S261247

In The Supreme Court

OF THE

State of California

LYNN GRANDE
Plaintiff and Respondent,

v.

EISENHOWER MEDICAL CENTER
Defendant and Petitioner.

FLEXCARE, LLC
Intervener and Appellant.

On Review from the Court of Appeal for the
Fourth Appellate District, Division Two
Appeal Nos. E068730 and E068751

After an Appeal from the Superior Court of Riverside County
Honorable Sharon J. Waters
Case Number RIC1514281

EISENHOWER MEDICAL CENTER'S
OPENING MERITS BRIEF

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Richard J. Simmons, Cal. Bar No. 72666
Karin Dougan Vogel, Cal. Bar No. 131768
John D. Ellis, Cal. Bar No. 269221
333 South Hope Street, 43rd Floor
Los Angeles, California 90071-1422
Telephone: (213) 620-1780

Attorneys for Defendant and Petitioner
EISENHOWER MEDICAL CENTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. ISSUE PRESENTED FOR REVIEW

May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's 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

Based on indistinguishable facts, two courts of appeal have come to opposite holdings as to the issue presented, requiring this Court to resolve the conflict. The issue arises in the temporary staffing agency context. Hospitals such as Eisenhower Medical Center (Eisenhower) typically supplement their nursing staffs with temporary employees from staffing agencies who are essential to meet their fluctuating needs. The employees take advantage of the flexible employment opportunities temporary staffing agencies and their clients provide. The staffing agencies, the client-hospitals and the employees mutually benefit from these arrangements. And importantly, temporary employees are afforded all the protections of the state and federal employment and tax laws, including California's wage-hour laws, through the combined efforts of the staffing agencies and their clients. The healthcare industry depends on staffing agencies to provide critically needed healthcare workers.

Lynn Grande (Grande) was an employee of the temporary staffing agency, FlexCare, LLC (FlexCare), for nine days in 2012. During that time, FlexCare assigned her to work exclusively for Eisenhower as a "traveling nurse." After that short employment, she sued FlexCare for a litany of wage-hour violations on behalf of a putative class of employees assigned to hospitals. Ultimately, Grande settled all of her class and

individual claims against FlexCare and others encompassed by the settlement, including all of FlexCare's "agents" and "representatives." FlexCare then paid approximately $700,000 in exchange for a release covering "any and all claims … which have been or could have reasonably been asserted in the Action." The settlement was approved by the superior court and incorporated into a final judgment.

Grande then brought a second class action against Eisenhower for the very same alleged wage and hour violations she had settled against FlexCare and others. Not only were the alleged violations identical. Her allegations were based on precisely the same hours she worked during her nine days of work in 2012, and the same meal and rest period, timekeeping and pay practices. She further alleged Eisenhower and FlexCare were her joint employers.

Based on facts indistinguishable from those here, the Court of Appeal in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 (*Castillo*) held that the second lawsuit is barred on two alternative grounds – (1) the employer-client was the agent of the staffing agency for purposes of the settlement, and (2) the employer-client and the staffing agency were in privity so that the judgment on the settlement agreement was res judicata as to the employer-client. If *Castillo's* holdings were applied here, Grande's second lawsuit against Eisenhower would be dismissed. Eisenhower was FlexCare's agent and therefore Grande released her wage-hour claims against Eisenhower. Alternatively, the same facts creating agency establish privity between FlexCare and Eisenhower and res judicata applies. Thus, based *either* on Grande's release in the settlement agreement or on res judicata, her lawsuit against Eisenhower is barred under *Castillo*.

The Court of Appeal here shifted from its tentative opinion in Eisenhower's favor and rejected both of *Castillo's* holdings. Instead, the

Court held that Eisenhower was not FlexCare's agent and therefore not a released party under the settlement agreement. The Court further held the two were not in privity so that res judicata does not apply to bar Grande's second action. (*Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147 (*Grande*).)

The *Castillo* holdings correctly address the triangular relationship between a staffing agency, its client, and the employees who must be protected through the combined and interdependent efforts of each of the three parties. Under this unique arrangement, the staffing agency hires and pays the employees while the hospital-client provides meal and rest periods, assigns work and any overtime and records work time and meal periods so the staffing agency can properly pay the employees. Consequently, the staffing agency's and client's roles are inextricably intertwined with regard to wage-hour compliance. Both must work in tandem so that the staffing agency can fulfill its myriad of wage-hour responsibilities to properly pay the employees in compliance with California law. Therefore, relying on this Court's decision in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 (*DKN Holdings*), and other precedents, *Castillo* concluded that the staffing agency and its client were in privity based on the "interdependent relationship" with respect to matters of wage-hour compliance as well as the fact that the litigation revolves around alleged errors in the payment of wages. (*Castillo*, *supra*, 23 Cal.App.5th at p. 280.)

As in *Castillo*, when Grande released FlexCare and its agents she also released Eisenhower. Similarly, FlexCare and Eisenhower are in privity with respect to Grande's wage-hour claims. Either way, her second action is barred. The judgment should be reversed based either on the settlement agreement and release, on application of res judicata, or both.

III. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Parties

FlexCare is a staffing agency that assigns nurses to work at healthcare facilities on a temporary basis. (2 Petitioner's Appendix [PA] 420 ¶¶ 1-2.) Eisenhower operates a not-for-profit hospital in Rancho Mirage, California and is one of FlexCare's clients. (2 PA 420 ¶¶ 3-4, 424 ¶ 3.) Eisenhower contracts with staffing agencies like FlexCare to meet its fluctuating nursing needs. (3 PA 635:9-636:8.) In 2007, Eisenhower and FlexCare executed a Supplemental Staffing Agreement (Staffing Agreement), pursuant to which FlexCare selected and assigned employees to perform work directly for the hospital. (2 PA 420 ¶ 3; 3 PA 602:25-603:12; 4 PA 898-910.) Eisenhower, in turn, would act as FlexCare's agent by directly exercising control over the hours and working conditions of the nurses assigned to it by FlexCare. (1 PA 19-20 ¶ 7; 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5, 903 ¶ 6.8.2, 990, 1062-1064.) Grande was an employee of FlexCare for just nine days in 2012. (2 PA 420 ¶ 9.) During those nine days, FlexCare assigned Grande to work exclusively at Eisenhower as a "traveling nurse." (2 PA 420 ¶¶ 8-10.)

B. FlexCare's and Eisenhower's Highly Interdependent Relationship

Eisenhower and FlexCare were interdependent on each other such that it took their combined efforts and intertwined responsibilities to provide employees the protections imposed under the state and federal laws. (1 PA 19-20 ¶ 7; 3 PA 601:18-602:14, 605:24-606:9; 4 PA 898-910, 989-990, 1062-1064.) As an example, FlexCare asked Eisenhower to create and furnish FlexCare with records of employees' work time and meal periods so that FlexCare could identify and fulfill the wage-hour

obligations at the heart of both Grande's lawsuits. (1 PA 20 ¶ 7.j; 4 PA 597:3-15, 605:24-606:9, 640:6-11, 901 ¶ 5.2, 903 ¶ 6.8.3, 990.)

In order to allocate legal responsibilities, the Staffing Agreement provides that "[s]taff assigned by [FlexCare] to [Eisenhower] under this Agreement are employees of [FlexCare] and are not employees or agents of [Eisenhower]." (4 PA 901 ¶ 5.1.) Under their agreement, FlexCare retained "s[o]le, exclusive and total legal responsibility as the employer of Staff," including primary responsibility for compliance with all wage and hour laws. (*Ibid.*) The Staffing Agreement required Eisenhower to pay specific rates to FlexCare for the hours of work by each category of supplemental personnel FlexCare provided. (4 PA 903-905 ¶¶ 7.1.1-7.1.10, 909.) In turn, FlexCare paid employees the hourly rates it separately negotiated with the employees and placed in their contracts. (3 PA 605:24-606:9; 4 PA 989-990.) The Staffing Agreement required FlexCare to indemnify Eisenhower "against any and all" legal claims asserted against Eisenhower that arise from a breach of the agreement by FlexCare or which are predicated on allegations that FlexCare employees were jointly or otherwise employed by Eisenhower. (4 PA 901 ¶ 5.3.)

Because FlexCare and Eisenhower were interdependent on one another to be sure employees were properly paid and California's requirements were met, each company was required to perform various functions. (4 PA 898-910.) Some of the responsibilities were delegated to Eisenhower because FlexCare did not have on-site personnel at the hospital. (*Ibid.*, 1 PA 19 ¶ 7.a; 3 PA 601:18-28.) For instance, Eisenhower directly supervised nurses, provided them meal and rest periods, approved their hours of work and any overtime and created and submitted to FlexCare the time records used to document the nurses' hours and meal periods. (1 PA 19-20 ¶ 7; 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5,

903 ¶ 6.8.2, 990, 1062-1064.) Given the interdependence of FlexCare and Eisenhower, the Staffing Agreement required FlexCare's nurses to use Eisenhower's time and attendance system and to comply with all of Eisenhower's policies and procedures. (4 PA 901 ¶ 4.4, 903 ¶ 6.8.2.) FlexCare's agreements with individual nurses required that their timesheets be reviewed and verified by an Eisenhower representative, to "[c]onform and adapt" to Eisenhower's schedules and policies, including with respect to meal and rest periods. (3 PA 605:24-606:9; 4 PA 990.) FlexCare, for its part, was obligated to administer benefits and process the weekly payroll for its nurses based on their reported hours worked. (3 PA 597:3-15, 640:6-11; 4 PA 901 ¶ 5.2.)

Grande recognizes the roles Eisenhower and FlexCare played in ensuring she got paid consistent with California law. Grande alleges that Eisenhower controlled the work schedules and working conditions of employment of FlexCare nurses, "who were required to report to [Eisenhower] and follow [its] directions." (1 PA 19 ¶ 7.b.) Grande alleges that Eisenhower "instructed [Grande] and other [FlexCare nurses] when and/or where to work once they arrived at [Eisenhower]'s work sites" and "had the power to instruct [Grande] and other [FlexCare nurses] when and whether to take meal and rest periods." (1 PA 19-20 ¶¶ 7.f & 7.h.) Grande also acknowledges that Eisenhower "provided the forms and systems in which the details of the performance of [Grande] and other [FlexCare nurses] were recorded." (1 PA 20 ¶ 7.j.)

C. The *Erlandsen* Action and Settlement

One of FlexCare's employee nurses, Christina Erlandsen, filed a class action and PAGA action against FlexCare in Santa Barbara County Superior Court in 2012. (*Christina Erlandsen v. Flexcare LLC*, Santa Barbara Superior Court Case No. 1390595 [*Erlandsen*]; 2 PA 421 ¶ 12; 4

PA 1084-1121.)[1] A year later, Grande joined *Erlandsen* as a named plaintiff and putative class representative. (2 PA 421 ¶ 14.) The operative third amended complaint in *Erlandsen* asserted causes of action for: (1) failure to pay compensation due for hours worked; (2) failure to pay meal period wages; (3) failure to pay rest period wages; (4) failure to pay waiting time wages; and (5) violation of Business and Professions Code section 17203. (1 PA 114-139; 2 PA 421 ¶ 18.) Each of Grande's claims against FlexCare in *Erlandsen* was predicated solely on her short assignment at Eisenhower, and Grande was represented by the same attorneys who represent her in this case. (1 PA 17; 2 PA 421 ¶¶ 15-16; 5 PA 1352:9-17.) Grande did not name Eisenhower as a party in *Erlandsen*. (2 PA 424 ¶ 33.)

On January 28, 2014, Grande and FlexCare signed an agreement to settle the class and PAGA claims alleged in *Erlandsen* against FlexCare as well as its agents and others. (1 PA 79-112; 2 PA 421 ¶ 19.) This naturally included the *only* claims Grande had alleged – those arising from her work at Eisenhower. (1 PA 83 ¶ FF; 2 PA 421 ¶ 15, 422 ¶ 23.) The *Erlandsen* settlement provides that all class members "release the Released Parties from the Released Claims" and broadly defines "Released Claims" as: "any and all claims, causes of action, debts, liabilities, demands, obligations, guarantees or damages, in law or equity, tort or in contract, by statute, pursuant to case law, or otherwise, *which have been or could have reasonably been asserted* in the [*Erlandsen*] 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 [*Erlandsen*] Action during the Class Period." (1 PA 83 ¶ FF, 89:2-3; 2 PA

---

[1] *Erlandsen* is referred to in the court of appeal opinion and some of the parties' prior briefing as "the Santa Barbara action."

422 ¶ 23, emphasis added.) The *Erlandsen* settlement also releases all PAGA claims as proxy for the Labor and Workforce Development Agency (LWDA) and the State of California. (*Ibid.*) The settlement expressly releases FlexCare's "agents" and "representatives" by defining the following as "Released Parties:"

> FlexCare, LLC, Vantus, LLC, Christopher Truxal, Travis Mannon, Michael Kenji Fields, and Nathan Porter [the named defendants], and 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, insureds and reinsurers, and their counsel of record.

(1 PA 83 ¶ GG; 2 PA 422-423 ¶ 24.)

On April 8, 2015, the Santa Barbara Superior Court approved the *Erlandsen* class-wide settlement and entered judgment. (1 PA 165-170; 2 PA 423 ¶ 27.) The certified class was defined in the *Erlandsen* judgment as "all persons who at any time from or after January 30, 2008, through April 8, 2014, were non-exempt nursing employees of FlexCare, LLC employed in California." (1 PA 166 ¶ 6.) The class plainly encompassed Grande and all nurses assigned by FlexCare to Eisenhower. (*Ibid.*; 2 PA 420-21 ¶¶ 8-10.) The judgment incorporated the settlement agreement's definitions of "Released Parties" and "Released Claims," which encompasses all claims that "could have reasonably been asserted in" *Erlandsen*. (1 PA 167-168 ¶¶ 11-12; 2 PA 423-424 ¶¶ 30-31.) The judgment stated that "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[.]" (1 PA 167 ¶ 10; 2 PA 423 ¶ 29.) The State's related PAGA claims were included in the settlement. (1 PA 167 ¶ 12; 2 PA 423 ¶ 30.)

FlexCare paid $700,000 in satisfaction of the *Erlandsen* settlement, which included a $20,000 class representative incentive payment to Grande, $162.13 reflecting her pro rata share of the settlement proceeds distributed to the class and her PAGA allocation. (2 PA 423 ¶¶ 26 & 28; 3 PA 613:20-25; 4 PA 982; 6 PA 1397:17-19, 1398:19-1399:18, 1400:15-24.) Grande's entire employment with FlexCare and her corresponding assignment to Eisenhower (nine days in 2012) was during the January 30, 2008 to April 8, 2014 release period in *Erlandsen*. (1 PA 166 ¶ 6; 2 PA 420-21 ¶¶ 8-10; 5 PA 1352:9-17.) Grande does not dispute that the payments she received (along with the wages she was previously paid) fully satisfied all wage claims flowing from her nine-day assignment.

D. The Present Action

On December 3, 2015, after judgment was entered in *Erlandsen*, Grande filed a second putative class action, this time against Eisenhower in Riverside County Superior Court, asserting identical claims for the same nine-day assignment as those alleged and settled in *Erlandsen*. (*Lynn Grande v. Eisenhower Medical Center*, Riverside Superior Court Case No. RIC1514281 [*Grande*]; 1 PA 17-32; 2 PA 425 ¶ 43.) This time Grande's complaint alleged that Eisenhower and FlexCare jointly employed her during her work at Eisenhower. (1 PA 19-20 ¶ 7.) Grande defined her proposed class to encompass those in the settlement class in *Erlandsen* who had worked at Eisenhower. (1 PA 21 ¶ 14, 166 ¶ 6.) The proposed class includes: "All persons who at any time during the applicable period of limitations through the date of trial 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 … at Eisenhower Medical Center health provider facilities."[2] (1 PA 21 ¶ 14.) Eisenhower filed an answer on March 22, 2016, asserting res judicata and release as affirmative defenses. (1 PA 35, 39 ¶ 10, 41 ¶ 18.)

On January 4, 2016, Eisenhower sent a letter and a copy of the *Grande* complaint to FlexCare demanding that FlexCare indemnify Eisenhower pursuant to the Staffing Agreement. (2 PA 425 ¶ 44, 430-448.) FlexCare responded by intervening in *Grande* for the purpose of asserting that the claims against Eisenhower were barred by the *Erlandsen* settlement and judgment. (1 PA 45-50.) FlexCare's intervention was based, in part, on the fact that the *Erlandsen* settlement fully extinguished all claims "which have been or could have reasonably been asserted in" *Erlandsen*, including claims against Eisenhower that FlexCare would be obligated to indemnify. (*Ibid.*)

From February 3, 2017 though February 7, 2017, the trial court held a short bifurcated trial, largely on stipulated facts, on the issue of whether the *Erlandsen* settlement and/or judgment precluded Grande's claims against Eisenhower. (2 PA 384-408; 3 PA 557-698; 6 PA 1418-1469.) A FlexCare representative testified unambiguously the *Erlandsen* settlement was intended to release Eisenhower and to mean FlexCare was "done with this … done with all of it for everybody." (3 PA 616:16-23.)

On May 26, 2017, the trial court issued a statement of decision concluding that Eisenhower was not a released party under the *Erlandsen* settlement and that res judicata did not apply. (7 PA 1664-1690.) The trial

---

[2] The complaint does not mention the *Erlandsen* case and the settlement and release. (1 PA 17-32.)

court entered judgment on FlexCare's complaint in intervention on June 14, 2017. (7 PA 1749-1750.) At Eisenhower's request, the trial court issued an order under Code of Civil Procedure section 166.1 finding that its statement of decision presented a controlling question of law as to which there are substantial grounds for difference of opinion and that immediate appellate resolution would materially advance the conclusion of the litigation. (7 PA 1755-1756.)

FlexCare timely appealed the trial court's judgment on its complaint in intervention, and Eisenhower petitioned for a writ of mandate. (7 PA 1761.) The court of appeal issued an order to show cause on Eisenhower's writ petition and consolidated the writ proceedings with FlexCare's appeal. In a 2-1 split decision, the court of appeal reversed its tentative decision in Eisenhower and FlexCare's favor and instead affirmed the trial court and denied Eisenhower's writ petition.

This Court granted review on May 13, 2020.

IV. STATEMENT OF JURISDICTION

The Fourth District Court of Appeal had jurisdiction over FlexCare's appeal pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1). (See *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 [in multiparty action judgment or order final as to one party is appealable by that party], disapproved on another ground by *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) The court of appeal had jurisdiction over Eisenhower's petition for writ of mandate pursuant to Code of Civil Procedure § 1085 and Cal. Const. art. VI, § 10. Eisenhower's writ petition became a "cause" in the court of appeal when the court issued an order to show cause. (See *People v. Medina* (1972) 6 Cal.3d 484, 490.)

This Court has jurisdiction under Cal. Const. art. VI, § 12, subdivision b.

V. STANDARD OF REVIEW

On review of a judgment based on a statement of decision following a bench trial, the trial court's factual findings are reviewed for substantial evidence and questions of law are reviewed de novo. (*McPherson v. EF Intercultural Found., Inc.* (2020) 47 Cal.App.5th 243, 257; *Durante v. County of Santa Clara* (2018) 29 Cal.App.5th 839, 842.) Contract interpretation is a question of law reviewed de novo when it does not depend on resolution of conflicts in extrinsic evidence. (*City of Hope Nat'l Med. Ctr. v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.) "When the essential facts are not in conflict and the evidence is susceptible to a single inference," the question of whether an agency relationship exists "is a matter of law for the court." (*Emery v. Visa Internat. Serv. Ass'n* (2002) 95 Cal.App.4th 952, 960; see also *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1189 [*Borders Online*]; *Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 41 ["[I]f the essential facts are not in conflict the question of the legal relations arising therefrom is a question of law."].) Whether res judicata bars an action is a question of law reviewed de novo. (*Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1325; *City of Oakland v. Oakland Police & Fire Ret. Sys.* (2014) 224 Cal.App.4th 210, 228.)

VI. ARGUMENT

Grande's claims in this action are barred for two reasons.

First, the approved settlement released all claims that were or could have been asserted in *Erlandsen* against FlexCare and its "agents" and "representatives." (1 PA 83 ¶ GG; 2 PA 422-423 ¶ 24.) Eisenhower served as FlexCare's special agent and representative for numerous purposes material to FlexCare's wage-hour obligations. Because Eisenhower is a

third party beneficiary to the settlement in *Erlandsen*, it is entitled to enforce the approved release and settlement.

Second, Grande's claims against Eisenhower are barred by res judicata, because the *Erlandsen* release was incorporated into a final judgment and Eisenhower was in privity with FlexCare. (1 PA 165-170.) They are in privity because of: (1) Eisenhower's and FlexCare's interdependent relationship that required their combined efforts to satisfy FlexCare's wage-hour obligations for nurses assigned to Eisenhower; (2) the fact that Grande's second action revolves around the same alleged errors in wage-hour practices as she asserted in *Erlandsen*; (3) Grande's allegations of joint employment; and (4) the contractual relationship between FlexCare and Eisenhower that shows their interests "are so intertwined as to put [them] in the same relationship to the litigation." (See *Castillo*, *supra*, 23 Cal.App.5th at p. 280.) Accordingly, res judicata and claim preclusion bar the claims asserted against FlexCare in *Erlandsen* from being pursued against Eisenhower in *Grande*.

For these reasons, the Court should reverse the court of appeal and hold that Grande's claims against Eisenhower are barred by the *Erlandsen* settlement and judgment.

A. The *Erlandsen* Settlement Releases Grande's Claims Against Eisenhower

The uncontroverted evidence demonstrates that Eisenhower served as FlexCare's special agent for the purpose of recording and verifying FlexCare's employees' time. (1 PA 19-20 ¶ 7; 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5, 903 ¶ 6.8.2, 990, 1062-1064.) That special agency allowed FlexCare to comply with California law governing the payment of wages, timekeeping, and provision of meal and rest periods to Grande and other FlexCare nurses. (3 PA 597:3-15, 640:6-11; 4 PA 901 ¶ 5.2.) The

comprehensive *Erlandsen* settlement releases "any and all claims … which have been or could have reasonably been asserted in the [*Erlandsen*] Action" against FlexCare, as well as its "agents" and "representatives." (1 PA 83 ¶¶ FF & GG; 2 PA 422-423 ¶¶ 23-24.) Because Eisenhower was FlexCare's agent and representative, Grande's claims against Eisenhower are released under the express terms of the *Erlandsen* settlement.[3]

1. Eisenhower Was FlexCare's Special Agent and Representative

Eisenhower acted as FlexCare's special agent and representative for the purpose of complying with California's wage and hour laws.

"An agent is one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295; see also *Sunset Mill. & Grain Co. v. Anderson* (1952) 39 Cal.2d 773, 778 [*Sunset Mill*].) California recognizes two types of agent: special and general. (Civ. Code, § 2297; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 908.) A special agent is "[a]n agent for a particular act or transaction…All others are general agents." (*Ibid.*) A "representative" is "[o]ne who represents others or another in a special capacity," and the term is interchangeable with "agent." (*Sunset Mill, supra*, 39 Cal.2d 773, 778.) Agency can be formed either by express agreement or implied by conduct. (*Warfield v. Summerville Senior Living, Inc.* (2007) 158 Cal.App.4th 443, 448; *Malloy*

---

[3] There is no dispute that Grande is bound by the *Erlandsen* settlement as both a signatory and class member. (1 PA 109.) Nor is there any dispute that the release of "any and all claims…which have been or could have reasonably been asserted in" *Erlandsen* covers the identical claims asserted against Eisenhower in this case. (1 PA 83 ¶ FF; 1 PA 89:2-3; 2 PA 422 ¶ 23.) The only disputed issue as to effect of the *Erlandsen* release is whether Eisenhower is a released party.

v. Fong (1951) 37 Cal.2d 356, 372 ["An agency relationship may be informally created. No particular words are necessary, nor need there be consideration."].)

In this case, the undisputed facts demonstrate that Eisenhower acted as FlexCare's special agent. Eisenhower supervised FlexCare nurses, assigned their work, provided their meal and rest periods, approved their hours of work and overtime, and created and provided time records as required by section 7 of Industrial Welfare Commission (IWC) Wage Orders Nos. 4 and 5.[4] (1 PA 19-20 ¶ 7, 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5, 903 ¶ 6.8.2, 990, 1062-1064; Cal. Code Regs. tit. 8 §§ 11040(7), 11050(7).) The Staffing Agreement expressly dictates that temporary nurses employed by FlexCare are to use Eisenhower's time and attendance system to record their hours worked. (4 PA 903 ¶ 6.8.2.) Consistent with the Staffing Agreement, FlexCare's agreements with its nurses required them to report their hours on timesheets reviewed, verified and signed by an Eisenhower representative. (3 PA 605:24-606:9; 4 PA 990.) By Grande's own admission, Eisenhower controlled FlexCare nurses' work schedules and instructed them when and where to work, and when to take meal and rest periods. (1 PA 19-20 ¶¶ 7.b, 7.f & 7.h; see *Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433 [*Uram*] [factual allegations in a complaint are deemed judicial admissions].)

---

[4] IWC Wage Order No. 4 governs work "in professional, technical, clerical, mechanical, and similar occupations" and covers temporary nurse staffing agencies like FlexCare. (Cal. Code Regs. tit. 8 §§ 11040, subd. (1), 11040, subd. (2)(O).) IWC Wage Order No. 5 governs work "in the public housekeeping industry," which includes hospitals like Eisenhower. (Cal. Code Regs. tit. 8 §§ 11050, subd. (1), 11050, subd. (2)(P)(4).)

Eisenhower and FlexCare were interdependent on one another so that their combined efforts were needed to comply with FlexCare's wage-hour obligations. Because FlexCare did not have on-site personnel at the hospital, Eisenhower's actions were necessary to enable FlexCare to comply with its timekeeping and meal and rest period obligations and to pay its employees correctly for all working time. (1 PA 19 ¶¶ 7.a, 7.h & 7.j; 3 PA 597:3-15, 601:18-28, 605:24-606:9, 640:6-11; 4 PA 901 ¶ 5.2; 4 PA 903 ¶ 6.8.2, 990.) FlexCare plainly could not fulfill its obligations to its employees without Eisenhower performing the critical tasks described above on FlexCare's behalf. FlexCare necessarily relied on the time records verified by Eisenhower to know when to pay a one-hour premium for unprovided meal periods under Labor Code section 226.7. (1 PA 20 ¶¶ 7.h & 7.j; 3 PA 605:24-606:9; 4 PA 903 ¶ 6.8.2, 990.) The undisputed facts are thus sufficient to establish that Eisenhower acted for and represented FlexCare in its dealings with the temporary nurses with respect to various matters relating to wages, hours and working conditions, as specified in section 2(H) of Wage Order 4. Eisenhower was therefore FlexCare's special agent or representative as a matter of law. (See *Borders Online*, *supra*, 129 Cal.App.4th at p. 1189 [agency is a question of law when "the evidence is susceptible of but a single inference"], quotations omitted.)

2. *Castillo* Found Agency Based on Nearly Identical Facts

The Second District Court of Appeal determined agency exists based on nearly identical facts in *Castillo*, *supra*, 23 Cal.App.5th 262 at pp. 281-82. In *Castillo*, as here, the evidence was "undisputed that [the staffing agency] authorized [its client] to collect, review, and transmit [staffing agency] employee time records to [staffing agency]. Thus, [client] was authorized to represent, and did represent, [staffing agency] in its dealings

with third parties, specifically [staffing agency]'s payment of wages to its employees placed at [client]." (*Id.* at p. 281.) The court of appeal concluded that "the undisputed evidence is susceptible of only one conclusion, namely that [client] was an agent of [staffing agency] for the purpose of collecting, reviewing, and providing [staffing agency] employee time records to [staffing agency] so that [staffing agency] could properly pay its employees." (*Ibid.*) Therefore, the staffing agency's client was permitted to enforce a release of "agents" in a class action settlement between the staffing agency and the plaintiffs in an earlier class action against two class members who later sued the client. (*Id.* at pp. 281-82.) *Castillo* is on-point, persuasive, properly applies *DKN Holdings* and should be adopted by the Court in this case.

Castillo's holding is supported by a line of cases concluding that the client of a staffing agency may enforce the arbitration agreement between the staffing agency and its employees when one of the employees sues the client. In *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 788, the court of appeal held that the client of a staffing agency could enforce an arbitration agreement between the staffing agency and its employees because, "[a]s the alleged joint employers, [client] and [staffing agency] were agents of each other in their dealings with [plaintiff]." *Ibid.* *Garcia* has been routinely followed in federal cases applying California law. (See, e.g., *Hughes v. S.A.W. Entertainment, Ltd.* (N.D. Cal. 2019) 2019 WL 2060769, p. *26; *Lucas v. Michael Kors (USA), Inc.* (C.D. Cal. 2018) 2018 WL 6177225, p. *7.)

Furthermore, *Castillo*'s holding is entirely consistent with the definition of "employer" adopted by the IWC in California's Wage Orders. Notably, IWC Wage Orders Nos. 4 and 5 define "employer" as "any person as defined in Section 18 of the Labor Code, who directly or indirectly, *or*

through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs. tit. 8 §§ 11040, subd. (2)(H), 11050, subd. (2)(H), emphasis added; see also *Martinez v. Combs* (2010) 49 Cal.4th 35, 71 [*Martinez*].) The Wage Orders' definition of employer establishes that an employer, like FlexCare, can exercise control over the wages, hours, or working conditions of its employees through an "agent." This is precisely what Grande alleges Eisenhower did and what the evidence demonstrates.[5] (See *Martinez*, *supra*, 49 Cal.4th at pp. 58-66 [Wage Orders' definition of employer controls for most wage and hour purposes].) Thus, Grande has admitted in her complaint to the very facts that make Eisenhower an agent and representative of FlexCare with respect to her employment and that of other FlexCare nurses. (1 PA 19-20 ¶ 7.)

The undisputed evidence and plain language of the *Erlandsen* settlement therefore establish that Eisenhower was FlexCare's special agent or representative.

3. As FlexCare's Agent, Eisenhower Is a Released Third Party Beneficiary

Because Eisenhower was FlexCare's special agent, it was released under the *Erlandsen* settlement. Thus, as a third party beneficiary of the settlement agreement, it is entitled to enforce the broad release of all claims that Grande could have brought in *Erlandsen*, such as her individual and class claims against Eisenhower.

---

[5] All of the other IWC Wage Orders, except Wage Order No. 17 governing "Miscellaneous Employees," include the same definition of "Employer" as Wage Orders Nos. 4 and 5.

A class action settlement incorporated into a judgment binds all class members on the released claims. (*Villacres v. ABM Indus. Inc*. (2010) 189 Cal.App.4th 562, 577 [*Villacres*]; *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1555.) A judicially approved settlement is interpreted and applied in the same manner as an ordinary contract. (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439; see also *Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642, 649 ["A contractual settlement of a disputed claim is an agreement the interpretation and effect of which are governed by ordinary principles of contract law."] [*Gouvis Engineering*].)

Under ordinary contract principles, an agreement may be enforced not only by the parties to it, but also by intended third party beneficiaries. (Civ. Code, § 1559; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.) To qualify as a third party beneficiary, it is "not necessary that the beneficiary be named and identified as an individual. A third party may enforce a contract where he shows that he is a member of a class of persons for whose benefit it was made." (*Garratt v. Baker* (1936) 5 Cal.2d 745, 748; see also *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 444.)

The *Erlandsen* settlement releases not only the defendants to *Erlandsen*, but also their "agents" and "representatives." (1 PA 83 ¶ GG; 2 PA 422-423 ¶ 24.) And because Eisenhower was FlexCare's special agent and representative, it is an express third party beneficiary of the release and entitled to its benefits. In that sense, this case is analogous to *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 558-61 [*Brinton*], which enforced a class action release in favor of an entity who was neither a party to the settled class action nor named in the release. In *Brinton*, the non-party was a "principal" of one of the defendants and the

settlement agreement released all claims against the "principals" of the parties. As here, the "settlement agreement's language [was] very broad and comprehensive in scope," and "[i]t covered all present and future litigation concerning" the subject matter of the litigation. (*Id.* at p. 560.)

That Eisenhower is a released party is fully consistent with the *Erlandsen* parties' intent to achieve global peace by putting to rest all claims that were or reasonably could have been asserted. Certainly, this applied to Grande's claim based on her short Eisenhower assignment, which was her only assignment. (2 PA 420-421 ¶¶ 8-10 & 15.) A FlexCare representative testified unambiguously at trial that the *Erlandsen* settlement was intended to release Eisenhower and put an end to everything so FlexCare would be "done with this … done with all of it for everybody." (3 PA 616:16-23.) "Extrinsic evidence is allowed to determine the parties' intent when a stipulated order or judgment is ambiguous." (*SLPR, L.L.C. v. San Diego Unified Port District* (2020) 49 Cal.App.5th 284, 299, quotations and brackets omitted.)

4. The *Erlendsen* Settlement Released All Claims That Were or Could Have Been Asserted

It is significant that the *Erlandsen* agreement covers "any and all claims … which have been or could have reasonably been asserted in the Action." (1 PA 83 ¶ FF; 2 PA 422 ¶ 23.) While caselaw makes it clear that all claims that reasonably could have been brought are encompassed within wage-hour settlements, the parties here did not leave it to chance. Rather, they expressly released claims that could have been included. (*Ibid.*) After all, Grande received in the settlement over $20,000 above the wages she had been paid for her nine-day stint. (1 PA 423 ¶ 28; 6 PA 1397:17-19.)

In *Villacres, supra,* 189 Cal.App.4th at pp. 588-89, the court of appeal held that "[a] general release—covering 'all claims' that were or

could have been raised in the suit—is not uncommon in class action settlements" and that agreements containing such language are "meant to be a final resolution of all issues." *Villacres* further held releases "of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction... If parties intend to leave some things open and unsettled, their intent so to do should be made manifest." (*Id.* at p. 589, quoting *United States v. Wm. Cramp & Sons Co.* (1907) 206 U.S. 118, 128.)

However, the court of appeal in this case mistakenly reversed the applicable standard by imposing the burden on the parties to expressly include each claim or party they wished to release. The court mistakenly inferred an intent to exclude the claims against Eisenhower based on an overly narrow reading of the list of released parties (which were all of the defendants named in the complaint). This ignored the fact that the *Erlandsen* parties expressly manifested an intent to release all claims that were or reasonably could have been asserted and put an end to litigation related to the subject matter of the *Erlandsen* case. (See *Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242, 247-48 ["The character of a contract is not to be determined by isolating any single clause or group of clauses; rather, 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.'"]; Civ. Code, § 1641.)

It is undisputed that the wage-hour claims Grande asserted in this case against Eisenhower are identical to those she asserted against FlexCare in *Erlandsen*. (1 PA 17-32, 114-139.) It is also undisputed that the identical claims in both cases are based on the very same hours she worked over a nine-day period at Eisenhower. (*Ibid.*; 2 PA 420-421 ¶¶ 8-10 & 15.) Likewise, Grande admitted nothing prevented her from including her claims against Eisenhower in the *Erlandsen* action. Yet she chose not to

include them in that action and, unlike the plaintiff in *Kim v. Reins International Cal., Inc.* (2020) 9 Cal.5th 73 (*Kim*), she failed to expressly exclude such claims from her class and PAGA settlement. (6 PA 1379:13-18; *Kim, supra,* 9 Cal.5th at p. 91 [Court noted that employees who seek to exclude possible claims they wish to pursue from a settlement can expressly carve out such claims in the settlement agreement].) It cannot be disputed that Grande would necessarily have had to rely on exactly the same records and evidence to pursue claims against Eisenhower and FlexCare. Because the claims in this case could have reasonably been asserted in *Erlandsen*, and logically should have been, Eisenhower must be understood as an intended third party beneficiary to the *Erlandsen* settlement.

5. The Court of Appeal's Agency Analysis Is Flawed

In rejecting the conclusion that Eisenhower was FlexCare's agent or representative and thus a released party, Grande and the court of appeal focused on evidence that FlexCare did not generally control Eisenhower. (See *Grande, supra,* 44 Cal.App.5th at pp. 1166-67.) The court's analysis was fundamentally flawed. By misdirecting its attention to FlexCare's *general* control over Eisenhower, the court ignored the Wage Order's definition of "employer," which focuses instead on the "control over the wages, hours, and working conditions" of Grande and FlexCare's other employees. The court also failed to consider that Eisenhower was only a special agent of FlexCare for the limited purposes described *supra*. While Eisenhower and FlexCare had an interdependent relationship through which FlexCare relied on Eisenhower to meet its wage-hour obligations to Grande and its other nurses, they were not general agents of each other. As *Castillo* properly held, "[i]t need not be shown that [the staffing agency] generally controlled [its client]. Rather, it must be shown that [the staffing agency]

had the right to control [its client] with respect to the special agency at issue, namely [its client]'s role in collecting, reviewing, and providing time records to [the staffing agency]." (*Castillo, supra*, 23 Cal.App.5th at p. 282.) Here, Eisenhower's special agency went further. FlexCare relied on Eisenhower to create and furnish accurate time records so FlexCare could pay wages correctly and comply with its meal and rest period and timekeeping obligations.[6] (1 PA 19-20 ¶ 7, 3 PA 597:3-15, 601:18-28, 605:24-606:9, 640:6-11; 4 PA 901 ¶ 5.2, PA 903 ¶ 6.8.2, PA 990,PA 1062-1064.)

Furthermore, "'[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 establishes the relationship.'" (*Castillo, supra*, 23 Cal.App.5th at p. 282, quoting *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620; see also *Malloy v. Fong* (1951) 37 Cal.2d 356, 370.) As in *Castillo*, FlexCare's right to control the special agency is established by the fact that it authorized Eisenhower to perform timekeeping and other tasks on behalf of FlexCare. (3 PA 605:24-606:9; 4 PA 903 ¶ 6.8.2, 990.) The only reasonable inference is that FlexCare required Eisenhower to perform those tasks. "Had [Eisenhower] failed to perform those timekeeping tasks, [FlexCare] would not have been able to pay its employees." (See *Castillo, supra*, 23 Cal.App.5th at p. 282.) Indeed, Grande's complaint effectively

---

[6] In finding no agency, the court of appeal relied on the Restatement (Third) Of Agency. *Grande, supra*, 44 Cal.App.5th at pp. 1167.) Strikingly, it failed to address California's definition of agency in Civil Code section 2295 that "[a]n agent is one who represents another, called the principal, in dealings with third persons." Nor did the court of appeal acknowledge that the Civil Code recognizes and distinguishes between special and general agents. (Civ. Code, § 2297.)

admits that Eisenhower was FlexCare's agent by alleging that Eisenhower controlled the work schedules and working conditions of FlexCare's nurses and that Eisenhower "had the power to instruct" the nurses "when and whether to take meal and rest periods." (1 PA 19-20 ¶¶ 7.b & 7.h; see *Uram*, *supra*, 217 Cal.App.3d at p. 1433.)

Grande and the court of appeal both emphasized a provision of the Staffing Agreement that states "[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]." (4 PA 907 ¶ 14.1.) They characterize this provision, which allocates responsibilities to the parties, as a disavowal of agency, mistakenly assuming that the parties to an agreement can conclusively control their legal status by designating an "independent contractor" relationship. This notion is fundamentally at odds with *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 962 (*Dynamex*). More importantly, this clause of the Staffing Agreement states only that FlexCare is not an agent of Eisenhower. It does not state that Eisenhower is not FlexCare's agent. Of course, the facts show the parties' significant interdependence and the existence of a special agency relationship.

In any event, when read in context with the rest of the Staffing Agreement and the parties' actual practice, this provision seeks only to disclaim FlexCare's general agency. (See *Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919 ["We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation."], quoting *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 655-56.) The facts here demonstrate that Eisenhower and FlexCare created a special agency that relies on Eisenhower's direct control of hours, working conditions and

timekeeping records to facilitate FlexCare's compliance with its wage-hour laws obligations. (1 PA 19-20 ¶ 7, 3 PA 597:3-15, 601:18-28, 605:24-606:9, 640:6-11; 4 PA 901 ¶ 5.2, 903 ¶ 6.8.2, 990, 1062-1064, see Cal. Code Regs. tit. 8 §§ 11040(2)(H), 11050(2)(H) [defining "employer" to mean any person who controls the wages, hours or working conditions either directly or indirectly "or through an agent"].) This special agency included obligations of Eisenhower that were broader than those in *Castillo*, such as creating schedules, providing meal and rest periods, and participating in training and discipline. (1 PA 19-20 ¶¶ 7.b & 7.h; 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5, 990.)

When determining whether an agency relationship has been created, the parties' actual conduct controls over labels placed in contracts. (See *Pistone v. Superior Court* (1991) 228 Cal App.3d 672, 680-81 ["[C]ontract recitals of the existence or absence of agency, while relevant, are never determinative…The cases freely allow parties to contradict 'clear' contract language and show their actual relationships."]; see also *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 952 ["the terminology used in an agreement is not conclusive"]; cf. *Dynamex, supra,* 4 Cal.5th at p. 962 [labels do not control employment status].) FlexCare's and Eisenhower's actual conduct shows that Eisenhower represented FlexCare as its agent in dealing with Grande by controlling her hours and working conditions, providing meal and rest breaks, and keeping track of her hours worked. (1 PA 19-20 ¶ 7; 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5, 903 ¶ 6.8.2, 990, 1062-1064.) Those actions by Eisenhower – taken to facilitate FlexCare's compliance with its wage-hour obligations – establish an agency relationship, regardless of what the Staffing Agreement says.

Therefore the Court should reject the court of appeal's reasoning on the issue of Eisenhower agency and hold that Eisenhower is a released party under the *Erlandsen* settlement.

B. Grande's Claims Against Eisenhower Are Barred by Res Judicata

The Court can rule in Eisenhower's favor based solely on its contractual release defense. Independently, Eisenhower should prevail because res judicata or claim preclusion bar Grande's claims.[7]

"Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings*, *supra*, 61 Cal.4th 813 at p. 824.) In determining whether two actions involve the same cause of action, California courts apply the "primary rights" theory of claim preclusion. Under that theory, "the invasion of one primary right gives rise to a single cause of action." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.)

There is no dispute that the claims asserted in *Erlandsen* are identical to those asserted in *Grande* and arise from the same alleged wage

---

[7] In *DKN Holdings LLC*, the Court described how previously it "sometimes described 'res judicata' as synonymous with claim preclusion, while reserving the term 'collateral estoppel' for issue preclusion," and at other times used "res judicata" as an umbrella term encompassing both claim preclusion and issue preclusion/collateral estoppel. (*DKN Holdings*, *supra*, 61 Cal.4th 813 at pp. 823-24.) In *F.E.V. v. City of Anaheim* (2017) 15 Cal.App.5th 462, 473, fn.3, the court of appeal noted the inconsistent usage of "res judicata" and adopted the narrower definition of res judicata that is synonymous with claim preclusion. Consistent with *DKN Holdings* and *F.E.V.*, Eisenhower uses "res judicata" and "claim preclusion" synonymously to refer specifically "to the doctrine preventing relitigation of the same cause of action in a second suit between the same parties" (*Ibid.*)

and hour violations. (1 PA 17-32, 114-139.) In fact, Grande's claims allegedly arise from the same nine-day assignment at the same employer: Eisenhower. (*Ibid.*; 2 PA 420-421 ¶¶ 8-10 & 15.) Therefore, the "same cause of action" element of claim preclusion is satisfied. Nor is there any dispute that the *Erlandsen* settlement was incorporated into a final judgment that binds Grande, thereby establishing the third element of claim preclusion. (1 PA 165-170; see *Johnson v. American Airlines, Inc.* (1984) 157 Cal.App.3d 427, 431 ["The final order approving the settlement in the…class action was equivalent to a final judgment for res judicata purposes."].)

Res judicata bars Grande's claims against Eisenhower if *Erlandsen* and *Grande* involve the same parties. The same parties element of res judicata is satisfied if the parties to the second action are in privity with those of the first. (*DKN Holdings, supra*, 61 Cal.4th at pp. 824-25; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Because Grande was a party to *Erlandsen* and is bound by the settlement, the remaining focus of the res judicata analysis centers on Eisenhower, which as explained *supra*, was an agent and representative of FlexCare.

1. As in *Castillo*, Eisenhower and FlexCare Are in Privity Because Eisenhower Is a Third Party Beneficiary

As the court of appeal held in *Castillo, supra*, privity for res judicata purposes can be established where the defendant is a released third party beneficiary under an approved class action settlement. (23 Cal.App.5th at p. 281.)

When a settlement is incorporated into a judgment, it is interpreted and applied in the same manner as an ordinary contract. (*In re Marriage of Iberti, supra*, 55 Cal.App.4th at p. 1439.) As the Ninth Circuit has noted, California decisions often obscure and conflate whether a judicially

approved settlement is binding as a contractual release, or whether it serves as a bar under claim preclusion principles. (*Rangel v. PLS Check Cashers of California, Inc.* (9th Cir. 2018) 899 F.3d 1106, 1110, fn. 3 [*Rangel*]; see, e.g., *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1065-66 [employing res judicata and contract formation concepts in analyzing effect of a settlement incorporated into a judgment]; *Shine v. Williams-Sonoma, Inc.* (2018) 23 Cal.App.5th 1070, 1076-1082 [*Shine*] [same]; *Brinton, supra,* 76 Cal.App.4th 550, 558-61 [analyzing class action settlement as a contractual release]; *Villacres, supra,* 189 Cal.App.4th at pp. 575-93 [analyzing class action settlement as res judicata].) However, the distinction between res judicata and a release "makes very little (if any) practical difference because '[t]he doctrine of claim preclusion in class actions' must still 'take account of…settlement [contracts] approved as judgments.'" (*Raquedan v. Volume Services, Inc.* (N.D. Cal. 2018) 2018 WL 3753505, at p. *5, quoting William B. Rubenstein, 6 Newberg on Class Actions § 18:19 (5th ed.); see also *Rangel, supra,* at p. 1110, fn. 3 ["[R]es judicata in the [class] settlement context tends to resemble waiver or release."].)

Coupling general contract principles with the res judicata analysis, Eisenhower's status as a third party beneficiary under the *Erlandsen* settlement can satisfy the privity requirement. When a settlement incorporated into a judgment releases third party beneficiaries, those beneficiaries are treated as being in privity with the parties for purposes of res judicata.[8] (See *Castillo, supra,* 23 Cal.App.5th at p. 281; see also

---

[8] The *Erlandsen* judgment expressly incorporates and adopts the definitions of "Released Claims" and "Released Parties" in the settlement between Grande and FlexCare. (1 PA 167-168 ¶¶ 11-12; 2 PA 423-424 ¶¶ 30-31.)

Reyn's Pasta Bella, LLC v. Visa USA, Inc. (9th Cir. 2006) 442 F.3d 741, 748-49 [enforcing class release incorporated into a judgment as preclusive in favor of non-party beneficiary]; *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287 [class judgment resulting from settlement may release non-parties].) [9]

Because Eisenhower is a released party under the *Erlandsen* settlement for the reasons described, *supra*, Eisenhower is in privity with FlexCare for purposes of res judicata. Thus, claim preclusion, as well as contractual release and wavier, bars Grande's claims.

2. As in *Castillo*, Eisenhower and FlexCare Are in Privity Because of Their Identity of Interests With Respect to the Subject Matter of the Litigation

Even if Eisenhower is not found in privity with FlexCare by virtue of its status as a third party beneficiary of the *Erlandsen* release, it is in privity because of the identity of interests with respect to the subject matter of the litigation. As *Castillo* correctly notes, this is an independent basis to find privity.

In addressing privity, *DKN Holdings* emphasizes the importance of whether the non-party is close enough to the original case to justify preclusion. "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

---

[9] Federal decisions are relevant and persuasive due to the similarity between federal and state class action procedure and preclusion doctrine. (See *Green v. Obledo* (1981) 29 Cal.3d 126, 145-46 [directing courts to apply federal class action procedure in the absence of California precedent]; see also *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1460, fn. 16 ["there is little difference in the doctrine of res judicata as expounded in state and federal courts"], quotations omitted.)

representative' in the first action." (*DKN Holdings, supra,* 61 Cal.4th at p. 826.) "The emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion." (*Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223, 1236-37; see also *Castillo, supra,* 23 Cal.App.5th at p. 279 ["the concept of privity has expanded over the years and today involves a practical analysis"].)

The "classical definition" of privity was "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." (*Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 672 [*Cal Sierra Development*]; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811.) "[T]o maintain the stability of judgments, insure expeditious trials, prevent vexatious litigation, and to serve the ends of justice, courts are expanding the concept of privity beyond the classical definition to relationships sufficiently close to afford application of the principle of preclusion." (*Cal Sierra Development, supra,* 14 Cal.App.5th at pp. 672-73.) "'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship *to the subject matter of the litigation.*" (*Id.* at p. 674, original emphasis; see also *Atwell v. City of Rohnert Park* (2018) 27 Cal.App.5th 692, 703 [*Atwell*].)

Here, according to Grande's allegations of joint employment, FlexCare and Eisenhower share a sufficiently strong interest with respect to the subject matter of the litigation that they are in privity for purposes of res judicata. Under virtually identical facts, *Castillo, supra*, held that a staffing agency and its client were in privity for purposes of res judicata. (23

Cal.App.5th at pp. 279-81.) After the staffing agency settled a class action, a class member asserted the same claims against the agency's client. (*Id.* at pp. 267-70.) *Castillo* reasoned that the subject matter of the two cases was identical and

> [b]ased on the undisputed facts, it is apparent [client] and [staffing agency] share the same relationship to the [plaintiffs]' claims here. Both [client] and [staffing agency] were involved in and responsible for payment of the [plaintiffs]' wages. [Client] was authorized by [staffing agency] and responsible for recording, reviewing and transmitting the [plaintiffs]' time records to [staffing agency]. [Staffing agency] paid the [plaintiffs] based on those time records. And, by virtue of the [prior] settlement, the [plaintiffs] were compensated for any errors made in the payment of their wages. Thus, with respect to the [plaintiffs]' wage and hour causes of action, the interests of [client] and [staffing agency] are so intertwined as to put [client] and [staffing agency] in the same relationship to the litigation here.

(*Id.* at p. 280.)

Castillo closely examined this Court's decision in *DKN Holdings* and followed its principles throughout its opinion. While addressing the expansion of the concept of privity beyond the classical definition to extend to "sufficiently close" relationships, the court considered the person's relationship to the subject matter of the litigation. (*Id.* at pp. 276-77.) It determined that the staffing agency and its client were in privity based both on their interdependent relationship with respect to the payment of the plaintiff's wages as well as the fact that the litigation revolved around alleged errors in the payment of such wages. (*Id.* at pp. 279-81.) The court expressly found that *DKN Holdings* did not preclude its conclusion. (*Id.* at pp. 280, 288.)

Castillo's analysis is correct and applicable to the undisputed facts here. As in *Castillo*, FlexCare and Eisenhower had a highly interdependent

relationship with one another that relied on their combined efforts to enable FlexCare to comply with its obligations. (1 PA 19-20 ¶ 7, 3 PA 597:3-15, 601:18-28, 605:24-606:9, 640:6-11; 4 PA 901 ¶ 5.2, 903 ¶ 6.8.2, PA 990, 1062-1064.) In addition, because the allegations raised in *Erlandsen* and *Grande* revolve around the same job assignment, work, and alleged violations, the subject matter of *Erlandsen* and *Grande* is identical. (1 PA 17-32, 114-139; 2 PA 420-421 ¶¶ 8-10 & 15.) Grande and the putative class members recorded their work time using Eisenhower's timekeeping system, Eisenhower representatives verified the records, and Eisenhower scheduled Grande's hours and provided her meal and rest periods. (1 PA 19-20 ¶¶ 7.b, 7.h & 7.j; 3 PA 605:24-606:9; 4 PA 900 ¶ 4.1, 903 ¶ 6.8.2, 990.) Not only does Grande admit these facts, she alleges that FlexCare and Eisenhower were intertwined as her joint employers. (1 PA 19-20 ¶ 7.) As pleaded by Grande, *Castillo* is on point as "the interests of [Eisenhower] and [FlexCare] are so intertwined as to put [them] in the same relationship to the litigation here." (*Castillo, supra*, 23 Cal.App.5th at p. 280.)

In fact, Grande's claims against Eisenhower and FlexCare rely on their interdependent relationship, as the only way Grande could possibly prove violations against FlexCare would have required use of Eisenhower's time records and its day-to-day control over her hours and work conditions. The evidence is the same in both cases. Grande could not have litigated her claims against FlexCare without introducing evidence of Eisenhower's time records and meal period practices. Likewise, Grande can only prove her claims against Eisenhower by relying on evidence of the wages FlexCare paid her. *Castillo* correctly recognized that privity between the two exists for purposes of resolving a second lawsuit by a member of a class that settled an earlier case. Under these circumstances, a staffing agency and its client's interests are so aligned and their responsibility for wage and hour

obligations are so intertwined and interdependent that they serve as each other's "virtual representative[s]" and agents for purposes of wage and hour litigation and their potential liability is "derivative" of each other's. (See *DKN Holdings*, *supra*, 61 Cal.4th at pp. 826-28.)

3. Other Authorities Independently Support a Privity Finding

Further confirming Eisenhower and FlexCare's privity is Labor Code section 2810.3. That statute makes a "client employer" responsible for a "labor contractor's" payment of wages to employees placed at the "client employer."[10] By enacting section 2810.3, the legislature confirmed that the client of a staffing agency is liable for payment of wages and therefore in privity with the staffing agency with respect to those wages. (See *DKN Holdings*, *supra*, 61 Cal.4th at p. 28 ["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."].)

Castillo comports with several other California appellate decisions. For instance, in *Cal Sierra Development*, *supra*, 14 Cal.App.5th at p. 672, rather than focusing on the relationship between the parties, the court relied

---

[10] Labor Code section 2810.3 defines a "client employer" as a ""a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor." A "labor contractor" "means an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business." (Lab. Code §§ 2810.3, subd. (a)(1) and subd. (a)(3).) "Usual course of business" is defined to mean "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer." (Lab. Code § 2810.3, subd. (a)(6).)

on the principle that privity deals with the relationship to the subject matter of the litigation. The court held that res judicata barred a second action because the defendants in the first and second actions "had an identical interest; all were adversely and similarly impacted by the propriety (or impropriety) of the plant's location." (*Id.* at p. 674.) Just as in *Cal Sierra Development*, Eisenhower and FlexCare share an identical interest in the subject matter of Grande's cases, and under her allegations of joint employment they are similarly impacted by the propriety of the wages paid for hours worked by FlexCare's employees.

Lippert v. Bailey (1966) 241 Cal.App.2d 376, 382 (*Lippert*) also supports *Castillo*'s holding. *Lippert* held that a plaintiff was precluded from suing insurance agents after he settled with the insurance company for the same loss. (*Id.* at p. 382.) *Lippert* establishes that when the defendant of a second action is the agent of the defendant in the first action, the two defendants are in privity for purposes of res judicata. In fact, this is true regardless of any contractual release language.

Eisenhower is therefore in privity with FlexCare with respect to wage claims asserted in *Erlandsen* and *Grande*.

4. The Court of Appeal's Privity Analysis Is Flawed

The court of appeal in this case rejected *Castillo's* analysis in a 2-to-1 opinion. It held that FlexCare and Eisenhower are not in privity. (*Grande*, *supra*, 44 Cal.App.5th at p. 1162.) The majority justified the departure from *Castillo* on the ground that *Castillo* "failed to apply the test for privity articulated in" *DKN Holdings*, *supra*, 61 Cal.4th 813. (*Ibid.*) Contrary to the majority's conclusion, *Castillo* faithfully and correctly applied this Court's decision in *DKN Holdings.*

The court of appeal stated that *Castillo* inappropriately collapsed the "same claims" element of claim preclusion with the "same parties" element.

(*Grande*, *supra*, 44 Cal.App.5th at p. 1163.) This is not so. *Castillo's* holding that the staffing agency and its client were in privity was not based solely on the fact that the claims in both actions were identical. (*Castillo*, *supra*, 23 Cal.App.5th at p. 279-81.) Indeed, *Castillo* noted clearly that its "conclusion does not necessarily place [the client] and [the staffing agency] in privity for all purposes." (*Id.* at p. 280.) But *Castillo* correctly looked to the two companies' interdependent relationship and their "relationship to *the subject matter of the litigation*" to determine privity. (*Id.* at 279-80, original emphasis; see also *Cal Sierra Development*, *supra*, 14 Cal.App.5th at p. 674.) That is because the two companies had shared responsibilities in performing a single legal duty such that their roles could not be divided into separate causes of action. (*Castillo*, *supra*, at p. 279.) As a result, the court soundly concluded that the interdependent relationship of the two parties with each other and their relationship to the claims and obligations at issue in both actions warranted the conclusion they were in privity. (*Id.* at pp. 279-81.)

Finding that *Castillo*'s privity analysis was inconsistent with *DKN Holdings* (see *Grande*, *supra*, 44 Cal.App.5th at pp. 1162-63), the court of appeal asserted that *Castillo* should have ignored Eisenhower's and FlexCare's interdependent relationship with each other, intertwined responsibilities, and shared relationship to the subject matter of the litigation. Instead, ignoring due process considerations altogether, the court found it necessary to ask only "whether their interests are so close to identical that the nonparty should have reasonably expected to be bound by the prior judgment." (*Id.* at p. 1163, emphasis omitted.) *DKN Holdings*, however, recognizes that "derivative liability" can give rise to privity. Derivative liability necessarily requires analysis of the parties' relationship to the subject matter of the two cases in circumstances where the non-party

would not necessarily be bound by an adverse judgment against a party. (*DKN Holdings*, *supra*, 61 Cal.4th at pp. 827-28.) For example, *DKN Holdings* approved the holding of *Lippert*, *supra*, 241 Cal.App.2d at p. 382 that "the plaintiff was precluded from suing insurance agents after he settled with the insurance company for the same loss." (*DKN Holdings*, *supra*, at p. 827.) But since the insurance agents (like Eisenhower) were never informed of the first case they could not be "bound" to pay a judgment against their principal consistent with due process. (See *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 210 [default judgments against parties provided no notice or opportunity to be heard are void as violating due process].) Yet, even though the insurance agents in *Lippert* were not and could not be bound, *DKN Holdings* agreed that they and their principals were in privity for purposes of the settlement against their principal. (*DKN Holdings*, *supra*, at p. 827.)

Expanding on the same general principles, three court of appeal decisions after *DKN Holdings* apply some version of the "subject matter" test of privity without requiring that the non-party in privity necessarily be bound by any adverse judgment against the party to the first action. (See *Castillo*, *supra*, 23 Cal.App.5th at pp. 279-81, *Cal Sierra Development*, *supra*, 14 Cal.App.5th at p. 674, and *Atwell*, *supra*, 27 Cal.App.5th at p. 703.) The opinion below in *Grande* is a clear outlier that is inconsistent with *DKN Holdings* and a line of court of appeal decisions.

Nor did *Castillo* fail to address and apply *DKN Holdings*, as the *Grande* opinion insinuates. *Castillo* discussed *DKN Holdings* throughout the opinion. It explained that *DKN Holdings* stands for the proposition that joint and several liability between the parties is not sufficient *on its own* to give rise to privity. (*DKN Holdings*, *supra*, at p. 826 ["Joint and several liability alone does not create such a closely aligned interest between co-

obligors…[J]oint and several obligors are not considered to be in privity for purposes of issue or claim preclusion."]; *Castillo*, *supra*, 23 Cal.App.5th at pp. 280, 287.) *DKN Holdings* went no further than that and does not impose "an absolute bar against finding privity amongst parties who are also jointly and severally liable on a contract or as tortfeasors."[11] (*Castillo*, *supra*, 23 Cal.App.5th at p. 287.)

In this case and in *Castillo*, privity is based on far more than Grande's bare allegation of joint employment. Under Grande's allegations and theories, Eisenhower's potential liability is derivative of FlexCare's. More specifically, Grande's nine-day assignment at Eisenhower, and Eisenhower's time records, provision of meal and rest periods, and day-to-day control of Grande's work formed part of the basis of her wage-hour claims against FlexCare and Eisenhower. (1 PA 17-32, 114-139; 2 PA 420-421 ¶¶ 8-10 & 15; 3 PA 605:24-606:9; 4 PA 900-901 ¶¶ 4.1-4.5, 903 ¶ 6.8.2, 990, 1062-1064.) This is sufficient to show that the two companies' alleged liability is "derivative" of one another or based on agency principles, and that their interests and relationship to the subject matter of the claims are so closely aligned that they stand in privity with respect to the claims asserted by Grande in both actions.

---

[11] As noted, *DKN Holdings*, *supra*, 61 Cal.4th at pp. 827-28 affirmed the holding of *Lippert*, *supra*, that an insurance agent is in privity with his or her principal, and several other analogous decisions. (See *Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, 328 [finding privity between a corporation and its employees]; *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 757 [finding privity between a general contractor and subcontractors]; *Brinton*, supra, 76 Cal.App.4th at pp. 557-58 [finding privity between an association of securities dealers and member agents]; *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 579 [finding privity among alleged co-conspirators].)

The court of appeal in this case also reached its holding, in part, based on its belief that *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773 [*Serrano*] is controlling on the question of privity. (*Grande*, *supra*, 44 Cal.App.5th at p. 1159-60.) Again, not so. In *Serrano*, a staffing agency was not liable for alleged meal period violations committed by its client where the evidence demonstrated that the staffing agency fully satisfied its own, independent duty to provide meal periods. *Serrano* held that "whether an employer is liable for a co-employer'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.'" (*Serrano, supra*, 21 Cal.App.5th at p. 785, quoting *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 333-34.) *Serrano* did not address privity, res judicata or the applicability of a class action release. Nor was there any evidence or discussion of special agency.

Once again, the court of appeal's failure to defer to *Castillo* undercut its holding. *Castillo* correctly recognized that "*Serrano* is procedurally, factually and legally distinct" and did "not affect [the] decision here." (*Castillo, supra*, 23 Cal.App.5th at p. 286.) Here, it is the parties' actual relationship and facts that demonstrate privity. Eisenhower does not contend that a staffing agency and client are always vicariously liable for each other's wrongs based solely upon a finding of joint employment. *Serrano* confirms that such an assumption is incorrect.

C. *DKN Holdings* Does Not Preclude *Castillos'* Conclusions

A finding that the claims against Eisenhower are barred does not implicate the policy of joint and several liability discussed in *DKN Holdings.* While *DKN Holdings* noted that parties are generally free to sue joint and several obligors in separate actions, the case did not involve a settlement intended to effect a full and complete end to the litigation.

Nothing in *DKN Holdings* prohibit parties to a lawsuit from contractually agreeing to release all claims which were or could have been asserted against a joint-obligor, regardless of whether the joint obligor would be in privity in the absence of the settlement. (See *Brinton, supra,* 76 Cal.App.4th at pp. 558-61 [enforcing class action release in favor of non-party without a finding of privity].)

DKN Holdings also held that "[t]he 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." (*DKN Holdings, supra,* 61 Cal.4th at p. 820.) But here, any obligation with regard to Grande's wage claims has been satisfied by Grande's agreement to accept $700,000 for all claims that were or could have been brought in the *Erlandsen* action. (1 PA 83 ¶ FF, 89:2-3; 2 PA 422 ¶ 23; 3 PA 613:20-25.) And *DKN Holdings* does not preclude a finding of privity between joint obligors where, as here, the obligors share an identical interest with respect to the subject matter of litigation and liability cannot be proven against one without relying on the acts of the other.

D. Public Policy Supports a Reversal of the Court of Appeal Opinion

Sound policy considerations favor finding that Eisenhower was in privity with FlexCare and was a released party under the *Erlandsen* settlement.

Hospitals and other employers throughout California rely on temporary staffing agencies to fill short-term staffing needs for a number of

reasons.[12] For hospitals, utilizing temporary nurses ensures that statutorily required nurse-to-patient staffing ratios are met. (See Cal. Code Regs. tit. 22, §§ 51215.5 and 51215.11.) But a hospital's census and patient acuity fluctuate, depending on the season and other events outside of its control. For example, Eisenhower's census increases in the winter when "snow birds" escape to the desert and decreases in the summer when they leave. (1 PA 636:2-8.) More recently, every time Eisenhower experiences a surge in COVID-19 cases, it relies heavily on temporary nurses and other professionals to staff the units for the sudden and marked increase in patients. In addition, in a tight labor market that includes a nursing shortage, staffing agencies are necessary to address patient care needs. Staffing agencies obviously provide a critical role in the healthcare delivery system. The system cannot operate efficiently or effectively without hospitals acting as the agents for the staffing agencies in ensuring that the employee protections of state and federal wage-hour laws are provided.

As an illustration, in administering wage payments and employee benefits, FlexCare, as the staffing agency, relies on Eisenhower, its client, to create and furnish time records and provide required meal and rest breaks. (1 PA 19-20 ¶ 7, 3 PA 597:3-15, 601:18-28, 605:24-606:9, 640:6-11; 4 PA 901 ¶ 5.2; 4 PA 903 ¶ 6.8.2, 990, 1062-1064.) For these reasons, the wage-hour claims asserted in *Erlandsen* and *Grande* necessarily implicate both the staffing agency and its client and, based on the identical

---

[12] According to the U.S. Bureau of Labor Statistics' 2018 quarterly census of employment and wages for California there were almost 400,000 employees utilizing temporary employment services in 2018, earning $15 billion in wages working at almost 5,000 establishments. (https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=2&st=06&year=2018&qtr=A&own=5&ind=56132&supp=.)

subject matter, rely on exactly the same evidence. The decision in *Castillo* appropriately acknowledges this reality and the agency and privity that result from it. Changing that reality through judicial opinion would benefit neither the employee, the agency, the client or an already back-logged judicial system.

Further, if Grande is permitted to pursue exactly the same claims that were satisfied by way of the settlement and release in *Erlandsen*, it would undermine the finality of the bargained for and judicially approved settlement. (See *Castillo*, *supra*, 23 Cal.App.5th at pp. 286-87.) If Grande thought she was entitled to more for her claims than the amount she agreed to in the *Erlandsen* settlement, she could have joined Eisenhower in the *Erlandsen* case or insisted that those claims be excluded from the settlement. (6 PA 1379:13-18.) Allowing Grande to split her claims into separate actions serves no proper purpose, imposes inefficient burdens on the courts and parties, and condones procedural gamesmanship. (*Castillo*, *supra*, at p. 287 ["two fundamental policy considerations – promotion of judicial economy and protection of litigants from unnecessary litigation – are furthered by imposing res judicata as a bar to [the plaintiffs'] present action"]; see also *Kim*, *supra*, 9 Cal.5th at p. 92 [Court noted how claim preclusion "promotes judicial economy"].) "The doctrine is based on public policy, recognizing there must 'be an end to litigation.'" (*Shine*, *supra*, 23 Cal.App.5th at p. 1076, citing *Villacres*, *supra*, 189 Cal.App.4th at p. 575.)

Additionally, the fact that FlexCare is obligated to indemnify Eisenhower for any recovery that Grande obtains in this case creates a serious danger of double recovery, now that the *Erlandsen* settlement has been fully paid. (3 PA 613:20-25; 4 PA 901 ¶ 5.3.) FlexCare paid $700,000 to fully resolve all of Erlandsen's and Grande's individual and

class claims and buy finality, peace and a guarantee that it would not be liable for any more on those claims. (3 PA 616:16-23.) If Grande can now pursue the same claims against Eisenhower that she settled with FlexCare, and pursue a judgment on the merits that FlexCare is forced to indemnify, then FlexCare has effectively purchased nothing with the *Erlandsen* settlement. (See *Castillo*, *supra*, 23 Cal.App.5th at pp. 286-87 [holding that public policy supports application of res judicata because the client "could seek indemnification from [staffing agency], thus reopening the same wage and hour claims [staffing agency] settled in" the prior class action].)

FlexCare's desire to buy complete finality with respect to the claims at issue is consistent with why parties settle class actions and why the law permits the release of unnamed parties. In *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* (2nd Cir. 2005) 396 F.3d 96, 108-09, the Second Circuit approved the release of non-parties in a class action settlement, noting that "it is hard to imagine that defendants would have settled without also releasing their member banks from liability; to do so would have invited relitigation of the same factual allegations against the banks." The same is true here. It is hard to imagine that FlexCare would have agreed to settle the *Erlandsen* case if clients like Eisenhower were not also released when FlexCare was fully aware of its indemnification obligations.

Based on these clear principles of public policy, the Court should therefore hold that Grande's claims against Eisenhower are barred.

VII. CONCLUSION

For these reasons, the Court should reverse the court of appeal and hold that Grande's claims against Eisenhower are barred by the *Erlandsen* settlement and judgment.

Dated: September 1, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/Richard J. Simmons*
RICHARD J. SIMMONS
KARIN DOUGAN VOGEL
JOHN D. ELLIS

Attorneys for Defendant and Petitioner
EISENHOWER MEDICAL CENTER

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached Appellant's Opening Merits Brief is proportionately spaced, has a typeface of 13 points, and contains 12,476 words, according to the counter of the word processing program with which it was prepared.

Dated: September 1, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/Richard J. Simmons*
RICHARD J. SIMMONS
KARIN DOUGAN VOGEL
JOHN D. ELLIS

Attorneys for Defendant and Petitioner
EISENHOWER MEDICAL CENTER

PROOF OF SERVICE

Lynn Grande v. Eisenhower Medical Center
Case No. S261247

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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 San Diego, State of California. My business address is 501 West Broadway, 19th Floor, San Diego, CA 92101-3598.

On September 1, 2020, I served true copies of the following document(s) described as **EISENHOWER MEDICAL CENTER'S OPENING MERITS BRIEF** on the interested parties in this action as follows:

SERVICE LIST

Peter R. Dion-Kindem #95267 The Dion-Kindem Law Firm 21550 Oxnard Street, Suite 900 Woodland Hills, CA 91367	Attorneys for Respondent Lynne Grande
Lonnie Clifford Blanchard #93530 Blanchard Law Group, APC 3311 E. Pico Blvd. Los Angeles, CA 90023	Attorneys for Respondent Lynne Grande
Cassandra M. Ferrannini #204277 Bradley C. Carroll #300658 Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814	Attorneys for Intervenor Flexcare, LLC
California Court of Appeal Fourth Appellate District Division Two 3389 12th Street Riverside, CA 92501	Superior Court of California County of Riverside 4050 Main Street Riverside, CA 92501-3704

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 firm's practice 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.

BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List. TRUE FILING is the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING 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 September 1, 2020, at San Diego, California.

Pamela Parker

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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.

2. My email address used to e-serve: **kvogel@sheppardmullin.com**

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

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S261247 Opening Merits Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
George Howard Jones Day 076825	gshoward@jonesday.com	e-Serve	9/1/2020 3:30:16 PM
Lonnie Blanchard The Blanchard Law Group, APC 93530	lonnieblanchard@gmail.com	e-Serve	9/1/2020 3:30:16 PM
Pamela Parker Sheppard Mullin Richter & Hampton	pparker@sheppardmullin.com	e-Serve	9/1/2020 3:30:16 PM
Karin Vogel Sheppard Mullin Ruchter & Hampton, LLP	kvogel@shepardmullin.com	e-Serve	9/1/2020 3:30:16 PM
Paul Grossman Paul Hastings Janofsky & Walker 035959	paulgrossman@paulhastings.com	e-Serve	9/1/2020 3:30:16 PM
Peter Dion-Kindem Peter R. Dion-Kindem, P.C. 95267	kale@dion-kindemlaw.com	e-Serve	9/1/2020 3:30:16 PM
Richard Simmons Sheppard, Mullin, Richter & Hampton LLP 72666	rsimmons@sheppardmullin.com	e-Serve	9/1/2020 3:30:16 PM
Peter Dion-Kindem Peter R. Dion-Kindem, P.C.	peter@dion-kindemlaw.com	e-Serve	9/1/2020 3:30:16 PM
Bradley Carroll Downey Brand LLP 300658	bcarroll@downeybrand.com	e-Serve	9/1/2020 3:30:16 PM
Karin Vogel Sheppard, Mullin, Richter & Hampton 131768	kvogel@sheppardmullin.com	e-Serve	9/1/2020 3:30:16 PM
Gail Blanchard-Saiger	gblanchard@calhospital.org	e-	9/1/2020

California Hospital Association 190003		Serve	3:30:16 PM
Patricia Pineda Downey Brand LLP	ppineda@downeybrand.com	e-Serve	9/1/2020 3:30:16 PM
Cassandra Ferrannini Downey Brand LLP 204277	cferrannini@downeybrand.com	e-Serve	9/1/2020 3:30:16 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

9/1/2020

Date

/s/Pamela Parker

Signature

Vogel, Karin Dougan (131768)

Last Name, First Name (PNum)

Sheppard, Mullin, Richter & Hampton LLP

Law Firm