certified its statement of decision as appropriate for writ review. (Slip op. at 10.) Eisenhower filed a petition for writ of mandate and the Court of Appeal, Fourth District, Division 2, stayed proceedings in the trial court and consolidated FlexCare's appeal with Eisenhower's writ proceeding. (*Id.* at 10-11.)

The Court of Appeal affirmed the trial court's decision, concluding that FlexCare and Eisenhower were not in privity and thus res judicata did not apply. (*Id.* at 12-21.) The Court of Appeal also concluded that Eisenhower was not an agent of FlexCare, and thus was not a released party under the settlement of the Santa Barbara Class Action. (*Id.* at 21-27.)

The Hon. Manuel A. Ramirez filed a dissenting opinion. Justice Ramirez would have followed the recent decision of the Second District Court of Appeal in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, on facts that were essentially identical to the facts in this case. (Slip op. at dis. opn. of Ramirez, P.J.) Justice Ramirez stated that he did "not find *Castillo*

to be so plainly wrong as to justify creating a split of authority in this area." (*Ibid.*)

IV. LEGAL DISCUSSION

A. Review Should Be Granted Because the Court of Appeal's Analysis Finding FlexCare and Eisenhower Not in Privity Was Flawed.

The Court of Appeal's analysis in this matter was flawed. Despite the essentially identical facts of *Castillo* and this matter, the Court of Appeal reached the opposite conclusion from *Castillo*. Unlike *Castillo*, the Court of Appeal here concluded that joint employers FlexCare and Eisenhower were *not* in privity for the purposes of the litigation, and thus the judgment in the Santa Barbara Class Action did not preclude Grande's Riverside Class Action against Eisenhower. This decision does not comport with the decisions of this Court and needlessly conflicts with *Castillo*.

1. *Castillo* Decided This Issue Correctly and the Court of Appeal Should Not Have Departed from *Castillo*'s Reasoning.

(a) The *Castillo* Decision

Grande argued below—and the Court of Appeal concluded—that the decision of the Second District Court of Appeal in *Castillo* should not be applied in this case. *Castillo* answered the following question:

> In a joint employer arrangement, can a class of workers bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work. We answer no.

(*Castillo, supra*, 23 Cal.App.5th at p. 266.)

In *Castillo*, GCA Services Group ("GCA") was a temporary staffing company that provided employees to work on site at its client company, Glenair. (*Id.* at p. 267.) An employee, Gomez, filed a putative class action

against GCA, alleging wage and hour claims, including unfair business practices under Business and Professions Code section 17200, just as Grande did when suing FlexCare in Santa Barbara. (*Ibid.*) The Gomez matter settled in exchange for a release and a California Civil Code section 1542 waiver. (*Id.* at pp. 267-268.) Like Eisenhower here, client-company Glenair was not a named defendant in the first case and was not expressly named in the release. (*Id.* at pp. 267-269.) Two other employees, the Castillos, were class members in the first action and did not opt out of the settlement. (*Id.* at p. 268.)

The Castillos later filed a separate class action against the client-company, Glenair. They did not name GCA as a party to that case. (*Id.* at p. 269.) The Second District Court of Appeal affirmed summary judgment against the Castillos on the basis that Glenair and GCA share the same relationship to the claims and were thus in privity for the purposes of res judicata:[2]

> [I]t is clear that Glenair and GCA are in privity for present purposes. The subject matter of this litigation is the same as the subject matter of the *Gomez* litigation—namely, both cases involve the same wage and hour causes of action arising from the same work performed by the same GCA employees (the Castillos) at GCA's client company Glenair. Based on the undisputed facts, it is apparent Glenair and GCA share the same relationship to the Castillos' claims here. Both Glenair and GCA were involved in and responsible for payment of the Castillos' wages. Glenair was authorized by GCA and responsible for recording, reviewing and transmitting the Castillos' time records to GCA. GCA paid the Castillos based on those time records. And, by virtue of the *Gomez* settlement, the Castillos were compensated for any errors made in the payment of their wages. Thus, with respect to the Castillos' wage and hour causes of action, the interests of Glenair and GCA are so intertwined as to put Glenair and

[2] The Court also determined that Glenair was an agent for GCA with respect to GCA's payment of its employees and was thus a released party.

> GCA in the same relationship to the litigation here. Accordingly, we conclude they are in privity for purposes of the instant litigation.

(*Id.* at pp. 279-280.)

Given the identical factual situation in this case, the Court of Appeal should have followed *Castillo* and concluded that FlexCare and Eisenhower were in privity for purposes of this litigation. To do so would not have run afoul of this Court's decision in *DKN Holdings*.

(b) *Castillo* Was Properly Decided in Light of This Court's Precedents and Should Have Been Followed

DKN Holdings established that joint and several liability, standing alone, is not enough to establish privity for claim preclusion purposes. *DKN Holdings* does *not* state that parties who are jointly and severally liable can never be found in privity. Thus, *Castillo* does not conflict with this Court's precedent.

The *Castillo* court expressly considered *DKN Holdings* when it issued its decision. Indeed, like Grande here, the plaintiffs in *Castillo* argued that the decision in *DKN Holdings* dictated a contrary result from the decision eventually reached. (See *Castillo, supra*, 23 Cal.App.5th at p. 280.) However, as the *Castillo* court pointed out, *DKN Holdings* did not hold that, *in all cases*, parties that are jointly and severally liable cannot be in privity. (See *ibid.*) Rather, *DKN Holdings* stands for two unremarkable propositions: (1) that a plaintiff may sue parties that are jointly and severally liable in one or multiple actions at her election; and (2) joint and several liability *alone* is not enough to establish privity for res judicata purposes. (See *DKN Holdings, supra*, 61 Cal.4th at pp. 820-21, 826.) In other words, *DKN Holdings* concludes that, in the absence of some other reason to find a closely aligned interest between two persons that are jointly

and severally liable, their joint and several liability alone does not create privity.

Importantly, *Castillo* is distinguishable from *DKN Holdings* because it involved a case where a closely aligned interest mandated a finding of privity, even if the two parties affected by that finding happened to be joint and several obligors. (See *Castillo, supra*, 23 Cal.App.5th at pp. 279-281.) In *Castillo*, as in this case, a staffing agency and the entity at which the staffing agency placed temporary employees were in privity because of their closely intertwined interests. (*Id.* at pp. 279-280.)

Because of this special, closely intertwined relationship, the *Castillo* court easily—and correctly—found that *DKN Holdings* did not, as a matter of law, preclude a finding that Glenair and GCA, even if joint and several obligors, were in privity. (See *id.* at p. 280 ["This case is distinguishable because, assuming Glenair and GCA are jointly and severally liable, our finding of privity does not rely on any such relationship. Rather, as explained above, Glenair and GCA are in privity for present purposes based both on their interdependent relationship with respect to payment of the Castillos' wages as well as on the fact that this litigation revolves around alleged errors in the payment of the Castillos' wages. *DKN Holdings* does not preclude our conclusion here."].)

In sum, *Castillo* is consistent with this Court's precedents and its holding should have been followed by the Court of Appeal here. This Court should accept review in order to confirm that *Castillo* was decided correctly and resolve the split of authority existing in the Courts of Appeal.

2. As in *Castillo,* Staffing Company FlexCare and its Client, Eisenhower, Share a Community of Interest in the Subject Matter of the Litigation.

"*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.'"

(*DKN Holdings, supra*, 61 Cal.4th at p. 824, emphasis in original.) "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit." (*Ibid.*) The parties here did not dispute that the first and third elements of claim preclusion were satisfied, but disagreed only on whether FlexCare and Eisenhower were in privity such that the second element of claim preclusion applied.

This Court recently outlined the test for privity in *DKN Holdings*: "[P]rivity requires the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit." (*Id.* at p. 826.) As this Court explained, "[j]oint and several liability *alone* does not create such a closely aligned interest between co-obligors." (*Ibid.*, emphasis added.) This Court's observation was amplified and twisted by the trial court and the Court of Appeal into a holding that this Court did not make and has never made: that joint and several obligors can *never* be in privity. (See Slip op. at 15-16.) That is not the case.

In analyzing the situation of joint employers who were likely jointly and severally liable, the *Castillo* court quoted from this Court's opinion in *DKN Holdings*:

> As applied to questions of preclusion, privity requires the sharing of "an identity or community of interest," with "adequate representation" of that interest in the first suit, and circumstances such that the nonparty "should reasonably have expected to be bound" by the first suit. [Citation.] A nonparty alleged to be in privity must have an interest so similar to the party's interest that the party acted as the nonparty's """virtual representative""" in the first action.

(*Castillo, supra*, 23 Cal.App.5th at p. 277.)

The *Castillo* court went on to examine the recent decision in *Cal Sierra Development, Inc. v. George Reed* (2017) 14 Cal.App.5th 663, a Court of Appeal decision published after *DKN Holdings*. In *Cal Sierra*, the appellate court concluded that, where two companies in a contractual licensor-licensee relationship had an identical interest and were adversely and similarly impacted by the subject matter of the two litigations, then those two companies were in privity with one another for purposes of claim preclusion. (*Cal Sierra, supra*, 14 Cal.App.5th at pp. 673-674.)

Applying the reasoning of *Cal Sierra* and discussing the law of *DKN Holdings*, the *Castillo* court concluded that Glenair (the client of the staffing agency) was in privity with GCA (the temporary staffing agency) with respect to the subject matter of the litigation:

> The subject matter of this litigation is the same as the subject matter of the [first] litigation—namely, both cases involve the same wage and hour causes of action arising from the same work performed by the same GCA employees (the Castillos) at GCA's client company Glenair. Based on the undisputed facts, it is apparent Glenair and GCA share the same relationship to the Castillos' claims here. Both Glenair and GCA were involved in and responsible for payment of the Castillos' wages. . . . And, by virtue of the [first action's] settlement, the Castillos were compensated for any errors made in the payment of their wages. Thus, with respect to the Castillos' wage and hour causes of action, the interests of Glenair and GCA are so intertwined as to put Glenair and GCA in the same relationship to the litigation here. Accordingly, we conclude they are in privity for purposes of the instant litigation.

(*Castillo, supra*, 23 Cal.App.5th at pp. 279-280.)

This case cannot be meaningfully distinguished from *Castillo*. First, both the Santa Barbara Class Action and the Riverside Class Action involve the same alleged wage and hour violations arising from precisely the same hours worked on precisely the same days worked by the same FlexCare employee (temporary nurse Grande) at Eisenhower. Second, both FlexCare

and Eisenhower were "involved in and responsible for" payment of Grande's wages: Eisenhower was required to sign off on the time records Grande provided to FlexCare, who in turn was responsible for paying Grande. Third, the settlement of the Santa Barbara Class Action was paid in full, compensating Grande for any alleged wage and hour violations. Thus, as the dissent below recognized, there was no reason for the Court of Appeal to depart from the reasoning of *Castillo* and conclude that claim preclusion did not apply in this case.

Because the legal principles and undisputed evidence establish that FlexCare and Eisenhower share a community of interest in the subject matter of the prior litigation, privity exists and the Court of Appeal should be reversed.

B. Review Should Be Granted Because the Court of Appeal Incorrectly Decided that FlexCare and Eisenhower Did Not Share an Agency Relationship.

The release in the Santa Barbara Class Action specifically released FlexCare's "agents and principals." (Slip op. at 8.) The Court of Appeal incorrectly decided that FlexCare and Eisenhower did not share an agency relationship in this case, contravening both *Castillo* and *Garcia.*

1. *Castillo*'s Analysis of Agency Applies to the Relationship Between FlexCare and Eisenhower in This Case.

In addition to its well-reasoned decision regarding privity and claim preclusion, the *Castillo* court also concluded that the temporary staffing agency and its employer-client shared an agency relationship, making the employer-client a released party under the settlement agreement in that case. Again, the *Castillo* court's decision and reasoning is indistinguishable from this case.

In *Castillo*, the court concluded that, although the two companies did not share a relationship where one could generally control the other, they

did share an agency relationship with regard to payment of the employees at issue. Specifically:

> 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. . . The evidence is undisputed that GCA authorized Glenair to collect, review, and transmit GCA employee time records to GCA. Thus, Glenair was authorized to represent, and did represent, GCA in its dealings with third parties, specifically GCA's payment of wages to its employees placed at Glenair.

(*Castillo*, 23 Cal.App.5th at p. 281.)

Here, nurses assigned by FlexCare to Eisenhower were required to use Eisenhower's time and attendance system. Before transmitting time sheets to FlexCare to be paid, travel nurses were required to get an appropriate signature from an Eisenhower representative. Thus, Eisenhower was responsible for ensuring accurate time reporting, and FlexCare was responsible for actually paying the travel nurse employee. Eisenhower was thus an agent of FlexCare for purposes of payment of FlexCare's employees. Under the plain language of the settlement agreement in the Santa Barbara Class Action, Eisenhower was a released party as an "agent" of FlexCare.

2. *Garcia*'s Analysis of Agency Also Applies Here.

After the trial court took this matter under submission and shortly before the statement of decision was filed, the Fourth District Court of Appeal decided *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, which holds that alleged joint employers are agents of each other in their dealings with the joint employee. The legal holding of *Garcia* is critical here because the relevant facts are undisputed. Here, just as in *Garcia*, the agency issue raises a question of law, not fact. (See (*Troost v. Estate of DeBoer* (1984) 155 Cal.App.3d 289, 299 [citing *Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 41].)

In *Garcia*, Real Time Staffing Services hired Garcia and assigned him to work for Pexco. (*Garcia, supra,* 11 Cal.App.5th at p. 784.) Garcia filed suit against Real Time and Pexco for violations of the Labor Code, including unfair business practices pertaining to the payment of wages during the assignment with Pexco. (*Id.* at p. 785.) Much like the complaint in this matter, the operative complaint in the action alleged that Pexco and Real Time were acting as joint employers. (*Ibid.*) Real Time and Garcia had an arbitration agreement, but Pexco was not a signatory to it. (*Id.* at p. 786.) However, a non-party may enforce an arbitration provision when the plaintiff alleges that the defendant acted as an agent of a party to the agreement. (*Ibid.*) After observing that Garcia's claims were founded on the employment relationship and alleged identical claims and conduct against both Real Time and Pexco, the appellate court determined that "as the alleged joint employers, Pexco and Real Time were agents of each other in their dealings with Garcia." (*Id.* at p. 788.)

The conclusion reached in *Garcia*—that a staffing agency and its client company are agents of each other—is borne out by the undisputed evidence presented at the trial of this matter. It is undisputed that Grande's claims against Eisenhower were predicated on the exact same seven days of employment that were at issue against FlexCare in the Santa Barbara Class Action. (Slip op. at 5-6.) Her unfair competition claim, though more narrow in this matter, is otherwise identical to the claims brought in the prior action. (*Ibid.*) The Court in *Garcia* specifically noted that "Garcia cannot attempt to link Pexco to Real Time to hold it liable for alleged wage and hour claims, while at the same time arguing that the arbitration agreement only applies to Real Time and not Pexco." (*Garcia, supra,* 11 Cal.App.5th at p. 788.) By determining in this case that FlexCare and Eisenhower are joint employers but not agents, this is exactly what the trial court and Court of Appeal did here.

More importantly, the trial court's and Court of Appeal's agency analyses were necessarily erroneous in light of *Garcia*. As discussed, both courts assumed that Eisenhower and FlexCare are joint employers. But, contrary to *Garcia*, both courts concluded that there was no evidence that Eisenhower at any time acted as FlexCare's agent or vice versa. Moreover, both courts cited the Staffing Agreement between FlexCare and Eisenhower stating that FlexCare was not Eisenhower's agent.

The assumption that FlexCare and Eisenhower are joint employers and the decision that they do not share an agency relationship are diametrically opposed in light of *Garcia*. Furthermore, the law is clear that "contract recitals of the existence or absence of agency, while relevant, *are never determinative*." (*Pistone v. Superior Court* (1991) 228 Cal.App.3d 672, 680-81, emphasis added.) Thus, an analysis that relies solely on the contractual language disavowing agency to determine that Eisenhower and FlexCare were not agents of one another is necessarily flawed. But even if this alone was not error, both courts erred because *Garcia* holds that joint employers are necessarily agents of one another.[3] (*Garcia, supra,* 11 Cal.App.5th at p. 788.)

In sum, FlexCare and Eisenhower were agents of each other as a matter of law, and the Court should accept review in this matter to confirm that joint employers like FlexCare and Eisenhower are agents of each other as a matter of law.

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[3] In addition to the decision in *Garcia*, *Castillo* counsels that where an employee brings claims against a staffing agency and its client company, the analysis focuses not on general agency, as the trial court did here, but rather, on the specific agency at issue in the wage and hour action. (*Castillo, supra*, 23 Cal.App.5th at pp. 281-282.)

V. CONCLUSION

FlexCare respectfully requests that the Court grant this petition for review and accept this matter as a timely opportunity to resolve this split of authority and provide much needed practical guidance to California courts regarding the relationship between temporary staffing companies and their employer-clients.

DATED: March 17, 2020 DOWNEY BRAND LLP

By: */s/ Cassandra M. Ferrannini*
CASSANDRA M. FERRANNINI
Attorneys for 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 5,904 words.

DATED: March 17, 2020 DOWNEY BRAND LLP

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

ATTACHMENT: COURT OF APPEAL OPINION

Filed 2/6/20
See dissenting opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LYNN GRANDE, Plaintiff and Respondent, v. EISENHOWER MEDICAL CENTER, Defendant; FLEXCARE, LLC, Intervener and Appellant.	E068730 (Super.Ct.No. RIC1514281) OPINION
EISENHOWER MEDICAL CENTER, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; LYNN GRANDE, Real Party in Interest.	E068751 (Super.Ct.No. RIC1514281)

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed.

ORIGINAL PROCEEDINGS; petition for writ of mandate. Sharon J. Waters, Judge. Petition denied.

Downey Brand, Cassandra M. Ferrannini, and Bradley C. Carroll for Intervener and Appellant.

The Dion-Kindem Law Firm and Peter R. Dion-Kindem; The Blanchard Law Group and Lonnie C. Blanchard, III for Plaintiff, Respondent, and Real Party in Interest.

Sheppard, Mullin, Richter & Hampton, Richard J. Simmons, and Ruben D. Escalante as Amicus Curiae on behalf of Defendant and Petitioner Eisenhower Medical Center.

No appearance for Respondent.

FlexCare, LLC (FlexCare), a temporary staffing agency, assigned Lynn Grande to work as a nurse at Eisenhower Medical Center (Eisenhower). According to Grande, during her employment at Eisenhower, FlexCare and Eisenhower failed to ensure she received her required meal and rest breaks, wages for certain periods she worked, and overtime wages.

Grande was a named plaintiff in a class action lawsuit against FlexCare brought on behalf of FlexCare employees assigned to hospitals throughout California. Her own claims were based solely on her work on assignment at Eisenhower. FlexCare settled with the class, including Grande, and Grande received $162.13 for her injuries, plus a class representative incentive bonus of $20,000. Grande executed a release of claims, and the trial court entered a judgment incorporating the settlement agreement.

About a year later, Grande brought a second class action alleging the same labor law violations, this time against Eisenhower, who was not a party to the previous lawsuit. FlexCare intervened in the action asserting Grande could not bring the separate lawsuit against Eisenhower because she had settled her claims against them in the prior class action.

The trial court held a trial limited to questions as to the propriety of the lawsuit, and ruled Eisenhower was not a released party under the settlement agreement and could not avail itself of the doctrine of res judicata because the hospital was neither a party to the prior litigation nor in privity with FlexCare.

Eisenhower filed a petition for a writ of mandate and FlexCare appealed the trial court's interlocutory order. We affirm the trial court and deny the petition because Eisenhower and FlexCare were not in privity, preventing Eisenhower from blocking Grande's claims under the doctrine of res judicata, and Eisenhower was not a released party under the settlement agreement.

I

FACTS

A. *The Parties and the Lawsuits*

FlexCare is a temporary nurse staffing agency which employs nurses and assigns them to work on a temporary basis as supplemental staff at California hospitals. FlexCare serves nearly 200 hospitals in California, and Eisenhower was one of those clients. FlexCare employed Grande and assigned her to Eisenhower, where she worked from February 6 to February 14, 2012.

FlexCare and Eisenhower defined their respective relationships to the temporary nurses in a contract called a staffing agreement. According to the agreement, nurses were employees of FlexCare and not employees of the hospital. The agreement gave FlexCare "exclusive and total legal responsibility as the employer of Staff . . . includ[ing], but not . . . limited to, the obligation to ensure full compliance with and satisfaction of (l) 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]." FlexCare was also responsible for screening candidates for placement and ensuring they met certain minimum standards.

However, Eisenhower maintained control over the temporary nurses in the performance of their jobs. The hospital assessed their competency during an orientation program. The hospital also could require nurses to take its medication and clinical skills test. It also retained discretion to make decisions about the nurses' assignments and to terminate nurses for poor performance. Finally, the agreement required nurses to conform with hospital policies and procedures.

Under the staffing agreement, Eisenhower paid FlexCare based on the hours the temporary nurses worked. FlexCare in turn paid nurses under their separate travel nurse agreements. The staffing agreement required temporary nurses to use the hospital's time and attendance system. The travel nurse agreement required Grande to report her hours worked to FlexCare after obtaining approval from Eisenhower. Specifically, the contract said she must "accurately report actual hours worked and fax or e-mail time sheet weekly with appropriate facility representative and Consultant signature."

The rate schedule attached to the staffing agreement provided Eisenhower would pay FlexCare $71 per hour for registered nurses, plus overtime of $20 per hour for hours worked

in excess of 12 hours in a day. Under the travel nurse's agreement, FlexCare would pay Grande a base rate of $26.40 per hour, $39.60 per hour for hours worked over 40 hours in a week, and $50 per hour after working 48 hours in a week. She was also to receive a $497 weekly meals and incidentals per diem and a weekly housing per diem of $805. Her per diem payments could be reduced if she failed to work at least 48 hours per week.

The staffing agreement also purported to define the relationship between FlexCare and Eisenhower. First, it stipulated there was no agency relationship between the parties. "[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. Hospital retains professional and administrative responsibility for the services rendered." Second, the agreement required FlexCare to indemnify Eisenhower under certain circumstances—for claims and losses in connection with any FlexCare breach of the agreement or violation of statute or regulation, except those resulting from FlexCare's negligence,[1] as well as for claims and losses predicated on a finding temporary nurses were joint employees of FlexCare and Eisenhower.

After her assignment with Eisenhower ended, Grande brought claims for wage and hour violations, first against FlexCare, and later—separately—against Eisenhower. In both cases, she alleged failures on the part of the defendants to pay wages earned, to provide

[1] The provision is not a paragon of contractual draftsmanship. It says FlexCare agrees "to indemnify and hold harmless Hospital . . . from any and all claims, losses, demands, fees, attorneys fees or expenses, causes of action, costs, damages, and expenses . . . resulting from or arising in connection with any breach by [FlexCare] of any provision of this Agreement, the violation of any statute, rule, regulation, or order or an intentional, reckless, or negligent act or omission by [FlexCare], other than [those] that arise out of or are attributable to the negligent act or omission of [FlexCare]."

lawful meal and rest periods, to pay wages for meal and rest periods, to pay waiting time wages, and to provide required itemized wage statements. Both complaints alleged violations of various provisions of the Labor Code and violations of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200) with the labor violations as predicates.

Both cases were purported class actions. In the first, filed in Santa Barbara County Superior Court by a coplaintiff on January 30, 2012, the named plaintiffs purported to represent all persons who were nonexempt nursing employees of FlexCare beginning January 30, 2008. The class consisted of all nurses FlexCare employed and assigned to work at any health care facility in California. The original named plaintiff was employed by FlexCare and assigned to work at the Lompoc Valley Medical Center, and based her claims on her treatment during that assignment. The complaint in the Santa Barbara action was amended to add Grande as a named plaintiff, and her allegations were based on her employment at Eisenhower. But Eisenhower didn't intervene and was never made a defendant in the Santa Barbara case.

In December 2015, Grande filed a second putative class action in Riverside County Superior Court, this time alleging claims against Eisenhower. In the Riverside case, Grande purported to represent all persons who were "non-exempt employees who were staffed by [Eisenhower] through third party registries, temporary employment services, temporary employment agencies, staffing agencies and services, or other employment agencies." Thus, in contrast to the Santa Barbara case, the class consisted of all nurses *any staffing agency* employed and assigned to work specifically *at Eisenhower*. The class period differed too; in the Riverside case it covered claims arising from December 2011 to the date of trial. Like

the Santa Barbara case, however, Grande's individual claims were based on her work at Eisenhower from February 6 to February 14, 2012, and asserted a UCL claim based on the same predicate wage and hour violations. Neither FlexCare nor any other staffing agency was named as a defendant.

B. *Settlement of the Santa Barbara Case*

The Santa Barbara case settled before the Riverside case commenced. In January 2014, the parties entered an agreement under which FlexCare agreed to pay up to $750,000 to the class. The settlement included a stipulation that Grande and her coplaintiff represented a certified class of "[a]ll persons who at any time from or after January 30, 2008 through the date of Preliminary Approval were non-exempt nursing employees of FlexCare, LLC employed in California." After the claims administration process, FlexCare paid approximately $700,000. Grande signed the settlement agreement and received $20,000 as a representative incentive award plus $162.13 (net of taxes) as a class member. The settlement was incorporated into a final judgment on April 8, 2015.

The final judgment ordered "the Released Claims of each and every Class member and Settlement Class Member, respectively, are and shall be deemed to be conclusively released as against the Released Parties," and "All Class members, as of the Effective Date, are hereby forever barred and enjoined from prosecuting Released Claims against the Released Parties." The agreement defines the "Released Claims" as "any and all claims . . . which have been or could have reasonably been asserted in the [Santa Barbara] Action or in any other state or federal court, administrative tribunal, or in arbitration or similar

proceeding, based upon, or arising out of, or related to the allegations in the [Santa Barbara] Action during the Class Period."

The settlement named as "Released Parties" FlexCare and the other named defendants, who were affiliates and officers of FlexCare. The settlement also included standard language releasing the named defendants' "present and former subsidiaries, affiliates, divisions, related or affiliated companies, parent companies, franchisors, franchisees, shareholders, and attorneys, and their respective successors and predecessors in interest, all of their respective officers, directors, employees, administrators, fiduciaries, trustees and agents, and each of their past, present and future officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their counsel of record." The settlement did not release Eisenhower or any other client of FlexCare by name, nor did it release the category of FlexCare's clients.

An attorney for the Santa Barbara plaintiffs later testified FlexCare's potential liability in the Santa Barbara action was "in excess of $10 million" and said FlexCare's counsel provided evidence to plaintiffs' counsel showing "they would not have the ability to pay any large judgment substantially in excess of the settlement amount." The plaintiffs agreed to the lesser settlement amount of $750,000, based on FlexCare's "financial viability." The settlement contains a statement that, in addition to the standard concerns about the expense, duration, and uncertainty of litigation, the "Named Plaintiffs and Class Counsel also have taken into account . . . the difficulties and delays inherent in such litigation, including the financial ability of the Defendants to respond to any judgment that

may be obtained against them if the claims are successful." An attorney for the Santa Barbara plaintiffs later testified his clients did not intend to release Eisenhower. However, a FlexCare representative testified he did intend the release to extend to Eisenhower. He said the release was intended to mean FlexCare was "done with this . . . done with all of it for everybody."

C. *The Dispute Over the Effect of the Santa Barbara Settlement on this Case*

A month after Grande filed this case, Eisenhower demanded FlexCare indemnify it against her claims. Eisenhower's counsel sent FlexCare a letter along with the complaint and the staffing agreement between the two companies. They pointed out FlexCare "expressly agreed to 'hold [Eisenhower] harmless, pay the entire cost of [Eisenhower's] legal defense, and fully indemnify [Eisenhower] against any and all legal claims asserted against [Eisenhower] or [Eisenhower's] employees, and/or liability imposed against [Eisenhower] or [Eisenhower's] employees that are predicated in any matter [*sic*] on a finding by any court, enforcement agency, government entity, arbitrator or other adjudicator that Staff are joint employees of [FlexCare] and [Eisenhower].'" Eisenhower asserted Grande's claims were based on both companies' "alleged failure to fulfill its obligations under the Labor Code as Plaintiff's and other proposed class members' joint employers," and therefore "request[ed] that FlexCare indemnify and hold Eisenhower harmless for the claims made against it by Plaintiff, including the payment of its defense costs," under the terms of their staffing agreement.

FlexCare intervened in the Riverside case and sought a declaration that (1) Eisenhower was a released party under the Santa Barbara settlement and (2) the

judgment in Santa Barbara precludes Grande's causes of action against Eisenhower in Riverside. On Eisenhower's motion, the trial court bifurcated the released party and res judicata issues from all other issues and held a limited bench trial.

After trial, the court ruled Eisenhower was not a released party. The court reached that conclusion based on the language of the settlement, which did not mention Eisenhower or the category of FlexCare's hospital clients. Instead, the settlement named FlexCare, its officers and a corporate alter ego, and then added standard settlement language to release general categories of people and groups, like affiliated companies, principals or agents of FlexCare. The court held Eisenhower didn't fit any of these categories; most pertinent to this appeal, the court concluded Eisenhower was not a "related or affiliated company" or an "agent" of FlexCare under the Released Parties clause of the settlement.

The court also ruled Grande's claims against Eisenhower were not barred by res judicata because Eisenhower was not in privity with FlexCare. It noted the complaint alleged the two companies were joint employers, who typically are jointly and severally liable. The agreement also indicates independent, but joint and several liability. Since the Supreme Court had recently held joint and several obligors are not considered to be in privity for purposes of res judicata, the court concluded FlexCare and Eisenhower weren't in privity and res judicata didn't preclude Grande's second lawsuit against Eisenhower. The court therefore entered judgment in favor of Grande and against FlexCare on FlexCare's complaint in intervention.

FlexCare appealed. At Eisenhower's request, the trial court certified its statement of decision as appropriate for writ review. (Code Civ. Proc., § 166.1.) Eisenhower filed a

petition for writ of mandate. This court stayed proceedings in the trial court and consolidated the appeal with the writ proceeding.

II

ANALYSIS

FlexCare and Eisenhower found their arguments for reversal on the claim that the trial court erred in concluding Eisenhower was neither an affiliated company nor an agent of FlexCare. They argue the companies' relationship establishes both that Eisenhower was a released party under the agreement and that the parties were in privity. They argue that means the judgment in the Santa Barbara case both bars (under the settlement) and precludes (under res judicata) Grande's claims against Eisenhower in this case.

"In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo, and we review the trial court's findings of fact for substantial evidence." (*Durante v. County of Santa Clara* (2018) 29 Cal.App.5th 839, 842.) We liberally construe findings of fact "to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Ibid*.)

A. *Res Judicata Does Not Apply Because the Companies Are Not in Privity*

According to the Restatement Second of Judgments, a "judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor." (Rest.2d Judg., § 49.) "When the claimant thus brings consecutive actions against different persons liable for the same harm, the rendition of the judgment in the first action does not terminate the claims against other persons who may be liable for the loss in question. The judgment itself has the effect of officially confirming the defendant's obligation to make redress, an obligation which under the substantive law co-exists with that of the other obligor. No reason suggests itself why the legal confirmation of one obligation should limit or extinguish the other." (*Id.*, com. a.)

Our Supreme Court recently recognized this as "a bedrock principle of contract law." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 818 (*DKN*).) "Parties who are jointly and severally liable on an obligation may be sued in separate actions." (*Ibid.*) "It has long been settled that contracting parties who are severally liable, or subject to joint and several liability, may be sued in the same action *or in separate actions* at the plaintiff's option. [Citations.] The plaintiff 'does not lose the right to the several liability of a several obligor until the obligation is fully satisfied,' notwithstanding that he may have obtained a judgment against other severally liable obligors." (*Id.* at p. 820.) The rule is not limited to contract claims. "The rule that there are separate claims against each obligor applies whether the obligation results from a tort, a breach of contract, or other obligation." (Rest.2d Judg., § 49, com. a.)

As the Supreme Court explained in *DKN*, the rule used to be different. "At common law, when multiple parties promised the same performance, they were presumed to be jointly obligated absent a clear indication otherwise. [Citation.] Parties who are jointly liable are each responsible for their share of a total obligation. When enforcement was sought, the common law rule required that *all* jointly liable parties be joined in a single suit that would determine the total amount of their shared liability." (*DKN*, *supra*, 61 Cal.4th at p. 820.) However, the old compulsory joinder rule had unwanted results, most notably that some plaintiffs couldn't obtain relief because they couldn't reach all the jointly liable parties. (*Ibid.*) "California and nearly all other states have passed statutes to ameliorate the harshness of the common law's compulsory joinder rule. [Citation.] The typical solution was to convert 'joint' obligations into 'joint and several' obligations." (*Ibid.*)

As the Restatement explains, the older rules under which "rendition of judgment against one of several obligors sometimes had the effect of extinguishing a claim against another . . . [were] based on the notion that a 'joint' obligation could be enforced only through a single action, and so an action against one of the obligors was deemed to result in merger of the claim in the judgment. Other rules having like effect were expressed in terms of requiring an 'election of remedies.' Both types of rules were often justified as a means of preventing double recovery for the loss involved. These rules are now obsolete. Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments. [Citation.] Requiring that a single action be brought or that the injured party make an election of remedies also formerly had justification insofar as it precluded relitigation of matters previously adjudicated, particularly the issue of the

amount of damages sustained. This objective is now accomplished by the modern rule that a claimant may not relitigate issues determined adversely to him in a prior action against another adversary, including issues relating to the damage he has sustained." (Rest.2d Judg., § 49, com. a.) California has adopted these modern rules against double recovery and relitigation of issues decided adversely against a party. (E.g., *Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1001-1003; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.)

Thus, the general rule is a plaintiff may sue parties separately, whether they are independently liable or jointly and severally liable. Under the doctrine of res judicata, however, a final judgment on the merits in a prior litigation may "prevent[] relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Thus, a defendant not party to a prior lawsuit may bar subsequent litigation of a claim already decided in the prior case against another defendant. Such preclusion is appropriate only where the two defendants are in "privity."

The Supreme Court articulated the basic test for privity in *DKN*. "As applied to questions of preclusion, privity requires the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit. [Citation.] A nonparty alleged to be in privity must have an interest so similar to the party's interest that the party acted as the nonparty's ""'virtual representative'"" in the first action."

(*DKN, supra,* 61 Cal.4th at p. 826.) We conclude FlexCare and Eisenhower don't stand in that kind of relationship.

For starters, the Supreme Court held in *DKN* the fact that two parties are joint and several obligors is not enough to put them in privity for purposes of issue or claim preclusion. (*DKN, supra,* 61 Cal.4th at p. 826.) That is so because "[t]he liability of each joint and several obligor is separate and independent, not vicarious or derivative." (*Ibid.*) This holding is binding on us.

The recent decision in *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773 (*Serrano*) explains why this is the proper holding and why it should control this case. In *Serrano*, Aerotek was a staffing agency and placed temporary employees, like Serrano, with clients, like Bay Bread. Aerotek had in place an employee handbook, which set out, among other things, the agency's meal break policy for the temporary employees it placed with Bay Bread and other employers. Bay Bread had its own meal break policy for its own employees, which differed. In practice, Bay Bread required Aerotek employees to follow Bay Bread's policy, with the result that the plaintiff and others did not receive meal breaks consistent with California employment law. Serrano filed a class action lawsuit against Aerotek and Bay Bread alleging meal break violations. (*Id.* at p. 778.) The trial court granted summary judgment in Aerotek's favor based on the undisputed evidence it "provided Serrano with compliant meal periods, based on evidence that it 'adopted a lawful meal period policy'" which Serrano had received and Serrano's statement that she was "unaware of any actions taken by Aerotek to prevent her from taking meal periods." (*Id.* at p. 780.) The undisputed evidence also showed Aerotek's contract with Bay Bread required the client company to

comply with applicable laws and Aerotek trained its temporary employees on meal breaks and required them to notify it if they were being prevented from taking meal breaks. The court concluded nothing more is required of staffing agencies when they provide temporary employees to other companies, so it granted summary judgment for Aerotek. (*Id.* at pp. 780-781.)

Serrano argued the trial court erred by granting summary judgment because Aerotek could be vicariously liable for Bay Bread's separate violations. (*Serrano*, *supra*, 21 Cal.App.5th at p. 782.) The Court of Appeal assumed, without deciding, that the two companies were joint employers, but concluded "whether an employer is liable for a coemployer's violations depends on the scope of the employer's own duty under the relevant statutes, not 'principles of agency or joint and several liability.'" (*Id.* at p. 784.) The court therefore concluded Aerotek could be liable only for its own breach of duty, not vicariously based on a joint employer's liability.

Serrano teaches that joint employers are not vicariously liable for each other's Labor Code violations, but liable for their own conduct. One result here, as in *Serrano*, is that staffing agencies and their clients are likely to have very different interests in defending against wage and hour claims. One joint employer can escape liability by pursuing a factual defense even though that defense leaves the other joint employer exposed to liability. The difference in incentives precludes finding the companies are adequate representatives for privity purposes. Here, FlexCare could have gone to trial in the Santa Barbara case defending itself on the theory that Eisenhower committed the wage and hour violations, while it had fulfilled its own duties to its employees. Eisenhower could not be bound by

such a finding under the doctrine of issue preclusion precisely because the two companies' legal interests diverged. In other words, FlexCare and Eisenhower were not closely enough aligned to be in privity. (*DKN*, *supra*, 61 Cal.4th at p. 826.)

The fact that the staffing agreement requires FlexCare to indemnify Eisenhower under some circumstances does not change the analysis. Those provisions of the staffing agreement put FlexCare and Eisenhower at legal odds with each other as much as they bring them together. Eisenhower has telegraphed its intent to argue in this case that FlexCare must indemnify it against any liability based on a finding that the two parties were joint employers. FlexCare's incentive is to establish Eisenhower is liable under a theory that doesn't implicate the indemnity clause. Ultimately, FlexCare may fail to do so, but it is clear the two companies have disparate legal interests in the case and cannot act as each other's virtual representatives.

Res judicata may bar a claim brought against an indemnitee where the same claim has already been pursued against the indemnitor. However, that rule applies only "when the indemnitor is, in the first action, acting *in its capacity as indemnitor*. If the indemnitor is sued for its own actions and is not sued as an indemnitor for the acts of another, the rationale favoring preclusion no longer holds." (*F.T.C. v. Garvey* (9th Cir. 2004) 383 F.3d 891, 898.) Here Grande sued FlexCare based on labor law violations FlexCare committed on its own. She didn't allege it was derivatively or vicariously liable as Eisenhower's indemnitor.

FlexCare and Eisenhower argue we should find them in privity with each other because their status as joint employers means they are agents of each other. They rely for this position on *Garcia v. Pexco* (2017) 11 Cal.App.5th 782, 788 (*Garcia*), but the case is

inapposite. *Garcia* involved an attempt by a nonparty to enforce an arbitration clause in an employment agreement. The Court of Appeal recognized an exception to the general rule against allowing such nonparty enforcement "when a plaintiff *alleges* a defendant acted as an agent of a party to an arbitration agreement." (*Ibid*., italics added.) In *Garcia*, the plaintiff affirmatively alleged the party and the nonparty were "acting as agents of one another." (*Ibid*.) Here, Grande's pleadings don't allege the companies stand in an agency relationship. Moreover, because we are reviewing a judgment after a bench trial rather than interpreting an arbitration agreement, we're not concerned with the pleadings, but the actual relationship of the two companies. (*Durante v. County of Santa Clara*, *supra*, 29 Cal.App.5th at p. 842.) Thus, the limited holding of *Garcia* has no bearing on the issue presented in this case.

As to the actual relationship of the companies, the trial court found, in the context of interpreting the settlement agreement, that neither FlexCare nor Eisenhower was an agent of the other. As the court noted, "'"[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."'" (Statement of Decision, p. 17, quoting *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184.) Here, FlexCare and Eisenhower affirmatively disavowed any agency relationship in their contract, which says 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." The contract notes specifically "[Eisenhower] retains professional and administrative responsibility for the services rendered." Moreover, as the trial court noted, there was no evidence Eisenhower ever acted as FlexCare's agent or vice versa. On the

contrary, Eisenhower maintained control over the temporary nurses in the performance of their jobs. It assessed their competency during an orientation program, could require nurses to take its medication and clinical skills test, and retained discretion to make decisions about the nurses' assignments and to terminate nurses for poor performance. In addition, the staffing agreement made clear nurses were required to conform with hospital's policies and procedures. These facts show FlexCare and Eisenhower operated independently, and constitute substantial evidence supporting the trial court's finding that neither company was an agent of the other.

Finally, FlexCare and Eisenhower argue we should follow the recent decision of *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 (*Castillo*). There, the Second District, Division Two held a class of workers cannot "bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work." (*Id.* at p. 266.) The Second District concluded the staffing agency and the client were in privity with each other for purposes of the wage and hour claims. (*Ibid.*)

We are not bound by the decision of the Second District. (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 498, pp. 558-559.) However, because stare decisis serves the important interests of stability in the law and predictability of decisions, we ordinarily follow the decisions of other districts, unless we have good reason to disagree. (*Ibid*.) In this case, departure from *Castillo* is justified because the court failed to apply the test for privity articulated in *DKN*. As a result, its conclusion that the staffing agency and its client were in privity is not supported.

What courts are required to ask in determining whether a party and nonparty are in privity is whether they shared "'an identity or community of interest,' with 'adequate representation' of that interest in the first suit," under circumstances where the nonparty "'should reasonably have expected to be bound' by the first suit." (*DKN, supra,* 61 Cal.4th at p. 826.) The *Castillo* court didn't ask that question. Instead, following *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, the court asked whether the "subject matter of the litigation . . . was the same as that at the center of the [prior] dispute" and whether the party and the nonparty "shared the same relationship to the subject matter."[2] (*Castillo, supra,* 23 Cal.App.5th at p. 279.) Employing that standard, the court concluded the two companies were in privity because "[t]he subject matter of this litigation is the same as the subject matter of the [prior, settled] *Gomez* litigation—namely, both cases involve the same wage and hour causes of action arising from the same work performed by the same [staffing agency] employees (the Castillos) at [the staffing agency's] client company" (*id.* at pp. 279-280) and both the client and the staffing agency "were involved in and responsible for payment of the Castillos' wages." (*Id.* at p. 280.)

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[2] The test *Castillo* applies traces to an aside in a South Carolina Supreme Court case. (See *Cal Sierra Development, Inc. v. George Reed, Inc., supra,* 14 Cal.App.5th at p. 674, citing *Manning v. South Carolina Dept. of Highway and Public Transportation* (4th Cir. 1990) 914 F.2d 44, 48.) But the test isn't properly a test for privity even in South Carolina. That state's Supreme Court wrote, "The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." (*Richburg v. Baughman* (S.C. 1986) 351 S.E.2d 164, 166.) The language certain courts have plucked from *Richburg* emphasized that privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation" only in response to the litigants' argument that a parent and child were in privity with each other just by virtue of their relationship to each other. (*Ibid.*)

Respectfully, this is not the correct analysis. The first step in deciding whether res judicata (claim preclusion) applies is to determine whether the prior and current lawsuits involve the same causes of action. (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 896.) It's only after we answer that question affirmatively, that we get to the question of the parties' relationship to the claim. If the person or entity seeking preclusive effect was not a party to the first litigation, we must then focus on their relationship to the party and the subject matter of the litigation, asking whether their interests are *so close to identical* that the nonparty should have reasonably expected to be bound by the prior judgment even though not a party. By focusing overmuch on whether the subject matter of the litigation is the same, the *Castillo* court nearly collapses the second element (same parties) into the first (same claims). The court then justified finding a sufficiently close relationship on the fact that both companies were involved in paying the plaintiffs their wages. That's simply not a sufficient basis for finding a client and staffing agency to be in privity. As the court explained in *Serrano*, a staffing agency and a client may both be "involved in" the payment of wages, yet be independently liable for wage and hour violations. We therefore depart from the reasoning in *Castillo*, conclude FlexCare and Eisenhower were not in privity, and affirm the trial court.

B. *Eisenhower is Not a Released Party under the Settlement Agreement*

Eisenhower and FlexCare also argue the trial court erred by determining Eisenhower was not a released party under the settlement agreement.

Settlement agreements incorporated into a judgment are construed under the rules governing the interpretations of contracts generally. (*In re Marriage of Iberti* (1997) 55

Cal.App.4th 1434, 1439.) "The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) "When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction [following a trial] will be upheld if it is supported by substantial evidence." (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8 (*Iqbal*).)

Under these familiar standards, the question we must decide is whether the language of the release shows the parties intended to release Eisenhower and other hospital clients of FlexCare. The settlement release clause says the "Class Members release the Released Parties from the Released Claims. Class Members agree not to sue or otherwise make a claim against any of the Released Parties that is in any way related to the Released Claims." If the settlement defined "Released Party" by naming Eisenhower, as it named FlexCare and several other individual parties, we would have to conclude Grande had settled her claims against the hospital. But the definition of "Released Parties" doesn't do that. It names "FlexCare, LLC, Vantus, LLC, Christopher Truxal, Travis Mannon, Michael Kenji Fields, and Nathan Porter" as the parties subject to the release.

The settlement includes a long list of categories of people and entities who also fall within the definition of "Released Parties" based on their relationship to the named parties.

Also released are "all present and former subsidiaries, affiliates, divisions, related or affiliated companies, parent companies, franchisors, franchisees, shareholders, and attorneys, and their respective successors and predecessors in interest, all of their respective officers, directors, employees, administrators, fiduciaries, trustees and agents, and each of their past, present and future officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their counsel of record." Despite the broad language, none of the categories appears broad enough to encompass FlexCare's clients as a group.

The list does not include words such as clients, joint employers, joint obligors, or other similar language which could reasonably be read to include the hospitals to which the plaintiff class members had been assigned. As Grande points out, if FlexCare and the class representatives had intended to release Eisenhower, they could have included as a Released Party, "any client of FlexCare as to whom any class member may have provided services through FlexCare." The fact that they did not do so weighs in favor of finding Eisenhower was not released. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527 ["The failure of the Release to specifically name Ford even though the signatories to the Release had counsel and were aware of [plaintiff's] claims against Ford also suggests that the Release did not cover those claims"].)

FlexCare and Eisenhower argue the definition of Released Parties does include Eisenhower—and presumably the other hospital clients—because it releases FlexCare's "related or affiliated companies." They argue Eisenhower was a related or affiliated company because they were "connected" in some way, namely in that FlexCare provided

temporary nursing staff to Eisenhower under a contract. Under settled principles of contractual interpretation, Eisenhower would be protected against liability under the release only if Grande and FlexCare intended to cover Eisenhower as one of the parties' affiliates. (*Iqbal, supra,* 10 Cal.App.5th at p. 9.)

Where words have a definite legal meaning, we presume the parties intended them to have their ordinary legal meaning, unless a contrary intent appears in the instrument. (*Weinreich Estate Co. v. A.J. Johnston Co.* (1915) 28 Cal.App. 144, 146 ["legal terms are to be given their legal meaning unless obviously used in a different sense"].) The term "affiliate company" is known to mean a "[c]ompany effectively controlled by another company. A branch, division, or subsidiary." (Black's Law Dictionary (6th ed. 1990) p. 58.) Other sources confirm the same meaning for the term "affiliate." (See *Iqbal, supra,* 10 Cal.App.5th at p. 9 [collecting sources which "indicate the common meaning of an affiliate generally is one who is dependent upon, subordinate to, an agent of, or part of a larger or more established organization or group"].) We conclude the terms "affiliate" and "affiliated company" are unambiguous and "refer[] to a relationship that is closer than a mere arm's length contractual relationship." (*Ibid.*; see also *Satterfield v. Simon & Schuster, Inc.* (9th Cir. 2009) 569 F.3d 946, 955 ["The plain and ordinary meaning of 'affiliate' supports this definition as 'a company effectively controlled by another or associated with others under common ownership or control'"].)

There is no indication in the settlement agreement or otherwise that the parties had some other meaning in mind. It is plain from the staffing agreement, the stipulation, and other extrinsic evidence that the two companies are not related or affiliated in this sense.

Indeed, the parties stipulated specifically that Eisenhower was not a division, subsidiary, parent, franchisor, franchisee, or shareholder of the named released parties. Under the uncontested facts of the case, then, Eisenhower and FlexCare are not affiliated companies as a matter of law.

Nor can the inclusion of the term "related," in the category "related or affiliated company" expand the meaning of the phrase to include the relationship FlexCare and Eisenhower did have—a contractual relationship for the supply of temporary workers. "Related company" means essentially the same thing as "affiliated company." (Cambridge Business English Dictionary [defining "related company" as "a company that controls or is controlled by another company, often one that is in the same business group"].)

FlexCare and Eisenhower also argue Eisenhower was a released party because it was a principal or agent of FlexCare. They base their argument largely on the assertion that the trial court assumed they were joint employers and the court in *Garcia*, *supra*, 11 Cal.App.5th at p. 788, held joint employers are necessarily agents of each other. As we discussed above, this argument is not persuasive. *Garcia* does not stand for the proposition that joint employers are agents of each other as a matter of law.

It's important to read all these terms in the context of the entire list of released parties. Courts should adopt a restrictive meaning of a listed item if acceptance of a broader meaning would make the item markedly dissimilar to the other items in the list. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.) A corollary holds "'"[w]here general words follow the enumeration of particular kinds or classes of persons or things, the general words will, unless a contrary intent is manifested, be construed as applicable only to

persons or things of the same general nature or class as those specifically enumerated.""" (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1468-1469.) Here, the release begins by listing specific entities and persons. Besides FlexCare, it specifically releases the company's corporate parent as well as partners and officers of the company. The general terms that follow—subsidiaries, divisions, parent companies, shareholders, attorneys, officers, directors, employees, administrators, fiduciaries, and trustees—identify categories of persons or entities who, like the specifically named parties, either exercise control over FlexCare or act on their behalf. Thus, construing the terms "affiliate," "related or affiliated companies," and "agents" more broadly than their standard legal sense is inconsistent with the definition of Released Party as a whole.

The trial evidence also weighs against concluding the parties were in a principal-agent relationship. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." (Rest.3d Agency, § 1.01.) The trial court concluded there was no evidence Eisenhower ever acted as FlexCare's agent or vice versa. Eisenhower maintained control over the temporary nurses in the performance of their jobs. It assessed their competency during an orientation program, retained discretion to require nurses to take its medication and clinical skills test, and had authority under the contract to make decisions about the nurses' assignments, including whether to terminate them for poor performance. In addition, the staffing agreement made clear nurses were required to conform with the hospital's policies and procedures and use the hospital's time and attendance system. In

addition, the travel nurse agreement required Grande to report her hours worked to FlexCare after obtaining approval from Eisenhower. Finally, FlexCare's corporate representative testified FlexCare did not control Eisenhower and said he didn't know whether Eisenhower exercised control over FlexCare. These facts support the trial court's finding that FlexCare and Eisenhower did not exercise control over each other, and provide sufficient support for the trial court's finding that neither company was an agent of the other.[3] (*Iqbal*, *supra*, 10 Cal.App.5th at p. 8.)

We're left with the fact that the staffing agreement between FlexCare and Eisenhower disavows any agency relationship between them. "[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. Hospital retains professional and administrative responsibility for the services rendered." That provision, while not dispositive of the relationship, is the best evidence we have regarding whether the parties understood the companies to be in a principal-agent relationship, and strongly counsels against overruling the trial court and reading into the agreement a release of Eisenhower.

For all these reasons, we affirm the trial court's determination that Eisenhower is not a released party under the terms of the settlement agreement and allow the Riverside putative class action to proceed in the trial court.

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[3] Though a representative of FlexCare did testify he understood the settlement to release Eisenhower, there's no evidence he expressed this intention to anyone, and undisclosed, subjective intent is irrelevant to interpreting the release's language objectively. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, *supra*, 109 Cal.App.4th at p. 955.)

III

DISPOSITION

We affirm the trial court's judgment against FlexCare and deny Eisenhower's petition for a writ of mandate. Our previous stay order will be dissolved when this opinion becomes final. Eisenhower and FlexCare shall bear Grande's costs.

CERTIFIED FOR PUBLICATION

SLOUGH
J.

I concur:

RAPHAEL
J.

[*Grande v. Eisenhower Medical Center*, E068730]

Ramirez, P.J., Dissenting

Recently, *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 held — on facts essentially identical to those here — that a settlement agreement between a staffing company and its employees barred those employees from asserting the same claims against the staffing company's client. Specifically, it held that the client was the staffing company's agent, and therefore within the scope of the release that the employees had given. (*Id*. at pp. 281-282, 285-286.) It also held, alternatively, that the staffing company and the client were in privity for purposes of res judicata. (*Id*. at pp. 278-282, 286-287.)

The majority deems *Castillo* to be irreconcilable with *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813. (Maj. opn. at pp. 12-15, 17, 19-20.) *Castillo* itself, however, considered this very argument (and reconsidered it on rehearing), but rejected it. (*Castillo v. Glenair, Inc.*, *supra*, 23 Cal.App.5th at pp. 280, 287.) Likewise, the majority relies on *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773. (Maj. opn. at pp. 15-16, 21.) *Castillo*, however, concluded that "*Serrano* is procedurally, factually and legally distinct . . . ." (*Castillo v. Glenair, Inc.*, *supra*, at p. 286; see also *id*. at pp. 285-286.)

I would follow *Castillo*, as a matter of stare decisis. *Castillo* at least has the virtue of stating clear rules on which parties on all sides can easily rely going forward. I do not find *Castillo* to be so plainly wrong as to justify creating a split of authority in this area.

RAMIREZ

P. J.

DOWNEY BRAND LLP

PROOF OF SERVICE

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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

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Executed on March 17, 2020, at Sacramento, California.

/s/ Patricia Pineda
Patricia Pineda

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