2d Civil No. B266242

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

GLENN SMITH,

Plaintiff and Appellant,

v.

FARMERS GROUP, INC. et al.,

Defendants and Respondents.

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Appeal from Los Angeles County Superior Court
Case No. BC 512079
Honorable Dalila C. Lyons

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# RESPONDENTS' BRIEF

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FARMERS NEW WORLD LIFE INSURANCE COMPANY

**Court of Appeal**
**State of California**
**Second Appellate District, Division Three**

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B266242

Case Name: Glenn Smith v. Farmers Group, Inc. et al.
Please check the applicable box:

□ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

■ Interested entities or parties are listed below:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| 1. Farmers Group, Inc. | Farmers Group, Inc. wholly owns petitioner Farmers New World Life Insurance Company |
| 2. Zurich Insurance Group Ltd. | Farmers Group, Inc. is a wholly-owned indirect subsidiary of Zurich Insurance Group Ltd. (formerly known as Zurich Financial Services Ltd.). Zurich Insurance Group Ltd. is publicly traded on the Swiss Stock Exchange |

*Please attach additional sheets with Entity or Person Information if necessary.*

Signature of Attorney/Party Submitting Form

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Party Represented: Defendants and Respondents Farmers Group, Inc., Farmers Insurance Exchange, Fire Insurance Exchange, Truck Insurance Exchange, Mid-Century Insurance Company, Farmers New World Life Insurance Company

*SUBMIT PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE*

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## INTRODUCTION

Employment claims are reserved for employees. Independent contractors cannot sue under employment statutes. Here, plaintiff Glenn Smith was a district manager for various related insurance companies (the Companies). His contract with those insurance companies classified him as an independent contractor. And that's exactly what he was.

The applicable common-law test for distinguishing between an employee and an independent contractor focuses on who has the right to control the day-to-day work details: the hirer or the worker. If the worker is in control, he is an independent contractor. The undisputed evidence in this case, consistent with the governing contract's express language, confirms that Smith was in control.

He ran his own business, subject only to exercising good business practices and meeting overall goals and objectives. He chose and rented his office. He hired his staff—who were his employees. He paid their salaries, payroll taxes, and benefits. He bought office equipment, which he could depreciate on his individual tax return. He recruited, trained and coached insurance sales agents. He controlled his day-to-day hours, subject to making sure his office was staffed during normal business hours and that his vacations did not conflict with client requirements. Viewing the common-law factors together, the only reasonable conclusion the undisputed evidence permits is that Smith was an independent contractor.

To avoid this undisputed evidence, Smith seeks to employ collateral estoppel as a sword to preclude the Companies from asserting Smith's clear

independent-contractor status. He relies on an outlier jury finding in another case, *Davis v. Farmers Insurance Exchange,* that a different plaintiff was an employee. *Davis* is the exception. The Companies have prevailed on the issue in a long line of cases, including a summary judgment in *Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, affirmed by this Division.

Plus, offensive, non-mutual collateral estoppel, as sought here, is only available in the clearest circumstances. The doctrine is equitable. The Companies *prevailed* at trial in *Davis.* Not being aggrieved by the ultimate trial court judgment, they had no reason to appeal an interlocutory employee finding. It would be inequitable to bind the Companies to that intermediate-step result here. Smith also provides no evidence demonstrating that the issues decided in *Davis* and here are *factually identical*. Without knowing the facts that the *Davis* jury considered, and the precise issue it decided, collateral estoppel is unavailable.

Smith also claims that the Companies breached the District Manager Agreement by terminating it without good cause. But the contract is clear: *either* party can terminate it on 30-days' notice without cause. He does not dispute that. Rather, he claims an *oral* modification. But the contract prohibits oral modifications. To allow oral modification of a no-oral modifications provision would make such language a nullity.

Smith next claims that the Companies breached a contractual promise putting him in control of the manner and means of his work. But he failed to show damages. The opening brief claims that Smith's damages

were not receiving a lucrative agency or job from the Companies when they terminated his contract. But an asserted too-much-control breach doesn't cause supposed lost-job/agency-promise harm.

Nor does the opening brief's catalog of purported procedural errors come close to having merit—the record establishes that the court followed the law and acted well within its discretion. Smith has not established any error or prejudice.

Finally, Smith's attempts to attach liability to non-contracting party Farmers Group, Inc. through various doctrines are both moot and meritless. Farmers Group, Inc. followed corporate formalities; it was the Companies' disclosed agent. The Companies are fully capable of satisfying any judgment Smith might legitimately seek. There is no basis for alter-ego or similar liability.

The judgment must be affirmed.

## STATEMENT OF THE CASE

### A. Background.

#### 1. The District Manager's Appointment Agreement with the Companies, designating Smith an independent contractor.

In 1976, plaintiff Glenn Smith signed a "District Manager's Appointment Agreement" (Agreement) with defendants Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company (collectively, the Companies). (4AA/674-679; 32AA/6812.)

Smith agreed to "recruit for appointment and train as many agents acceptable to the Companies as may be required to produce sales in accordance with goals and objectives established by the Companies." (4AA/674 ¶B.1; see 32AA/6817.)

The Agreement expressly established an independent contractor relationship: "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee." (4AA/679 ¶H; see 22AA/4536; 32AA/6817.)

It specified that Smith, not the Companies, would be in control of day-to-day details: "The time to be expended by the District Manager is solely within his discretion, and the persons to be solicited and the area within the district involved wherein solicitation shall be conducted is at the election of the District Manager. No control is to be exercised by the Companies over the time when, the place where, or the manner in which

the District Manager shall operate in carrying out the objectives of this Agreement . . . ." (4AA/679 ¶H; see 22AA/4537; 32AA/6817.)

The Agreement superseded all prior agreements, written or otherwise, and barred oral modifications: "[N]o change, alteration or modification hereof may be made, except as is evidenced by an agreement in writing signed by the District Manager and an authorized representative of the Companies." (4AA/679 ¶J.)

It was terminable without cause by either side upon 30-days' written notice: "This Agreement . . . may be cancelled without cause by either the District Manager or the Companies on 30 days written notice[.]" (4AA/675 ¶D.) Upon such termination, Smith was entitled to a substantial "'contract value'" payment. (4AA/676 ¶E.)

During the Agreement's 35-year duration, Smith never complained that he was not an independent contractor. (3AA/594-599.)

**2. Smith's compensation.**

The Companies paid Smith an "overwrite" based on district-wide sales figures—effectively a commission on the premiums for the policies that the sales agents he recruited, trained and coached sold. (4AA/674 ¶A.1; 5AA/898 ¶14; 32AA/6812.) The better he recruited, trained and motivated his district's sales force, the more money he made. (3AA/587-589.) The Companies annually reported his compensation via IRS-1099 form. (3AA/593; 22AA/4528.)

### 3. Smith's control over district operations and his own time.

The Agreement gave Smith the right to control, and he controlled, his district's day-to-day operations:

- He leased and paid for office space in his name alone. (4AA/622, 631-633, 641, 744, 780; 22AA/4543, 4545; 32AA/6818.)
- He paid operating expenses, including purchasing computer equipment and telephones. (4AA/667, 670-671; 32AA/6818.)
- He hired his district's staff, determined their schedules and salaries, paid them via IRS W-2s, and provided health insurance and retirement plan benefits. (4AA/647, 652-653, 658-659, 661-664; 22AA/4546-4548; 32AA/6818.)
- He developed district business plans. (4AA/613-614, 692, 708.)
- The Companies set the office's business hours, but Smith was not required to account for his own daily hours, his start and end times, how much time he was out to lunch, or how much weekly or monthly time he devoted to his obligations. (4AA/801-802.)
- He had no set number of vacation days or a set time to take vacation or sick days (4AA/803-804; 32AA/6818), although he had to pre-clear vacation and personal days to ensure continuity for clients (12AA/2393 ¶102).

#### 4. Other signed agreements confirm the independent-contractor relationship.

The parties also entered into a "Horizontal Marketing – District Manager Relationship Agreement," expressly disavowing any employment relationship: "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee, rather, the District Manager is an independent contractor for all purposes." (4AA/681-682; 22AA/4540-4541; see also 3AA/604.) As with the Agreement, the horizontal marketing agreement granted Smith control of how much time he would spend carrying out the contract's terms, as well as the time, place and manner in doing so. (*Ibid*.)

When Smith hired a specialist to assist in selling commercial insurance policies, he entered into a reimbursement agreement with Truck Insurance Exchange (one of the Companies), in which he again acknowledged his independent contractor status: "The District Manager is an independent contractor and understands and acknowledges that he or she has sole discretion in determining the suitability of and hiring, firing, supervising, training and compensating the person selected as District Commercial Specialist[.]" (4AA/688 ¶2.)

#### 5. The Companies terminate Smith's Agreement giving the requisite 30-days' written notice.

The Companies eventually terminated the Agreement with Smith, effective July 2, 2011, giving the required 30-days' notice. (1AA/67 ¶4; 3AA/590-591; 5AA/894 ¶3; 32AA/6812.)

As required by the Agreement, the Companies, upon termination, paid Smith $1,531,918.92 in "'contract value.'" (4AA/615-619, 676-678 ¶E, 738-742.)

### 6. The Companies' relationship to Farmers Group, Inc.

Each of the five Agreement signatory Companies is a distinct entity, founded years apart. (7AA/1407-1416.) Three of the Companies—Farmers Insurance Exchange, Truck Insurance Exchange, and Fire Insurance Exchange—are reciprocal or inter-insurance exchanges, which consist of "subscribers" who exchange insurance contracts amongst themselves. (7AA/1392, 1407-1412; see *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 702-705.)

Every reciprocal exchange requires an attorney-in-fact to perform non-claims-related, managerial services. (7AA/1392-1393; see *Lee*, *supra*, 50 Cal.App.4th at p. 704.) Farmers Group, Inc. d.b.a. Farmers Underwriters Association (FGI) is the attorney-in-fact for Farmers Insurance Exchange. (7AA/1392, 1415; 32AA/6821.)

In their Subscription Agreements, policyholders appoint FGI as attorney-in-fact. (7AA/1358, 1393, 1415.) Two FGI subsidiaries, Truck Underwriters Association and Fire Underwriters Association, are the attorneys-in-fact for Truck Insurance Exchange and Fire Insurance Exchange, respectively. (7AA/1392-1393.)

FGI is the Companies' authorized agent in their business relationship with independent-contractor district managers. (7AA/1415; 32AA/6821.)

FGI and its subsidiaries are not insurance companies and do not legally or equitably own any of the exchanges. (7AA/1401, 1409, 1414-1415.)

FGI was not a party to the Agreement. (4AA/674, 679.)

**B. Smith's Lawsuit.**

**1. The operative first amended complaint.**

Smith sued Farmers (both the Companies and FGI).[1]

*Employment Claims*. Smith alleged FEHA and Labor Code claims that required him to prove, as a threshold matter, that he was an employee rather than an independent contractor. (1AA/65-113; see Gov. Code, § 12940; Lab. Code, §§ 200, 221, 226, 2802.)

He alleged that he was Farmers' employee, not an independent contractor, and that Farmers controlled the manner and means by which he and his district office worked. (1AA/76-79, 84-85, 90.)

*Breach of Contract Claims*. Smith alleged three supposed Agreement breaches:

- Smith claimed that the parties orally modified its no-oral-modifications provision to permit oral modifications and then further orally modified the no-cause termination provision to *preclude* the Companies from terminating the Agreement without cause;

[1] We refer to the Companies and FGI collectively as "Farmers," except where necessary to draw distinctions.

- The Companies supposedly orally promised Smith an insurance agency or equally lucrative position when the Agreement terminated; and
- The Companies purportedly exerted "undue control over him throughout his tenure," breaching the Agreement's promise that "'no control was to be exercised by the Companies over the time when, the place where or the manner'" in which Smith performed.

(1AA/93-96.)

*Claims Against FGI*. Smith sued FGI for aiding and abetting, and for acting as the Companies' agent, co-conspirator, attorney-in-fact, and alter ego. (1AA/67-72, 102.)

The causes of action remaining in the operative complaint were: common-law wrongful termination, FEHA claims, Labor Code wage-payment violations, contract breach, aiding and abetting, and unfair business practices under Business and Professions Code, section 17200 et seq. (1AA/65-113, 165-166.)

**2. Summary adjudication.**

After a lengthy discovery battle, the Companies moved for summary judgment/adjudication. They argued that Smith's independent-contractor status defeated nine of Smith's causes of action. (3AA/549-562.) In addition to the Agreement and the later written agreements, they submitted

evidence that Smith, in fact, controlled his own hours, work details, and business. (See p. 22, *ante*.)

As to breach of contract, they argued that the Agreement's express provisions—(1) permitting termination "'without cause'" and (2) precluding oral modification—were fatal. (3AA/562-565.)

FGI joined in the Companies' motion. (7AA/1419-1427.) It also moved for summary judgment/adjudication on the (1) agency, (2) alter-ego/single-enterprise, and (3) aiding and abetting theories. (6AA/1236-1262; 7AA/1422-1426.)

Smith filed 478 objections to Farmers' supporting declarations. (32AA/6822.)[2] He also sought judicial notice of the jury's special verdict in *Davis v. Farmers Insurance Exchange* (2016) 245 Cal.App.4th 1302, which was then on appeal. There, the Companies had prevailed in the trial court, but there was an adverse intermediate employee-status finding. (14AA/2972-2973.)

After hearing arguments (RT/3001-3009), the court granted Farmers' motions in part (32AA/6807-6812).

*Independent Contractor Status Means No Employee Claims.* The trial court held, based on the undisputed material facts, that Smith was not an employee, as a matter of law. (32AA/6818.) Accordingly, it summarily

[2] The appellant's appendix omits almost half of those objections. (See 15AA/2996-3233; 17AA/3548-3633; 22AA/4565-23AA/4765.)

adjudicated all of Smith's claims that required him to establish employee status. (32AA/6807-6809, 6812, 6816-6819, 6826-6828.)

"He was an independent contractor because not only did the [Agreement] say so, but because Plaintiff controlled where, when and how he performed his services and Defendants only required that those services and the resulting agents meet certain standards." (32AA/6818.)

That actual control was consistent with the Agreement:

- Although not dispositive, it expressly disclaimed employee status, creating a presumption that he was not an employee. (32AA/6817.)
- It gave the Companies no right to control the time, place, or manner in which Smith performed his end of the bargain; and,
- It gave Smith sole discretion over the time he expended, the persons he solicited, and the area in which he conducted solicitation. (*Ibid*.)

*Breach of Contract.* The court held: (1) the Agreement expressly precluded the oral modifications on which Smith's breach claims were based (32AA/6809, 6820, 6828); without an oral modification, it allowed termination without cause on 30-days' notice (4AA/675 ¶D), and (2) Smith failed to show that he had incurred any right-to-control damages.

*Summary Adjudication Denial For Harassment And Unfair Business Practices.* The court declined to summarily adjudicate Smith's FEHA/Government Code section 12940(j)(1) harassment claim and his UCL/unfair business practices claim. (32AA/6809-6810, 6819-6821.)

*FGI.* The court found Smith's aiding and abetting and alter-ego allegations moot. (32AA/6821, 6828.) Accordingly, it did not reach the alter-ego claim's merits. (*Ibid*.)

*Evidentiary Rulings: Overruling Objections and Declining Judicial Notice.* The court overruled Smith's 478 evidentiary objections, finding them "meritless and frivolous." (32AA/6822; RT/3009.) It denied Smith's request to judicially notice *Davis v. Farmers Insurance Exchange*'s verdict form, finding the request improper as "for purposes of taking it for its truth based on the theory that the same witnesses and evidence are implicated here[.]" (32AA/6815.)

### 3. Smith voluntarily dismisses his remaining two claims; the court enters judgment.

Smith voluntarily dismissed without prejudice the remaining FEHA non-employee harassment and unfair business practices claims. (32AA/6804.)[3] The court entered "judgment of dismissal." (32AA/6858-6859.)

[3] The applicable statutes of limitations have run making the dismissals effectively with prejudice. (See Gov. Code, § 12965, subd. (b) [FEHA]; Bus. & Prof. Code, § 17208 [UCL].)

#### 4. The trial court taxes costs.

FGI requested $54,869.03 in costs. (33AA/6880.) The trial court reduced the costs to $12,912.17, including only 3% of judicial discovery referee costs—roughly $1,500. (34AA/7184.)

### C. Smith Appeals.

Smith timely appealed. (33AA/6939; 6944.)

## ARGUMENT

### I. THE OPENING BRIEF MUST BE DISREGARDED TO THE EXTENT THAT IT INCORPORATES BY REFERENCE TRIAL COURT ARGUMENTS.

The opening brief throughout "incorporates by reference herein all arguments and evidence produced in opposition thereto, for Appellate review." (E.g., AOB/34; see AOB/32, 38, 44, 50, 65.) That is improper: Arguments not included, and evidence not specifically referenced, in the opening brief are waived. (See *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 290-291 [incorporation by reference in opening brief fails to comply with California Rules of Court, rule 8.204(a)(1)(B), citing *People v. Stanley* (1995) 10 Cal.4th 764, 793].) It is unfair to this Court and to respondents to have to ferret out which arguments and issues Smith is claiming as reversible error on appeal.

### II. SMITH'S FEHA AND WAGE CLAIMS REQUIRE HIM TO PROVE THAT HE WAS AN EMPLOYEE; THEY HAVE NO MERIT BECAUSE, AS A MATTER OF LAW, HE WAS AN INDEPENDENT CONTRACTOR.

The trial court granted summary adjudication on Smith's wrongful termination, FEHA and wage claims (the first eight causes of action) because Farmers demonstrated that Smith was *not* an "employee." (32AA/6816-6819; Code Civ. Proc., § 437c, subds. (f)(1), (o)(1).)

Smith doesn't dispute that a factual issue regarding his employment status was necessary to survive summary adjudication of those claims.

(See AOB/38-44.)[4] He merely argues that the trial court erred in holding, as a matter of law, that he was an independent contractor not an employee. (AOB/32-49.)

This court's review is de novo. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*).)

### A. The Applicable Employment-Status Standard: The Common-Law Control-Of-Work-Details Test.

#### 1. To qualify as an employee, Smith had to satisfy the common-law test, i.e., the Companies had to have the right to completely control the manner and means by which he accomplished his work.

Neither FEHA nor the wage statutes define "employee." The common-law "control-of-work-details" test therefore applies. "[A]s a general rule, when 'employee' is used in a statute without a definition, the Legislature intended to adopt the common law definition and to exclude independent contractors." (*People v. Palma* (1995) 40 Cal.App.4th 1559, 1565-1566; see *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500-501, 512 ["employee" has the common-law meaning unless a particular statute clearly reflects a different legislative intent]; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10 ["Because the Labor Code does not expressly define 'employee' for purposes of section 2802, the common law test of employment applies"];

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[4] See *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426, fn. 8 (wrongful termination/public policy claim reserved for employees); *Vernon v. State* (2004) 116 Cal.App.4th 114, 123 (FEHA claims require employee status); *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530 (Labor Code wage claims protect "employees," not independent contractors).

*Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1629, fn. 3 [“common-law principles apply for FEHA purposes in defining the term ‘employee’”].)

The common-law test—reflected in Restatement Second of Agency, section 220—focuses on the degree of control that the hirer exercises over the agent’s work-details based on the parties’ agreement. (*Metropolitan Water Dist., supra*, 32 Cal.4th at pp. 500-501; Rest.2d Agency, § 220(2)(a), p. 485 [test’s first factor is “extent of control”].)

The pivotal inquiry is who has the right to control day-to-day work details. (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143.) If the principal/hirer has the right to control the manner and means of accomplishing the result desired, then an employer-employee relationship exists. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531; accord, *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1012 [“the right to control job performance is the primary factor in determining any employment relationship”].) By contrast, where the principal/hirer merely seeks specific results and sets performance expectations, leaving the manner and means of achieving them to the agent, the agent is an independent contractor. (E.g., *Beaumont-Jacques*, at pp. 1144-1145.) The lack of “control” or lack of a “right to control” is usually determinative. (Rest.2d Agency, § 220, com. d, p. 487.)

“What matters under the common law is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to

exercise." (*Ayala, supra*, 59 Cal.4th at p. 533, original italics.) "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179.) The principal may retain broad general supervision and control over results to insure satisfactory performance, but the relationship does not thereby transform into one of employer-employee so long as the principal does not otherwise control the *manner and means* of accomplishing the task. (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790; accord, *Beaumont-Jacques, supra*, 217 Cal.App.4th at p. 1143.) The principal may retain the right to inspect, the right to make suggestions or recommendations regarding work details, or the right to prescribe alterations or deviations in the work without transforming an independent contractor into an employee. (*Ibid*.)

**2. Secondary common-law factors confirm the "employee" versus "independent contractor" distinction.**

Along with the right to control, courts also "recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship." (*Ayala, supra*, 59 Cal.4th at p. 532; *Borello, supra*, 48 Cal.3d at p. 351 [secondary factors "derived principally from the Restatement Second of Agency"]; *id.* at pp. 354-355 [other "logically pertinent" factors]; Rest.2d Agency, § 220(2), pp. 485-486 [non-exhaustive criteria for identifying master-servant relationship]; Rest.3d Agency, § 7.07, com. f, pp. 210-211 [numerous "factual indicia" "relevant to determining whether an agent is an

employee"]; see also *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751-752 (*Reid*) [United States Supreme Court's formulation of common-law test].)

Such indicia include: (a) whether the services are a distinct occupation or business; (b) whether the principal or a specialist without supervision usually directs the work; (c) the skill required; (d) who supplies the instrumentalities, tools, and workplace; (e) the length of time for which the services are to be performed; (f) whether payment is by time or by the job; (g) whether the work is a part of the principal's regular business; and (h) whether the parties believe they are creating an employer-employee relationship. (*Ayala*, *supra*, 59 Cal.4th at p. 532.)

These factors are not "of uniform significance." (*Id.* at p. 539.) Some may be of "minute consequence" in a particular case. (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 953.) Some are merely "evidentiary indicia of the right to control," intertwined and overlapping with each other and the right-to-control factor. (*Ibid*.; *Borello*, *supra*, 48 Cal.3d at p. 354.) These factors cannot be "'applied mechanically as separate tests'"; "'their weight depends often on particular combinations.'" (*Borello*, at p. 351.)

The test—both the primary "control" factor and the secondary indicia—is tied to the specific individual's relationship. (*Fireman's Fund Ins. Co. v. Davis* (1995) 37 Cal.App.4th 1432, 1443.) Where the factual nature of the relationship is clear, determining whether an individual is an

employee is a question of law. (*Borello, supra*, 48 Cal.3d at p. 349; *Robinson v. George* (1940) 16 Cal.2d 238, 242-243.)

### B. As A Matter Of Law, Smith Is An Independent Contractor—Not An Employee.

#### 1. The written agreements demonstrate that Smith was an independent contractor—not an employee.

##### a. The Agreement's no-employment-relationship disclaimer demonstrates that Smith was an independent contractor.

The parties' written agreements are significantly probative of the principal's right to control. (*Tieberg*, *supra*, 2 Cal.3d at p. 952; *Grant v. Woods* (1977) 71 Cal.App.3d 647, 653.) Where, as here, a written contract defines the parties' relationship, it is "virtually impossible" to determine a principal's legal right to control without "full examination of the contract[.]" (*Ayala*, *supra*, 59 Cal.4th at p. 535.)

The Agreement expressly disavows an employer-employee relationship: "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee." (4AA/679 ¶H.)

Absent contrary evidence, it is "prima facie proof" of Smith's independent-contractor status, and demonstrates that the Companies had no right to control how Smith performed his tasks. (*Garrison v. State of California* (1944) 64 Cal.App.2d 820, 826, citing *Burlingham v. Gray* (1943) 22 Cal.2d 87, 94; see also *Jackson*, *supra*, 233 Cal.App.4th at pp. 1167, 1181 ["Independent Contractor Agreement" label was "persuasive given the fact that the parties actual conduct established an independent

contractor relationship"]; 32AA/6817 [Agreement's employee disclaimer was "probative in evaluating the right to control"].)

This is especially so as the parties performed under the contract for thirty-five years without modifying it. (See *Mission Ins. Co. v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 211, 226 ["a lawful agreement between the parties expressly stating that the relationship created is that of independent contractor should not be lightly disregarded when both parties have performed under the contract and relied on its provisions"].) At no time during the 35-year contractual relationship did Smith claim that he was anything other than an independent contractor. (3AA/594-599.) Parties on both sides detrimentally relied on the independent-contractor provision in structuring their relationships not only with each other, but also with tax authorities in reporting income, paying payroll taxes, and taking business expense deductions, as well as with third parties, including office lessors and those whom Smith directly hired as his own employees.

"[W]ithout proof that the true relationship of the parties was that of employer-employee such recital in an insurance agent's contract compels only one conclusion to be drawn, to wit: That the agent is an independent contractor." (*Garrison*, *supra*, 64 Cal.App.2d at p. 826.)

**b. The Agreement establishes Smith's express right to determine the time, place and manner of completing the Agreement's objectives, making him an independent contractor.**

The opening brief mischaracterizes the court's order as relying *exclusively* on the Agreement's no-employment-relationship disclaimer.

(See AOB/35-36.) In fact, the opposite is true. As the trial court recognized (32AA/6817), the rest of the Agreement confirmed the independent contractor relationship.

It expressly granted Smith the right to control the manner and means by which he accomplished the details of his work: "No control is to be exercised by the Companies over the time when, the place where, or the manner in which the District Manager shall operate in carrying out the objectives of this Agreement . . . ." (4AA/679 ¶H.)

Smith's primary Agreement objective was to "recruit for appointment and train as many agents acceptable to the Companies as may be required to produce sales in accordance with goals and objectives established by the Companies." (4AA/674 ¶B.1.) The Agreement gave Smith the absolute right to decide who to proffer to the Companies to recruit and train—i.e., the manner and means of accomplishing this task: "The time to be expended by the District Manager is solely within his discretion, and the persons to be solicited and the area within the district involved wherein solicitation shall be conducted is at the election of the District Manager." (4AA/679 ¶H.)

In the trial court's words, "[o]bviously, the language of the [Agreement] was intended to set forth an independent contractor relationship under its language compared to the case law factors." (32AA/6817.)

The Agreement's requirements that Smith "conform to normal good business practice, and to all State and Federal laws governing the conduct

of the Companies and their Agents" (4AA/679 ¶H) are not to the contrary. Rather, they relate to seeking a particular *result* in order to achieve client satisfaction. (See *Bohanon v. James McClatchy Pub. Co.* (1936) 16 Cal.App.2d 188, 201 [rules imposed to ensure the specific result of client satisfaction do not establish control over the manner and means of doing the work]; *McDonald*, *supra*, 44 Cal.2d at p. 790 [right to control work results does not govern classification].)

The trial court's hypothetical perfectly illustrates why such broad guidelines did not create an employer-employee relationship: "[I]f one hires a contractor to perform construction, one would, apart from making sure the contractor was licensed, also possibl[y] expressly require the contractor not construct any structure without proper permits as required under the law and also not violate any local ordinances. This would not, by itself, create an employer-employee relationship between, for example, a housing developer and contractor, even if the parties maintained their relationship for decades." (32AA/6817.)

**c. The parties' other written agreements confirm that Smith was an independent contractor.**

The Agreement is not the only written contract between Smith and the Companies in which Smith expressly acknowledged he was an independent contractor; two other written agreements confirm his status.

While still operating under the Agreement, Smith entered into a "Horizontal Marketing – District Manager Relationship Agreement," under

which he would earn an overwrite for sales of certain non-insurance products, such as home warranties. (4AA/681; 22AA/4540.)

This agreement confirmed Smith's continuing status as an independent contractor: "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee, rather, *the District Manager is an independent contractor for all purposes*." (4AA/682, italics added; 22AA/4541.) It mirrored the term in the Agreement's express grant to Smith of discretion to schedule his own time and "to determine the time, place and manner" in which to carry out the agreement's objectives. (4AA/682.)

Thereafter, Smith and Truck Insurance Exchange (one of the Companies) entered into another collateral agreement, in which Smith again expressly acknowledged his ongoing role as the Companies' independent contractor: "The District Manager is an independent contractor and understands and acknowledges that he or she has sole discretion in determining the suitability of and hiring, firing, supervising, training and compensating the person selected as District Commercial Specialist[.]" (4AA/688 ¶2.)

All three agreements expressly denominate Smith as an independent contractor, granting him control over work details. Together, they conclusively demonstrate the Companies' lack of control.

### 2. The undisputed secondary common-law factors establish that Smith was an independent contractor.

#### a. The Companies lacked control over Smith's work details.

Consistent with the Agreement, the undisputed evidence establishes that the Companies did not control how Smith ran his business. He was in charge of setting up and running his office and business, including:

- leasing his own office space, making the lease payments in his name alone (4AA/622, 631-633, 641, 744, 780; 22AA/4543, 4545; 32AA/6818);
- hiring and supervising his staff, determining their schedules and salaries which he paid via IRS W-2s, and providing health insurance and retirement plan benefits (4AA/647, 652-653, 658-659, 661-664; 22AA/4546-4548; 32AA/6818);
- paying his office's operating expenses, including purchasing computer equipment and telephones (4AA/667, 670-671; 32AA/6818); and
- developing business plans (4AA/613-614, 692, 708).

Having provided the instrumentalities, equipment, materials, tools, office space, and hiring the district's staff, the law favors Smith being an independent contractor rather than an employee. (See *Borello*, *supra*, 48 Cal.3d at pp. 351, 355; Rest.2d Agency, § 220(2)(e), p. 485 [supplying "instrumentalities, tools, and the place of work" demonstrates independent-contractor status].)

Smith also controlled his day-to-day work schedule, including:

- his daily work hours—i.e., the time when he arrived and left the district office, including for breaks (4AA/801-802); and
- his vacation time, other than pre-clearing specific days (4AA/803-804; 12AA/2393 ¶102; 32AA/6818).

"Precisely because of facts such as these, courts consistently hold that an insurance agent or district manager is an independent contractor and not an employee." (32AA/6818 [court's order granting summary adjudication]; see *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 584 [independent insurance agent is an independent contractor]; *Beaumont-Jacques*, *supra*, 217 Cal.App.4th at pp. 1144-1145 [same]; *Murray v. Principal Fin. Group, Inc.* (9th Cir. 2010) 613 F.3d 943, 944 ["We, along with virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees"]; Rest.2d Agency, § 220, com. i, p. 489 ["The custom of the community as to the control ordinarily exercised in a particular occupation is of importance"].)

That the Companies may have given some input, set goals, provided pre-approved materials, and established certain guidelines in an effort to obtain certain results (AOB/11-16), does not suggest the requisite right to completely control Smith's day-to-day work details. A hirer's exercise of control over the *results* of the work, without right to control the manner and means of accomplishing that result, establishes an independent-contractor, *not* employment, relationship. (See *McDonald*, *supra*, 44 Cal.2d at p. 790.)

The principal gets to dictate the quality of the work product. That's the essence of an independent-contractor relationship.

*Beaumont-Jacques v. Farmers Group, Inc.*, *supra*, 217 Cal.App.4th at pp. 1144-1145, a case from this Division, is directly on point. There, a district manager for the Companies sued under a similarly-worded District Manager's Appointment Agreement and likewise could not proceed beyond summary judgment because of her independent-contractor status. On appeal, the court found the district manager's day-to-day discretion regarding her time, vacations, breaks, and office staffing, coupled with the Agreement's express no-employment-relationship disclaimer, established, as a matter of law, that she was an independent contractor and not an employee. (*Id*. at pp. 1143-1147.)

As the trial court in this case recognized, "the facts are similar or the same" here as in *Beaumont-Jacques*. (32AA/6818.) In its view, "[t]he fact that the Court of Appeal recently decided a very similar situation and with Farmers to boot, only further bolster[ed] the result"—i.e., that Smith was an independent contractor. (*Ibid*., citing *Beaumont-Jacques*.)

The opening brief seeks to evade *Beaumont-Jacques*, proffering two reasons: (1) the District Manager in *Beaumont-Jacques* "was working under a different contract and was a new District Manager"; and (2) "the *Beaumont-Jacques court* ruled that '*at will*' meant something very different from what the Supreme Court said it meant." (AOB/47, original italics.) Neither evasion works.

The operative terms disclaiming employment status and establishing the Companies' lack of control are the same in the two agreements. (Compare *Beaumont-Jacques*, *supra*, 217 Cal.App.4th at p. 1141 ["'Nothing contained herein is intended or shall be construed to create a relationship of employer and employee. The time to be expended by District Manager is solely within his/her discretion, and the persons to be solicited and the area within the district involved wherein solicitation shall be conducted is at the election of the District Manager. No control is to be exercised by the Companies over the time when, the place where, or the manner in which the District Manager shall operate in carrying out the objectives of this Agreement provided only that they conform to normal business practice' and to applicable law"] with 4AA/679 ¶H [same].) That Smith was not a *new* district manager when he sued cuts *against* an employer-employee relationship because he worked under express independent-contractor terms (and took advantage of them—e.g., controlling his own hours, having available tax benefits) for thirty-five years without complaining about, or disagreeing with, them.

Nor did *Ayala*, the Supreme Court case the opening brief cites, alter the long-established common-law test or create a new termination-without-cause-equals-employment standard. *Ayala* expressly adopts and applies the Restatement/common-law test. (59 Cal.4th at p. 532.) And, it has to be read in its specific factual and procedural context: a class certification determination regarding newspaper delivery persons who had no material control over their job performance. (*Id*. at pp. 528-538.) *Ayala* does not

suggest that just because a hirer can terminate a relationship with an attorney, a doctor, or an exclusive-product distributor, they are automatically employees. Nor did it consider the circumstance here where the right to terminate is accompanied by a very substantial "contract value" payment obligation. While a *unilateral* no-cause termination provision with no additional payment obligation might, without more, suggest hirer control, a *mutual* no-cause termination provision that triggers a substantial termination-related payment obligation does not. (See *Varisco v. Gateway Science and Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1107 [mutual termination right does not create an employment relationship].)

In this case, both sides—the Companies and Smith—had the right to terminate the Agreement "without cause" on 30-days' written notice. (4AA/675 ¶D.) *Beaumont-Jacques* held that a comparable, mutual no-cause termination provision "show[s] an association, rather than the relation of employer and employee." (217 Cal.App.4th at p. 1147, citing *Varisco, supra,* 166 Cal.App.4th at p. 1108, internal quotation marks omitted.) That "each side could cancel" "augurs" against an employment relationship. (*Ibid*.)

The "right to control" factor standing alone makes Smith's independent-contractor status indisputable.

**b. The secondary common-law factors confirm Smith's independent-contractor status.**

Under the common-law test, secondary factors—even on summary judgment when the evidence of these factors is undisputed—are part of the

calculus. (*Arnold, supra*, 202 Cal.App.4th at pp. 588-589; see 32AA/6817-6818 [trial court weighing secondary factors].) "Even if one or two of the individual factors might suggest an employment relationship, summary judgment is nevertheless proper when, as here, all the factors weighed and considered as a whole establish that [the agent] was an independent contractor and not an employee[.]" (*Arnold*, at p. 590 [insurance agent]; *Beaumont-Jacques*, *supra*, 217 Cal.App.4th at p. 1147.)

Multiple secondary factors compel the conclusion that Smith is an independent contractor:

- The parties believed they were creating an independent-contractor relationship. (4AA/679 ¶H; *Borello, supra*, 48 Cal.3d at p. 349; *Arnold, supra*, 202 Cal.App.4th at pp. 589-590 [parties' intent relevant factor]; Rest.2d Agency, §220(2)(i), p. 486 [same]; see also 32AA/6817 [court finding that Agreement demonstrated parties' intent].)

- An insurance company district manager is a high-skilled position, requiring licensure. (*Ayala*, *supra*, 59 Cal.4th at p. 540 [the "skill involved" is a "key" factor]; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 304-305 [that job required driver to be "skilled in the operation of a dump truck" was substantial evidence of independent-contractor status]; *Varisco*, *supra*, 166 Cal.App.4th at p. 1106 [that job providing construction site inspection services was "skilled work, in a distinct occupation" weighed in favor of independent-contractor classification]; see also

32AA/6818 [court finding that Smith "was skilled, experienced, licensed and oversaw staff he employed"].)

- Smith's commission-based compensation was based on results, not the time he spent working on the Companies' behalf. (*Fireman's Fund Ins. Co., supra*, 37 Cal.App.4th at p. 1443 [compensation dependent on ability to make sales weighs in favor of an independent-contractor relationship]; *Arnold, supra*, 202 Cal.App.4th at pp. 589-590 [insurance company's payment to agent by commission weighed against employer-employee relationship]; Rest.2d Agency, § 220(2)(g), p. 486 ["method of payment" relevant].)

- The Companies paid Smith via IRS-1099 rather than W-2. (*Bowman, supra*, 186 Cal.App.4th at p. 305 [tax treatment, including whether by 1099 or W-2 form, relevant].)

- Smith provided the instrumentalities of his business.

Payments owed upon terminating the relationship—e.g., the $1,531,918.92 "contract value" paid to Smith here—shifts the balance toward independent-contractor, not employment, status. (*Mountain Meadow Creameries v. Industrial Acc. Commission* (1938) 25 Cal.App.2d 123, 127-128; see also *Bates v. Indus. Acc. Comm'n* (1958) 156 Cal.App.2d 713, 719 [contractual $50 credit for each additional customer added upon termination of the contract favored independent-contractor status].) The "contract value," calculated on the overwrite Smith was paid on policies sold by agents in his district during the prior six months, reflected payment

for *results*, not time expended. (4AA/615-618, 676-678, 738-742.) That weighs in favor of independent-contractor status. (*Mountain Meadows Creameries*, at pp. 127-128.)

In contrast, the factors Smith relied on do not demonstrate a triable issue regarding his independent-contractor classification:

That Smith was expected to attend meetings and trainings, to write reports, issue business plans, promote the Farmers brand, and maintain his office in a respectable manner (AOB/7-16) are consistent with the Companies' expectations as a contracting party that services would be delivered in an acceptable manner. Establishing quality standards is not indicative of an employer-employee relationship. "On the contrary, an employer who controls the manner in which the work is done has little need of establishing quality standards for completed work[.]" (*Mission*, *supra*, 123 Cal.App.3d at p. 224.)

That Smith was paid at regular intervals is immaterial as his payment was based on results and not time. (See *Arnold*, *supra*, 202 Cal.App.4th at p. 589 [independent contractor insurance agent, paid every two weeks, was not an employee because his payment was results-based rather than time-based].)

Nor does the fact that Smith was contractually prohibited from working for other insurance companies matter; exclusive agents/distributors are typically independent contractors. (See *Murray*, *supra*, 613 F.3d at pp. 944, 946 ["career agent" deemed independent contractor]; *Mountain*

*Meadow Creameries, supra*, 25 Cal.App.2d at p. 125 [distributor prohibited from handling competing products classified as independent contractor].)

The secondary common-law factors, thus, weigh decisively against classifying Smith as an employee. The only possible legal conclusion here is that Smith was an independent contractor. "[I]f it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck." (*Estrada, supra*, 154 Cal.App.4th at p. 9.)

### 3. The Wage Order definition is inapplicable; but even applying that definition, Smith was not an employee.

Smith argues that Industrial Welfare Commission (IWC) Wage Order 4-2001—"whether the putative employer controlled the wages, hours or working conditions of the worker"—rather than the common law, sets the test for his wage claims (but not his FEHA claims). (AOB/35-38, citing *Martinez v. Combs* (2010) 49 Cal.4th 35, 69.) Not so.

Because Smith sued under Labor Code wage statutes that do not define "employee," the common-law test applies. (See *Metropolitan Water Dist.*, *supra*, 32 Cal.4th at pp. 500-501, 512; *Estrada*, *supra*, 154 Cal.App.4th at p. 10.)

*Martinez* is not to the contrary. After reviewing in detail Labor Code section 1194's specific legislative history, it held that Wage Order No. 14's definition of employee applies to section 1194 claims. (49 Cal.4th at pp. 52-66.) Even then, the common-law test remained relevant under section 1194: "This is not to say the common law plays no role in the IWC's definition of the employment relationship. In fact, the IWC's

definition of employment [governing section 1194] incorporates the common law definition as *one alternative*." (*Id.* at p. 64, original italics; accord, *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185-1187 [addressing Labor Code sections 204, 223, 510, 1182.12, and 1194].)

*Martinez* does not govern here. Smith made no section 1194 claim. Nothing in the legislative history of the Labor Code sections Smith sued under suggests that they (like section 1194) are subject to a special statutory "employee" definition. "In this circumstance—a statute referring to employees without defining the term—courts have generally applied the common law test of employment." (*Metropolitan Water Dist.*, *supra*, 32 Cal.4th at p. 500.)

Additionally, the *Martinez* wage order addresses a concern not at issue here: The joint employer problem—where one party controls hours and working conditions but a different party controls wages. (49 Cal.4th at p. 59.) Absent the wage order, one such party could claim not to be an employer and thereby avoid the reach of the wage order.

The Companies are not subject to Wage Order No. 14, at issue in *Martinez*. That order applies only to "agricultural occupation[s]." (Cal. Code Regs., tit. 8, § 11140, subd. (1).) Rather, as the opening brief recognizes (AOB/36-37), only Wage Order No. 4 (4-2001) could possibly be relevant as the order applicable to "all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis[.]" (Cal. Code Regs., tit. 8, § 11040, subd. (1).) Under that wage order, an employee is someone

employed by any person or company "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." (*Id.*, § 11040(2)(F), (H).)

The undisputed evidence establishes that the Companies had no power to control Smith's wages, hours, and working conditions. Smith was paid by commission; *he* controlled his wages. He also had discretion to select his own work hours and control district office conditions. Even under the inapplicable wage-order test, Smith qualifies as an independent contractor. (See, e.g., *Aleksick, supra*, 205 Cal.App.4th at p. 1190 [where principal "exercised no control over (agent)'s employees, including their hiring or firing, rate of pay, work hours and conditions," the agent is deemed an independent contractor].)

### C. Smith Fails To Meet His High Burden In Asserting Offensive, Non-Mutual Collateral Estoppel Based On An Outlier, Intermediate Trial Result In *Davis v. Farmers Insurance Exchange*.

The opening brief contends that the Companies are collaterally estopped to deny that Smith is an employee because "the misclassification issue has already been litigated and resolved as to Mr. Smith's employment status and that of his colleagues" in *Davis v. Farmers Insurance Exchange* (2016) 245 Cal.App.4th 1302. (AOB/21 [heading].)[5] Not so.

[5] The preferred terminology is now "issue preclusion." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823-825.) We use "collateral estoppel" interchangeably with "issue preclusion" as that is the term the opening brief uses.

### 1. A party asserting offensive, nonmutual collateral estoppel bears a heavy burden.

Collateral estoppel can preclude parties from relitigating *identical* factual issues actually litigated and finally decided in a prior proceeding. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

"The party asserting collateral estoppel bears a 'heavy' burden" of proving all of its required elements. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1482, citing *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.) "'"[I]t is not enough that the proposed evidence tends to show that the precise question *may* have been involved in such litigation."'" (*Kemp Bros. Const.*, at p. 1482, quoting *People v. Garcia* (2006) 39 Cal.4th 1070, 1092 (conc. & dis. opn. of Chin, J.), italics added.) Argument or inference do not suffice. "'"If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." [Citation.]'" (*People v. Garcia*, at p. 1092; accord, *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1520.)

The doctrine is equitable. Accordingly, it is unavailable where "'considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case,'" or "'if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding.'" (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 125; see *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829 [collateral estoppel "'"is not an

inflexible, universally applicable principle; policy considerations may limit its use where the . . . underpinnings of the doctrine are outweighed by other factors,"'" ellipsis in original].)

The burden is greater where the claimed collateral estoppel is nonmutual—that is, where "collateral estoppel is invoked by a nonparty to the prior litigation." (*Vandenberg, supra,* 21 Cal.4th at pp. 829-830.) "Such cases require close examination to determine whether nonmutual use of the doctrine is fair and appropriate." (*Id*. at p. 830.) The opening brief does not attempt even to proffer a reason why this is a unique case that would justify nonmutual collateral estoppel.

The burden is even higher still because Smith is attempting to use collateral estoppel offensively—that is, to impose liability, rather than to defeat it. "Offensive non-mutual collateral estoppel" arises "'when a plaintiff seeks to estop a defendant from relitigating an issue which the defendant previously litigated and lost against another plaintiff.' [Citations.]" (*Collins v. D.R. Horton, Inc.* (9th Cir. 2007) 505 F.3d 874, 880.) Offensive collateral estoppel use "does not promote judicial economy in the same way defensive use does[.]" (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 942, citing *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 329.) For that reason, offensive application "is more closely scrutinized than the defensive use of the doctrine." (*White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763; accord, *Smith v. Exxon Mobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414.) The

opening brief provides no rationale why Smith's request to use collateral estoppel as a sword should be countenanced.

The trifecta of (1) nonmutual, (2) offensive, (3) collateral estoppel can only apply in the clearest of circumstances.

**2. Farmers is not collaterally estopped from asserting Smith's independent-contractor status.**

**a. Smith does not get to cherry-pick amongst competing prior adjudications, the overwhelming weight of which reject employee status for the Companies' district managers.**

"[B]ecause the law of collateral estoppel is essentially *equitable* in nature there must be some leeway for reexamination of judgments, i.e., there must be some limit to the principle of finality to accord basic fairness to the parties." (*Sandoval, supra,* 140 Cal.App.3d at p. 941, original italics.) By "'virtually unanimous agreement,'" it is "'patently unfair'" to pick an instance where a defendant did not prevail and bind the defendant to that result amongst a group of competing prior results. (*Id.* at p. 944.)

Collateral estoppel is inappropriate where prior adjudications on the same issue are inconsistent. (*Parklane Hosiery, supra,* 439 U.S. at p. 330; accord, *Sandoval, supra,* 140 Cal.App.3d at p. 941.) A party should not be precluded from relitigating an issue when "'the determination relied on as preclusive was itself inconsistent with another determination of the same issue.'" (*Sandoval,* at p. 941, quoting Rest.2d Judgments, § 29(4).)

Here, the determination that Smith seeks to rely on, *Davis v. Farmers Insurance Exchange*, is itself an outlier. Prior determinations have

consistently adopted Farmers' position that district managers such as Smith are independent contractors. In *Beaumont-Jacques,* for example, this Division held that, as a matter of law, a Farmers district manager was an independent contractor, not an employee. (217 Cal.App.4th at p. 1147.) A host of other determinations concur with *Beaumont-Jacques*. (E.g., *Shin v. Farmers Group, Inc.* (Cal.Ct.App., June 24, 2013, B240989) 2013 WL 3158213 [Second District; nonpub. opn.]; *Zentner v. Farmers Group, Inc.* (Cal.Ct.App., Nov. 8, 2012, B235767) 2012 WL 5448208 [Second District; nonpub. opn.]; *Steele v. Farmers Group, Inc.* (Super. Ct. L.A. County, 2012, No. BC438942); *Pexa v. Farmers Group, Inc.* (Super. Ct. Sac. County, 2009, No. 34-2009-00034950-CU-BC-GDS); see also Respondents' concurrently filed Motion Requesting Judicial Notice at pp. 16-20, 26-28, 35, 50-51, 82-96, 99.)[6] The opening brief does not even acknowledge that *Davis* is an outlier.

**b. In any event, *Davis v. Farmers Insurance Exchange* does not bind.**

The jury finding in *Davis v. Farmers Insurance Exchange* on which the opening brief relies was interlocutory.[7] There, after the Companies

[6] Unpublished decisions and trial court decisions are citeable for collateral estoppel purposes. (Cal. Rules of Court, rule 8.1115(b)(1).)

[7] The opening brief, without argument, authority or explanation, asserts that the trial court "should have taken judicial notice of the verdict form from the *Davis* case[.]" (AOB/24.) Such lack of explication waives any challenge on appeal. (See *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [appellant seeking to reverse judgment has burden of demonstrating reversible error]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [general assertion without legal argument or authority is waived].) In any event, the court acted well within its discretion. Smith proffered the

terminated the contract with another district manager, he sued for FEHA violations and for improperly deducting business expenses, claiming that he was an employee rather than an independent contractor. (245 Cal.App.4th at pp. 1309, 1311.)

The trial court directed a verdict on the business-expense-deductions claim. (*Id*. at pp. 1316-1317.) In phase I of a bifurcated trial, the jury found, by special verdict, that Davis was an employee. On the FEHA claim, the jury found that the Companies had legitimate reasons to terminate the relationship. (*Id*. at pp. 1309-1310, 1313.) The resulting judgment was wholly in *the Companies'* favor. (*Id*. at p. 1319.) They were not aggrieved; they had prevailed.

Davis appealed. The Court of Appeal *affirmed* on the main issue—the jury's FEHA finding. (245 Cal.App.4th at pp. 1319, 1322.) But, it reversed the directed verdict, remanding for a limited retrial on the amount of deducted business expenses. (*Id*. at pp. 1330-1331.) It reasoned that the jury's intermediate bifurcated-trial finding that Davis was an employee should remain in place because the Companies did not appeal that finding

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*Davis* verdict for the truth of its content (32AA/6815), something *not* subject to judicial notice. (*Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569; see also *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1051 [judicial notice of verdict as true improper without res judicata or collateral estoppel].) And, there is no prejudice. As discussed in text, *Davis* is not collateral estoppel.

"and there has been no showing of error with respect to that finding." (*Id*. at pp. 1313, fn. 7, 1338.)[8]

Even were it the only prior determination, *Davis* should not operate as collateral estoppel.

***No appellate review.*** The Companies were not aggrieved by the trial court judgment in *Davis.* They won in the trial court, totally and completely. They had no right to appeal the adverse employee-status determination because they were not aggrieved by the judgment. (Code Civ. Proc., § 902 [only a "party aggrieved may appeal"]; *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779 (*Riles*) ["It is also the rule that if the judgment or order is in favor of a party he is not aggrieved and cannot appeal"].)

Had Davis not appealed, the jury's intermediate finding could not be collateral estoppel. "[W]here a finding is contrary to a judgment or order rendered, or immaterial to it, and the judgment or order is based upon other findings that do support it, the findings contrary or immaterial are not adjudications against the party who prevails." (*In re Funkenstein's Estate* (1915) 170 Cal. 594, 595-596.) Collateral estoppel is inappropriate absent an opportunity to challenge a ruling on appeal. (See *Vandenberg*, *supra*, 21 Cal.4th at pp. 829, 834-835 [arbitration decision could not be collateral estoppel because no right to full-fledged appellate review]; *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d

[8] No final judgment has been entered in *Davis* on remand. The case is settling.

1279, 1290-1291 [res judicata does not apply where first tribunal "decided that one party should have relief but the amount of the damages, or the form or scope of other relief, remains to be determined"].)

*Davis*, nonetheless, held Farmers bound on remand by the prior intermediate determination. It suggested that Farmers had to cross-appeal. (245 Cal.App.4th at pp. 1313, fn. 7, 1338; contra, *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 221; *Riles, supra,* 149 Cal.App.3d at p. 779.) But to require a prevailing respondent to cross-appeal subsidiary adverse findings that are immaterial to the ultimate judgment to avoid the possibility of issue preclusion would unnecessarily burden appellate courts with collateral cross-appeals and briefing.

Having prevailed in the judgment entered in the trial court in *Davis*, Farmers should not, as the opening brief claims, "reasonably have expected to be bound by the *Davis* decision, as to misclassification." (AOB/24.) Rather, *Davis*'s remand holding was totally unexpected and out of step with existing law as to when a party had to, or even could, cross-appeal. Because of its procedural posture—no cross-appeal by Farmers on an issue Farmers had no reason to believe that it could or had to cross-appeal—*Davis* never considered whether the jury's interlocutory phase I employee-status decision was consistent with *Beaumont-Jacques.*

Given its novel procedural posture and unpredictable remand holding, it would be inequitable for the *Davis* jury finding to estop Farmers on an independent-contractor issue that it never had an opportunity to challenge on appeal.

***No identical issue showing.*** For collateral estoppel to apply, the factual issue in the two cases must be *identical*. (See § II.C.1., *ante*.) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." (*Lucido, supra*, 51 Cal.3d at p. 342.) Each case must be "carefully scrutinized" to determine whether the fact issue adjudicated in the first proceeding is the same as raised in the second. (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880-881.) "Precisely defining the issue previously decided and the one sought to be precluded is critical." (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1513; *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1516-1517 ["need to distinguish 'issues' from 'legal theories,'" citing *Pacific Mutual Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 724-725].) There is no wiggle room. The issues must be shown to be *identical*, not just similar. (*People v. Garcia*, *supra*, 39 Cal.4th at p. 1092 (conc. & dis. opn. of Chin, J.).)

Smith fails to meet this burden. The record here is devoid of evidence showing whether the employment-classification issue adjudicated in *Davis* and presented here are identical. The opening brief contends that Smith and Davis shared *some* factual context. (AOB/22-23.) But most of its assertions are unsupported by evidence. The only *evidence* in this record is that they worked together for 23 years. (12AA/2383.) There is no *evidence* showing the degree to which the Companies had the right to control Davis or relating to any other common-law factors. Nor has Smith

established what common-law factors the jury considered in *Davis*—such as whether Davis was required to prove Farmers' control over his day-to-day work details. Without such evidence, there is no way to establish that the issues were identical.

*Davis* likewise says nothing about the allegations or evidence related to the Companies' purported control over Davis's day-to-day work details. (See 245 Cal.App.4th at p. 1313 & fn. 7.) It notes that both Davis and Smith were district managers for the Companies, both of their contracts were terminated (five years apart), and Smith testified on Davis's behalf at Davis's trial. (*Id*. at pp. 1313 & fn. 8, 1327.) That's it. Even where background facts are similar, collateral estoppel is unavailable as a matter of law unless the issues are *identical*. (*Diocese of San Joaquin v. Gunner* (2016) 246 Cal.App.4th 254, 266.) Without *certainty* as to what *Davis* necessarily decided, collateral estoppel is unavailable. (*Garcia*, *supra*, 39 Cal.4th at p. 1092.)

## III. THE TRIAL COURT PROPERLY CONCLUDED THAT SMITH'S BREACH OF CONTRACT CLAIM HAS NO MERIT.

### A. Later Oral Modification Evidence Cannot Create A Triable Issue Where, As Here, The Agreement Expressly Precludes Oral Modifications.

The opening brief's claim that the Agreement was orally modified with new terms that altered the nature of the relationship is meritless. The Agreement required all modifications to be in a signed writing. (4AA/679 ¶J; 32AA/6820.) Civil Code section 1698 precludes oral modifications of a written agreement where the agreement expressly prohibits them. (Civ.

Code, § 1698, subd. (c) ["*Unless the contract otherwise expressly provides*, a contract in writing may be modified by an oral agreement supported by new consideration," italics added]; accord, *Marani v. Jackson* (1986) 183 Cal.App.3d 695, 703-704.)[9]

Smith proffered no *evidence* of any signed writing modifying the Agreement's terms and he made no *argument* that there was a signed writing modifying its terms. (32AA/6820; see 29AA/6097-6114.) The absence of any post-Agreement *written* modification dooms Smith's orally-modified contract-breach argument.

*Marani v. Jackson*, *supra*, 183 Cal.App.3d at pp. 702-705, is on point. There, a written agreement between a real estate broker and a salesperson specified when a commission would be paid, how it would be calculated, and precluded oral modifications. The salesperson claimed an oral agreement altering the commission arrangement. *Marani* held that in light of the no oral-modifications provision, oral-agreement evidence was inadmissible. (See Civ. Code, § 1698, subd. (c); *Beggerly v. Gbur* (1980) 112 Cal.App.3d 180, 189; *Monaghan v. Telecom Italia Sparkle of North*

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[9] The opening brief complains: "[T]he trial court abused its discretion by **unreasonably** finding that the [Agreement] was integrated[.]" (AOB/50, original emphasis.) The trial court never reached integration. (See 32AA/6820.) And for good reason. Integration is beside the point as there is an *express* provision barring oral modifications. "The express term is controlling even if it is not contained in an integrated employment contract." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 630, superseded by statute on another ground as stated in *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 427.)

*America, Inc.* (9th Cir. 2016) 647 Fed.Appx. 763, 768-769 [enforcing employment no-oral-modification clause].)

And, there is another problem. An oral modification is only valid if there is new consideration and performance. (See Civ. Code, § 1698, subd. (c); *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 673 ["executed" oral modification requires full performance; "In the absence of consideration, a gratuitous oral promise" is unenforceable].) The opening brief points to no consideration or performance of the claimed oral modifications. These essential elements cannot be first raised in reply. The claim that the promised lifetime sinecure is its own consideration (AOB/53) mangles the concept. Consideration is what Smith supposedly gave up, not what he received. (See Civ. Code, § 1605.) The answer is: nothing.

The two cases Smith relies on, *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 176, and *Youngman v. Nevada Irr. Dist.* (1969) 70 Cal.2d 240, 249, are not to the contrary. Neither involves a contract clause barring oral modifications. *Charnay* was a legal malpractice case. In the course of the litigation, and contrary to the attorney's retainer agreement's "no guarantees" wording, the attorney guaranteed that the client would win to convince the client not to settle. (145 Cal.App.4th at pp. 177-178.) The parol evidence rule (not at issue here) did not apply because the claim involved a post-contract promise in return for new consideration (not settling). (*Id*. at p. 186.) *Youngman* is comparable to *Charnay*. It found, on demurrer, a properly alleged implied-in-fact contract. In dicta, it suggested that promissory estoppel might exist if there was no implied-

in-fact contract, and a promise plus detrimental reliance. (70 Cal.2d at pp. 249-250.) There is no claim of promissory estoppel or detrimental reliance here.

The writing-only-modifications clause bars Smith's oral modification claims. Were the law otherwise, contract clauses granting the right to terminate without cause could always be challenged. One party could always claim a mere oral promise to terminate only for cause.

### B. Smith Failed To Demonstrate That He Was Harmed By Farmers' Alleged Undue Control.

"A breach of contract is not actionable without damage." (*Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 473.)

Smith alleged that Farmers breached the Agreement's promise that "'no control was to be exercised by the Companies over the time when, the place where or the manner'" in which Smith could operate, by exerting "undue control throughout his tenure." (1AA/93-96.) The Companies prima-facie established that Smith was not damaged by any purported undue control, pointing to the absence of control-related damages allegations or any complaint about undue control during the Agreement's 35-year term. (3AA/564; see 1AA/93-96.) The trial court correctly concluded that Smith failed to proffer any damages connected to this purported breach. (32AA/6820.)

Smith repeats the same argument on appeal. (AOB/53-54.) Now he claims that "the oral agreement to provide Appellant with an agency after

he was fired explains how he was damaged." (AOB/53.) But he nowhere explains how there is any link between the Companies' purported interference with independently running his district office and an unenforceable gratuitous promise of a future agency. There isn't any. Supposedly interfering with Smith's independent operation of his district office business did not, and could not, obstruct a conjectured promise to provide him with an agency if his Agreement was terminated.

## IV. THE COURT DID NOT ABUSE ITS DISCRETION IN ITS DISCOVERY, EVIDENTIARY, AND PROCEDURAL RULINGS.

### A. The Court Acted Well Within Its Discretion In Its Discovery Rulings.

The opening brief posits a laundry-list of criticisms aimed at the trial court's supposed mishandling of the discovery process:

- choosing the discovery referee Farmers wanted;
- using the wrong standard in ruling on some of Smith's discovery motions;
- denying Smith's ex parte application to continue the summary judgment hearing and his deadline to file an opposition;
- forcing Smith to dismiss his remaining claims; and
- awarding Farmers $1,500—roughly 3% of the total referee cost.

(AOB/57-65.) None of these arguments begins to have merit.

As Smith acknowledges, discovery management issues such as these are reviewed for an abuse of discretion. (AOB/65; *Lipton v. Superior Court*

(1996) 48 Cal.App.4th 1599, 1612 [discovery management lies within the sound discretion of the trial court]; see also *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 250-251 [order denying request to continue summary judgment motion reviewed for abuse of discretion].) The trial court's rulings cannot be set aside unless Smith demonstrates "that there was 'no legal justification' for the order granting or denying the discovery in question." (*Lipton*, at p. 1612, quoting *Carlson v. Superior Court* (1961) 56 Cal.2d 431, 438.) The opening brief fails to meet this standard.

It starts by casting unsubstantiated aspersions on the trial court's motives and fairness. That is both unprofessional and violates the rule on appeal that all intendments and presumptions must be made in favor of the judgment unless demonstrated otherwise. (E.g., *People v. Giordano* (2007) 42 Cal.4th 644, 666; *Caminetti v. Edward Brown & Sons* (1943) 23 Cal.2d 511, 521 ["Every presumption is in favor of the fairness, impartiality, and regularity of the proceedings in the trial court leading to judgment"].)

*Referee Selection*. The trial court found it necessary to appoint a discovery referee, in part, because Smith's five motions were "large in scope." (3AA/444.) Smith does not dispute that a referee was appropriate. Because the parties could not agree on a referee, the court followed Code of Civil Procedure sections 640 and 641, which allow each party to submit three referee nominees for selection by the court. (3AA/444-445.) When the court selected one of the referees on Farmers' list, Smith filed a peremptory challenge under section 170.6 to that referee. (3AA/484 ¶2.)

The court then supplied the parties with a new list of *court*-selected possible referees. (3AA/499-500; RT/905-906.)

Counsel *stipulated* to two of the court-recommended names. (3AA/503.) Thereafter, the court appointed one of those two approved referees. (3AA/503, 510.)

This was not an abuse of discretion. The trial court ultimately proposed the potential referees. Likewise, the court did not abuse its discretion in accepting the parties' stipulation. (See *Lyons v. Lyons* (1961) 190 Cal.App.2d 788, 790 [court has broad discretion to accept parties' stipulation; appellate court will interfere only on showing of abuse].) And, Smith has shown no prejudice from this process.

*Referee Cost*. The opening brief complains that Smith was denied due process because he was saddled with the cost of a referee and thereby "forced to dismiss his remaining claims[.]" (AOB/65.) Farmers agreed to advance 100% of the cost. (2AA/440; 3AA/444.) Only $1,500 in referee fees were assessed against Smith. (34AA/7183-7184.) And, he has never made a *showing* that, having received an over $1.5 million "contract value" payment upon termination (4AA/615-619, 676-678 ¶E, 738-742), he was unable to bear such court costs. There is no showing or evidence—and no contemporaneous complaint (the opening brief cites to none)—that his *voluntary* dismissal of his remaining claims was anything other than what it purported to be: a tactical dismissal to obtain immediate appellate review of adverse interlocutory rulings.

*Discovery Rulings*. The opening brief's claim that the trial court applied the wrong standard in ruling on nine discovery motions also has no merit. (AOB/60-61; see RT/2415-2417 [trial court deciding to rule on last nine discovery motions and explaining its procedure].) According to the opening brief, the court's error was "demand[ing] that each of about 19,000 documents be identified by individual document request . . . ." (AOB/61, fn. omitted.) The record establishes that the court did no such thing. Farmers filed requests for production, and in response to certain requests Smith produced nothing, so the court ordered Smith to produce the requested documents. (RT/2410-2411, 2701-2703; 9AA/1741, 1752, 1913-1923.)

Smith's counsel was "unclear on exactly what [she was] being ordered to do." (RT/2702.) So the court clarified its order:

> COURT: "You're being ordered to comply with the discovery: interrogatory requests, special interrogs and request for production."
>
> COUNSEL: "For request for production, I was supposed to produce documents?"
>
> COURT: "That's usually what a request for production requires."
>
> COUNSEL: "So not to identify, just to produce?"
>
> COURT: "Generally a request for production means you produce documents. If you think that the request – if you've complied by identifying the documents, I'm going to leave that up to you. If they feel that they need to come back here, they'll come back. [¶] But generally – general principle is a request for production means to produce documents, not

> identify them. But you've been practicing a long time. You're a very good lawyer. I'll let you make that analysis."
>
> COUNSEL: "So my understanding, then, is that I am to produce documents. And the only thing that we haven't produced, that I'm aware of, based on the time period that we filed the response, was that – was the *Davis* documents."

(RT/2702-2703.)

The opening brief's contention that the court ordered Smith to identify 19,000 documents, thus, is belied by the record. Moreover, Smith has shown no abuse in the court ordering him to comply with Farmers' requests for production nor any prejudice.

### B. The Court Employed The Proper Summary Adjudication Process.

The opening brief's list of purported trial court procedural errors regarding summary adjudication is lengthy and scattered throughout the brief under multiple argument headings. For clarity sake, we respond to each argument under one heading as all of the issues are subject to the same abuse of discretion standard.

As a threshold matter, the opening brief nowhere explains how any of the supposed errors prejudiced Smith. That, in itself, is reason enough to reject the arguments. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475 [court must disregard any non-prejudicial error; there shall be no presumption that a procedural error is prejudicial]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

### 1. Denial of Smith's third continuance request.

The court acted within its discretion in denying Smith's additional continuance request. It had twice before granted Smith's ex parte applications to extend the deadlines. (11AA/2345-2346.) Smith's third ex parte request was based on his allegations that Farmers had not complied with the court's prior discovery orders and had "produced virtually no discovery." (11AA/2349-2356.) However, at the time of Smith's third application, FGI alone had provided (1) full and complete verified responses to all of the written discovery propounded by Smith, (2) more than 12,600 pages of documents in response to Smith's two requests for production, and (3) 23,000 pages of confidential documents in response to one of Smith's deposition notices. (11AA/2346 ¶9.)

Smith failed to comply with the applicable statute in providing no clear statement as to what facts additional discovery may have uncovered. (Code Civ. Proc., § 437c, subd. (h); see 11AA/2355-2356.) He failed to establish the necessary "*likelihood that controverting evidence may exist* and *why* the information sought [wa]s *essential* to opposing the motion." (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532, original italics; accord, *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715-716 [the party seeking a continuance "must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented"].)

### 2. The court acted well within its discretion in overruling Smith's meritless boilerplate objections.

Smith filed 478 boilerplate objections to Farmers' declarations in support of summary judgment/adjudication. (32AA/6822.) The court overruled all of them, concluding that they were "meritless and frivolous." (*Ibid*.; RT/3009.)

The opening brief contends that "the trial court for all practical purposes refused to hear oral argument," "remained silent and did not engage in any way, nor respond to counsel's arguments and instead stared at the back of the courtroom," and thus Smith "was unable to ascertain on what basis any of the evidentiary objections was overruled, even though he tried to engage the court to respond in vain." (AOB/31-32.)

The record is otherwise. The trial court asked Smith's counsel if she had any further arguments after listening to her arguments on the merits. (RT/3008.) She responded: "I don't waive any of the arguments that are possible which would take a long time to argue. Also, I guess, finally I want to discuss the evidentiary objections. It's unclear that a statement that Farmers was formed in nineteen whatever is not [*sic*] hearsay. That's an out-of-court statement offered for the truth of the matter asserted, and that's hearsay. And yet the court didn't, you know, sustain our objection to that. In fact, everything that they said in their declarations is hearsay. They have pages and pages and pages of similar testimony, and that's hearsay." (RT/3008-3009.) The court invited Smith's counsel to make additional arguments, but she declined. (RT/3009.)

The opening brief adds nothing to what Smith offered at trial other than the conclusory statement that every objection "should have been sustained, as conclusory, lacks personal knowledge or for hearsay." (AOB/32.) This conclusory statement, with no accompanying citation to authority or legal analysis, falls far short of demonstrating error. Smith's evidentiary argument is thus waived. (See *Dills v. Redwood Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [court not required to consider appellant's passing reference to an issue unaccompanied by argument or citation to authority]; *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114 [appellant's attempt to challenge trial court's evidentiary rulings in brief with no accompanying argument or citation to legal authority "deemed to be without foundation and requires no discussion"].)

Nor was the trial court required to walk through each and every objection. (See *Hodjat v. State Farm Mut. Auto. Ins. Co.* (2012) 211 Cal.App.4th 1, 8-9 [trial court does not have to "wade through stacks of documents" and the evidence to rule on the admissibility of particular items of evidence].) Smith's boilerplate objections were the type of abusive objections that are properly condemned. (See, e.g., *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 254-257.) The one objection Smith identified in the trial court is illustrative. Even if it were hearsay for a corporate officer to testify to when a corporation was incorporated, Smith demonstrates, and can demonstrate, no *prejudice* from admitting an incorporation date.

Nor was it even required to rule on the objections. They are *presumed* to be overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) The trial court could not abuse its discretion for not explaining the reasons why each of the 478 objections was overruled. Nowhere does the opening brief argue why *any* evidentiary ruling was error let alone prejudicial error. The court's overruling of Smith's objections must therefore be affirmed.

### 3. The trial court properly shifted the burden of persuasion to Smith once Farmers established that he was not an employee.

The opening brief contends that the trial court improperly placed the burden on Smith to show that he was an employee under the common-law test. (AOB/33.) Not so. The trial court properly imposed the burden on Smith *after* Farmers had satisfied its initial burden of establishing that Smith was an independent contractor. (32AA/6815-6818; see *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 858; Code Civ. Proc., § 437c, subd. (o)(1).)

### 4. The trial court cited relevant authority for the common-law test.

The opening brief argues that the trial court committed reversible error by quoting the United States Supreme Court's recitation of the common-law factors in *Reid, supra*, 490 U.S. 730, instead of the California Supreme Court's list of factors in *Ayala*, *supra*, 59 Cal.4th at p. 532. (AOB/41.) But as this Court's review is de novo, what authority the trial court cited is irrelevant. In any event, *Reid* and *Ayala* are indistinguishable for multiple reasons:

- *Metropolitan Water Dist., supra*, 32 Cal.4th at p. 500, cited *Reid* with approval for the common-law "employee" definition. So it is "the law." *Ayala* nowhere suggests otherwise.

- *Vernon v. State, supra*, 116 Cal.App.4th at pp. 124-125 employs *Reid*'s formulation in analyzing a plaintiff's FEHA employment discrimination claims, noting that the tests "have 'little discernible difference' between them."

- Both *Reid* and *Ayala* adopt the same Restatement factors. (*Reid, supra*, 490 U.S. at pp. 751-752; *Ayala, supra*, 59 Cal.4th at p. 532; Rest.2d Agency, § 220(2), pp. 485-486.)

- The Ninth Circuit followed *Reid* for Title VII cases. (*Murray, supra*, 613 F.3d at p. 945.) Our Supreme Court uses Title VII cases to interpret employment law. (*Reno v. Baird* (1998) 18 Cal.4th 640, 647.)

In short, *Reid* properly states the common-law test employed in California, including in *Ayala*. In any event, the question is whether, on de novo review, Smith was an independent contractor. As set forth in section II, above, he was.

### 5. The summary judgment motions and summary adjudication order were procedurally proper and nonprejudicial.

Smith's remaining procedural arguments fail:

*FGI's Separate Statement.* The opening brief argues that FGI's separate statement should be stricken. (AOB/26.) At no time did Smith move to strike it. In any event, FGI's separate statement complied with Code Civ. Proc., § 437c, subd. (b)(1), setting forth plainly and concisely all material undisputed facts and referencing the supporting evidence. (See 5AA/936–6AA/1234.)

*FGI's Declarations*. The opening brief attacks FGI's declarations as "self-serving." (AOB/28.) "[D]eclarations may well be self-serving, 'but where (as here) [they are] uncontradicted, case law establishes that such a showing can provide the basis for summary judgment.'" (*Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 636, alterations in original.)

*The Trial Court's Summary Adjudication Order*. The opening brief criticizes the trial court for purportedly: (1) not considering any of Smith's evidence submitted in opposition to Farmers' motions, (2) improperly weighing the evidence on summary judgment, and (3) not viewing the evidence in the light most favorable to Smith. (AOB/42-43.)

On appeal, the trial court's reasons for summary adjudication are irrelevant as review is de novo. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) In any event, the trial court *did* consider all of the evidence: Its order states that it considered the various relevant factors and

"all the facts and circumstances together under California and U.S. law." (32AA/6818; see AOB/44.) There is no evidence, no record that the court did not do what it said it did. It was only required to "examine the opposing *evidence* rather than the opposing party's characterization of that evidence in his or her opposing statement of undisputed and disputed material facts." (*Arnold*, *supra*, 202 Cal.App.4th at p. 588, original italics, citing Code Civ. Proc., § 437c, subd. (c).)

The court properly relied on *undisputed* facts and evidence in determining, as a matter of law, that Smith was an independent contractor. This ruling must be affirmed.

### C. The Trial Court Properly Awarded Costs.

Finally, the court did not abuse its discretion in ordering Smith to pay $1,500—roughly 3% of the total costs owed for the multiple judicial referees. (34AA/7184.) Farmers had agreed to advance 100% of the cost for the first two referees and it was ordered it to pay 50% of the cost for the third referee. (34AA/7180-7184.) The court followed the parties' agreements and its previous order to the letter, reducing the costs so that Smith would only be responsible for 50% of the third referee's charges. (*Ibid*.) The court acted well within its discretion.

## V. SMITH'S ALTER-EGO, AIDING AND ABETTING, AND UNDISCLOSED PRINCIPAL THEORIES ARE MOOT AND MERITLESS.

Smith argued several different related, but distinct, theories at trial attempting to attach liability to FGI. None suffices.

### A. Smith's Alter-Ego Allegations Are Moot.

The trial court concluded that Smith's alter-ego allegations were moot because the claims upon which alter-ego liability was premised were summarily adjudicated in Farmers' favor. (32AA/6821, 6828.) Smith does not dispute that if the summary adjudications are affirmed, his alter-ego claims against FGI are moot.

### B. FGI Is Not The Companies' Alter Ego.

Alter ego requires all of a unity of interest, a misuse of a corporate form *and* an inequitable result. (E.g., *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285; *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417-418.) The undisputed evidence here is that there is *not* common ownership. (7AA/1401, 1405, 1409-1416.) FGI and its subsidiaries are attorneys-in-fact for various exchanges which, in turn, own others of the Companies. But FGI holds no ownership interest. And there is no evidence of injustice. The Companies are worth *billions* of dollars. (7AA/1388-1416.) They are fully capable of responding to any judgment that Smith might have obtained. (See *Leek*, at pp. 415-419 [on summary judgment motion plaintiff could not amend to claim alter ego without evidence of unjust result]; *Tomaselli*, at pp. 1285-1286 [reversing punitive damage award premised on parent company's financial statements because evidence of shared offices, shared employees and consolidated financial statements were insufficient to show alter ego].)

Smith's showing in response? Nothing relevant.

According to the opening brief, Farmers has "lost the opportunity to address or contest" Smith's alter-ego and single-enterprise allegations on appeal because it did not challenge the court's mootness ruling. (AOB/18, fn. 1.) That's absurd.

There was no adverse ruling for Farmers to challenge. It was not aggrieved by the judgment. Were this Court to reverse the summary adjudication rulings favoring the Companies, the judgment favoring FGI would still need to be affirmed as to alter ego, an alternative ground supporting the existing judgment in FGI's favor.

### C. Smith's Aiding And Abetting Claim Has No Merit Without An Underlying Tort.

The trial court's summary adjudication rulings also left nothing for Farmers to have aided and abetted, so the court's decision to summarily adjudicate Smith's aiding and abetting claim was correct. There can be no aiding and abetting liability absent the commission of an underlying tort. (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343, fn. 7.) Even if Farmers didn't specifically mention the aiding and abetting claim in its summary judgment motion (AOB/55-57), this Court can properly decide the legal issue de novo as to whether the claim is meritless.

### D. Smith's Undisclosed Principal Argument Has No Merit.

The opening brief also criticizes the trial court for purportedly failing to consider Smith's "undisclosed principal" argument. (AOB/54.) Wrong. The court specifically referenced the argument and explained why it doesn't apply. (32AA/6821.)

In any event, Smith's argument fails on the merits. His operative complaint admits that FGI was acting as an agent for the Companies, which FGI does not dispute. (1AA/72.) Farmers' agency status was disclosed. And an agent who signs a contract on behalf of a disclosed principal is not personally liable under that contract. The contract binds the principal, not the agent. (*Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382.)

Smith's attempts to attach liability to FGI have no merit. The trial court's rulings must be affirmed.

## CONCLUSION

Smith ran his own business. He made his own hours. He was paid handsomely for *results*, not hours expended. His contract accurately described him as an independent contractor—a status he did not contest for 35 years. Accordingly, summary adjudication was proper on the employment-related claims. Smith's contract prohibited oral modifications. The express no-cause termination provision therefore controls. His procedural, discovery and evidentiary claims are meritless.

Judgment should be affirmed.

Date: January 11, 2017

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Robert A. Olson
Gary J. Wax

By _____
Gary J. Wax

Attorneys for Defendants and Respondents Farmers Group, Inc., Farmers Insurance Exchange, Fire Insurance Exchange, Truck Insurance Exchange, Mid-Century Insurance Company, Farmers New World Life Insurance Company

## CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENTS' BRIEF** contains **13,636** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 11, 2017

Gary J. Wax

## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 11, 2017, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the parties in this action by serving:

Nancy Beth Anfanger
The Anfanger Law Firm
433 North Camden Drive, 6th Flr.
Beverly Hills, California 90210

**[Attorney for Plaintiff and Appellant, GLENN SMITH]**

Hon. Dalila C. Lyons
Department: 20
Los Angeles Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, California 90012

CALIFORNIA SUPREME COURT
**[Electronic Service under Rule 8.212(c)(2)]**

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on January 11, 2017, at Los Angeles, California.

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

Leslie Barela

Leslie Y. Barela