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 RIC 1109512, Hon. John Vineyard

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

I.

SPECIFICATION OF ISSUES

The following issues have been specified for review:

(1) Can parties who are jointly and severally liable on an obligation be sued in separate actions?

(2) Does the opinion of the Court of Appeal in this case conflict with the opinion of this Court in *Williams v. Reed* (1957) 48 Cal.2d 57, 307 P.2d 353?

II.

PETITIONER'S CONTENTIONS ON REVIEW

(1) Parties who are jointly and severally liable on an obligation may be sued in the same or separate actions. If such parties are sued severally in separate actions, a first-in-time judgment in one action in favor of the plaintiff does not constitute res judicata barring any other action against one or more jointly and severally liable co-obligors.

(2) The Court of Appeal's Opinion ("the Opinion") conflicts with *Williams v. Reed* (1957) 48 Cal.2d 57 ("*Williams 2*") because, notwithstanding the immaterial factual distinction between *Williams 2* and this action, the Opinion contradicts the fundamental common law principle upon which the *Williams 2* holding was premised.

III.

INTRODUCTION

Both the trial court and the Court of Appeal below refused to apply what Petitioner contends is controlling Supreme Court precedent. Affirmed by the Court of Appeal, the trial court pronounced that the Supreme Court's holding in *Williams 2* was "wrong" with respect to the proposition that *joint and several* obligors can be sued either jointly in a single lawsuit, or severally in separate lawsuits. Both the trial court and the Court of Appeal announced that commentary in Witkin consistent with the *Williams 2* opinion was a "classic example" of Witkin mischaracterizing the law. Finally, the Court of Appeal refused to apply what appears to be the clear language and legislative intent of Corporations Code § 16307(b), which expressly permits partners to be sued jointly in a single lawsuit, or severally in separate lawsuits.[1]

IV.

STATEMENT OF FACTS AND SUMMARY OF UNDERLYING PROCEEDINGS

Petitioner DKN Holdings, LLC ("Lessor" or "DKN") was one of two Lessors under a ten-year commercial lease in which, it was eventually

[1] Corporations Code § 16307(b) was not expressly mentioned in the issues specified for review. Petitioner does not intend to exceed the scope of the specified issues by discussing §16307(b). Rather, Petitioner believes that the statute and its "joint and several" implications fall within the first specified issue.

established, there were three individual tenants ("Lessees"). The individual Lessees were Caputo, Faerber, and Neel. The lease expressly provided that the Lessees were jointly *and severally* liable under the lease.

A. Lessee Caputo Alone Sued the Lessors for Rescission and Related Claims; Lessors Obtained Judgment on the Cross Complaint against Caputo for Breach of Lease

In 2007 Lessee Caputo, but not the other two co-Lessees, sued Lessors for rescission, breach of contract and tort damages ("*Caputo Action*"). As cross-complainants in the *Caputo Action*, commercial Lessors DKN and CDFT obtained a judgment of over $3 million against Lessee Caputo only, for unpaid rent and damages for breach of the ten-year lease.

B. DKN's Separate Suit Against the Co-Lessees in the *Faerber Action* was Dismissed on Demurrer Without Leave to Amend

After having prevailed at trial on its claims against Caputo, but before entry of judgment in the *Caputo Action*, DKN initiated a separate action against co-Lessees Faerber and Neel seeking to hold them severally liable for breach of the lease and related damages ("*Faerber Action*"). The trial court granted the first demurrer of Faerber without leave to amend. The trial court held that the judgment in the *Caputo Action* precluded the *Faerber Action* as a matter of law under, *inter alia*, the claim preclusion arm of res judicata.

C. At the Outset of the *Caputo Action*, Counsel for the Three Lessees Formally Asserted that Caputo was Actually the Sole Lessee

Though the Lessors initially cross-complained against all three Lessees, they proceeded against only the single Lessee Caputo in the *Caputo Action.* This was a result of contentions made on behalf of both Caputo and co-Lessees Faerber and Neel, all represented by the same counsel, that Caputo was the only intended Lessee, and that Faerber and Neel were not co-Lessees. The documentation of the lease was not well prepared. From the documentation alone, there was room for some uncertainty as to the identity of the intended Lessees at the outset of the *Caputo Action.* The principal of the co-Lessor CDFT, who had been primarily responsible on behalf of the Lessors for the documentation of the lease, had passed away prior to the *Caputo Action* and was therefore unavailable to provide clarifying input as to the intended identity of the Lessees.

The *Caputo Action* thus proceeded to trial without the co-Lessees Faerber and Neel having been brought into the action as cross-defendants, as plaintiffs on the claims to rescind the lease, or otherwise. Caputo lost at trial on his affirmative claims. The Lessors prevailed on their claim for breach of lease. Judgment was entered in favor of the Lessors against Caputo on November 11, 2011.

D. Testimony at Trial Having Clarified that There Had Always Been Three Individual Co-Lessees, Lessor DKN Initiated Suit Against the Co-Lessees Prior to Entry of Judgment in the *Caputo Action*

During the trial in the *Caputo Action* it had become clear that, contrary to the contentions earlier made on behalf of the three co-Lessees, Faerber and Neel were indeed co-Lessees, and were also "partners" with Caputo in the fitness club venture that employed the leased premises. On June 1, 2011, several months prior to the entry of judgment against Caputo, Lessor DKN initiated this action against the co-Lessees Faerber and Neel.

Faerber demurred. Neel failed to respond and was defaulted. Faerber's demurrer contended that DKN's action constituted an improper "splitting" of a cause of action, and was barred, *inter alia*, by the doctrine of res judicata.

E. DKN Cited Three Primary Sources in Support of the Assertion that Jointly *and Severally* Liable Co-Obligors may be Sued *Severally* in Separate Suits

DKN opposed the Faerber demurrer citing, *inter alia*, *Williams 2*[2] for the proposition that where the liability of co-obligors on a contract is both *joint*

[2] *Williams 2* followed the previously published appellate opinion in *Williams v. Reed* (1952) 113 Cal.App.2d 195 ("*Williams 1*").

and several,[3] it is permissible to sue the obligors either *jointly* in a single lawsuit, or *severally* in separate lawsuits. DKN also cited 4 Witkin, *California Procedure* (5th ed. 2008) Pleading, 365, p. 124 in support of this legal principle. Finally, DKN cited Corporations Code § 16307(b), which provides, *inter alia*, that "an action may be brought against a partnership and any or all of the partners in the same action **or in separate actions**." (Emphasis added.)

Faerber's demurrer was granted without leave to amend. The court opined, *inter alia*, that this Court's holding in *Williams 2* was "wrong." It further concluded that the consistent discussion in Witkin was "one of those classic examples of Witkin referring to and relying on a case that doesn't support the theory published in Witkin." The Opinion includes this pejorative reference to Witkin at footnote 5.

The trial court subsequently ordered on its own motion that the defaulted Lessee Neel also have judgment entered in his favor.

DKN appealed.

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[3] It is undisputed that a written provision of the standard form commercial lease employed in this case provided that the contractual liability of the Lessees was joint and several.

F. The Court of Appeal Agreed With the Trial Court that the Supreme Court Was "Wrong" In *Williams 2*, and Thereon Established the *Res Judicata Exception* to the *General Rule of Joint and Several Liability*

Relying on *Williams 2*, DKN argued on appeal that a judgment against one joint and several obligor does not foreclose a later action against another joint and several obligor. In rejecting DKN's argument, the Court of Appeal nonetheless acknowledged the general rule of joint and several liability upon which DKN relied. (The "*general rule of joint and several liability*" *or* "*general rule.*")[4] In this regard the Court of Appeal quoted the following passage from *Williams 2* as a reflection of the *general rule*:

> "It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensible parties. They may not be sued separately [citations]. If judgment is obtained in a separate action against one, it bars an action against the others. [Citation.] **When the obligation is *joint and several*, it is not nonjoinder to sue one alone** [citations]. The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tortfeasors. In such a case **the judgment obtained against one is not a bar to an action against the remaining joint and several obligors.**

[4] The term "general rule" was employed in *Williams 1*, *supra*, at 204: "The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort-feasors. In such a case the 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....'[Citations.] That being so in respect to joint and several tort obligors, the same should be true of joint and several obligors under a contract. That seems to be the **general rule**." (Emphasis added.)

> '*Nothing short of satisfaction in some form constitutes a bar . . .* .'" (*Ibid.*, quoting *Grundel v. Union Iron Works* (1900) 127 Cal. 438, 442.)[5]

Opinion, 11, bold added, italics in original.

Noting that, based on the above-quoted passage from *Williams 2*, DKN had argued that, because Caputo, Faerber, and Neel "are jointly *and severally* liable for the unpaid rents and other monies due under the lease, the judgment against Caputo does not bar DKN's identical claims against Faerber and Neel in the present action. . . ," (*id.*) the Court of Appeal stated its disagreement with the following explanation:

> As the trial court noted in sustaining the demurrer, **the passage from *Williams [2]* is "wrong" and incorrectly states the law**—to the extent it may be construed as allowing an obligee, such as DKN, to obtain separate judgments *in separate actions* against joint and several obligors, based on the same claims.[6]

Opinion, 11, emphasis added.

The Court of Appeal attempted to distinguish the holding in *Williams 2*:

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[5] See also *Heath v. Manson* (1905) 147 Cal. 694, 701, citing *Grundel* for the relevant proposition.

[6] As argued below, DKN submits that the Court of Appeal's supposition that DKN's claim against Faerber and Neel was the "same claim" as that against Caputo, appears to ignore the fundamental difference between a merely "joint" liability, and a "several" liability. The latter, by definition, signifies the existence of a *separate claim* against each of the severally liable co-obligors, though that claim may arise from what appears on its face a single contract, such as the lease here. (See argument, *infra*.)

> *Williams [2]* did not address the issue presented here: whether a final judgment on the merits against *one* joint and several obligor bars a subsequent action and judgment against *additional* joint and several obligors, on the same obligation, by the same claimant.[7]

Opinion, 11-12.

Noting that "cases are not authority for propositions not considered. . .," the court concluded that "*Williams [2]* does not support DKN's position." (Opinion, 12.) In creating what DKN submits is an irreconcilably contradictory exception to the *general rule of joint and several liability*, the court concluded that, though the *general rule* permits separate actions against severally liable co-obligors, that same *general rule* did not permit DKN to sue the jointly and severally liable co-Lessees in a separate action **following a judgment[8] on the merits in favor of DKN** against the severally liable co-Lessee Caputo. This rule applied by the Court of Appeal will be referred to

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[7] As argued below, it appears that the controlling *general rule of joint and several liability* acknowledged by the court necessarily presupposes the possibility, in connection with every *joint and several* liability, of a prior judgment on the merits in a *first-in-time* legally permissible separate action against one severally liable co-obligor, and a subsequent judgment against another severally liable co-obligor in a legally permissible separate action. If the first judgment legally precludes pursuit of any other action against severally liable co-obligors, then the *general rule of joint and several liability* has been rendered both meaningless and materially misleading.

[8] Though DKN does not perceive the fact as particularly material, it notes that the *Faerber Action* was filed prior to the entry of judgment in the *Caputo Action.*

below as the "*res judicata exception*" to the *general rule of joint and several liability.*

G. Under the *Res Judicata Exception*, There Can Only Ever Be but a Single Judgment on the Merits Against Severally Liable Co-Obligors, Notwithstanding that Multiple Separate Actions are Permitted Against Multiple Jointly and Severally Liable Co-Obligors

Thus the *res judicata exception* to the *general rule* may be stated as follows: While the *general rule* expressly permits separate actions to enforce joint and several liabilities (indeed, that is effectively its *raison d'être*), it does not permit separate judgments in those permissible separate actions. As applied here, and as it would need to be applied generally if it is found to be an accurate statement of the law, the *res judicata exception* bars any further pursuit of an otherwise permissible separate action against a severally liable co-obligor once a judgment on the merits has been entered against another severally liable co-obligor in any other permissible separate action. The *res judicata exception* thus stands for the proposition that **only one judgment will ever permissibly exist on the merits of a claim as to which there are multiple jointly and severally liable co-obligors**. As argued below, DKN contends that the *general rule of joint and several liability* openly acknowledged by the Court of Appeal is irreconcilably in conflict with the *res judicata exception* created in the Opinion.

In a manner which DKN contends reflects the irreconcilable inconsistency between the *general rule* and the *res judicata exception*, the court emphasized ("[t]o be sure") the applicability of the *general rule* in establishing the *res judicata exception*:

> **To be sure, courts are generally authorized to render separate judgments,**[9] in the same action *or* ***in separate actions,*** against joint and several obligors. (*Melander v. Western Nat. Bank* (1913) 21 Cal. App. 462,474-78 [construing former § 414, now § 410.70 & §§ 578, 579,[10] as authoring [sic] courts to enter separate judgments in separate actions against joint and several obligors]; [fn.] see also *Grundel v. Union Iron Works, supra*, 127 Cal. at p. 442 [joint and several tortfeasors may be sued in separate actions].)

Opinion, 12, bold added, italics in original.

Notwithstanding this repeated recognition of the *general rule*, the Court of Appeal declared the *res judicata exception* in the following passage:

> But even when joint and several obligors are not required to be sued in the same action (see §§ 410.70, 389) **when, as here, a final judgment on the merits has been rendered in one action against a joint and several obligor, res judicata will**

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[9] Given the necessary effect of the *res judicata exception* of prohibiting any subsequent action or judgment against a severally liable co-obligor once a judgment on the merits has been entered against any other severally liable co-obligor, DKN is unable to conceive how any "generally authorized...separate judgment" expressly referenced in the passage above can ever come into being without violating the *res judicata exception*.

[10] The Opinion acknowledges that these current sections of the Code of Civil Procedure are consistent with the *general rule*.

> **bar the assertion of identical claims**[11] **against other joint and several obligors, in a subsequent action**, by parties bound by the judgment in the prior action.

Opinion, 12-13, emphasis added.

H. The Opinion Rejected a Passage From Witkin, Consistent With *Williams 2*, As a "Classic Example" Of Witkin Mischaracterizing the Law

Following its creation of the *res judicata exception*, the court expressly rejected a passage from Witkin that is consistent with the *general rule.* Quoted by the Court of Appeal, the Witkin passage relied upon by DKN states, consistent with the holdings in the two *Williams* cases, *Grundel v. Union Iron Works* (1900) 127 Cal. 438, *Melander v. Western National Bank* (1913) 21 Cal.App. 462, and the provisions of Code of Civil Procedure §§ 379, 389 and 410.70:

> "If defendants are both jointly and severally liable, **joinder is not mandatory but permissive,** and **the plaintiff,** although he or she has but one cause of action, **may sue one defendant first and another later**. Despite the theoretical incongruity, the **plaintiff is not barred in the second action** because the defense of res judicata is available only *when both the cause of action and the parties are the same.*" (4 Witkin, Cal. Procedure (5th Ed. 2008) Pleading § 65 p.124, italics added.)[12]

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[11] As noted above, the employment of the term "identical claims" appears to ignore the fundamental difference between a merely "joint" liability, and a "several" liability. (See fn. 6, *supra.*)

[12] See also 5 Witkin, Summary 10th (2005) Torts, § 66, p. 136, citing several different authorities for the same principle in the tort context: "If an action is

Opinion, 13, bold added, italics in original.

In rejecting Witkin's statement of the *general rule*, the court noted:

> Like the passage from *Williams, supra*, 48 Cal.2d at page 65, the trial court rejected this passage from Witkin as an incorrect statement of the law, [fn.] and **we agree it is incorrect**. The passage from Witkin mistakenly indicates that defendants in the current proceeding must have been parties to the prior proceeding, in which a final judgment on the merits was obtained on the same claims, in order to invoke res judicata in the current proceeding, but this is not the law.

Id., emphasis added.

Relying on the holdings in, *inter alia*, *Arias*, *Vandenberg*, and *Lippert*, *infra*, the court concluded that the successful establishment of the liability of one jointly and severally liable obligor in the *Caputo Action* barred DKN from seeking to establish the legal responsibility of the other severally liable co-obligors in the separate *Faerber Action.*

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brought or judgment rendered against less than all, the entry of judgment alone is not res judicata with respect to the liability of the others. (*Knowles v. Tehachapi Valley Hosp. Dist.* (1996) 49 C.A.4th 1083, 1090, 57 C.R.2d 192, quoting the text; see Rest.2d, Torts §884; Rest.2d, Judgments §49; 6 Cal. L. Rev. 230; 74 Am.Jur.2d (2001 ed.), Torts §64 et seq."

I. The Opinion Rejected the Contention that Corporations Code § 16307(b) Provides for Joint and Several Liability in Partners When a Judgment on the Merits is First Obtained Against One Partner, but Not the Other Partners

The Court of Appeal rejected DKN's contention that Faerber's alleged "partnership liability" under the Lease created an independent basis for holding him severally responsible on the Lease, and therefore subject to a separate lawsuit on that several obligation. DKN argued that since Corporations Code § 16307(b) provides 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***" (emphasis added), it was permissible for DKN to sue the alleged partner Faerber in an action separate from the *Caputo Action.*

The Court of Appeal rejected this contention tersely, without citation of authority. It held that "this statutory authorization [of § 16307(b)] to sue partners in separate actions does not apply when, as here, the claims asserted in the subsequent action are barred by res judicata principles." (Opinion, 14.)

In rejecting the partnership claim, the Court of Appeal did not accept DKN's assertion that the trial court had "found that Faerber, along with Caputo and Neel, were 'partners' on the lease." (*Id.*) The Court of Appeal recognized, however, that the trial court in the *Caputo Action* had "loosely

referred to Caputo, Faerber, and Neel as 'partners' who 'wanted to lease and build out premises for a fitness club . . . .'" (*Id.*)

Whether or not the trial court in the *Caputo Action* actually ruled a partnership relationship existed appears immaterial to the issues specified for review. Even if it is assumed, *arguendo*, that the trial court did not find a partnership among the co-Lessees, DKN could certainly have alleged such a partnership had it been allowed to amend its complaint in the *Faerber Action*. It was therefore necessary for the Court of Appeal to make the formal finding that Corporations Code § 16307(b) did not permit separate actions against the putative partners, even if they were assumed to have been partners, because under the liberal rules governing amendment of pleadings, the supposition necessarily had to be made that DKN could have alleged the partnership relationship in an amended complaint.

V.

ARGUMENT

A. The *General Rule of Joint and Several Liability*, Acknowledged by the Opinion and Consistently Applicable at Common Law for Centuries,[13] Permits Separate Actions Against Severally Liable Co-Obligors

The first issue specified for review poses the question of whether or not "parties who are jointly and severally liable on an obligation [may] be sued in separate actions?" DKN's answer to this question is yes.

As noted above, the answer is reflected in the centuries-old, and still controlling, *general rule*, accurately characterized in the Opinion itself. (Opinion, 12.) Citing this Court's opinion in *Grundel v. Union Iron Works* (1900) 127 Cal. 438, 442, and the appellate-level holding in *Melander v. Western National Bank* (1913) 21 Cal.App. 462, the Opinion acknowledged the applicability of the *general rule* without reservation: "**To be sure, courts are generally authorized to render separate judgments**, in the same action or **in separate actions**, against joint and several obligors." (Opinion, 12, emphasis added.)

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[13] See, e.g., the discussion of *Sir John Heydon's Case*, (1613) 11 Co. Rep. 5, 77 Eng. Rep. 1150, *infra.*

1. The Difference Between *Joint* Liability and *Several* Liability is that the Former Requires a Single Action Against *Joint* Obligors, While the Latter Permits Separate Actions and Separate Judgments Against *Severally* Liable Obligors

As reflected in *Williston On Contracts*, the distinction between a "joint" liability and a "several" liability has always been that under a "joint obligation . . . each joint promissor is liable for the whole performance jointly assumed . . . ," while a "several obligation, by contrast, has the effect of creating **two separate liabilities on a single contract.**" (12 *Williston On Contracts* § 36:1 (4th ed., 2014), emphasis added.)

> Thus, when a several obligation is entered into by two or more parties in one instrument, **it is the same as though each has executed separate instruments**. Under these circumstances **each party is bound separately** for the performance which it promises and thus is **not bound jointly** with anyone else.

Id., emphasis added.

When an obligation is both joint and several, as here, the plaintiff has the right to pursue the obligors either jointly together, or severally as separate parties:

> Finally, a joint and several contract is a contract made by the promisee with each promissor and a joint contract made with all the promissors, so that **parties having a joint and several obligation are bound jointly as one party, and also severally as separate parties** at the same time.

Id., emphasis added.

B. The *Res Judicata Exception* Necessarily Negates any Meaning in the *General Rule* to Which it Purports to be an Exception

Though it acknowledged the *general rule*, the Court of Appeal applied the claim preclusion arm of the doctrine of res judicata to create, apparently for the first time in California law, a *res judicata exception* to the *general rule*. As discussed below, however, if the appellate court's conclusion is correct, then the *res judicata exception* necessarily eliminates any meaning from the *general rule* to which it purports to be an exception. Since, as expressly recognized in the Opinion, "courts are generally authorized to render **separate judgments**, in the same action ***or in separate actions*, against joint and several obligors**..." (Opinion, 12, bold added, italics in original), and since the *res judicata exception* necessarily precludes the possibility of any such "separate judgments...in *separate actions*" because it contradictorily mandates that any single judgment will preclude any separate action or judgment, the *exception* necessarily *eats up*, and cannot co-exist with, the *general rule*.

C. The *Res Judicata Exception* is Directly Contrary to the Holdings of *Grundel* and *Melander* Cited in the Opinion

While the Opinion cited both *Grundel* and *Melander*, *supra*, in the process of arriving at the *res judicata exception*, the consistent holdings in each of those cases are incompatible with and effectively contradicted by the *res judicata exception.*

In *Grundel*, *supra*, at 440-41, this Court applied the *general rule* to reverse both the appellate and trial court conclusions that four alleged joint tortfeasors in a state court action were entitled to a dismissal of that action because nine other alleged joint tortfeasors had invoked federal admiralty jurisdiction over the claim. The federal court had enjoined the state action against the nine federal petitioners, and the plaintiff sought to proceed in state court against the four remaining defendants to whom the federal injunction did not apply.

The trial court granted a dismissal of the state court action in favor of the four remaining defendants. The appellate court affirmed. In reversing the judgment of dismissal, this Court cited the *general rule*:

> 'The general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort[14] is joint and several, and gives the **same rights of action to the person injured as a joint and several contract.** Consequently **a judgment recovered against one of two joint tort feasors, remaining unsatisfied, is no bar to an action against the other for the same tort.'**

Grundel, *supra*, at 440-41, citing 2 Black, Judgm. § 777, emphasis added.

Citing "Judge Cooley, in his work on Torts (2d Ed. p. 159)," this Court emphasized, directly contrary to the *res judicata exception*, that a prior judgment against one jointly and severally liable co-obligor is no bar to a later judgment against a different jointly and severally liable co-obligor, and that no

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[14] The same *general rule* applies to both tort and contract actions. (See *Williams 1*, *supra*, at 204, and *Melander*, *supra*, at 475.)

bar to enforcement of several judgments arises until the obligation has actually been satisfied:

> Judge Cooley, in his work on Torts (2d Ed. p. 159), says: 'The rule laid down by that eminent jurist, Kent, in *Livingston v. Bishop,* 1 Johns. 290, which has since been generally followed in this country, is that the party injured may bring separate suits against the wrongdoers, **and proceed to judgment in each**, and that no bar arises to any of them until satisfaction is received....'

Grundel, supra, at 441, emphasis added.

The cited New York Supreme Court case of *Livingston v. Bishop* (1806) N.Y.Sup.Ct., 1 Johns. 290, contains an observation, directly applicable here, as to the inherent contradiction arising from the *res judicata exception* created below:

> It is, however, a proposition that is not controverted, but everywhere admitted, that, for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. **If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried may be used by way of plea *puis darrein continuance*, to defeat the other actions that are in arrear.**

Livingston, supra, at 290.

The foregoing quote underscores the inevitable result of the *res judicata exception.* Since the *res judicata exception* "permits but one recovery" by precluding any subsequent action or judgment, it renders it "vain to say that the plaintiff may bring separate suits...." What indeed is the point of a *general rule* that permits separate suits against severally liable co-obligors if

the first judgment entered in any such separate suit precludes the further pursuit of, or entry of judgment in, any other action? The *res judicata exception* eviscerates any meaning from the *general rule* to which it purports to be an exception. The two cannot rationally coexist.

1. The *General Rule* is the Product of Centuries of Common Law

The venerability of the *general rule* is reflected in a citation in *Livingston* to the rule "laid down" in *Sir John Heydon's Case* (1613), a common law precedent created while James I, son of Mary, Queen of Scots, was the King of England:

> This is agreeable to the rule laid down in *Sir John Heydon's Case*, [11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613)] where, in trespass against several, one appeared and pleaded not guilty to a declaration against him, ... and, afterwards, another appeared, and pleaded not guilty to a like declaration, whereupon separate *venires* issued, and the issues were separately tried, and separate and different damages assessed, and the court resolved that the plaintiff had his election of the different damages assessed, which should bind all, and that there should be but one execution.

Livingston, *supra*, at 291.

The extensive discussion in *Melander*, *supra*, at 476, further clearly reflects that the *general rule* cannot coexist with the *res judicata exception*. This 1913 decision provided a thorough analysis of the difference between merely *joint*, and *joint and several* liability, consistent with the *general rule* discussed above. Concisely put, *Melander* states the *general rule* as follows:

> Where the contract or obligation is joint and several, it is **not merged**[15] in the judgment against one of the contractors, and **such judgment remaining unsatisfied will not bar an action against another of the debtors.**

Melander, *supra*, at 476, emphasis added.

As with the holding in *Grundel*, *Melander* is cited in the Opinion as applicable precedent while its language expressly contradicts the *res judicata exception* created in the Opinion.

In *Melander*, a creditor bank was sued by an assignee of a guarantor and endorser of a debt which remained owing to the bank. The assignee sought to obtain the deposit balance of the assignor in the bank. The assignor owed the bank money jointly and severally with two co-obligors. In facts directly on point with those at issue here, the bank had previously obtained a judgment against the other two jointly and severally liable debtors, but not the assignor. The assignor, like Faerber here, had been initially named in the suit by the bank, but had never been served, and hence was not a judgment debtor.

In defense against the action of the assignee to recover the balance of the assignor's bank account with the bank, the bank pled its banker's lien right to apply the balance of the bank account to offset the unsatisfied debt of the joint and several obligors. Just as asserted here on behalf of Faerber, the claim was made that the entire original debt to the bank had merged into the

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[15] As discussed *infra*, the absence of any merger precludes the application of res judicata.

judgment, and therefore the bank had no remaining rights it could enforce against the assignor/depositor. "Did the original debt merge in the judgment obtained by the defendant against the [two co-obligors]?" (*Id.* at 466.) The claim was further made that the bank's right to add the assignee as a judgment debtor on the judgment, pursuant to Code of Civil Procedure § 989, constituted an exclusive remedy for the bank and therefore precluded it from taking enforcement action independent of the judgment.

The trial court granted a demurrer to the bank's answer, and held, consistent with the holding of the appellate court in this case, that the initial judgment merged the un-served assignor's debt into the judgment and barred any further action by the bank against the assignor independent of the original judgment.

Applying the distinction between merely joint liability, and joint and several liability, consistently with the *general rule* discussed herein, the Court of Appeal reversed. It ruled that "several liability on the original obligation survived the judgment or still retained its integrity, [and that] the bank could not be deprived of the right to its remedy by lien by reason of the fact" that it had available to it another and different remedy. (*Id.* at 479.)

Melander provides an in-depth analysis of decisions from several jurisdictions, including old English cases,[16] and an 1839 Kentucky case, *Sayre v. Coleman* (1839) 9 Dana 173, 1839 WL 2623 (Ky.App.). In applying the *general rule* as the basis for its holding, *Melander* discussed *Sayre* as follows:

> [W]here the action was upon a joint and several obligation, one of the defendants was not served with process, and judgment was taken against the others, who were served.[17] Judgment was thereafter obtained against the obligor not originally served, and the contention on his appeal was that the debt or obligation had been extinguished by the judgment against the others.[18] The Kentucky supreme court, refusing to accept that view, said: "But conceding...that, according to the principles of the common law, **such a judgment would be a bar in the case of joint obligors, it is so because of the unity or entirety of the obligation**; the consequence of which is, that whatever releases or extinguishes the cause of action as to one, has the same effect as to the other, there being no power to discriminate between

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[16] "In the English case of *King v. Hoare*, 2 D. & L. 383, Baron Parke stated the rule to be: That a judgment against one of two joint debtors merged the debt and foreclosed an action against the other debtor, but that **where the contract was joint and several, the rule was otherwise.** Referring to the last mentioned case in *In re Davidson*, 13 Q. B. Div. 50, Justice Cave said: 'There it was held that a judgment without satisfaction against one of two *joint* obligors is a bar to an action against the other, but it was pointed out both at the bar and in the judgment that **the law is otherwise when the obligation is both joint and several.**' (See the following English cases: *Whiteacres v. Hamkinson*, Cro Car. 75; *Blumfield's Case*, 5 Coke 86b; *Hayling v. Mullhall*, 2 W. Bl. 1235; *Ayrey v. Davenport*, 2, Bos. & P. N. R. 474; *Claxton v. Swift*, 1 Lutw. 362; *Brown v. Wootton*, Cro. Jac 73; *Dyke v. Mercer*, 2 Show. 394-these cases are cited in note, 43 L. R. A. 163.)" (*Melander supra*, at 476-77, emphasis added.)

[17] This factual construct is directly on point with the facts and contentions of Faerber here.

[18] This is akin to the Faerber contention, validated by the Court of Appeal in adopting the *res judicata exception*, while purporting to recognize the *general rule* of *Melander* as controlling law.

> them in this respect.... **But in the case of a joint and several obligation, the fundamental principle on which these consequences rest is wanting. There is a several obligation and liability resting upon each obligor, independent of that which rests upon the others. The release of one without satisfaction, does not necessarily release the others; and we do not see how or why the merger or extinguishment of the cause of action in any other mode as to one should merge or extinguish it as to another, who is separately bound, until the debt or duty is itself discharged."**

Melander, *supra*, at 477-78, emphasis added.

Plainly, if applied to the current case, the holding in *Melander*, as is the case with that in *Grundel* before it, cannot be reconciled with the *res judicata exception* created in the Opinion. If applied to the facts here, both *Grundel* and *Melander* compel the conclusion that the *res judicata exception* created in the Opinion is contrary to the longstanding law of California and many other common law jurisdictions.

It therefore appears clear, in response to the first specified issue, that separate suits and separate judgments are not only permitted against jointly and severally liable co-obligors, but also that the right to bring such separate suits and obtain separate judgments lies at the very essence of the *general rule of joint and several liability* which the Opinion recognized, but did not follow.

D. Independent of, but Consistent with the Common Law *General Rule*, Corporations Code §§ 16306-16307 Create a Basis for Separate Actions and Judgments against Jointly and Severally Liable Partners

1. At Common Law Partners Were Only Jointly, and Not Severally, Liable for Partnership Obligations

Separate and apart from the common law *general rule*, Corporations Code §§ 16306-16307 provide an independent basis for both joint and several liability, and the separate actions and judgments permitted thereby, as against the co-obligors under the lease here. As noted above, the Court of Appeal assumed the possibility that the Complaint could have been amended to allege that Faerber and Neel were "partners" of Caputo in the fitness facility venture involving the lease.

At common law the general rule was that partners were only jointly, but not jointly **and** severally liable for partnership obligations:

> Generally and at common law **a partnership obligation is joint, and not joint and several.** Accordingly a judgment against less than all the partners upon such a liability extinguishes the original claim against all, for **the joint obligation has been merged in the judgment**, and, the obligation being joint, the **individual partners have not undertaken to be severally liable.**

Iwanaga v. Hagopian (1919) 39 Cal.App 584, 584-85, emphasis added.

As of the 1919 holding in *Iwanaga, supra*, while some states had relaxed the rigor of that common law rule by statute, California had codified

the common law rule with the enactment of then-applicable Civil Code § 2442:

> In some states the rigor of this common-law rule has been relaxed by statutes, which declare the obligations of copartners to be **several as well as joint**. But in this state **the common-law rule has been expressly enacted by section 2442 of the Civil Code, which declares the liability of copartners to be joint**, and we have no provision permitting several judgments to be recovered in several actions upon a joint obligation.

Iwanaga, *supra*, at 585, emphasis added.

With the adoption of the original Uniform Partnership Act in 1929, California partially abandoned its codification of the common law rule. (See 9 Witkin, Summary 10th (2005) Partnership, § 15, p. 590.) Under then-applicable Corporations Code § 15015, partners were jointly and severally liable for "wrongful acts or omissions," and, or "misapplication of money or property of a third person" by the partnership, but remained only jointly liable for "other debts and obligations" of the partnership, such as the contractual liability under the commercial lease at issue here. (See, e.g., *Riddle v. Lushing*

(1962) 203 Cal.App.2d 831, 835-36;[19] see also 9 Witkin, Summary 10th (2005) Partnership, § 39, p. 613.[20]

With the enactment of the revised Uniform Partnership Act in 1996, California adopted the rule that partners in a general partnership are jointly **and** severally liable for **all** obligations of the partnership. California thus abandoned the former limitation that partners were liable only jointly on contractual obligations of the partnership.

Corporations Code § 16306(a) provides in relevant part that "all partners are liable jointly and severally for **all** obligations of the partnership unless otherwise agreed by the claimant or provided by law." (Emphasis added.) Of particular relevance here, Corporations Code § 16307(b) provides that a creditor may, consistent with the *general rule of joint and several liability*, pursue legal action against "any or all of the partners in the same action **or in separate actions**." (Emphasis added.) This section appears to

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[19] *Riddle* quoted the then-applicable provision of the Corporations Code: "Section 15015 provides: 'All partners are liable (a) Jointly and severally for everything chargeable to the partnership under Sections 15013 [liability for wrongful acts or omissions] and 15014 [liability for misapplication of money or property of a third person]. (b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.'" (*Riddle*, *supra,* at 836.)

[20] "Under the UPA, partners were *jointly and severally* liable for torts and breaches of trust, but only *jointly* liable on contracts. ... Under Corp.C. 16306(a), all partners are *jointly and severally liable* for *all* partnership obligations except as 'agreed by the claimant or provided by law.'" (Witkin, *supra,* at § 39, p. 613.)

simply state in words what is otherwise necessarily implied in the "joint and several" mandate of § 16306(a).

It therefore appears clear that the legislative intent reflected in the unambiguous language of Corporations Code §§ 16306(a) and 16307(b) mandates an affirmative response to the question posed by this Court in the first specified issue, where the defendants have prospective liability as general partners.

E. An Application of the *Res Judicata Exception* Transforms § 16307(b) into a Facially False and Dangerously Misleading Statute

The *res judicata exception* would transform the legislatively mandated right to bring "separate actions" against partners with what amounts to a judicially legislated caveat to § 16307(b). The import of the *res judicata exception* is that, in order for § 16307(b) to be *correctly* understood, the express statutory authorization to bring "separate actions" against partners needs to be supplemented with words warning that, while "separate actions" are permitted by the statute, "separate judgments" in those separate actions are prohibited. Indeed, the *res judicata exception* created below not only prohibits separate judgments against jointly and severally liable defendants, it prohibits the continued pursuit of any separate action as soon as judgment is entered in any other separate action. This result is mandated by the *res judicata*

exception regardless of whether or not the judgment has been even partially satisfied.

To be fair to the public relying on the statute, it would have to be rewritten with additional words to the effect of: "If, however, a partnership creditor relies upon this statute,[21] and pursues the expressly permitted 'separate actions,' and then obtains a judgment against any one or more partners in one of those separate actions, then, though the judgment may remain completely unsatisfied by the judgment debtor(s), all other jointly and severally liable partners who are not subject to the judgment are exonerated by that judgment,[22] and the 'separate actions' permitted by this statute must therefore be immediately dismissed with prejudice."

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[21] One example of a practical need to bring separate actions against partners would be where one or more partners are outside the personal jurisdiction where another partner or partners reside. Another example is a situation in which one of the co-obligors is engaged in active military duty. Under the Service Members Civil Relief Act [50 USC 501, et seq.], a creditor may not proceed against the service member obligor while he or she is on active duty, which, in many instances, can last several years. During that time, the creditor could not pursue the co-obligors without running the risk of obtaining a judgment which would preclude the creditor from proceeding against the service member obligor. Conversely, the creditor runs the risk of the statute of limitations running on the co-obligors if they are not pursued while the service member obligor is on active duty.

[22] Such a conclusion plainly contradicts the authorities on joint and several liability, and the *general rule of joint and several liability*, in that they all are based on the principle that only a joint liability, and not a several liability, results in the merger of all joint obligations into the judgment.

Such a result plainly makes no sense. First, the required re-writing of the statute obviously eviscerates the principal intent of the enactment of the statute in the first place. Second, in order for the *res judicata exception* to apply, the exoneration of the co-obligors could only occur—indeed, would have to occur—because the first judgment would "merge" the obligations of all the co-obligors into the judgment. That would be a legally incorrect result, however, because the very nature of several liability is that the severally liable co-obligor has an independent obligation to the plaintiff which, because of the independent and discrete nature of that several obligation, does not merge into the judgment against any other co-obligor.

Certain questions necessarily arise as to the practical import of this aspect of the *res judicata exception.* Are the partners in the post-judgment "must-be-dismissed" actions the prevailing parties? Are they entitled to an award of costs, or attorney's fees where the contract at issue so provides? If the putatively authorized separate actions are simultaneously pending, might one or more jointly and severally liable obligors be entitled to stay the action against it, or them, while another action proceeds to judgment? If so, what rules apply? These are just some of the undoubtedly many questions and issues that would be born of a validation of the *res judicata exception.*

It is submitted that the foregoing scenario and hypothetical questions reflect the necessarily absurd consequences of the *res judicata exception* co-existing with the *general rule.* This exception, though undoubtedly

unintended by the Court of Appeal, would constitute an overtly unconstitutional and patently impermissible act of judicial legislation with respect to §§ 16306(a) and 16307(b). The larger effect of the *res judicata exception* would be to reverse the centuries-old common law principles of joint and several liability generally.

F. *Lippert* Does not Support the Creation of the *Res Judicata Exception*: *Lippert* is Neither a Res Judicata Nor a Joint and Several Liability Case

The Opinion relied, *inter alia*, upon *Lippert v. Bailey* (1966) 241 Cal.App.2d 376 in holding that the claim preclusion element of res judicata applied to prohibit the *Faerber Action*, notwithstanding that the *general rule* reflected in the cited *Grundel* and *Melander* cases would plainly permit the separate *Faerber Action*. In this regard the court held:

> DKN argues that because joint and several obligors are jointly *and severally, or individually,* liable on an obligation, a claim against each of them constitutes a *separate claim.* DKN is mistaken. Under the primary rights theory, and for purposes of applying the res judicata doctrine, the claims are identical. (*Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382. . . .)

Opinion, 10.

It is here, in failing to recognize that the precise basis for the holdings in *Grundel* and *Melander* was that claims are **not** "identical" where the liability is joint and several, that the Opinion failed to apply the g*eneral rule* it nonetheless acknowledged is the law. Contrary to the appellate court's *ratio*

decidendi that DKN had but a single indivisible set of primary rights, in essence a single cause of action, the *general rule* is premised upon the principle that several liability, by definition, falls outside the single set of primary rights concept. When there are severally liable defendants, the plaintiff has primary rights against each severally liable obligor. A judgment against any one severally liable obligor merges only the rights against that particular obligor into the judgment. The independent and severally held rights against co-obligors remain unimpaired by the separate action or judgment against the judgment debtor.

The holding in *Lippert* is materially distinguishable in several respects. First, though the Opinion relies upon *Lippert* "for purposes of applying the res judicata doctrine . . ." (*id.*), **the holding in *Lippert* has nothing to do with res judicata.** *Lippert* involved a claim by a plaintiff-insured against the insurance company, and the company's sales agents, in connection with an alleged failure to provide sufficient insurance to the insured. Prior to trial against the agents, the insured settled with the insurance company.[23] The insured provided the insurance company a general release, reserving the right to proceed against the sales agents.

[23] There was no prior judgment in *Lippert* upon which to even raise a res judicata issue.

After trial on the merits, the court held that the insured's general release of the insurer barred further action against the agents. This conclusion was not based in any way upon the principles of res judicata. It was premised upon the trial court's fact conclusion, based on *substantial evidence*, that the nature of the defendants' agency was such that they were the agents of the insurance company only, and not agents of the plaintiff insured. (See *Lippert*, *supra*, at 383.) Relying on that fact-based conclusion as to the nature of the agency, the trial court applied the principle of law that an agent does not bear liability for the breaches of its principal if the nature of the agency relationship is properly disclosed at the time of the transaction between the third party and the principal, through its disclosed and authorized agent. In this regard the appellate court provided the following rationale:

> While an insurance agent may be personally liable to the insured for damages which are the result of the agent's negligent failure to insure property as contracted, the **agent's personal liability is dependent upon the extent of the disclosure of his agency.** . . . '(L)iability to the applicant or insured for acts or contracts of an insurance agent within the scope of his agency, with a full disclosure of the principal, **rests on the company.**' . . . 'Where an agent is duly constituted and names his principal and contracts in his [principal's] name and does not exceed his authority, **the principal is responsible and not the agent.**'

Lippert, *supra*, at 382, emphasis added.

The holding in *Lippert* appears to have nothing to do with the material facts or legal principles applicable in this case. First, unlike here, there was no expressly stated contractual *joint and several* liability in the insurance

company and its agents. On the contrary, the agents were found to be neither jointly nor severally liable with the insurer because, as fully disclosed agents acting within the scope of their authority, the agents did not share the insurer's liability.

Second, there was no allegation in *Lippert* that the insurance company and the agents were "partners," subject to joint and several partnership liability, which a statute expressly provided could be pursued in a single, or several lawsuits. On the contrary, the basis for the Court of Appeal upholding the trial court's fact-based conclusion, under the *substantial evidence* standard of review wholly inapplicable here, was the legal principle that a disclosed agent acting within the scope of his agency does not bear liability for the obligations of his or her principal.

G. Neither *Arias* Nor *Vandenberg* Supports the *Res Judicata Exception*[24]

The Opinion holds that co-Lessees Faerber and Neel were entitled to "invoke res judicata against DKN in the present action based on the final judgment in the Caputo action, even though Faerber and Neel were not parties to the Caputo action." (Opinion, 8-9.) The Opinion cited *Arias v. Superior*

[24] Ironically, to the extent res judicata applies, it would invoke collateral estoppel against Faerber, barring him from contesting liability. While this is not an issue specified, it is a principle that stems from the *res judicata exception.*

Court (2009) 46 Cal.4th 969, 985 and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828, for this proposition.

Neither of these holdings extends to the facts of this case. Nor do they remotely support the creation of the *res judicata exception.*

As explained in *Vandenberg*:

> Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form, res judicata "'precludes parties or their privies from relitigating a *cause of action* [finally resolved in a prior proceeding].'" (Citations.) But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an *issue* " 'necessarily decided in [prior] litigation [may be] conclusively determined *as [against] the parties [thereto] or their privies* . . . in a subsequent lawsuit on a *different* cause of action.'" (Citation.)

Vandenberg, supra, at 828.

The text above reflects an essential element for the application of the "claim preclusion" arm of res judicata. Where, as here, a non-party to the initial litigation seeks to apply claim preclusion or collateral estoppel against a party plaintiff in a second litigation, the ruling from the first litigation must have been "against" the party plaintiff in the second litigation. The party plaintiff in the second litigation must be seeking a *second bite at the apple* whereby it hopes to obtain a beneficial ruling in the second action, notwithstanding a negative ruling in the same issue in the first action.

> Accordingly, the collateral estoppel doctrine may allow one who was not a party to prior litigation to take advantage, in a

> later unrelated matter, of findings[25] **made against his current adversary in the earlier proceeding**. This means that **the loss of a particular dispute** against a particular opponent in a particular forum may impose adverse and unforeseeable litigation consequences far beyond the parameters of the original case.

Vandenberg, *supra*, at 828-29, emphasis added.

It is through this prohibition against a party seeking different results on the same issue in subsequent litigation, that collateral estoppel and claim preclusion doctrines assist in maintaining the integrity of the legal system.

> Collateral estoppel (like the narrower "claim preclusion" aspect of res judicata) is intended to preserve the integrity of the judicial system, promote judicially economy, and protect litigants from harassment by vexatious litigation.

Vandenberg, *supra*, at 829.

Neither *Vandenberg* nor *Arias*, which relies upon *Vandenberg*, supports the *res judicata exception* holdings. Faerber does not seek to hold any "finding" in the *Caputo Action* against DKN. DKN does not seek a *second bite at the apple* in the *Faerber Action*. On the contrary, the judgment in the *Caputo Action* was entirely in favor of DKN. This renders both collateral estoppel and claim preclusion inapplicable in the *Faerber Action*.

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[25] There was no finding in the *Caputo Action* of which Faerber sought to take advantage.

H. None of the Res Judicata Authorities Cited in the Opinion Support the Creation of the *Res Judicata Exception*

The Court of Appeal cited this Court's holding in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, to establish the "prerequisite elements" for the application of res judicata. (Opinion, 8.) While *Boeken* undoubtedly sets forth the prerequisite elements for res judicata in an accurate manner, it is important to note that, factually, *Boeken* is not analogous to the current case with respect to the facts relevant to applying those prerequisites. *Boeken* involved successive lawsuits by the same plaintiff, the survivor of a deceased smoker, against the same defendant, a cigarette manufacturer. *Boeken* also involved a dismissal with prejudice by the plaintiff of the defendant in an initial action, prior to the plaintiff instituting a second action against that same defendant. Each action arose from the death of the plaintiff's husband as an alleged result of tobacco use. Thus the plaintiff in *Boeken* did not, as DKN has here, succeed against one jointly and severally liable obligor in obtaining a judgment in a first separate action, and then seek to proceed against other jointly and severally liable obligors in a successive action.

Indeed, perhaps the most material factual distinction between *Boeken* and the current case is that the concept of joint and several liability was not involved in *Boeken* in any way.

The first essential prerequisite for the application of res judicata cited in the opinion from *Boeken* is the requirement that a "claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding...." (Opinion, 8.) As discussed above, the Opinion relied upon the holding in *Lippert* to reach the conclusion that this first essential prerequisite was met. The Opinion rejected DKN's contention that its claims against Faerber and Neel were not "identical" to its claims against Caputo because "joint and several obligors are jointly *and severally, or individually* liable on an obligation [and therefore] a claim against each of them constitutes a *separate claim*." (Opinion, 10.) The Opinion specifically held that DKN was "mistaken" in this assertion. (*Id.*)

As discussed in the argument above, the only way DKN could be "mistaken" in its contention is if the *general rule of joint and several liability*, as it has existed for centuries, is ignored and, or rejected. Since the very definition of several liability recognizes that it permits separate actions and separate judgments against severally liable co-obligors, and therefore recognizes those claims as independent sets of primary rights, or causes of action, against each severally liable co-obligor, the first of the essential prerequisites for the application of the doctrine of res judicata does not exist in this case.

None of the other res judicata authorities cited in the Opinion involve the unique combination of material facts applicable here, namely: (1) a

proponent of res judicata who is, by provision of express written contract, jointly and severally liable for the obligations of a commercial lease; (2) a proponent of res judicata who is alleged to have misled the plaintiff in an underlying action, so as to avoid being included as a defendant therein, with the false assertion that the jointly and severally liable obligor was not in fact an intended lessee; and (3) a judgment in the underlying action which is negative to the interests of the jointly and severally liable proponent of res judicata.

I. The Opinion Conflicts with the Opinion in *Williams 2*

The second issue specified for review poses the question of whether or not the Opinion below conflicts with the opinion of this court in *Williams 2*. DKN submits that the Opinion below certainly conflicts with the statement of law by this Court in *Williams 2*, as well as the same statement of law by the appellate court in *Williams 1*. While there is a factual distinction between this case and the facts giving rise to the holding in *Williams 2*, DKN respectfully submits that: (1) that factual distinction is immaterial because the court in *Williams 2* expressly set forth the *general rule on joint and severally liability* at issue here, and relied upon that statement of law in its opinion; and (2) even if the factual distinction in *Williams 2* is assumed, *arguendo*, to distinguish the facts in this case from those in *Williams 2*, the black letter legal principle set forth in *Williams 2*, that jointly and severally liable co-obligors can be sued in

the same or separate actions, is a correct statement of law clearly applicable to the facts here.

1. Irrespective of its Attempt to Factually Distinguish *Williams 2*, the Opinion Below Expressly Contradicts the *General Rule of Joint and Several Liability* as Stated Therein by this Court

DKN relied upon the following passage from *Williams 2* in arguing that its judgment in the *Caputo Action* did not bar it from pursuit of the *Faerber Action*:

> It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensible parties. They may not be sued separately (citations). If judgment is obtained in a separate action against one, it bars an action against the others. (Citation.) When the obligation is *joint and several* it is not nonjoinder to sue one alone (citations). The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort-feasors. In such a case the 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....'

Williams 2, *supra*, at 65, quoting *Grundel v. Union Iron Works* (1900) 127 Cal. 438, 442, as cited in the Opinion at 11.

Though it agreed with the trial court's express statement that the passage from *Williams 2* is "wrong," the Opinion distinguished *Williams 2* factually with the observation that its holding did "not support DKN's position" because "cases are not authority for propositions not considered."

(Opinion, 12.) The suggestion is that *Williams 2* did not rule upon the legal issue integral to this case.

Contrary to the inference in the Opinion, the holding in *Williams 2* was focused directly upon whether or not a creditor, such as DKN here, could maintain a successive action against jointly and severally liable co-obligors on the same contract, after a judgment had been obtained against one but not the successively sued others. *Williams 2* involved four co-obligors on two promissory notes secured by a chattel mortgage encumbering property of one of the co-makers, Reed. As here, it was uncontested that the co-obligors were jointly and severally liable.

After default on the notes, the creditor entered into an agreement (the "October 12th Agreement")[26] with the co-maker Reed, and not the other co-makers, allowing an additional two and a half months for the repayment of the note, and establishing a reduced amount[27] for which the creditor would accept payment in full satisfaction of both the notes. Reed failed to pay the agreed

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[26] The express terms of the agreement are quoted at length in *Williams 1* at 197-99.

[27] While the principal amount of the short term notes was forty thousand dollars, with interest at five per cent, the agreed satisfaction amount in the October 12th Agreement was thirty five thousand dollars. (See *Williams 1* at 197-98.)

amount in the extended term and the creditor then obtained a judgment against Reed on the October 12th Agreement.[28]

The October 12th Agreement did not constitute a novation of the promissory notes, nor did it extinguish the obligations created by those notes.[29]

With the judgment against Reed unpaid, the creditor then brought suit against all four co-makers, including Reed, on the two original notes and the chattel mortgage, seeking to foreclose the mortgage and obtain a deficiency judgment. Reed defaulted. The action was dismissed as to the three co-makers of the note.[30]

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[28] "Soon after maturity of the October 12, 1950, obligation, plaintiff brought suit upon it against Reed, and on November 2, 1950, obtained judgment against him for $35,571.24, costs, and attorneys fees. No part of that judgment has been paid. Nor does it appear that plaintiff has taken any steps, by levy of execution or otherwise, to enforce that judgment." (*Williams 1* at 199.)

[29] "Plaintiff agreed to accept, in settlement of the old notes, a certain sum of money, with interest, that sum to be paid in full by October 28, 1950. That does not indicate an intent to substitute the new obligation for the old, **unless and until the new obligation has been performed**. Of like import was plaintiff's promise 'upon receipt of payment in full' to execute documents evidencing satisfaction of the old obligation. His agreement that he would withhold until October 28, 1950, 'any action to enforce the collection of said note' (the old obligation) or 'the foreclosure of said chattel mortgage' indicates an intent to keep the old obligation alive, not to extinguish it nor to release Reed or any of his cosigners, nor to release the mortgage security." (*Williams 1* at 201, emphasis added).

[30] "The judgment was rendered in response to a motion for summary judgment by defendant Cairns and a motion for dismissal by defendants Arvidson and Carroll. It followed an order which declared that it appeared from the affidavits of the parties that the 'debt sued upon **has been satisfied by a**

Williams appealed this judgment and it was reversed, resulting in the published opinion in *Williams 1*. The case was tried on remand, with judgment being entered in favor of the creditor Williams.

Just as Faerber successfully argued here, the successively-sued co-obligors in *Williams 2* argued that the initial judgment against the first co-obligor barred the later suit against the remaining three co-obligors:

> [The] comakers claim that in such a case the bringing of an action against one of the makers . . . without joining the others, and obtaining judgment against him alone, bars the plaintiff from later suing any of the others in respect to that obligation.[31]

Williams 2, *supra*, at 64-65.

The Supreme Court, quoting with approval the earlier published *Williams 1* opinion, rejected that argument:

> [A] mere judgment against [the first co-maker] in a separate action against him **upon the original notes** would not preclude [the creditor] from bringing subsequent actions against [the] comakers.

Williams 2, *supra*, at 65, emphasis added.

The clear legal principle reflected in *Williams 2* is the *general rule* that joint and several obligors may be sued jointly in a single suit, or severally in

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judgment (§ 726, C.C.P.), and that there are no triable issues presented by the pleadings.'" (*Williams 1* at 197, emphasis added.)

[31] See also *Williams 1* at 203-04.

separate suits. It appears beyond rational argument to the contrary that this legal principle applies directly in this case.

The holding in the Opinion not only directly conflicts with *Williams 2* on this essential point, it actually validates a trial court statement that the holding in *Williams 2*, along with consistent commentary in Witkin, is "wrong." DKN submits that this constitutes a violation of the compulsory doctrine of *stare decisis* but, as that was not identified as a specified issue for review, though identified as an issue in the Petition for Review, DKN will not brief that contention.

VI.

CONCLUSION

DKN submits that the holding of the Opinion is definitely wrong. It promulgates a *res judicata exception* to the centuries-old *general rule of joint and several liability*, which, if it were to stand, would have the effect of negating any meaning in the *general rule*, and transforming that *general rule* and the provisions of Corporations Code §§ 16306-16307 into misleading traps for the unwary.

As reflected in the authorities discussed above, though the *general rule of joint and several liability* is undoubtedly venerable, it plainly needs reaffirmation and clarification from this Court in the context of the facts here, and in the context of the doctrine of res judicata. DKN submits that, by definition, a second action against a joint and several obligor, brought after a first successful judgment in an against a separate jointly and severally liable obligor, simply does not invoke the doctrine of res judicata. The fact that the claims against the severally liable co-obligors are permitted as a matter of law to be brought in separate actions, regardless of a prior action or judgment, necessarily compels the conclusion that the claims do not meet the essential "identity of claims" prerequisite for the application of res judicata. There is no published case that Petitioner has found which clarifies this important issue.

Apart from the foregoing, Petitioner submits that both the trial court and the Court of Appeal have each violated *stare decisis* in an express manner

that seems almost an open challenge to the critical chain of authority reflected by that doctrine. The appellate court has given unequivocal approbation to a trial court ruling that expressly rejected as "wrong" the controlling precedent of this court. As noted in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, legal "chaos" will ensue if the principle of *stare decisis* is ignored.

DATED: **August 20th, 2014**

Respectfully submitted,

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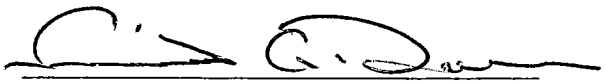
CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 11,171 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: **August 20, 2014**



MICHAEL G. DAWE

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 **August** 20, **2014**, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

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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 **August** 20, **2014**, at Santa Ana, California.

Yvette Gradias