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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

IRMA GARCIA et al., Plaintiffs and Respondents, v. ACS ENTERPRISES, INC., Defendant and Appellant.	B268814 (Los Angeles County Super. Ct. No. BC567072)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Law Offices of Santiago & Jones, David G. Jones and Alex Vo for Defendant and Appellant.

Law Offices of Stephen Glick, Stephen Glick and M. Anthony Jenkins for Plaintiffs and Respondents.

Plaintiffs Irma Garcia (Garcia), Hipolito Garcia, Christopher Mata,[1] and Maria Erminia Alvarez filed this case as a class action against ACS Enterprises, Inc. (ACS), alleging that ACS as their employer committed violations of the Labor Code and California's unfair competition law. ACS filed a motion to compel arbitration pursuant to an arbitration clause in its subcontract with nonparty Fast & Neat Cleaning Service (Fast & Neat), which ACS asserted was the plaintiffs' true employer. The trial court denied the motion on the basis the plaintiffs were not signatories to the subcontract.

On appeal ACS contends the plaintiffs are bound by the subcontract's arbitration clause as the employees of Fast & Neat or, as to Garcia, as its agent, relying on theories of third party beneficiary, agency, and equitable estoppel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pleadings*

Plaintiffs filed their class action complaint on December 17, 2014. In their first amended class action complaint plaintiffs alleged causes of action for failure to pay minimum wage for all hours worked, failure to pay overtime compensation, failure to pay all wages owed following separation from employment, failure to provide off-duty meal and rest periods, failure to furnish timely and accurate wage statements, and unfair and unlawful business practices. Plaintiffs alleged that ACS, which

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[1] Because Hipolito Garcia and Christopher Mata share a last name with other family members involved in this case, we refer to them by their first name to avoid confusion.

provides janitorial services for movie theaters, employed the class members to do the janitorial work, but used Fast & Neat as "a straw man in an attempt to shield itself from liability for wage and hour violations under California law."

ACS filed an answer denying the allegations of the complaint and asserting numerous affirmative defenses, including in its 27th affirmative defense that the plaintiffs were not employed by ACS. ACS also filed a cross-complaint against Fast & Neat[2] for express and implied indemnification, breach of contract, equitable indemnity, and declaratory relief. ACS alleged it did not directly provide janitorial services, and instead entered into subcontracts with independently owned companies, including Fast & Neat, whose employees performed the janitorial services for the movie theaters. ACS alleged it did not employ the janitorial employees; instead, the subcontractors were responsible for the hiring and firing, supervision, work hours, and payment of wages of the employees.

B. *ACS's Motion To Compel Arbitration*

On July 7, 2015 ACS filed a motion to compel arbitration based on an arbitration clause in its subcontract with Fast & Neat (the subcontract). ACS argued that plaintiffs should be bound by the arbitration clause even though they were not signatories to the subcontract based on principles of equitable estoppel and agency, as well as asserted benefits the plaintiffs derived from the subcontract. In support of its motion, ACS filed

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[2] The cross-complaint also names Caritina Diaz, doing business as Kary Janitorial Maintenance, as a cross-defendant. However, she is not a party to this appeal.

a declaration of Raul Alvarado, the owner of ACS, and a copy of the subcontract.

In their opposition, the plaintiffs asserted they worked for ACS, not Fast & Neat, were not involved in the negotiation of the subcontract, and did not benefit from the subcontract. Plaintiffs filed a declaration from Garcia in support of their opposition.

On August 28, 2015 the trial court held an evidentiary hearing to resolve factual disputes raised by the parties' declarations. ACS called as witnesses Alvarado and ACS employees Anthony Michaels and Jose Nunez. Plaintiffs called as witnesses Garcia, Hipolito, and Fast & Neat's owner Leslie Mata (Mata). The parties introduced exhibits admitted at the hearing, including prior deposition testimony from Garcia and Hipolito, emails among the parties, ACS payment records, and Fast & Neat's corporate records.

1. *The Fast & Neat Subcontract*

The subcontract provides that Fast & Neat "shall be acting as an independent contractor," and that Fast & Neat will have "day to day control of the means, methods and manner of performing the [janitorial s]ervices, including the time and sequence of such work." The subcontract specifies the janitorial services Fast & Neat was to provide, the theater locations where Fast & Neat would provide these services, and the payments ACS would make to Fast & Neat for services at each location.

The subcontract states that ACS was not responsible for paying Fast & Neat's employees, and that Fast & Neat's employees would not be entitled to any employment rights or benefits from ACS. Further, the subcontract states that Fast & Neat would be responsible for complying with applicable labor

and employment laws. Fast & Neat agreed to indemnify ACS "against all claims or actions, including . . . claims of wage and hour violations or any other claims brought by employees" of Fast & Neat arising out of the janitorial services to be provided.

The arbitration clause in Article 14 of the subcontract provides that other than actions to enforce specified contract terms, including those relating to confidentiality and ACS's business relationships with its customers, "[a]ny . . . claim, controversy or dispute arising out of or relating to Services rendered pursuant to this Agreement . . . , or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, or any resulting transaction, shall be exclusively resolved by binding arbitration . . . ."

The subcontract is signed by Mata on behalf of Fast & Neat and Alvarado, as the "Owner/Secretary" of ACS, with an effective date of January 1, 2011.[3]

2. *The Written Evidence and Testimony at the Evidentiary Hearing*

According to Alvarado, ACS does not directly provide janitorial services. Instead, ACS "subcontracts the janitorial work to wholly independent subcontractors," who perform the janitorial work for the theaters. The subcontractors are responsible for hiring, firing, supervising, and paying their employees.

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[3] Although the subcontract has an effective date of January 1, 2011, it was signed by Mata on January 10, 2011.

Fast & Neat is a corporation owned by Mata and Ciro Lopez, who are also officers of the company.[4] Garcia is Mata's mother; Hipolito and Christopher are Garcia's adult sons and Mata's brothers. According to Alvarado, Alvarez is related in some manner to the plaintiffs, although he did not know the exact relationship.

According to Alvarado, Garcia was the agent of Fast & Neat, and "was present and participated in negotiating the terms of the [subcontract], in concert with her daughter, Leslie Mata." Alvarado testified at the hearing about the meeting to finalize the subcontract. He stated that Mata, Garcia, and Lopez were present on behalf of Fast & Neat. Mata and Garcia reviewed the subcontract together, and they discussed the scope of work under the contract. Garcia discussed her concerns, including whether the janitors had to mop and vacuum the theaters on a daily basis instead of just using a leaf blower to clean up at the end of the evening. Garcia also raised concerns over pricing for specific locations. Garcia told Alvarado she would "be right by her daughter's side," and would take care of anything that needed to be done that Mata could not do. Garcia indicated Mata would handle the business side and be the lead contact with ACS; Garcia would oversee the day-to-day operations in the field with the janitorial staff.

Alvarado testified ACS paid Fast & Neat by check or direct deposit, not cash. Two exhibits admitted into evidence reflected these payments. Alvarado believed Mata and Garcia shared the responsibility for paying Fast & Neat's employees. Garcia exercised control over Fast & Neat's daily operations and was

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[4] Fast & Neat is currently suspended as a corporation.

responsible for hiring and firing employees. On occasion, Garcia contacted ACS regarding payments to Fast & Neat. Alvarado recalled one time when Mata had not been paid so Garcia wanted to know if ACS had made its payments to Fast & Neat. On another occasion Garcia inquired about ACS's payments when she learned Mata had not paid a staff member.

After issues arose with Fast & Neat's performance, ACS began reducing the number of theaters Fast & Neat serviced. When Garcia learned the subcontract might be terminated, she called Alvarado and told him "that she was going to come after [him]." In October of 2013 ACS terminated Fast & Neat's contract.

Garcia stated in her declaration that she was not present during, and did not participate in, any of the negotiations between ACS and Fast & Neat. Garcia had no control over Fast & Neat's daily operations and was not in charge of hiring and firing. Rather, she simply worked as a janitor and supervised janitorial work for ACS at a Culver City theater, making sure the theater was properly cleaned and maintained. On many occasions, representatives from ACS, including Alvarado, "gave [her] sealed envelopes containing the wages of janitors, including [herself], in cash." Garcia denied ever threatening Alvarado that she would come after him.

Garcia stated in her declaration that she worked as a janitor for ACS since 2005, before Fast & Neat was formed. She stated, "I was told I was an employee of ACS Enterprises by their employees/agents and they controlled the method and manner of my job duties as well as payment of my wages. After formation of Fast & Neat, there were no material changes as to this." Garcia testified at her deposition taken in 2014 in a workers'

compensation action that ACS paid her and all its janitorial workers with cash. It was Alvarado who told her where to work and what her responsibilities were, and she called him if there were any problems at work.

Garcia testified at the evidentiary hearing that Alvarado initially approached her about her daughter becoming the owner of the company that would do the janitorial work. At his request, Garcia brought Mata to Alvarado's office, then Garcia left. Lopez, who had worked in theaters as a janitor like Garcia, was also at the meeting. Garcia was not aware of the terms of the agreement reached between Alvarado and Mata.

Mata testified that Alvarado ordered her to start a company with Lopez. Lopez helped her to incorporate Fast & Neat, and was a co-owner and one of its officers. They both received a salary from Fast & Neat. Garcia came with her to the initial meeting with Alvarado, but she never helped Mata run the company. Mata believed she worked for ACS because Alvarado "paid me. He was my boss. I . . . had to be responsible and account for my work to him."

Mata acknowledged she was an owner of Fast & Neat on paper, but repeatedly stated she "[didn't] have a company," and that she "worked for ACS all the time." She testified Fast & Neat received biweekly payments by check and electronic transfer. However, she did not pay Garcia or Hipolito. Instead, she used the money in the Fast & Neat account to pay the other workers from ACS. She did not know how Garcia or Hipolito were paid.

Hipolito testified at his deposition taken in a workers' compensation action that he worked for Alvarado's company, but he could not remember the name of the company, although he thought it was called Fast & Cleaning. He knew it was not ACS.

He started working for Alvarado in December 2010. According to Hipolito, he was aware of Alvarado "[b]ecause he gave [Mata] some movie theaters to clean," and Mata in turn gave Hipolito work. Mata paid Hipolito in cash for his work. Hipolito's understanding was that Mata paid him from her account into which Alvarado deposited money. Mata paid the person in charge of the movie theater where Hipolito was working, then that person would hand Hipolito and the other employees envelopes with their pay.

When asked why he filed a workers' compensation claim with ACS, Hipolito responded, "Because the only thing that I know is [Alvarado] as the owner. So from there, I investigated what the name of the company was, and it turned out that that was the company, but I, in reality, did not know what that company was." He believed Alvarado was the owner of ACS; he also believed Alvarado was the owner of Fast & Cleaning.

C. *The Trial Court's Ruling*

In denying the motion to compel arbitration, the trial court stated that in general, "in order to be bound by an arbitration agreement, a party must have signed that agreement." The court noted that ACS presented no evidence that any of the named plaintiffs signed the subcontract containing the arbitration clause.

However, the court noted that "[e]xceptions are made to the 'non-signatory' rule in limited circumstances, such as where a non-signatory is a third party beneficiary of the agreement, or where there is a preexisting relationship between a signatory and a non-signatory such that equity compels the third party to be bound." ACS had argued the plaintiffs knowingly exploited and

benefitted from the agreement and were agents of Fast & Neat. The court concluded neither exception applied to the case.

The court explained that while the subcontract served as the vehicle by which the plaintiffs were able to work and get paid, "ACS presented no real proof that [p]laintiffs themselves knowingly exploited the agreement." The court also found ACS did not prove its theory of collusion among Fast & Neat, Mata, and Garcia, or that Garcia was bound as an agent, stating, "Even the evidence showing that . . . Garcia was present for the signing of the [sub]contract and helped . . . Mata run Fast & Neat does not make her an agent of Fast & Neat in order to bind her to an arbitration agreement she never signed. And while the [c]ourt recognizes that there may be room in the law for a 'collusion' exception to the non-signatory rule, ACS simply failed to meet its burden of establishing that such an exception should apply here."

DISCUSSION

A. *Standard of Review*

"'"If the court's order [denying a motion to compel arbitration] is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed."' [Citation.] In the absence of conflicting extrinsic evidence, "'[w]hether and to what extent [nonsignatories] can also enforce the arbitration clause is a question of law, which we review de novo."' [Citation.]" (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 300 (*Jensen*); accord, *Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 8 ["'We review the trial court's

interpretation of an arbitration agreement de novo when, as here, that interpretation does not depend on conflicting extrinsic evidence. . . . Our de novo review includes the legal determination whether and to what extent nonsignatories to an arbitration agreement can enforce the arbitration clause'"]; *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352 (*DMS Services*) [same].)

"'[T]o the extent there are material facts in dispute, we accept the trial court's resolution of disputed facts when supported by substantial evidence; we presume the court found every fact and drew every permissible inference necessary to support its judgment. [Citation.]' [Citation.]" (*Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 629, 630 [concluding substantial evidence supported trial court's finding that arbitration agreement was one-sided, objectively unreasonable, and lacked mutuality]; accord, *Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031, 1033 [affirming trial court's order denying petition to compel arbitration, presuming the trial court disbelieved the testimony that the moving defendant had continued to arbitrate claims before the specified forum in the arbitration agreement even after he went out of business].) For purposes of our review, we "defer to [the trial court's] determinations regarding the credibility of witnesses and the weight of the evidence." (*Provencio*, *supra*, at p. 1031; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

There is substantial evidence to support the trial court's findings that Garcia was present for the signing of the subcontract, Garcia helped Mata run Fast & Neat, and the plaintiffs were employees of and paid by Fast & Neat. It is

undisputed that the plaintiffs did not sign the subcontract. We independently review whether on these facts the plaintiffs were bound by the arbitration clause in the subcontract they did not sign. (*Jensen*, *supra*, 18 Cal.App.5th at p. 300; *Jenks v. DLA Piper Rudnick Gray Cary US LLP*, *supra*, 243 Cal.App.4th at p. 8.)

B. *The Trial Court Did Not Err in Denying ACS's Motion To Compel the Nonsignatory Plaintiffs To Arbitrate Their Claims*

There is a strong public policy in favor of arbitration. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 [acknowledging strong public policy favoring arbitration under state and federal law]; accord, *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843 ["California has a strong public policy in favor of arbitration as an expeditious and cost-effective way of resolving disputes"]; *DMS Services*, *supra*, 205 Cal.App.4th at p. 1352 [recognizing strong state and federal policy favoring arbitration].)

However, "'[e]ven the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement.' [Citation.]" (*Jensen*, *supra*, 18 Cal.App.5th at p. 300; accord, *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787 ["There is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate"]; *DMS Services*, *supra*, 205 Cal.App.4th at p. 1352 [with limited exceptions, """one must be a party to an arbitration agreement to be bound by it or invoke it"""]; *Westra v. Marcus & Millichap Real*

Estate Investment Brokerage Co., Inc. (2005) 129 Cal.App.4th 759, 763 [“‘“The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration”’”].)

California courts have applied six theories under which nonsignatories may be bound to arbitrate a dispute, including “‘“(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary.”’ [Citations.]” (*Jensen*, *supra*, 18 Cal.App.5th at pp. 300-301; accord, *DMS Services, supra*, 205 Cal.App.4th at p. 1353; *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513 (*Suh*).)

The exceptions to the general rule that nonsignatories are not bound to arbitrate their disputes have alternatively been described as falling into two categories: “‘In some cases, a nonsignatory was required to arbitrate a claim because a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third party beneficiary of the arbitration agreement. In other cases, the nonsignatory was bound to arbitrate the dispute because a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim.’ [Citation.]” (*Jensen*, *supra*, 18 Cal.App.5th at p. 301, quoting *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, (1996) 47 Cal.App.4th 237, 242; accord, *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1070.)

The court in *Crowley* provided as examples of a preexisting relationship, “agency, spousal relationship, parent-child

relationship and the relationship of a general partner to a limited partnership." (*Crowley v. Maritime Corp. v. Boston Old Colony Ins. Co.*, *supra*, 158 Cal.App.4th at p. 1070.) The court in *Crowley* also considered whether the plaintiff was bound under principles of equitable estoppel. (*Ibid*.) "Under this principle, a nonsignatory 'is estopped from avoiding arbitration if it knowingly seeks the benefits of the contract containing the arbitration clause. [Citations.]' [Citations.]" (*Ibid*.) ACS contends three of these theories apply here—third party beneficiary, agency, and equitable estoppel.[5]

1. *Third-Party Beneficiary*

"'A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his [or her] benefit.' [Citation.] ""The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract."" [Citation.]" (*Jensen*, *supra*, 18 Cal.App.5th at p. 301;

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[5] ACS bases its argument that the plaintiffs should be bound by the arbitration agreement on the plaintiffs' "preexisting relationship" with signatory Fast & Neat, as its employees. However, the cases relied on by ACS to expand the preexisting relationship exception to include an employer-employee relationship analyze the facts under the rubric of whether the employee is a third party beneficiary of the contract containing the arbitration agreement. (See, e.g., *Harris v. Superior Court* (1986) 188 Cal.App.3d 475 (*Harris*) and *Letizia v. Prudential Bache Securities, Inc.* (9th Cir. 1986) 802 F.2d 1185 (*Letizia*). We therefore separately analyze the third party beneficiary and agency exceptions to the general rule that nonsignatories cannot be bound to an arbitration agreement.

accord, *Suh*, *supra*, 181 Cal.App.4th at p. 1513 [doctors could not be compelled to arbitrate because "[t]here [was] no evidence . . . that plaintiffs actually derived any benefits [from the agreement] either as third party beneficiaries or otherwise"]; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc., supra*, 47 Cal.App.4th at p. 246 [health care providers had no right to compel nonsignatories to arbitrate claims related to traffic accident where nonsignatories did not benefit from agreement between the plaintiff and the health care providers]; cf. *Harris*, *supra*, 188 Cal.App.3d at p. 478 [nonsignatory doctor who was the beneficiary of a hospital arbitration clause was required to arbitrate claims brought by the signatory plaintiffs].)

In *Jensen*, plaintiff Virgil Jensen was an employee of a company that rented a truck from defendant U-Haul for him to use to transport the employer's equipment. Jensen was injured while driving the truck, and filed a lawsuit for negligence against U-Haul. The company's owner and chief executive officer had signed an arbitration agreement stating that the company and U-Haul agreed to arbitrate all claims arising from the rental agreement, and that the agreement was binding on the parties' "'agents, employees . . . [and] all authorized or unauthorized users of the U-Haul equipment . . . .'" (*Jensen*, *supra*, 18 Cal.App.5th at p. 299.)

The Fourth District affirmed the trial court's denial of U-Haul's motion to compel arbitration, rejecting U-Haul's argument that Jensen could be bound by the arbitration agreement as a nonsignatory on the alternative theories of third party beneficiary, agency, or equitable estoppel. (*Jensen*, *supra*, 18 Cal.App.5th at p. 301.) As to the third party beneficiary exception, the court concluded there was nothing in the contract

between the employer and U-Haul that showed an "express intent to benefit a third party," including either Jensen specifically or the company's employees generally. (*Id.* at pp. 301-302.) The court noted that Jensen drove the U-Haul truck not for his own benefit, but for the benefit of the company. Further, even if Jensen received a benefit, "it is well established that the 'mere fact that a contract results in benefits to a third party does not render that party a "third party beneficiary."' [Citation.] Rather, the terms of the contract must demonstrate the express intent to confer the benefit." (*Id.* at p. 302.) The court concluded the rental agreement did not do so. (*Ibid.*; see also *Suh*, *supra*, 181 Cal.App.4th at pp. 1507, 1513-1514 [hospital and medical group defendants could not compel nonsignatory doctors to arbitrate their claims because at the time the arbitration agreement was signed, the doctors were no longer receiving work at the hospital].)

ACS argues the plaintiffs benefitted from ACS's subcontract with Fast & Neat because but for the subcontract, they would not have earned wages for their janitorial work for ACS. However, this benefit is no different than the benefit the plaintiff in *Jensen* derived from driving the truck rented by his employer. As in *Jensen*, the subcontract does not in any way "demonstrate the express intent to confer the benefit." (*Jensen*, *supra*, 18 Cal.App.5th at p. 302.) To the contrary, the subcontract specifically stated it was not intended to confer any employment benefits on Fast & Neat's employees; instead, Fast & Neat was responsible for its employees' wages and benefits, and had the obligation to comply with the labor and employment laws. The fact that the plaintiffs earned wages because Fast & Neat contracted with ACS does not make the plaintiffs third

party beneficiaries. Indeed, under ACS's theory, the plaintiffs would be forced to arbitrate claims against any company with whom Fast & Neat contracted for work where it signed an arbitration agreement. Further, as to Garcia, the undisputed evidence was that she was employed as a janitor for ACS before Fast & Neat was formed.

ACS seeks to expand the categories of preexisting relationships that are sufficient to bind a nonsignatory to include employees of a signatory, relying on the holdings in *Harris*, *supra*, 188 Cal.App.3d 475 and *Letizia*, *supra*, 802 F.2d 1185. ACS contends Garcia, Hipolito, and Christopher were employees of Fast & Neat because Mata, as the owner of Fast & Neat, paid their wages.[6] However, even assuming Garcia, Hipolito, and Christopher were employees of Fast & Neat, the courts have made clear that an employment relationship with a signatory to an arbitration agreement is not sufficient alone to bind the nonsignatory to the agreement. As the court in *Jensen* concluded, "the mere fact that parties are employees of a corporation 'does not mean they were bound' by an arbitration clause in an agreement between the corporation and a third party." (*Jensen*, *supra*, 18 Cal.App.5th at p. 303; see also *Suh*, *supra*, 181 Cal.App.4th at p. 1514 ["That they were employees of [the signatory corporation] does not mean they were bound by the arbitration clause in an agreement between [the signatories]"].)

The holdings in *Harris* and *Letizia* are not to the contrary. In *Harris*, a mother and daughter filed a medical malpractice case against a doctor, a hospital, and a health care plan covering

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[6] ACS does not assert any arguments as to Alvarez, nor did ACS introduce any evidence relating to her employment.

the plaintiffs through the father's employment. The father signed a health care plan enrollment agreement with a clause requiring enrollees to arbitrate any claim against the health care plan, as well as the hospitals and doctors with whom the hospital contracted. (*Harris*, *supra*, 188 Cal.App.3d at p. 477.) The trial court granted the hospital's motion to compel arbitration, and the health care plan submitted to arbitration; the doctor refused. (*Ibid*.) The plaintiffs moved to compel the nonsignatory doctor to arbitrate their claims, which motion the trial court denied. (*Id*. at p. 477.) The Court of Appeal reversed, concluding the doctor could be compelled to arbitrate despite the fact he was a nonsignatory to the arbitration agreement. (*Id*. at p. 478.)

The court observed, "It is well established that a nonsignatory beneficiary of an arbitration clause is entitled to require arbitration. [Citations.] Whether a nonsignatory beneficiary can be forced to arbitrate is a closer question. Under the facts of this case, however, we have no difficulty in concluding [the doctor] was bound by the arbitration clause." (*Harris*, *supra*, 188 Cal.App.3d at p. 478.) The court noted that the doctor was subject to the hospital's obligations under the arbitration agreement just as the plaintiffs were bound by the father's agreement to arbitrate their claims against the hospital and the doctor. (*Id*. at p. 479.) The court concluded, "A third party beneficiary of a contract can gain no greater rights under that contract than the contracting parties. [Citation.]" (*Ibid*.)

Finally, "the voluntary acceptance of the benefit of a transaction constitutes consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (*Harris*, *supra*, 188 Cal.App.3d at p. 479.) Thus, because the doctor obtained his patients through their

enrollment in the health care plan, his acceptance of this benefit "necessarily entailed acceptance of the agreement that members' claims would be subject to binding arbitration." (*Ibid*.)

In *Letizia*, the plaintiff opened an account with a brokerage firm and signed the firm's customer agreement, which contained an agreement to arbitrate any dispute relating to his account. He later filed a lawsuit against the brokerage firm and two of its employees, alleging fraud and violation of securities laws. (*Letizia*, *supra*, 802 F.2d at p. 1186.) The brokerage firm and its employees, who had not signed the arbitration agreement, moved to compel arbitration against the signatory plaintiff, which the trial court denied. (*Id*. at pp. 1186-1187.)

The Ninth Circuit reversed, noting that under federal law courts have consistently "held the brokerage firm employees bound by the arbitration agreement." (*Letizia*, *supra*, 802 F.2d at p. 1188.) Further, in the case before it, "[a]ll of the [employees'] allegedly wrongful acts related to their handling of [the plaintiff's] securities account. [The brokerage firm] has clearly indicated its intention to protect its employees through its Customer Agreement. We conclude that the arbitration clause is applicable to [the employees]." (*Ibid*.)

Here, in contrast to the doctor in *Harris*, there would have been no basis for the plaintiffs to force ACS to arbitrate their claims. Further, the doctor in *Harris* benefitted by treating the patients enrolled through the enrollment agreement; here, the plaintiffs were paid by Fast & Neat, but only benefitted to the extent Fast & Neat obtained additional clients through ACS. As we discuss above, this benefit is insufficient to bind the

plaintiffs.[7] The Ninth Circuit's holding in *Letizia* is similarly distinguishable in that the arbitration agreement between the plaintiff and the brokerage firm was intended to protect the brokerage firm's employees, and thus the firm's employees were bound by the agreement. Accordingly, it was fair to allow the nonsignatory employees to compel the signatory plaintiff to arbitrate his claims, which were based on the employees' alleged misconduct. The subcontract here was in no way intended to protect the plaintiffs.

2. *Agency Relationship*

ACS contends Garcia is bound by the subcontract's arbitration provision because she acted as an agent for Fast & Neat by negotiating the terms of its subcontract with ACS, serving as a contact for Fast & Neat, supervising other janitors for Fast & Neat, and paying wages to Fast & Neat's employees.[8]

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[7] The courts in *Jensen* and *Suh* distinguished the holding in *Harris*. As the *Jensen* court explained, "In *Harris*, the doctor at issue was not only an employee of the corporation that entered into the arbitration agreement, but also a third party beneficiary of that agreement." (*Jensen*, *supra*, 18 Cal.App.5th at p. 303, citing *Harris*, *supra*, 188 Cal.App.3d at p. 479; see also *Suh*, *supra*, 181 Cal.App.4th at p. 1514 [distinguishing *Harris* as a case where the nonsignatory doctor "had treated the plaintiff patient and thus voluntarily had accepted the benefits under the [arbitration] contract"].)

[8] Because we assume Garcia was an agent of Fast & Neat for purposes of our analysis, we do not reach whether Garcia was a supervisor for Fast & Neat, as argued by ACS, or merely an employee. We also do not reach ACS's argument that the trial court erroneously applied "a heightened managing agent

However, even if Garcia was an agent of Fast & Neat, this did not mean she was bound by Fast & Neat's assent to the subcontract.[9]

ACS relies on the line of cases holding "that a nonsignatory sued as an *agent* of a signatory may enforce an arbitration agreement." (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1284; accord, *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418 ["If, as the complaint alleges, the individual defendants, though not signatories, were acting as agents for the [defendant football team], then they are entitled to the benefit of the arbitration provisions"]; *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 788 ["The [agency] exception applies, and a defendant may enforce the arbitration agreement, 'when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement'"]; *DMS Services*, *supra*, 205 Cal.App.4th at p. 1353 ["These exceptions to the general rule that one must be a party to an arbitration agreement to invoke it or be bound by it 'generally are based on the existence of a relationship between the nonsignatory and the signatory, such as principal and agent or employer and employee,

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standard" in finding Fast & Neat did not bind Garcia to the subcontract as its agent.

[9] The trial court found, "Even the evidence showing that . . . Garcia was present for the signing of the contract and helped . . . Mata run Fast & Neat does not make her an agent of Fast & Neat in order to bind her to an arbitration agreement she never signed." We cannot tell from this finding whether the trial court concluded Garcia was not an agent of Fast & Neat for any purpose, or she was not an agent for the purpose of being bound by the subcontract's arbitration agreement. For purposes of our analysis, we assume Garcia was an agent of Fast & Neat for some purposes, but read the trial court's ruling as finding Garcia was not bound as an agent of Fast & Neat to the subcontract.

where a sufficient "identity of interest" exists between them'"]; *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.*, *supra*, 129 Cal.App.4th at p. 765 ["A nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory"]; *NORCAL Mutual Ins. Co. v. Newton*, *supra*, 84 Cal.App.4th at p. 76 ["The common thread of all the above cases is the existence of an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement"].)

Notably, in each of these cases a signatory to an arbitration agreement sought to compel a nonsignatory defendant to arbitrate as the agent of the defendant signatory. In *Garcia*, for example, the plaintiff jointly sued his employer and the staffing agency that placed him for Labor Code violations. (*Garcia v. Pexco, LLC*, *supra*, 11 Cal.App.5th at p. 784.) Although the plaintiff signed an arbitration agreement with the staffing agency, the court concluded the staffing agency and nonsignatory employer were "joint employers," and thus, because they were agents of each other, the employee had a right to enforce the arbitration agreement against the nonsignatory employer. (*Id.* at p. 788; see also *Dryer v. Los Angeles Rams*, *supra*, 40 Cal.3d at p. 418 [signatory plaintiff sued nonsignatory owners and agents of football team for breach of contract with football team]; *Rowe v. Exline*, *supra*,153 Cal.App.4th at p. 1284 [signatory plaintiff sued nonsignatory corporate directors, seeking to compel arbitration under agreement with corporation]; *Westra v. Marcus &*

Millichap Real Estate Investment Brokerage Co., Inc., *supra*, 129 Cal.App.4th at p. 766 [signatory plaintiff sued nonsignatory agent of seller of real estate for breach of contract]; *NORCAL Mutual Ins. Co. v. Newton*, *supra*, 84 Cal.App.4th at pp. 66-71 [plaintiff insurer sued nonsignatory wife of insured whom it defended under a reservation of rights]; *Letizia*, *supra*, 802 F.2d at p. 1188 [signatory plaintiffs sued nonsignatory brokerage firm employees].)

By contrast, we are presented with the different question of whether a nonsignatory plaintiff is bound by an arbitration contract signed by her employer where she negotiated the contract as an agent of the employer. She is not. ""The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. . . ."" [Citation.]" (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1171-1172.) To the extent Garcia was an agent of Fast & Neat, she could therefore bind Fast & Neat.

However, where an agent negotiates a contract on behalf of a disclosed principal, she does not become liable under the contract. (*Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1442; *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 929; see also *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, 480 ["the normal rule [is] that agents are not liable for the torts or breaches of contract of their principals," unless the acts are "'wrongful in their nature'"].)[10]

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10 The plaintiffs also rely on the district court's holding in *Legacy Wireless Services v. Human Capital, L.L.C.* (D.Or. 2004) 314 F.Supp.2d 1045, in which the court considered whether a

As the court in *Jensen* observed, "the proper inquiry is not only whether there is any sort of preexisting agency relationship with one of the signatories to the arbitration agreement—whether employer-employee, or another form of agency—but also whether that preexisting relationship is of such a nature that it supports a finding of 'implied authority for [one of the signatories] to bind [the nonsignatory] by their arbitration agreement.' [Citation.] It is critical to ask who is seeking to bind whom, and on what basis; the question of whether a principal's acts bind an agent is fundamentally different from the question of whether an agent's acts bind a principal." (*Jensen*, *supra*, 18 Cal.App.5th at p. 303.) The court added, "[e]very California case finding nonsignatories to be bound to arbitrate is based on facts that demonstrate, in one way or another, the signatory's implicit authority to act on behalf of the nonsignatory." (*Id.* at p. 304.)

The court concluded Jensen was in an agency relationship with his employer, but there was no evidence the employer "had implicit authority . . . to bind . . . Jensen to an arbitration agreement." (*Jensen*, *supra*, 18 Cal.App.5th at p. 304.) Here, as in *Jensen*, ACS presented no evidence that Fast & Neat as Garcia's employer and principal had the authority to bind Garcia.

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plaintiff who signed an agreement with an arbitration clause could compel a nonsignatory agent of a party to the agreement to arbitrate the plaintiffs' breach of contract claims. Although the court denied the nonsignatory's motion to dismiss, the court noted, "Under basic agency theory: 'Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.' [Citations.]" (*Id.* at p. 1054.)

3. *Equitable Estoppel*

ACS contends plaintiffs received a direct benefit from and "'knowingly exploit[ed]'" the subcontract, and therefore should be equitably estopped from refusing to comply with the arbitration clause in the subcontract. ACS contends the evidence established that Garcia requested payment from ACS for Fast & Neat's employees and paid wages from Fast & Neat to its employees. We accept these facts as true for purposes of our analysis, and independently review whether ACS can compel the plaintiffs to arbitrate under an equitable estoppel theory. (*Jensen*, *supra*, 18 Cal.App.5th at p. 300; *Jenks v. DLA Piper Rudnick Gray Cary US LLP*, *supra*, 243 Cal.App.4th at p. 8.) It cannot.

"A nonsignatory plaintiff may be estopped from refusing to arbitrate when he or she asserts claims that are 'dependent upon, or inextricably intertwined with' the underlying contractual obligations of the agreement containing the arbitration clause. [Citation.]" (*Jensen*, *supra*, 18 Cal.App.5th at p. 306; accord, *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1241 [nonsignatory plaintiffs could be compelled to arbitrate their claims against signatory and nonsignatory sellers of property pursuant to arbitration agreement to the extent each "claim is itself based on, or inextricably intertwined with, the contract containing the arbitration clause"]; cf. *Garcia v. Pexco*, *supra*, 11 Cal.App.5th at p. 786 [concluding nonsignatory defendant was required to arbitrate claims by signatory plaintiff, holding, "'a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claim when the causes of action against the nonsignatory are "intimately founded in and intertwined" with the underlying contract

obligations'"]; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 271 [same].)

As we held in *DMS Services,* "The reason for this equitable rule is plain: One should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract." (*DMS Services, supra*, 205 Cal.App.4th at p. 1354; see also *Jensen*, *supra*, 18 Cal.App.5th at p. 306 ["'The fundamental point' is that a party is 'not entitled to make use of [a contract containing an arbitration clause] as long as it worked to [his or] her advantage, then attempt to avoid its application in defining the forum in which [his or] her dispute . . . should be resolved'"]; *Boucher v. Alliance Title Co., Inc.*, *supra*, 127 Cal.App.4th at p. 272 [same].) However, "'[e]ven if a plaintiff's claims "touch matters" relating to the arbitration agreement, "the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action."' [Citation.]" (*Jensen*, *supra*, at p. 306.)

In *Jensen*, the court concluded Jensen and his wife asserted claims for negligence and loss of consortium that were not "in any way founded in or bound up with the terms or obligations of [the rental] agreement" between Jensen's employer and U-Haul. (*Jensen*, *supra*, 18 Cal.App.5th at p. 306; see also *DMS Services, supra*, 205 Cal.App.4th at p. 1349 [nonsignatory defendant could not compel signatory plaintiffs to arbitrate their claims because the claims were "not founded upon, or inextricably intertwined with, the insurance agreements containing the arbitration provision"]; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, *supra*, 158 Cal.App.4th at p. 1071 [cross-complainant signatories to insurance agreements with arbitration clauses

were not required to arbitrate equitable indemnity claims against nonsignatory insurance companies where the signatories were "not suing for direct benefits under the insurance contracts"].)

Here, the plaintiffs' claims for Labor Code violations are not in any manner founded in the subcontract. As we discuss above in the context of ACS's third party beneficiary argument, the subcontract makes clear ACS is not responsible for compliance with applicable labor and employment laws with respect to Fast & Neat's employees. Thus, having not derived any benefit from the subcontract, equity does not support compelling the plaintiffs to arbitrate their claims pursuant to the subcontract.[11]

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[11] ACS's reliance on *Legacy Wireless Services v. Human Capital, L.L.C.*, *supra*, 314 F.Supp.2d 1045, is similarly misplaced. *Legacy* involved a signatory plaintiff seeking to compel a nonsignatory defendant to arbitrate the plaintiff's claims. The district court denied the defendant's motion to dismiss the complaint, finding based on the pleadings the plaintiff "may" be able to prove that the nonsignatory received direct benefits from the contract on which the plaintiff sued and assisted the signatory in fulfilling its contractual obligations. (*Id.* at pp. 1056-1057.)

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

FEUER, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.