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

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DKN'S REPLY TO FAERBER'S RESPONSE TO OPENING BRIEF ON THE MERITS

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I. INTRODUCTION

Faerber places thematic emphasis on the suggestion that DKN made an "election" to "single out Caputo ... instead of serving Faerber and Neel in the *Caputo lawsuit*. . . . " (Response ("RB") /2.) He repeatedly suggests that since there were allegedly "no impediments to DKN bringing Faerber into the *Caputo lawsuit* . . .", and since DKN had made an allegedly "tactical decision not to serve [Faerber] ...and to proceed to judgment against Caputo only . . .," (RB/5) neither the court system nor Faerber should be subjected to the burden of DKN's "vexatious litigation." (RB/4.)

In an effort to substantiate this theme, Faerber asserts that DKN's "wasteful litigation tactics" will unjustly burden the court system, Faerber and Caputo. (RB/3.) He asserts without factual support in the record, *inter alia*, that "[p]arties and witnesses that have already given deposition and trial testimony . . . will have to be called again in deposition and trial to testify on the same subject matter." (RB/4.)

> "Legal issues determined in the first lawsuit will have to be re-argued in a second proceeding with potentially conflicting results. Written discovery and document productions will need to be re-done. A new jury will need to be empanelled to decide the same issues as the first jury.[1] A Superior Court judge, staff and courtroom will be tied up for several weeks trying a case that has already been tried. Roy Caputo, who has already incurred the cost of one trial, will be forced into a second trial on indemnity and contribution claims. The likelihood of inconsistent judgments on the same claim is palpable. No meaningful public policy goal is served by allowing DKN to pursue multiple lawsuits on the same claim."

(RB/4.)

[1] There was no jury in the Caputo lawsuit.

Apart from constituting a prediction of litigation inefficiency verging on the hysterical, Faerber's theme is contrived upon a known false premise. The contention that it is DKN's fault that the second litigation is necessary because DKN *tactically* elected to "single out" Caputo, is belied by the fact that, despite DKN having initially named each of the three actual lessees as defendant co-lessees in the initial cross complaint, it was Faerber who demanded that he be dismissed with the repeated assertion[2] that the only lessee under the lease was Caputo. As reflected below, Faerber himself was to eventually admit during the trial of the *Caputo lawsuit*, four years after Faerber had initially demanded that he be dismissed because he was allegedly **not** a lessee, that: (i) He was actually always a lessee; (ii) He was a "partner" of Caputo and Neel in connection with the business operation for which the lease was undertaken; and (iii) The assertions made at the outset of the *Caputo lawsuit* that he was not a lessee were "false." (2 AA 223:28-224:7.)

When viewed in light of these now uncontested facts, Faerber's current argument that DKN is at fault for litigation gamesmanship necessitating the second lawsuit is disingenuous at best.

A second central tenet of Faerber's response is that, though DKN's argument is premised upon the long established *general rule*[3] at common law that joint and several obligors can be sued in the same or separate actions,

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[2] These assertions were made through Faerber's legal representative, the same attorney who represented Faerber's co-defendants Caputo and Neel.

[3] As in the Opening Brief, the term " *general rule*" will refer to the rule that jointly and severally liable obligors may be sued in a single, or in separate lawsuits, and the term *res judicata exception* will refer to the rule emanating from the Opinion, that res judicata will bar the further pursuit of any separate suit against a jointly and severally liable obligor once a first-in-time judgment is entered in any other suit against a jointly and severally liable co-obligor.

DKN is "arguing for **significant changes** to the current law." Faerber argues that "this Court should not change the law to accommodate DKN's wasteful litigation tactics." (RB/3.)

The lack of merit in this contention is reflected not only in the fact that it was Faerber's "wasteful litigation tactics," not those of DKN, that are responsible for any inefficiencies arising out of the second lawsuit. It is further reflected in the ironic fact that Faerber simultaneously argues the opposite proposition without apparently perceiving the contradiction. On the same page Faerber asserts that DKN is asserting a "stagnant . . . view of ancient rules . . . ." (RB/3.) The fact that Faerber's contentions on this central tenet are materially inconsistent reflects the extent to which his arguments are without soundly reasoned foundation.

A final point in this introduction is that Faerber's response fails to answer the core question of how the *res judicata exception* can possibly coexist with the *general rule* to which it is purportedly **just** an exception.[4] As applied in the Opinion below, the *res judicata exception* stands for the principle that: As a matter of law, despite the acknowledged *general rule* which expressly permits separate actions and separate judgments against jointly and severally liable co-obligors, the prior entry of any single judgment against one or more, but not all, such co-obligors, will bar any continued pursuit of, and any separate judgment upon, any claim against any other jointly and severally liable co-obligor(s).

A central tenet of the Opening Brief is that the *res judicata exception* necessarily consumes the *general rule.* Its sole purpose is to preclude the very

[4] Faerber takes on, but does not answer this question at pages 18 to 21 of the Response.

separate actions and *separate judgments,* the permission of which is the *raison d'être* for the *general rule*. Viewed in this light, the *res judicata exception* is either absurd, or is actually a brand new rule of res judicata which eliminates and inters the centuries-old *general rule.*

II. SUPPLEMENTAL FACTS[5]

In its opening brief, DKN set forth the "fact" that, though it had initially cross-complained against all three lessees, it proceeded against only the single lessee Caputo as "a result of contentions made on behalf of both Caputo and co-Lessees Faerber & Neel, all represented by the same counsel, that Caputo was the only intended Lessee, and that Faerber and Neel were not co-Lessees." (OB/4.) While not contesting the accuracy of the foregoing fact, Faerber's thematic portrayal of DKN as having made the "tactical decision" not to serve Faerber and to proceed to judgment against Caputo only (RB/5) is obviously intended to influence this Court. Faerber's characterization is so materially at odds with the record that DKN submits the following supplemental references to the record to assure that if there is any consideration given to Faerber's theme, that consideration has the benefit of the material facts.

A. DKN Dismissed Faerber and Neel In Reliance Upon the Now-Admittedly False Assertion that Caputo was the Only Lessee.

DKN's initial cross complaint alleged that on or about June 3, 2004, Faerber, Neel and Caputo entered into a lease with co-lessors DKN and

[5] The supplemental statement may be more information than is essential to a ruling on the designated issues. It is submitted solely to rebut the thematic inference in Faerber's response that DKN, and not Faerber, is responsible for tactically caused inefficiency in this litigation process, to the extent such an inference may be viewed as material by this Court in disposing of the designated issues.

CDFT.[6] (The "*June Lease*; 1 AA 7:4-7.) By a document dated June 18, 2004, entitled Amendment No. 1 ("*Amendment*"), each of the three lessees initialed an agreement which included a statement that "Lessee will be listed as Roy Caputo, an individual." (1 AA 01, ¶4.) As set forth on the initial *June Lease*, Caputo had been listed as "Roy Caputo, **M.D.**" The revision reflected, *inter alia*, the elimination of the "M.D." beside Caputo's name.

From the outset of the *Caputo lawsuit*, Faerber and Neel, always represented by the same attorney as Caputo, contended that the *Amendment* signified intent to leave Caputo as the sole lessee. The trial testimony of Faerber four years later was to concede that, contrary to this repeated contention, Faerber had always understood himself to be a lessee, and a "partner" of Caputo and Neel. Faerber admitted in trial testimony that the assertion that he had not always been a lessee was "false." (2 AA 223:28-224:7.)

A second amendment to the *June Lease* was executed in September of 2004. (The "*September Lease*; 1 AA 17:10-13.) Notwithstanding the prior *Amendment*, the *September Lease* expressly stated that Caputo, Faerber, and Neel were each lessees. Each of the three co-lessees initialed the *September Lease*. (*Id.*)

Caputo, Faerber and Neel were all "partners" in the operation of the fitness club known as Evolution Fitness, which operated out of the leased premises. Caputo, Faerber and Neel signed the lease in their capacity as "partners." (2 AA 367.) Though the Court of Appeal reached the conclusion that the trial court had not found Caputo, Faerber and Neel to be "partners,"

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[6] Faerber and Neel were named as lessees on the first page of the lease, initialed every page of the lease, and signed the lease. (1 AA 43.)

the Statement of Decision referenced "Caputo and his partners" Faerber and Neel, or "Plaintiff and his partners" five times. (4 AA 778-780.)

B. Faerber and Caputo Agreed to Indemnify Neel for His Liabilities Under the Lease.

In March 2007, almost three years after the initial execution of the *September Lease*, Faerber and Caputo terminated Neel's employment as a principal of Evolution Fitness. (1 AA 18:19-20.) Faerber and Caputo accepted Neel's ownership share in Evolution Fitness in exchange for indemnifying Neel against any liability arising out of Evolution Fitness. (*Id.*, 21-23.) DKN was a third-party beneficiary of that indemnity agreement. Faerber is "obligated to DKN for Neel's non-payment of rent." (*Id.*, 18:21-19:3.)

As of April 1, 2007, the co-lessees were in breach of the *September Lease*. (3 AA 523:14-17.) On June 28, 2007, Caputo sued co-lessors DKN and CDFT [7] for breach of contract and various torts in connection with the lease. (3 AA 476.) On September 18, 2007, DKN and CDFT cross-complained against each of the three individual co-lessees for damages arising out of breach of the lease. At this time the *June Lease* and the *Amendment*, but not the *September Lease,* was mistakenly appended to the cross complaint and alleged as the operative lease. (1 AA 21.) The prior death of the lessor representative principally responsible for the negotiation and documentation of the lease resulted in some uncertainty as to the operative documents from the lessor side.

In October 2007, DKN and CDFT dismissed Faerber and Neel **without prejudice** based on the representations that Caputo was the sole lessee. (2 AA

[7] The General Partner of CDFT, Limited Partnership, was Bill Dendy. By the time of the Caputo Action, Mr. Dendy, who handled all of the lease negotiations and documentation on behalf of the lessors, was deceased.

370:1-4, AA 611-12.) Faerber incorrectly states in his Response that he was "never dismissed" after DKN "reinstat[ed]" the claims against him in the First Amended Complaint. (RB/16-17.) However, Faerber was never reinstated as a defendant after having been dismissed. The parties then agreed that the initial dismissal controlled as to the later first amended complaint despite the names of Faerber and Neel having been left on the caption of that document. (3 AA 648:4-9.)

In December 2007, DKN and CDFT filed an unlawful detainer complaint (the "*UD Action*") against Caputo, Faerber and Neel. Faerber and Neel demurred to the complaint on the ground that Caputo was the sole lessee. (2 AA 370, fn. 2.) The demurrer asserted that Faerber and Neel were not parties to the lease, and thus had no liability thereunder. (2 AA 370:9-12; 3 AA 397-98.) The same attorney continued to represent Caputo and Faerber jointly, both in the *UD Action*, and before, during, and after the 2011 trial of the *Caputo lawsuit*. (2 AA 370, fn. 1.)

In September, 2009, DKN sought leave to file a first amended complaint in the *Caputo lawsuit*. The *September Lease* was alleged as the operative lease for the first time. Despite having been a signatory on the *September Lease,* Faerber continued to maintain that he was not a lessee. Caputo filed a Notice of Non-Opposition to the lessor's motion expressly contingent upon the "proviso that the other named cross-defendants, Neel and Faerber, remained dismissed from this litigation." (3 AA 648:4-9.) The prior dismissal of Faerber and Neel was agreed to remain effective, despite any implications in the amended pleadings to the contrary. (*Id.* at 9-14.)

C. Trial in the *Caputo Lawsuit* Resulted in a Finding that Faerber, Neel and Caputo were all "Partners" and Co-Lessees.

The *Caputo lawsuit* commenced a bifurcated court trial in January 2011. In its eventual ruling the court observed, *inter alia*, that Caputo "and his partners" initially entered into the *June Lease* intending to "lease and build out the premises for a fitness club." (4 AA 778-80.) The court further noted that, Caputo "and his partners . . . wanted more square footage and hence signed the September Lease." (4 AA 779.) The court held the operative lease was composed of the original *June Lease*, the *Amendment*, and the two page *September Lease* document.

The court also noted that even though Caputo was the only named plaintiff in the action for rescission of a lease in which Faerber and Neel were also lessees, "it appears that [Caputo] fairly represents the interests of Dr. Faerber, Mr. Neel and Evolution Fitness and the Court will not deny rescission" based on the fact that the other two lessees had not been included as parties. (4 AA 774.)

D. Faerber Admitted his Status as a Lessee and Partner During the 2011 Trial of the *Caputo Lawsuit.*

At trial, Faerber admitted he had considered himself a lessee as of his signature on the *September Lease* in 2004. (4 AA 778.) He further conceded that "it would be a false statement to say Dr. Caputo and not [Faerber] . . . was the only lessee under the lease." (4 AA 791:20-792:7.) He also admitted to being partners with Caputo and Neel. (2 AA 367:23-24.) Despite Faerber's admissions, during trial, counsel for Caputo continued to argue in closing argument that "Dr. Caputo . . .was the only lessee . . . ." (4 AA 764:18-19.)

III. ARGUMENT IN REPLY

A. Faerber's Argument that DKN had but a Single Indivisible Cause of Action Ignores the *General Rule.*

As to the first issue identified for review ["Can parties who are jointly and severally liable on an obligation be sued in separate actions?"], Faerber responds that jointly and severally liable defendants may be sued in separate actions in "some circumstances, but this rule is not absolute." Faerber contends that where the elements of res judicata are satisfied and important public policies underlying that equitable doctrine will be advanced, then "res judicata overrides the rule of nonjoinder to bar a second lawsuit on the same obligation." (RB/1.)

Faerber identifies three essential conditions precedent to a defensive application of the res judicata doctrine. He argues that each is present in this case and therefore the doctrine was correctly employed to bar the *Faerber lawsuit.* (RB/8-17.) The absence of any one of the three conditions precedent is fatal to Faerber's argument. DKN submits that none of the three elements are present in the record.

The first element is that the to-be-barred lawsuit must be based upon the "same cause of action" as that upon which the barring-judgment was based. Faerber argues that DKN's *several* causes of action against Faerber, Caputo and Neel, are actually such a single indivisible cause of action requiring *joint* pursuit in a single lawsuit. (RB/9-15.)

In so arguing Faerber ignores the *elephant in the room.* Since the essence of the difference between merely *joint liability*, and the materially broader joint *and several* liability, is that under the former there is but a single unified cause of action as a matter of law, while under the latter there are as

many potential causes of action as there are severally liable co-obligors, Faerber's argument is necessarily unavailing.

As noted in the opening brief (OB/19), directly contrary to Faerber's current argument, *Williston On Contracts* has characterized the principal distinction between a merely "joint" liability and "several" liability as follows: Under a "joint obligation...each joint promissor is liable for the whole performance jointly assumed . . . ." while, by contrast, a "several obligation... **has the effect of creating two [or more] 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.

Faerber does not address this passage from Williston. Nor does he address the plainly controlling concept that the word "several," in "joint and several," means exactly what it says. Several obligations, and hence several causes of action, are created when more than one obligor undertakes a joint and several obligation.

Consistent with the failure to address the passage from *Williston On Contracts*, Faerber completely ignores the substance of this Court's holding 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. These cases, expressly relied upon by the Court of Appeal below as a reflection of the vitality of the *general rule* argued here by DKN, were discussed at length in the Opening Brief. (OB/18-25.) The sole offering from Faerber as to these

holdings amounts to the conclusory assertion that "*Grundel* never discussed the interplay between res judicata and joint and several liability and for this reason is" as inapplicable as *Williams 2*,[8] which Faerber contends suffers the same flaw. Given that (i) the opinion in *Grundel* expressly sets forth that the *general rule* "in America" is that joint and several creditors are not barred by a prior unsatisfied judgment against any jointly and severally liable obligor, from pursuing a separate action against any other jointly and severally obligor (*Grundel, supra*, at 440-41, citing 2 Black, Judgm. § 777, emphasis added), and given that (ii) the Opinion expressly cited *Grundel* for this *general rule*, it becomes apparent why Faerber peremptorily dismisses the *Grundel* opinion as "inapplicable." If he were to actually address the substance of *Grundel*, Faerber would be compelled to concede that the Opinion below cannot be reconciled with *Grundel,* despite having cited it as controlling authority for the *general rule*.

The same assessment arises with respect to Faerber's summary disposition of the holding in *Melander* as immaterial because the case "contains no discussion of res judicata...." (RB/27.) As discussed in the Opening Brief, the extensive discussion of the principles of joint and several liability in *Melander* are completely inconsistent with the *res judicata exception* created in the Opinion.

(i) Faerber's Contention that None of the Cases Cited by DKN Address the "Interplay" Between Res Judicata and the *General rule* is Deliberately Myopic.

While it may be technically true that holdings such as *Grundel, Melander,* and *Williams 2* do not "expressly" discuss the "interplay" of the concepts of res judicata and the *general rule* of joint and several liability, the

[8] *Williams* v. *Reed* (1957) 48 Cal.2d 57.

suggestion that the interplay between those concepts is not central to the holdings of those cases is disingenuous. Each case addresses the *general rule* from the perspective of determining or reflecting whether or not separate actions and, or separate judgments, can be permissibly pursued on joint and several obligations. In reaching the conclusion that separate actions and separate judgments are permissible so long as there is a *several* liability, each case necessarily compels the conclusion that res judicata does not intervene to preclude such separate actions and, or, separate judgments. The inescapability of that conclusion necessitates the conclusion that, where separate actions and judgments are permissible, res judicata does not apply to bar the permitted separate actions and, or judgments.

Indeed, it may be that the reason there is no clearer or more recent law on this issue is because it has generally been perceived to be such a certain point that severally liable defendants who have been subject to separate actions and, or judgments, have not raised this argument, at least not to the point of obtaining a published Opinion on the issue more recent than *Williams 2.*

B. None of the Cases Cited in the Response Support the *Res Judicata Exception.*

None of the cases cited by Faerber support the legal conclusion that, despite the conceded continuing vitality of the *general rule*, the entry of a first-in-time judgment against one severally liable obligor in any one separate action necessarily bars the further pursuit of any other separate action against any other severally liable obligor. **No case cited by Faerber applies res judicata to bar a separate action against a jointly and severally liable obligor.**

One common material distinction between the cases cited by Faerber and the present case is that there is no joint and several liability issue facing the court applying the res judicata doctrine. Faerber repeatedly cites this Court's holding in *Mycogen Corp. v. Monsanto Corp.* (2002) 28 Cal.4th 888. That case stands only for the proposition that res judicata precludes "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" **as against the same defendant(s).** (RB/8.) Neither the legal principle nor the facts of *Mycogen* are analogous here. *Mycogen* involved a plaintiff filing a second lawsuit against the **same defendant**, not severally liable different defendants, after having succeeded against that same defendant in a first action. The concept of joint and several liability was completely absent as an issue or a consideration in *Mycogen*. The fact pattern in *Mycogen* reflects a common application of res judicata to preclude plaintiffs from taking a *second bite of the apple*.

Faerber cites *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755 [plaintiff/homeowner, having arbitrated a claim against a General Contractor who was the prevailing party, albeit having been found liable for some limited amount to homeowner, filed second lawsuit against a subcontractor, for whom the General Contractor was derivatively liable, after the General Contractor filed bankruptcy] 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. (RB/8-9.) As with *Mycogen*, there is no joint and several liability issue in *Thibodeau*. As with *Mycogen,* this is another *second bite at the apple* case inapposite here.

Faerber cites *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App. 4th 1234, 1246-47, [second lawsuit barred by res judicata where

successive lawsuits were filed against the **same defendants** on the same claims and the judgment in the first action had been in favor of the defendants; no issue of joint and several liability] for the proposition that "one injury gives rise to only one claim for relief." (RB/10.) This is yet another reflection of the *second bite at the apple* principle, inapposite here.

Faerber argues that the holding in *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 575 ("*LeVine*") is instructive because, it allegedly deals with the "exact issue presented here. . . ." (RB/10.) In *LeVine*, a plaintiff partner in a medical partnership sued the partnership's accountant alleging constructive and actual fraud, negligence, and conspiracy in connection with the allocation of partnership profits. Summary judgment was granted in favor of the defendant based, *inter alia*, on the fact that plaintiff had unsuccessfully pursued the same or similar claims against the defendant accountant's alleged co-conspirators, the other partners in the medical partnership, in a prior arbitration.

The holding in *LeVine* is both factually and legally inapposite. As with each of Faerber's other cited authorities, there is no issue of joint and several liability. As further noted by the court, the "unifying principle" under a theory of either civil conspiracy or aiding and abetting is that the defendant's liability depends upon the "actual commission of a tort." (*Id.*) Since the issue of whether the alleged co-conspirators of the second-action defendant accountant had committed a tort had already been litigated adversely to the plaintiff in the prior arbitration, the trial court understandably concluded that the determination of that issue, binding upon the plaintiff in the arbitration, precluded any claim in the subsequent lawsuit against the accountant. Allowing the plaintiff to pursue the claim a second time, despite having lost it previously in arbitration, would constitute the inequitable permission of a

second bite of the apple. As with each of Faerber's other citations, there was no issue of joint and several liability discussed by the court.

(i) Far from Attempting a *Second Bite of the Apple*, Plaintiff DKN Prevailed in the Initial Lawsuit.

It appears important that, far from having lost in the initial forum, DKN prevailed against Faerber's jointly and severally liable co-lessee and "partner" in establishing the lessees' liability for rent and related obligations. Thus, to the extent that res judicata may apply as between DKN and Faerber in the second action, it is possible, perhaps probable, that that doctrine will collaterally estop Faerber from contesting the already-established liability for rent and related obligations already determined against his partner and co-lessee. Since the trial court below expressly acknowledged that the interests of Faerber and Neel were being adequately represented in the form of their common attorney, and by the advocacy of their common interests by Caputo, it would seem that collateral estoppel is likely to preclude Faerber from contesting the determination of issues already litigated.[9] That potential application of collateral estoppel as against Faerber is not at issue here and will not be further briefed or argued.

Faerber cites the holding in *Lippert v. Bailey* (1966) 241 Cal.App. 376, 382, relied upon by the Opinion, for the proposition that a "single cause of action may not be maintained against various defendants in separate suits as

[9] "The threshold requirements for issue preclusion [collateral estoppel] are: (1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding." (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.)

plaintiff has suffered but one injury." (RB/11.) The inapplicability of this holding is discussed at length in the Opening Brief at 32-39. Faerber's reliance on this proposition, taken out of a context materially different than that here, again fails to acknowledge that the substance of the *general rule* necessarily entails the conclusion that, where the obligations of obligors are joint and several, the right of a plaintiff to pursue ***several*** actions and judgments against those defendants, as an alternative to ***jointly*** pursuing a single judgment, necessarily compels the conclusion that the plaintiff is not bound by the single "cause of action" principles applicable to other materially different factual situations.

The holding in *Lippert* is further inapposite because it has nothing to do with the doctrine of either res judicata or joint and several liability, let alone the interplay between the two concepts.

In *Brinton v. Bankers Pension Svcs. Inc.* (1999) 76 Cal.App.4th 550, 557-558, the later-sued defendant's liability was merely derivative of its agent, and the prior arbitration decision had been in the agent's favor. Faerber's liability here is not merely derivative, it is a discrete and independent contractual liability. *Brinton* is another reflection of the *second bite at the apple* principle inapposite here.

Faerber cites the District Court law and motion ruling in *Prosurance Group, Inc. v. ACE Property & Cas. Ins.* (N.D. Cal. May 12, 2010) 2010 U.S. Dist. LEXIS 46818 (RB/11-12) for the proposition that a "valid final judgment on the merits precludes a second action on that claim or any part of it." (RB/11.) Apart from the fact that *Prosurance* is a federal district level holding, on a law and motion matter, neither the facts nor the law of *Prosurance* apply here.

In the effort to extract relevance from *Prosurance*, Faerber argues that the second state court "lawsuit against the subsidiaries' parent companies, which were not parties to the [prior] arbitration, for tort claims [alleged] . . . they were **jointly and severally liable** because they instructed the subsidiaries to commit the contractual breaches litigated in the arbitration." (RB/11, emphasis added.) It is unclear from where Faerber derived the conclusion that the allegations against the parent companies in the second lawsuit claimed "joint and several" liability. There is no mention in the holding that the plaintiffs claimed, or that the court analyzed, the concept that the defendant parent companies in the second lawsuit were "jointly and severally" liable for contract damages awarded in arbitration. On the contrary, the arbitration award against the subsidiaries was a contract-based award, while the claims against the parent-defendants in the second action were solely a tort action. The causes of action in the second lawsuit were necessarily not the **same causes of action in the prior arbitration.** They were *ex contractu* in the first action, and *ex delicto,* against different defendants, in the second action.

It appears Faerber is incorrect in suggesting that the trial court in *Prosurance* applied a prior judgment to bar a subsequent lawsuit where the claims against the defendant in the subsequent lawsuit were based upon alleged joint and several liability. It further appears that the separate sets of defendants in *Prosurance* did not, as here, share either implied or express contractual joint and several liability.

C. The Mere Fact that DKN's Judgment Against Caputo was Final and on the Merits as to DKN's *Several* Cause of Action Against Caputo, Does Not Fortuitously Immunize Faerber From his *Several* Liability on the Lease Under the *General Rule.*

In addressing the second required element of res judicata (prior final judgment on the merits on the required single unified cause of action), 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." (RB/15.) This is not DKN's argument at all. It seeks no revision, drastic or otherwise, to the doctrine of res judicata. Nor does DKN contend that res judicata "only applies where the judgment on the merits is adverse to the party pursuing duplicative lawsuits."

DKN's core argument is simply this: Under the material facts of the current case, where DKN has prevailed against one jointly and severally liable co-lessee and partner, and now seeks to obtain a judgment against other jointly and severally liable co-lessees and partners, and where the only reason that DKN did not pursue all three co-lessee/partners in the initial action is that the attorney representing all three co-lessee/partners repeatedly asserted that the judgment debtor lessee was the only actual lessee under the operative lease, the successively-sued co-lessee/partners cannot rely on the equitable doctrine of res judicata to prohibit the second action because: (i) The *general rule* permits separate actions and separate judgments against jointly and severally liable co-obligors; and (ii) Even if res judicata might otherwise apply notwithstanding the *general rule*, it would be profoundly inequitable to apply it here, in light of the fact that the party seeking its equitable benefit directly caused the need for successive suits with representations he eventually conceded were false.

Far from arguing for a "drastic revision" in prior law, DKN simply asks that this Court affirm the long-standing existing law in the form of the *general rule*, and to clarify that the *res judicata exception* promulgated in the Opinion cannot co-exist with that long standing *general rule*.

Whether or not Faerber is able to establish the existence of either the second or third elements of res judicata appears ultimately immaterial. Since the first *sine qua non* condition precedent to the application of res judicata cannot be established, res judicata simply does not apply in this fact situation.

That said, however, it is evident that the record cannot support Faerber's contention that the second element was established. That element necessarily presupposes that the required judgment on the merits is upon a single indivisible cause of action, and thus necessarily precludes any separate or successive action. Since the *general rule* exists for the very purpose of establishing the right of separate actions and separate judgments, the single dispositive judgment required to establish the necessary second element simply does not exist.

D. Faerber's Assertion that "Many Courts Have Noted the Interplay" Between the Doctrines of Res Judicata and Joint and Several Liability is Incorrect.

In his effort to address DKN's contention that there is an irreconcilable conflict between the *general rule* and the *res judicata exception*, Faerber argues that "many courts have noted the interplay" between the doctrines of res judicata and joint and several liability. (RB/18.) He implies that these cases have expressly or impliedly reconciled the manner in which the *res judicata exception* may compatibly co-exist with the *general rule*. By contrast, Faerber contends that the holdings in *Williams 2* and *Grundel* are "inapplicable" because neither case discussed that same "interplay." (RB/27.)

Faerber's argument is without persuasive force on either of the two foregoing contentions. First, a review of the precedents cited by Faerber in support of his "many courts have noted the interplay" contention reveals that the cited decisions simply do not, either directly or impliedly, note or discuss the "interplay" between res judicata and joint and several liability. *Mirabile v. Smith* (1953) 119 Cal.App.2d 685, 688 deals with merely joint, but not several liability, and does not mention res judicata at all. *Cuevas v. Truline Corp.* (2004) 118 Cal.App 4th 56, 61 deals with the *one judgment rule*, and does not address res judicata or joint and several liability. *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725 deals with res judicata as applied in successive actions against the same obligor. It is a *second bite at the apple* case with no issue of joint and several liability. *Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App4th 1520,1527 holds only that res judicata bars a plaintiff from a *second bite at the apple* in a successive lawsuit, where the plaintiff dismissed the **same defendant with prejudice**[10] for the **same claims** in the first action. *Kopp v. Fair Pol. Practices Com* (1995) 11 Cal.4th 607, 621 does not deal with joint and several liability at all.

Not a single one of these cases even implies that the *general rule* can coexist with the *res judicata exception.*

Secondly, as noted above, while it may be technically accurate to state that neither *Williams 2* nor *Grundel* actually discussed the interplay between res judicata and the *general rule*, it is indisputable that both opinions stand

[10] By material distinction here, the dismissal of Faerber below was "without prejudice." The "with prejudice" dismissal was *sine qua non* to the *Countrywide* holding.

squarely for the proposition that the *general rule* governs in California in a manner which simply cannot co-exist with the *res judicata exception.*

E. DKN Does Not Contend that Res Judicata and the *General Rule* are Mutually Exclusive.

Faerber materially overstates DKN's contentions in his assertion that DKN asks this Court to disregard the "res judicata doctrine" by arguing that it "cannot rationally coexist" with the concept of joint and several liability. (RB/18; citing OB/21.) DKN's contention is far more limited. The referenced statement actually contends only that that the *general rule* cannot coexist with the *res judicata exception,* not the far broader res judicata "doctrine." Indeed, as noted above, in the event of a reversal, DKN will undoubtedly consider whether the res judicata doctrine may collaterally estop Faerber from contesting rulings already litigated by his partner and co-lessee Caputo, thus showing clearly that DKN agrees there are manners in which res judicata and the *general rule* can coexist.

F. The *Res Judicata Exception* Flies in the Face of Stare Decisis and Other Sound Public Policy.

DKN accepts *a priori* the soundness of the public policy upon which the doctrine of res judicata is based. That said, the doctrine of stare decisis is based upon no less sound and important public policy. Where a centuries old principle of common law has consistently informed courts, litigants, and legal representatives that, irrespective of principles such as res judicata, a creditor has the right to proceed in separate actions to separate judgments against jointly and severally liable obligors, then it is profoundly against public policy to simply change that black letter *general rule* without prior notice. Such a course of action would justifiably engender profound mistrust and disrespect for the court system. It would be so obviously unfair and inappropriate that further argument of the point seems redundant.

For all the public policy reasons that stare decisis has constituted the backbone of the common law legal system for centuries, it must be recognized that the sudden adoption of the *res judicata exception* as controlling law would constitute an irrational offense to public policy. There is no aspect of the public policy in support of the doctrine of res judicata which would even remotely support such an action.

On the contrary, it would seem very important that this Court send a clear message that, in the context of a stare decisis-based system of common law, neither trial courts nor Courts of Appeal should consider issuing dispositive decisions when to do so requires them to pronounce that a decision of this Court is "wrong." If a trial court or a Court of Appeal believes that a decision of this Court is "wrong," or, through the passage of time, should be revisited, then it would seem perfectly appropriate for the court to so state, while nonetheless complying with the dictates stare decisis until the Supreme Court issues a decision consistent with the lower court view.

G. The Opinion Below Plainly Contradicts the Opinion in *Williams 2*, and the Precedent Upon Which *Williams 2* is Founded.

In addressing the second designated issue for review, Faerber focuses on the key factual distinction between *Williams 2* and the current case in arguing that the holding in the Opinion does not conflict with the opinion of this court in *Williams 2.* While there is undoubtedly a factual issue distinction between *Williams* 2 and this case which one *could* argue is material, it cannot be plausibly contended that the Opinion is not in conflict with the opinion in *Williams 2.*

The relevant factual distinction, material or not, is that in *Williams 2* the judgment debtor on the first judgment, though he had been a jointly and

severally liable obligor on a promissory note with the defendants in the second action, had actually been held liable in the first action, not on the promissory note itself, but on a settlement agreement which he had entered into with the holder of the note after the holder had initially filed suit on the note. Thus, in theory, the first judgment in *Williams 2* was indeed on a separate and distinct contractual obligation (the settlement agreement) than the second action on the note. That said, however, this court saw fit to enunciate the *general rule* as support for its decision in *Williams 2.* This Court's statement of the *general rule*, including its reference back to the holdings in *Grundel* and *Melander*, was in direct response to an argument made by the co-makers of the promissory note in the second action, in the position of Faerber here, in their capacity as jointly and severally liable co-makers on the promissory note, that the plaintiff (in the position of DKN) was barred from suing any of the co obligors on the joint and several obligation of the note after having brought a separate action and obtained a separate judgment against Reed, in his capacity as a jointly and severally liable co-maker.

> Reed's co makers claim that in such a case[11] the bringing of an action against one of the makers (Reed) without joining the others, and obtaining judgment against him alone, bars plaintiff from later suing any of the others in respect to that obligation.

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

Since the co-makers directly raised the claim that Reed was barred from filing a second action simply because he had obtained a prior judgment against a jointly and severally liable co-maker, the holding in *Williams 2* necessarily

[11] This refers back to the joint and several liability of the co-makers on the note.

had to rule on this argument. It did so by citing, relying upon, and applying the *general rule* to reject this argument. Since the argument of the defendant co-makers would necessarily have resulted in a ruling in their favor but for the application of the *general rule,* the application of the general rule was not only collateral to the *ratio decidendi* of the opinion, but was in fact a core element of its actual holding.

This conclusion is further reflected in the fact that it was only after having applied the *general rule* to dispose of the defendant co-makers' contention that their status as jointly and several liable co-makers necessarily immunized them from liability, precisely because Reed had obtained a judgment against another jointly and severally liable co-maker, that this Court next dealt with the impact, if any, of the fact that the initial judgment against Reed was actually based upon a separate contractual obligation than the joint and several obligation of the promissory note. (*Williams 2, supra* at 65: "But Plaintiff's former action was not brought upon the original notes. It was brought against Reed upon his separate agreement of October, 1950, to which none of the other note makers was a party.") This Court proceeded to analyze the issues under that different fact premise only to reach the same conclusion it had already reached in applying the *general rule* to the issues from the factual premise of the shared joint and several liability of the co-obligors on the notes.

It therefore appears evident that the application of the *general rule* was essential to the holding of *Williams 2.* Therefore the Opinion below is in direct conflict with not only the *opinion* generally, but also the actual *holding* of *Williams 2.* The observation in the Opinion below with respect to the "passage from *Williams* [being]. . . wrong . . . 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 . . . " (Opinion, 11) applies directly to the *holding* in *Williams 2* as it relates to this Court's rejection of the

defendants' argument that the prior judgment against their co-obligor on the promissory note barred the subsequent action against the jointly and severally liable co-obligors.

Even if one were to assume, *arguendo*, that this Court's statement of the *general rule* in *Williams 2* was not central to the "holding" of the case because the judgment against the first co-obligor was on the settlement contract and not the note, the fact remains that *Williams 2* clearly and unambiguously set forth the *general rule* as an essential building block of the reasoning by which it rejected a material defensive contention of the co-obligors. There appears no way to reason around the fact that the Opinion below is plainly at odds with the opinion in *Williams 2.*

IV. CONCLUSION

Nothing in Faerber's Response alters DKN's conclusion 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*.

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. Despite his contention to the contrary, Faerber has not cited a single case (and DKN has not found a case in its own research) which clarifies this issue.

In addition, it remains clear that both the trial court and the Court of Appeal have violated stare decisis.

DKN maintains that the rulings of the lower courts should be overturned and the rules set forth above clarified by this Court.

DATED: **October 8, 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 7,518 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: **October 8, 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 ***October 8, 2014***, I served true copies of the following document(s) described as **DKN'S REPLY TO FAERBER'S RESPONSE TO OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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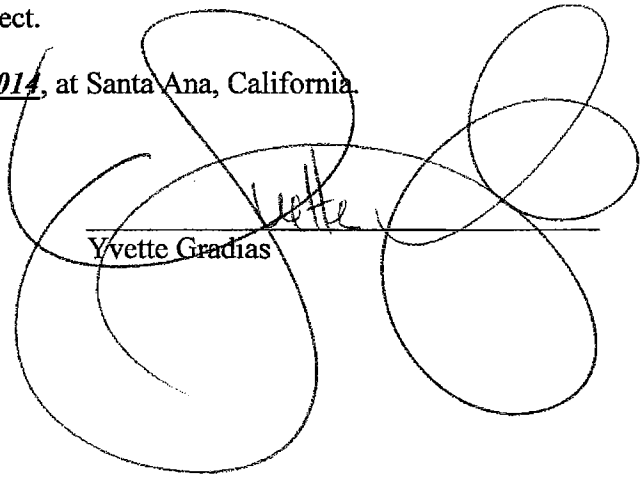
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Prenovost, Normandin, Bergh & Dawe's practice 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 ***October 8, 2014***, at Santa Ana, California.



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