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September 17, 2015

VIA OVERNIGHT DELIVERY
Attn: Clerk of the Court
California Supreme Court
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

Re: Reply to Letter Brief - Fannie Marie Gaines v. Fidelity National Title Insurance Co., et al. (S215990)

Dear Chief Justice Cantil-Sakauye,

Fidelity National Title Insurance Co. and Bobby Jo Rybicki ("Fidelity") submit this letter in reply to the Appellant's letter brief of August 28, 2015.

The Appellant's letter brief is entirely based upon one case, *Holland v. Dave Altman's R.V. Center*, 222 Cal.App.3d 477 (1990). The *Holland* case, as explained below, is not only distinguishable from this case; it actually supports the Appellee's position.

1. **The *Holland* Case Supports the Appellee's Position Because the Purpose and Scope of the Order in This Case was to More Efficiently Resolve the Case and the Order Did Not Cause Unavoidable Delay**

In *Holland,* the Court of Appeal looked at the exclusion of time under the five year statute while an appeal was pending on the issue of service of a defendant who resided out of the county. A motion to quash had been brought by the main defendant in that personal injury action and that motion

was granted, and the granting of the motion was appealed to the California Court of Appeal. The appeal was pending from December of 1986 until March of 1988.

During the pendency of the appeal, the plaintiff/appellant brought an ex parte application to continue all dates related to the trial, and the trial itself. The trial court entered the order and vacated the trial pending resolution of the appeal. After the granting of a five year motion to dismiss, the plaintiff appealed the dismissal, and the Court of Appeal reversed, holding that the time during which the appeal was pending should have been tolled under Sections 583.340(b) and (c). These letter briefs only concern Section 583.340(b).

Although the order in *Holland* was technically the vehicle by which the trial court issued the stay, the Court of Appeal acknowledged that it was "inartfully drafted."

> *"On January 26, 1987, appellant brought a motion for ex parte relief before the [trial] court. The motion was inartfully titled, "Ex Parte Motion for Continuance of Defendant's Motion for Summary Judgment, Trial Date, Mandatory Settlement Conference, and Demand for Designation of Expert Witnesses."* (*Id.* At 481) [Emphasis added]

The trial court in *Holland* went on to execute the order, which was drafted by the attorney who submitted it, and which contained the language that the trial was being continued.

In *Holland*, the order in question contained ostensible language that was more consistent with a continuance as opposed to a stay. However, the Court of Appeal looked at the purpose of the order, and determined that it fit neatly within the definition of a stay that would meet the requirements of Section 583.340(b) because, although the order used continuance language, the effect and purpose of the order was to stay the trial until a determination in the underlying appeal.

This case presents the exact opposite scenario: the order itself uses the words "stay" and "strike," but the effect and purpose of the order belies such language. This is the same reasoning in *Holland* and the reason why *Holland*, if anything, supports the Appellees. The effect and purpose of the order in this case was clearly to assist in facilitation of the resolution of the

action at the express request of the parties who, at the time at least, believed that the case would be more efficiently resolved by relaxing the constraints tied to the then trial date.

In contrast, in *Holland,* the order in question "continued" the trial date until a determination of the underlying appeal regarding the granting of a motion to quash service against the main defendant in the action. As the Court of Appeal alluded to under its analysis of Section 583.340(c), the pending appeal against the main defendant related to service essentially brought the underlying personal injury suit to a halt, and to move forward against other defendants would be highly duplicative and inefficient.

This analysis is relevant in making a determination under Section 583.340(b) as well, because it is useful in determining the intent of the order in question. In *Holland,* the case could not go forward to trial while an issue was pending in the Court of Appeal that would determine whether the main defendant was properly served. This, in combination with the trial court's notations that the trial was vacated pending appeal make it clear that the intent of the order was a stay of the action that would toll the five year statute.

Furthermore, the parties in *Holland* had no control over the length of time the trial would be continued. The trial court did not set a new trial setting conference date; it noted that trial would be reset, "*after ruling of appellate court.*" (*Id.* at 482) Therefore, the setting of a new trial date was wholly dependent upon the ruling of another court under a different jurisdiction. To call the order in *Holland* a continuance would work an injustice against plaintiffs in California and would encourage a policy directly contrary to the policy of the five year statute: avoidable delay. A pending appeal on an essential issue, such as whether the main defendant was ever properly served with the suit, would be a decidedly *unavoidable* delay. In fact, the plaintiff could literally not move forward against that defendant because the trial court had granted the underlying motion to quash.

Here, in stark contrast, every element of the order, including its origination, purpose and even its end (had termination of the order been sought) was completely within the control of the parties, and the order itself placed no involuntary burdens on the parties in resolution of the case. To the contrary; it facilitated resolution of the case by the Appellant's own admission.

In point of fact, *Holland* is not only distinguishable; it actually supports the Appellees' position, because the case merely stands for the proposition that

the intent of the order is paramount to the language within the order in determining whether a stay occurred within the scope of Section 583.340.

In the Appellant's letter brief, the Appellant misapplies *Holland* by arguing:

> *"Applying the reasoning expressed in the Holland and Santana decisions, it is clear that the trial court in the instant case stayed the trial...The trial court's order temporarily suspended all litigation activities, including the trial date for 120 days to allow the parties to attempt resolution of the case by mediation proceedings. The trial date was not continued to a later date at which time it automatically resumed. No new trial date was scheduled."* [Emphasis added]

The first problem with Appellant's analysis here is that the trial court did not suspend all litigation. As has already been argued, pending discovery was allowed to be completed, which, as the Court of Appeal held, alone was enough to call this stay partial with respect to whether the *proceedings* were stayed. More importantly, however, the very purpose of the order was to *effectuate* litigation, through mediation. No doubt the parties used then existing discovery, depositions and legal arguments to bolster their respective positions in attempting to resolve the case through mediation.

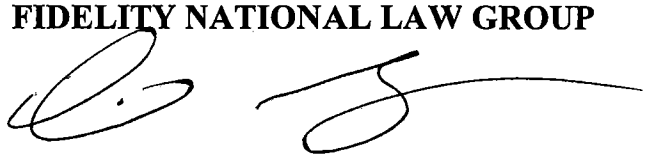
Appellant also states that the trial date was not continued to a later date. That may technically be true, but the date was not vacated pending the happening of some event of which Appellant had no control; the Trial Court set a post mediation status conference for July 16, 2008, and, more importantly, ordered the parties to participate in good faith in mediation. **(CT, 279)** The Appellant admits the order was entered to assist in resolution of the case.

The order in this case is nothing like the order in *Holland.* Not only was the plaintiff there completely precluded from any form of litigation while the motion to quash was before the Court of Appeal, but had the plaintiff sought a reversal of the trial court's order, it would have declined because the case could not proceed where service on the main defendant was still an issue to be decided in another court.

2. Conclusion

Appellant and Fidelity have come to fundamentally contradictory conclusions in looking at the *Holland* case. If anything, the ostensible language of the order in this case favors the Appellant, but its practical effect flows in favor of the Appellees. The *Holland* case only supports the conclusion that the nature and purpose of the order supersedes the order's language. Appellant argues the exact opposite in the letter brief. The order in this case, however, was not entered due to the appeal of a defendant on an issue that, by necessity, had to be decided before trial could proceed. The order here was requested by the parties based upon their perception at the time that they would more efficiently litigate and resolve the case *with* the order than without. As stated in Fidelity's letter brief, to qualify the order in this case as an order tolling the five year statute under Section 583.340(b) as a stay of trial would be contrary to the *Bruns* decision on the issues of stays of the proceedings, and would be contrary to the purpose and intent of the five year statute as a whole.

Respectfully Submitted,
FIDELITY NATIONAL LAW GROUP



Kevin R. Broersma,
Attorney for Fidelity National Title Ins. Co., and
Bobby Jo Rybicki

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 915 Wilshire Boulevard, Suite 2100, Los Angeles, CA 90017.

On September 17, 2015 I served the foregoing document(s) described as:
REPLY TO LETTER BRIEF
on the interested parties in this action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

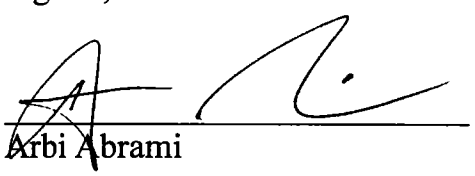
__X__ **(BY OVERNIGHT DELIVERY)** I delivered to an authorized driver authorized by Overnite Express to receive documents, in an envelope or package designated by Overnite Express with delivery fees paid or provided for, addressed to the person on who it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; or at that party's place of residence.

_____ **(BY MAIL)** I deposited such envelope in an internal collection basket. The envelope was mailed with postage thereon fully prepaid from Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if a postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__X__ **(BY ELECTRONIC SERVICE)** Pursuant to California Supreme Court's electronic notification address. Pursuant to Rule 8.212(c)(2), Respondents have submitted an electronic copy of the Letter Brief, which satisfies the service requirement of the California Supreme Court.

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

Executed on September 17, 2015 at Los Angeles, California.



Arbi Abrami

SERVICE LIST

Fannie Marie Gaines v. Joshua Tornberg, et al.

California Supreme Court Case No. S215990
Second Appellate Court of Appeal Case No. B244961
Los Angeles Superior Court Case No. BC 361768

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