S218597

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

DKN HOLDINGS LLC,

Plaintiff and Appellant,

v.

WADE FAERBER,

Defendant and Respondent.

On Review from the Court Of Appeal for the Fourth Appellate District, Division Two, 4th Civil No. E055732, E056294

After An Appeal From the Superior Court For The State of California, County of Riverside, Case Number RIC1109512, Hon. John Vineyard

PETITIONER DKN HOLDINGS, LLC's REPLY TO ANSWER FILED BY WADE FAERBER

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Pursuant to California's Rule of Court 8.500(a) (3), Petitioner DKN Holdings, LLC ("DKN") respectfully submits this Reply to the Answer filed by Answering Party Wade Faerber ("Faerber").

I.

INTRODUCTION

Faerber's Answer pretends there is no elephant in the middle of the room. Faerber argues that there is "nothing new" in the Opinion, "no change of the law; no conflict with other appellate decisions; and no issues impacting any significant public policy." He contends that the Opinion involves "nothing more than the routine and proper application of existing law to the specific facts of this case. As a result, there is no basis to grant review and the Petition should be denied."

Faerber's contentions appear disingenuous. Regardless of which argument prevails, there is no question that the effect of the Opinion is to eviscerate the fundamental common law principle (the *General Rule*) that there is a material difference between merely "joint" liability, and "joint and several" liability. Ironically the Opinion does this which nonetheless acknowledging and conforming the *General Rule*.

There is also no question that the Opinion neuters any application of Corporations Code §16307(b), rendering meaningless and misleading the legislature's dictate that an action on a partnership obligation may be brought

against the partnership "and any or all of the partners in the same action *or in separate actions*" (Corp. Code §16307(b) (*italics added*).

The substantive conflict in published law on these important legal principles creates a very real need for an opinion from this court establishing uniformity of decision and settling the important question of whether or not the claim preclusion arm of *res judicata* effectively eliminates joint and several liability and any meaning of Corporations Code §16307(b).

Faerber's Answer relies primarily on the contention that the Opinion was correct in concluding that the claim preclusion arm of the doctrine of *res judicata* bars DKN's claim against Faerber. (The "*New Rule*") This argument suffers from a fatal flaw. In material contrast, the claim preclusion of *res judicata* presupposes that there is but a *single cause of action*, emanating from a *primary right*, which single cause of action cannot be a basis for more than a single lawsuit. By definition, the legal principle of joint and several liability cannot fall within this claim preclusion arm of *res judicata*. By definition, the principle of joint and several liability presupposes the right of a creditor to bring separate lawsuits against jointly and severally liable obligors on the same underlying obligation; *i.e.* a promissory note or a lease. By their very definitional terms, the scope of these separate doctrines cannot overlap. Contrary to the Opinion's conclusion, claim preclusion cannot apply to joint and several liability without eviscerating all substance from that principle

II.

REPLY

A. Having Endorsed the Trial Court Ruling that this Court was "Wrong" in *Williams 2*, the Opinion Plainly Conflicts with Controlling California Law

1. By Holding that Joint and Several Debtors cannot by Sued in Separate Lawsuits, the Opinion Creates a *New Rule* that There is no Material Difference Between Merely "Joint," and "Joint and Several" Liability.

Faerber argues that DKN "pins it Petition on an isolated sound-bite" cited in *Williams 2* from the published opinion in *Williams 1*. That alleged *sound-bite* includes the statement that, in the case of jointly and severally obligated defendants, "a judgment obtained against one is not a bar to an action against the remaining joint and several obligors. 'Nothing short of satisfaction in some form constitutes a bar . . . [A] mere judgment against [the first co-maker of a note] in a separate action against him upon the original note would not preclude [the creditor] from bringing subsequent actions against [the] co-makers.'" *Williams v. Reed* (1957) 48 Cal. 2d 57, 65 (*Williams 2*) citing *Williams v. Reed* (1952) 113 Cal.App. 2d 195 (*Williams 1*).

Faerber's contention that this clear statement of law by this Court constitutes nothing more than an immaterial *sound-bite* which is allegedly mischaracterized in DKN's Petition is simply incorrect. Even if it assumed

arguendo that is this language from *Williams 2 dictum*, because of the slight factual distinction that the first judgment against the initial co-obligor was based on a settlement agreement with respect to the note, rather than an action on the note itself, the *dictum* is plainly reflective of a black letter legal principle the longstanding *General* Rule from common law, upon which the Supreme Court was relying in reaching the *Williams 2* holding.

Indeed, *Williams 2* cited both *Grundel v. Union Ironworks* (1900) 127 Cal. 438, 442 and *Melander v. Western National Bank* (1913) 21 Cal.App. 462, as support for this black letter legal principle. As discussed in some detail in the Petition, the holdings in both *Grundel* and *Melander* stand precisely for the proposition which Faerber mischaracterizes as an out of context *sound-bite* from *Williams 2*. Each of these cases stands for the long standing *General Rule* at common law, presumably alive and well today, that joint and several obligors can be sued either jointly in a single action or severally in separate actions.

It is noteworthy that Faerber's Answer neglects to address either *Grundel* or *Melander*, or DKN's argument that the Opinion is in direct contradiction not only of the alleged *dictum* in *Williams 2*, but also of the holdings in *Grundel, Melander,* and *Williams 1*. It is further noteworthy that Faerber's answer does not address DKN's argument that the Opinion, though reaching a conclusion contrary to the holdings in *Grundel* and *Melander*, cites both of those cases for the *General Rule*, acknowledged as such in the

Opinion, enunciating the *New Rule* which effectively annihilates the *General Rule*.

Faerber cannot directly address these points because to do so would require recognizing the elephant in the middle of the room: The *New Rule* effectively eliminates the *General Rule* which the Opinion ironically acknowledges as the controlling general rule.

B. DKN Does not Suggest Disagreement with Witkin is Grounds for Reversing any Appellate Court Opinion

Farber contends that DKN "argues that the Court of Appeals' disagreement with Witkin is grounds for reversal." (Answer/11) DKN does not so contend.

DKN has cited the characterization of Witkin as "wrong" only because it is consistent with the *General Rule* reflected in *Williams 2*, *Williams 1*, *Grundel,* and *Melander*. While Witkin is not binding on any court, when a principle cited in Witkin is consistent with controlling law, and is held to be "wrong," the holding's disagreement with Witkin is at least instructive.

C. Faerber's Argument Does Not Rebut the Incontestable Fact that the Opinion Eliminates any Meaning in Corporations Code §16307(b)

Corporations Code §16307(b) clearly permits a creditor to pursue legal action against "any **or** all of the partners in the same action or **in separate actions.**" (Emphasis.) The Petition points out that the necessary import of the

New Rule enunciated in the Opinion is to add a caveat to §16307(b) which is plainly contrary to the clear intent of the statute. This caveat would need to reflect the *New Rule* that, if a creditor took advantage of suing partners in the expressly permitted "separate actions," then the first judgment obtained in any one of such "separate actions" would necessarily prohibit the continued pursuit of any separate action, or the initiation of any successive action.

Faerber does not substantively address this obvious disconnect between the clear intent of the statutory language and the effect of the *New Rule*. He simply states, as if it needs no citation to authority, that the "statute does not resurrect a claim already barred by *res judicata*." He neither rebuts nor attempts to rebut DKN's argument that, if a single judgment against one partner in a separate action bars any other separate or successive action against another partner, then §16307(b) is not only devoid of substantive import, it is actually a misleading trap for any plaintiff, and a malpractice trap for their legal representatives, who chooses to rely on the clear language of the statute.

Faerber contends that DKN "could not and did not allege the existence of a partnership debtor because it already alleged that Caputo, Faerber and Neel were individually liable on the lease." This is wrong for a few reasons. First, there is no incompatibility between the allegation that each individual is a lessee, while also being a "partner" with each of the other lessees. Second, there is absolutely no reason DKN could not have alleged the partnership relationship if it had been allowed to amend its Complaint. As was noted in

the Opinion, the trial court decision had referred to the three tenants as "partners."

D. *Res judicata* Does Not Eliminate the *General Rule* that Jointly and Severally Liable Co-Obligors May be Sued in Separate or Successive Lawsuits

Faerber argues that the Opinion correctly applied the claim preclusion arm of the *res judicata* doctrine to prohibit DKN's action against Faerber, notwithstanding the acknowledged *General Rule* expressly permitting separate actions against jointly and severally liable co-obligors. The principal flaw in this argument is that it ignores the elephant in the room. If the argument is correct, then the *General Rule*, which is recognized as such in the Opinion, is rendered both defunct and dangerously misleading. Faerber's Answer does not attempt to explain how the *General Rule* can be compatibly reconciled with the *New Rule*. DKN submits that there is no such explanation because the *New Rule* is completely incompatible with the *General Rule*.

None of the cases cited in Faerber's Answer support the *New Rule*. Not a single one of these cases apply the claim preclusion doctrine to separate or successive actions against either jointly and severally liable co-obligors, or against partners sued separately under Corporations Code §16307(b).

Indeed, if there was such a published holding extant, it would be faced with the insurmountable hurdle of reconciling the irreconcilable coexistence of the *New Rule* with the *General Rule*.

DKN will not address every case cited by Faerber for the claim preclusion argument, but will briefly address those upon which Faerber has placed his primary reliance. One common material distinction in every case cited by Faerber is that there is no joint and several liability issue, nor is there a partner-liability issue which would fall within §16307(b). *Mycogen Corp., v. Monsanto Corp.* (2002) 28 Cal. 4th 888, 897, stands for the proposition that *res judicata* is intended to preclude "piecemeal litigation by splitting a single cause of action or re-litigation of the same cause of action on a different legal theory for different relief." (Answer/3.) Neither the legal principle nor the facts of *Mycogen* are analogous here. *Mycogen* involved a plaintiff filing a second lawsuit against the same defendant after having succeeded against that defendant in a first action. There was also no different defendant in the second action as there is here.

Faerber next cites *Thibodeau v. Crum* (1992) 4 Cal. App 4th 749, 755 for the proposition that *res judicata* precludes a party plaintiff "by negligence or design" from withholding issues and litigating them against the same, or a derivatively liable co-obligor, in consecutive actions. (Answer/4.) [Plaintiff/homeowner, having arbitrated a claim against a General Contractor who was the prevailing party, [1] albeit having been found liable for some

[1] A material difference between *Thibodeau* and other *res judicata* cases which might arguably preclude a second suit, is the Plaintiff, unlike the prevailing party

limited amount to homeowner, filed second lawsuit against a subcontractor, for whom the General Contractor was derivatively liable, after the General Contractor filed bankruptcy.] Neither the facts nor the legal holding of *Thibodeau* are analogous to the joint and several liability and statutory partnership litigation issues in the current case. DKN did not, "by negligence or design" withhold issues for the purpose of relitigating them in a second suit.

Faerber cites *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App. 4th 1234, 1246-47, for the proposition that "one injury gives rise to only one claim for relief." (Answer/5.) Plainly, if this legal proposition applied to either jointly and severally liable co-obligors, or to partners governed by Corporations Code §16307(b), then there simply would be no "and several" in the "joint and several" liability, and §16307(b) would have to be stricken from the statutory books, or recognized as wrong and misleading.

Equally as plainly, the holdings in *Weikel* and the other *res judicata* cases cited by Faerber, do not apply where, as here, clear and specific law, the case law reflecting the *General Rule* and §16307(b), expressly permits separate actions against severally liable co-obligors.

Faerber cites *Brinton v. Banker's Pension Services, Inc.* (1999) 76 Cal.App. 4th 550, and the Federal District Court decision in *Prosurance Group, Inc. v. ACE Property & Cas. Ins.* (N.D. Cal. May 12, 2010) 2010 U.S.

DKN, was seeking a *second bite of the apple* after having been unsuccessful in a first action.

Dist. LEXIS 46818, for the proposition that it is not necessary for the party seeking of *res judicata*, to have been derivatively liable through a defendant in a prior action. Apart from the fact that *Prosurance* is a federal district level holding with no precedential import upon this Court, neither the facts nor the law of *Prosurance* apply to the facts and issues in this case. Once again neither joint and several liability, nor partnership liability, was at issue in *Prosurance*.

Faerber contends that DKN "argues for a drastic revision to the doctrine of *res judicata*, claiming it only applies where the judgment on the merits is adverse to the party pursuing duplicative lawsuits." This is not DKN's argument. There is no "drastic revision" sought by DKN as to *res judicata* or any other legal principle.

DKN's argument is simply this: The *New Rule* enunciated in the Opinion creates a material conflict in published legal authorities. That material conflict creates a *New Rule* which necessarily subsumes and eliminates the longstanding *General Rule,* which the Opinion ironically recognizes as a controlling *General Rule*. In so doing the Opinion erases any difference between the materially distinguishable concepts of joint, and joint and several liability, and clearly ignores its compulsory responsibility under *stare decisis*.

III.

CONCLUSION

The important need for Supreme Court review of the Opinion is reflected in the fact that, though the legal distinction between merely joint liability, and joint and several liability, might be assumed to be a straight forward and generally understood *General rule*, the body of law underscoring this distinction is not only fairly sparse, it is also fairly aged. The most recent discussions reflected in *Williams 2* and *Williams 1* are each over fifty years old. The principal authorities, upon which those decisions rely, *Grundel* and *Melander*, are each well over a hundred years old.

It appears from the research done by the parties and the court below, that there are no published decisions discussing the manner in which the legal principles of *res judicata* apply in relation to the concepts of joint and several liability, both the *General Rule* and as tangentially reflected in a statute such as Corporations Code §16307(b).

The issue of whether or not a creditor can pursue its legal rights relying on the enforceability of the *General Rule*, or upon Corporations Code §16307(b), is anything but arcane. The concept of joint and several liability is essential to debtor-creditor relationships, landlord-tenant relationships, lessor-lessee relationships, and many others. It goes without saying that legal relationships of this type give rise to innumerable contractual commitments every single day in the State of California.

The relevance of the issue here extends not only to contractual relationships, but also to the concept of joint and several liability as it applies in tort. While this is not a tort case, the same principle of joint and several liability applicable here, applies equally in cases of joint and several tort liability.

It is respectfully submitted that the lack of uniformity of law reflected in the incompatibility between the *New* Rule and the *General Rule* makes this dispute one worthy of this Court's time and attention. It is also necessary for the courts, attorneys, and the public to have clear and instructive law as to this of the interplay between doctrines of *res judicata* and the *General Rule* of joint and several liability.

DATED: June 27, 2014

PRENOVOST, NORMANDIN, BERGH & DAWE
A Professional Corporation

By: _____
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Attorneys for DKN HOLDINGS, LLC

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)1))

The text of this brief consists of 3,429 words as counted by the Microsoft Word version 7 Professional word-processing program used to generate the brief, exclusive of the cover, table of contents, table of authorities, and this certificate of word count.

Dated: June 27, 2014

KRISTIN F. GODEKE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 2122 North Broadway, Suite 200, Santa Ana, CA 92706-2614.

On **June 27, 2014**, I served true copies of the following document(s) described as **PETITIONER DKN HOLDINGS, LLC's REPLY TO ANSWER FILED BY WADE FAERBER** on the interested parties in this action as follows:

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Riverside County Superior Court
4050 Main Street,
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(Hon. John Vineyard)

Court of Appeal
Fourth Appellate District
3389 12th Street
Riverside, CA 92501

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

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

Executed on **June 27, 2014**, at Santa Ana, California.

Yvette Gradias