S215990

IN THE SUPREME COURT OF CALIFORNIA

MILTON HOWARD GAINES, Plaintiff and Appellant, v. FIDELITY NATIONAL TITLE INSURANCE COMPANY, et al., Defendants and Respondents.	CASE NO. S215990 2nd District Court of Appeal Case No. B244961 Los Angeles Superior Court Case No. BC361768

On Appeal from the Judgment of the
Court of Appeal, Second District, Division 8
Case No. B244961

Superior Court, Los Angeles County
Case No. BC361768
The Honorable Rolf M. Treu, Judge

ANSWERING BRIEF OF RESPONDENTS LEHMAN BROTHERS HOLDINGS INC. AND AURORA LOAN SERVICES LLC ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITES OR PERSONS

S215990 – *Gaines v. Tornberg, et al.*

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
Aurora Loan Services LLC	[x]	[ ]	Respondent
Lehman Brothers Holdings Inc.	[x]	[ ]	Respondent
MLB Sub I, LLC	[ ]	[x]	Financial
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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Submitted by:

Dated: July 2, 2014

GARCIA LEGAL, A PROFESSIONAL CORPORATION

BY: _____

Steven Ray Garcia, Attorney for Respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC

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I.

A PARTIAL STAY FOR MEDIATION DOES NOT MAKE IT IMPOSSIBLE, IMPRACTIBLE, OR FUTILE TO BRING A CASE TO TRIAL

In a unanimous decision handed down just over three years ago, this Court explained to the bench and bar that the exception to the five-year period a plaintiff has to

bring a case to trial under Code Civ. Proc., § 583.310[1] contained in § 583.340(b)[2] applies "only when the stay encompasses *all* proceedings in the action." (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 721 [emphasis in original].) This Court further explained that "partial stays are governed, if at all, by subdivision (c)." (51 Cal.4th at p. 730, referring to Code Civ. Proc., § 583.340(c).[3]) After the trial court here exercised its discretion to dismiss this case pursuant to § 583.310 following due consideration of § 583.340(b) and (c), and the Court of Appeal, in a 2-1 decision, affirmed that ruling as to all but one party, this Court granted review, telling the parties that it wants to consider this case to decide:

> Was this action properly dismissed for the failure to bring it to trial within five years or should the period during which the action was stayed for purposes of mediation have been excluded under Code of Civil Procedure section 583.340, subdivision (b) or (c)?

Since mediation is merely a communication process aimed at assisting the disputants in reaching a mutually acceptable agreement with the help of a neutral third party (Evid. Code, § 1115(a); Code Civ. Proc., § 1775.1(a); Cal. Rules of Court, rule

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1 "An action shall be brought to trial within five years after the action is commenced against the defendant."

2 "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

"* * *

"(b) Prosecution or trial of the action was stayed or enjoined."

3 "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

"* * *

"(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

3.852(1).), it is very much a part of the prosecution of an action[4]—a part that the Legislature has endorsed as aimed at getting to what the plaintiff brought the action for in a way agreeable to the defendants—so that partially staying the proceedings while the parties are ordered to participate in the mediation process not only does not toll the five-year period to bring the case to trial but is consistent with the prosecution of the action. As such, absent a stipulation between the parties that the mediation period will be excluded from the five-years the Legislature has given the plaintiff to get the action to trial,[5] a partial stay to allow mediation does not make it impossible, impracticable, or futile to bring the case to trial. This is the case particularly where, as here, the parties voluntarily submit the case to mediation long before the five-year period expires. The trial court did not abuse its discretion in holding otherwise, and its judgment should be affirmed.

II.

THE FACTS SHOW THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THIS CASE

In this case, the trial court plainly acted within the bounds of its discretion in dismissing this case, which had been pending for more than five years. The trial court had

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4 "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Civ. Code, § 22.) For the purposes of § 583.340, it includes any pleading that asserts a cause of action or claim for relief. (Code Civ. Proc., § 583.110(a).)

5 See, Code Civ. Proc., § 583.330.

before it the representative of the estate[6] of a savvy plaintiff[7] who had received nearly $1,060,000.00 in financial benefits from the sale of property that, but for the events complained of in this case, would have been lost in foreclosure.[8] The trial court also had an ample record of dilatory conduct on the part of both plaintiff and her estate's representative. Besides that, the trial court also had before it a record of proven misrepresentation as to the reason for plaintiff and appellant's dilatory conduct, an effort that appellant continues in this Court. Specifically, appellant attempts to blame an extensive period of delay in obtaining bankruptcy counsel—time during which he could have brought this case to trial—on "financial considerations"[9] and "Plaintiff's limited

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6 Notwithstanding appellant's continued use of the old caption of this case in his Opening Brief on the Merits (OBM), in January 2010, appellant Milton Howard Gaines was substituted into this action as plaintiff upon the death of his mother, plaintiff Fannie Marie Gaines. (See, Court of Appeal opinion in *Gaines v. Fidelity National Title Insurance Company* (Cal. Ct. App. 2013) 165 Cal.Rptr.3d 544 *review granted and opinion superseded sub nom. Gaines v. Fidelity Nat. Title Ins. Co.* (Cal. 2014) 170 Cal.Rptr.3d 251, hearing granted (*Gaines*); 3 AA 573-601 [The Appellant's Appendix will be referred to in this brief as AA preceded by the volume number and followed by the page, and where applicable, the line number(s) separated by a colon. Thus, the immediately preceding citation would be volume 3 of the Appellant's Appendix at pages 573-601.].)

7 "Plaintiff" in this brief will refer to Fannie Marie Gaines, and "appellant" will refer to Milton Howard Gaines, plaintiff's successor as representative of her estate.

8 Plaintiff and her husband had no intention of selling the property (1 AA 10:18-21), and because they could not refinance it due to their limited income (1 AA 10:16-18), they would have likely lost the property in the foreclosure that was looming (1 AA 6:16-21) had it not been for the acts of defendants Tornberg, Johnson, and Ray Management they complain of in this case. While respondents do not wish to cast these defendants as angelic saviors, neither do they appear to be the victimizing sharks appellant makes them out to be. More on this will appear below.

9 OBM, at page 19, last paragraph.

financial means"[10] when the record demonstrates plaintiff received more than $282,000.00 in cash from the initial sale of the property[11] in August 2006 and another $375,000.00 from her settlement with Countrywide in August 2009,[12] and she still had more than $191,000.00 in her checking account when she died unexpectedly of cancer on November 29, 2009.[13] Thus, plaintiff and appellant had access to more than adequate cash to retain a lawyer to get relief from the automatic stay, which ended up costing less than $20,000.00 in legal fees. (2 AA 241:26-242:1.)

There is more. Appellant also makes repeated efforts to cast his parents as unsophisticated victims who could be easily duped. (See, e.g., OBM, page 5, first full paragraph; 1 AA 59:4-13.) That effort rings hollow, however, in light of the evidence in the record that plaintiff Fannie Marie Gaines[14] held a Master's degree and owned her own business as an antique dealer for 30 years. (3 AA 599:1-5; 3 AA 601:12, 17-19.) And, let

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10 OBM, at page 25. These misrepresentations are a repeat of a false undercurrent that was presented in the trial court. (See, e.g., 1 AA 185:24-195:8; 2 AA 232:19-21.)

11 1 AA 46:603; 1 AA 47:1305. See also, 1 AA 8:6-9. Delinquent property taxes owed by the Gaineses in the sum of $4,212.65 were also paid through the escrow from the funds provided by Tornberg. (1 AA 47:1303.)

12 4 AA 782, 784:19-26.

13 4 AA 777-779. No apparent explanation has ever surfaced or is in the record as to what happened to the difference between the $375,000.00 Countrywide paid for the settlement and the more than $191,000.00 plaintiff had left at her death. Nor does the record reveal what happened to the $280,000.00 plus the plaintiff received from the sale, other than that she paid $30,730.03 to stop the foreclosure of a deed of trust she now tries to invalidate. (2 AA 242:11-18; 372-377.)

14 Appellant's father died before this action was filed. (1 AA 1:23-25.)

us not forget that during their lives, the Gaineses managed to purchase a duplex in Los Angeles and obtain more than half a million dollars in financing against it (1 AA 64:12-15), so it is a stretch to suggest plaintiff was an inexperienced simpleton as appellant tries to do. (1 AA 59:4-13; OBM 1; 5.)

In short, appellant was in no hurry to move this case to trial, since he was living in the property payment free, with even the water he used being paid by others. (1 AA 36.[15]) Thus, as respondents Lehman Brothers Holdings Inc. (LBHI) and Aurora Loan Services LLC (Aurora) will demonstrate below, the trial court did not abuse its discretion in declining to apply the exceptions to the five-year rule and dismissing this case when appellant failed to get the case to trial within five years, even while he continued to enjoy free use of the property. And, as LBHI and Aurora will also demonstrate, the model that Justice Rubin in his dissenting opinion in the Court of Appeal suggests would eviscerate the abuse of discretion standard, a standard that this Court has well defined notwithstanding the efforts on the parts of some intermediate appellate courts either to redefine the standard or to ignore it altogether in order to substitute their own views of how a trial court should have decided a case.

Finally, as to the main issue that this Court indicated it wants to consider on this appeal, a voluntary partial stay while the parties mediate their dispute does not render it impossible, impractical or futile to bring the case to trial during the time the partial stay is

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15 The paragraph of the lease referred to states: "UTILITIES AND SERVICES: Tenant will be responsible for all utilities and services required on the Premises." It has been amended in handwriting to state, "Landlord pays water!!" Defendant Ray Management Group, Inc. was the landlord. (1 AA 34.)

in effect. The Legislature has said as much. Since the entire purpose of litigation is to resolve disputes, it would be entirely inconsistent to omit from the five-year period the Legislature has given a plaintiff to get a case to trial the time during which the parties are attempting to resolve the dispute in the first place. This is particularly so where, as here, ample time remains between the mediation and the expiration of the five-year period for the plaintiff to get the case to trial. Given that virtually all cases have settlement discussions, either because the parties engage in them on their own or through their counsel or because the court orders that they occur, it makes no sense to omit the time those discussions are taking place from the time that the plaintiff has to get the case to trial unless the parties agree that the time should be omitted as the statute allows or other circumstances not present here apply. There was no abuse of discretion in this case, and the decision of the trial court[16] should be affirmed.

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16 The Court of Appeal reversed the trial court's ruling as to Lehman Brothers Holdings Inc. only. (*Gaines*, supra, 165 Cal.Rptr.3d 544, 561, 564.) While LBHI wishes it were different, it appears that the Court of Appeal's ruling on that issue is correct under the authorities cited. LBHI appears in this brief, however, along with respondent Aurora, which did prevail in the Court of Appeal, because of the important issues this case raises and so that it cannot be said that it has entirely accepted the Court of Appeal's ruling, in case this Court sees fit to reinstate the trial court ruling in its entirety. In spite of that, LBHI will accept this Court's decision if the determination of the Court of Appeal as to it is upheld. As will appear, Aurora obviously contends the Court of Appeal made the correct decision as to it, and as consistent with his position in the Court of Appeal, appellant does not appear to raise any issues here unique to Aurora in his brief.

III.

THE PROCEEDINGS BELOW SHOW THAT THE APPELLANT UNREASONABLY DELAYED IN MOVING THIS CASE ALONG

For all of appellant's protestations regarding his purported diligence in moving this case to trial, the simple fact is he did very little after stepping into the case. And, the record shows that plaintiff did scant little before her death other than to meet the challenges of defendants to the pleadings. For example, although the case was filed on November 13, 2006, it was not fully at-issue with respect to the originally named parties—including those named in the Fourth Amended Complaint—until January 2009.[17] By August of 2009, however, the plaintiff was ready for trial. (2 AA 238:17-20.) Certainly, the partial stay for the mediation did not prevent the plaintiff from moving the case to trial up to that time, which was less than three years after the case was filed, and more importantly, was ***after*** the partial stay for mediation at issue here.

Shortly before trial was set to begin, the plaintiff settled with Countrywide. (2 AA 238:21-23.) It was nearly three months before, in May 2009, that plaintiff's counsel had been informed of LBHI's interest in the loan and the property and that Aurora was no longer able to exercise any rights in the property due to the bankruptcy of LBHI, however. (AAA 875:21-27.[18]) At the time, plaintiff, and later appellant, still had more

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[17] Numerous demurrers had been filed, and the three amended versions of the original complaint were filed before Aurora was named in the Fourth Amended Complaint.

[18] AAA refers to the Appellant's Augmented Appendix in Lieu of Clerk's Transcript. Since there is only one volume, no volume number will be referenced.

than two years and three months to bring the case to trial, a period which was extended 60 days due to plaintiff's death in order that appellant could be substituted into the action. (4 AA 749-752, especially 751:3-8.) Yet, over the next 29 months, a period of almost 2 ½ years, neither plaintiff nor appellant was diligent about bringing the case to trial.[19] What is more, the excuses given ring hollow.

First, appellant's counsel tries to blame his delay on Aurora's change in position, claiming it caused confusion. (See, e.g., OBM, page 17, §§ G-H.) A closer look at the record, however, shows the fallacy in this argument. For instance, in its Motion for Leave to File Amended Answer, Aurora fully explained why it needed to amend the answer, who had the interest in the loan in question, and what Aurora's and LBHI's respective roles were with respect to the loan. (See AAA 869-886; see especially AAA 871-874.) There was therefore no basis for counsel to be confused, and the trial court did not abuse its discretion in impliedly determining otherwise. Although the trial court did not make a specific finding that the time of counsel's claimed confusion should be omitted from the five-year period, its refusal to exclude all but the time between which appellant actually hired counsel to obtain relief from the LBHI bankruptcy stay and the time the stay order was actually granted lead to the inference that it did not accept this excuse. In *Gaines*, the Court of Appeal accepted the trial court's position. (165 Cal.Rptr.3d at 558-559.) This

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[19] There is nothing in the record to suggest that plaintiff's death resulted from an extended period of illness that rendered her in capable of participating in the case. Indeed, the record reflects that just three months before her counsel was ready for trial. (2 AA 238:17-20.)

rationale is consistent with the rule that a judgment of the trial court is presumed correct, and all intendments and presumptions are indulged to support it on matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Counsel's alleged confusion could have been easily cleared up through discovery in any event, but the record does not reflect that he did any. The Court of Appeal found this lack of effort compelling. (*Gaines*, 22 Cal.App.4th at 40-41, 165 Cal.Rptr.3d at 558-559.) In any event, the record shows that plaintiff's counsel was informed about LBHI's interest in the property by May 22, 2009, nearly three months ***before*** plaintiff settled with Countrywide and ***more than two years before*** he hired counsel in New York to seek relief from the automatic stay in LBHI's bankruptcy, which occurred on June 22, 2011. (Cf., AAA 875:21-27 and 1 AA 240:19-23.) With knowledge of LBHI's interest in the property and the loan, plaintiff's counsel twice advanced the position in the trial court that the case should be set for trial without first obtaining relief from the automatic stay, first when he prepared for trial on August 29, 2009,[20] and more than a year later at a status conference on November 18, 2010. (See, e.g., 1 AA 170:23-26.[21]) Counsel took the position that relief from stay was not required because LBHI was not a party to the case. (1 AA 171:8-11.) If that was the case, however, his failure to move the case forward is all

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20 "Judge Heeseman set this action for trial on August 29, 2009. On or about August 13, 2009, all of the named parties [were] set to go to trial on August 29, 2009." (2 AA 238:17-18.)

21 "THE COURT: Okay. Have a seat.
"So what's our situation?
"MR. WYATT: I think we're ready to set it for trial, your Honor."
(Transcript of November 18, 2010 status conference hearing.)

the more baffling.[22]

The fact that the initial answer was verified by Aurora's counsel—on information and belief[23]—did not elevate the pleading to a loftier position or make the change more confusing. Instead of propounding discovery, all we are told is that plaintiff's counsel made an informal request for "some proof that Lehman held the interest..." which he claimed not to have received until December 10, 2010. (OBM, page 17, § H-19, § K.) By then, plaintiff's counsel had received more than adequate information to indicate that LBHI held the loan, however. Although he had initially requested a letter setting out the information as to the ownership of interest of LBHI in the loan (AAA 876:3-4), he later requested and received a declaration from an LBHI employee (AAA 876:3-11), and he had a new verified answer disclaiming any interest in Aurora that had been filed with leave of the court after receiving evidence of why the original answer had to be amended. (AAA 878-886; AAA 869-877.) This information was at least as much evidence as he had of the interest initially claimed by Aurora in the original answer; in fact, it was more. This much is clear, however; by amending its answer to the Fourth Amended Complaint,

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22 There was certainly nothing that *required* appellant to name LBHI as a party to the case. In fact, by making a substantial payment without objection on the loan, as she did (2 AA 372-377), plaintiff may have indicated her acceptance of and acquiescence to the loan (see, e.g., *Reusche v. California Pacific Title Ins. Co.* (1965) 231 Cal.App.2d 731), or by omitting LBHI from the suit, she may merely have been indicating an intention to pursue her claims against LBHI in its bankruptcy. (Cf., *Deutsche Bank Nat. Trust Co. v. McGurk* (2012) 206 Cal.App.4th 201.)

23 2 AA 293-301, especially 299. Where, as here, and attorney verifies a pleading on information and belief, the pleading is not considered to be an affidavit or declaration establishing the facts therein alleged. (Code Civ. Proc., § 446.)

Aurora informed appellant and his counsel that it disclaimed any interest in the property or the loan held by LBHI and clearly alleged the interest of LBHI. (AAA 880:8-10; 881:14-16.) The motion for leave to file the amended answer was filed in November 2009 (AAA 869-886), six months after counsel was first informed that LBHI held the loan. (AAA 875:21-27.)

Second, the appellant had more than adequate time to plan for obtaining relief from the automatic stay to proceed against LBHI. The other claimed reason for his delay—that "financial considerations" and "plaintiff's limited financial means" prevented the hiring of bankruptcy counsel (OBM, page 19, § L., ¶2; OBM, page 25, last sentence before heading no. 3)—has already been shown to be untrue because plaintiff died with more than $191,000.00 in cash on hand that was available to the estate. (4 AA 777-779.) Given that this action is being prosecuted to benefit the estate, no reason appears why that money should not have been available for its use. But, we do know that appellant continued to enjoy the property free of charge while there was a delay. In short, he was in no hurry to move the case along. With this background in mind, it is apparent that the trial court was correct to dismiss this case after the appellant took too long to bring it to trial.

IV.

THE PARTIAL STAY DID NOT STOP THE LITIGATION SO AS TO HAMPER PLAINTIFF'S OR APPELLANT'S EFFORTS TO GET THIS CASE TO TRIAL

This Court indicated it wanted to consider the impact of the partial stay on the ability of the plaintiff to get the case to trial. It is worthwhile to consider the exact nature

of what is claimed to have been a stay in the trial court. To do so, we must begin with the genesis of that stay, the letter from Scott Drosdick, Aurora's General Counsel.

A. The Drosdick Letter Did Not Call for a Stay of Litigation of the Action.

The partial stay that eventually evolved between the appearing parties was different from the terms proposed in the letter from Drosdick,[24] which was required simply to allow full discussion of the issues without the pressure of the Trial Delay Reduction Act rules forcing the parties to focus on the litigation rather than the mediation.[25] It is noteworthy that as a result of the agreement between plaintiff and

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[24] (2 AA 270-271.) Drosdick's letter is curious in light of what appellant suggests it states. It does NOT call for a stay of the action or even of all activity as to Aurora. Instead, it purports to be an agreement only between plaintiff and Aurora. (2 AA 271 ["In light of the foregoing, it is agreed by and between Gaines and Aurora Loan...."].) In addition, while Drosdick uses the term "stay" in the letter, the way he defines the term makes it clear that , "(1) Aurora Loan shall not be required to enter an appearance, and/or answer, move or otherwise respond to, Gaines' (sic) Fourth Amended Complaint for 120 days from the date of this letter ("Stay"); (2) Gaines shall not file a request for default judgment on the Fourth Amended complaint against Aurora Loan during the [120 day period]; (3)-(6) [the tolling of various activities pertaining to the pending foreclosure sale are set out]; (7) Gaines' (sic) counsel will take the necessary steps to petition the Los Angeles Superior Court and request that the Court formally approve the [letter's terms]; and (8) Under Evid. Code, §§ 1152, 1154, Gaines' (sic) counsel agrees to coordinate with all party defendants an in person, non-binding mediation to occur before the expiration of the Stay to confidentially discuss if a global resolution can be reached between all parties to the Fourth Amended Complaint." (*Id.*)

[25] On March 18, 2008, when the Drosdick letter was written, this case was governed by The Trial Delay Reduction Act Rules of the Los Angeles Superior Court. The stated goal of those rules was to dispose of 100% of cases within two years of filing. (Rule 7.0(d), Local Rules of the Los Angeles Superior Court, (repealed 2013), available at http://www.lacba.org/Files/Main%20Folder/Documents/Judicial_Not_Restricted/files/LASC%20Local%20Rules__January%201,%202008__AOC.pdf (as of June 24, 2014).) Under those rules, granting a 120 day extension of time to respond to a pleading without court approval would not have been looked kindly upon, so the Drosdick letter was to deal with this issue. Plaintiff realized as much and invoked the so-called "Fast Track

Aurora in Drosdick's letter, although Aurora was not ***required*** to respond to the Fourth Amended Complaint within the 120-day period, there was nothing about the agreement that prevented it from doing so. And, under the letter agreement, plaintiff and Aurora were at liberty to conduct discovery—that is until *plaintiff* stipulated with the appearing parties not to engage in further discovery beyond what was already pending.

The Drosdick letter became the foundation for the partial stay that the parties requested that the trial court enter, and the plaintiff relied on that letter as Exhibit 1 to her ex parte application requesting the partial stay. (2 AA 250-276, especially 254:5-17, 259:11-25, 264-265.) Accordingly, the order proposed by the plaintiff pursuant to her ex parte application, which the trial court adopted virtually unchanged, did not completely halt the prosecution of the action, but instead, it required all pending discovery to be answered, ordered that the parties participate in good faith in a mediation within 90 days, and set the case for a post-mediation and trial setting conference before the partial stay expired. (2 AA 278-279.) In *Bruns*, this Court concluded that "prosecution" of an action includes, "the following up or carrying on of an action or suit already commenced until the remedy be attained.... In its broadest sense the term would embrace *all* proceedings... for the protection or enforcement of a right or the punishment of a wrong, whether of a public or private character." (*Bruns*, supra, 51 Cal.4th 717, 725, citing 32 Cyclopedia of Law & Procedure (1909) p. 727, *Ray Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, 18, and *Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708[taking of discovery

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Rules" at least four times in her ex parte application as a reason for the partial stay. (See, 2 AA 254: 12-17; 257:25-27; 259:15-25; and 260:19-24.)

is a step in the prosecution of an action].) Other cases have concluded that the five-year period is to allow for service of process, pleadings, discovery, court conferences, and like proceedings. (See, e.g., *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, 472; *Continental Pacific Lines v. Superior Court* (1956) 142 Cal.App.2d 744, 750.) Stipulations to extend the time for performing those tasks do not, by themselves, extend the five year statutory period to bring the case to trial unless it appears that the parties so intended (*J. C. Penney Co. v. Superior Court* (1959) 52 Cal.2d 666, 670-671["Despite the addition of another step in the necessary proceedings leading to the trial, the case still must be 'brought to trial within five years after the plaintiff has filed his action. ...'"]), particularly when, as in this case, the extensions of time are agreed to and expire within the five year period. (*Larkin v. Superior Court* (1916) 171 Cal. 719, 722-723.)

Given the variety of activity permitted—and in fact required—by the partial stay in this case, all of which was aimed at "carrying on of an action or suit already commenced until the remedy be attained" (*Bruns*, supra, 51 Cal.4th 717, 725), and given that mediation is simply another step in that process which has as its aim to move the parties to an agreement in resolution of a dispute (Evid. Code, § 1115(a); Code Civ. Proc., § 1775.1(a), Cal. Rules of Court, rule 3.852(1).), its use in this case was part of the "prosecution" of the action. The partial stay did not change that, and the five-year period was not tolled by the partial stay.

B. <u>The Legislature Views Mediation As Part of the Prosecution of the Action</u>.

The Legislature has recognized that mediation is or should be part of the judicial

process not only for the benefit of the parties but also to help unburden the courts. (Code Civ. Proc., § 1775.) In 1993, the Legislature enacted statutes to govern and encourage the mediation of cases pending in the courts of this State in general and in the Los Angeles Superior Court in particular. (Code Civ. Proc., §§ 1775-1775.15.) Although those statutes, in recognition of the essentially voluntary nature of mediation,[26] preclude the court from ordering cases to mediation where the amount in controversy exceeds $50,000,[27] and therefore are not directly applicable to this case, they are nevertheless instructive as to the overall attitude of the Legislature with regard to mediation and its effect on the five-year rule and its exceptions. Initially, the statutes show that the Legislature views mediation as a useful step in the process of prosecuting an action. (Code Civ. Proc., §§ 1775, 1775.2.)

C. Early Mediation Does Not Toll the Five-Year Statute.

It has long been the law that time spent in settlement negotiations does not delay the running of the five-year period to bring a case to trial. (*City of Los Angeles v. Superior Court* (1921) 185 Cal. 405, 413-414; *Elmhurst Packers v. Superior Court*

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[26] See *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536 and cases therein cited [In light of the voluntary nature of mediation, a court cannot order a party to participate in mediation with a paid mediator.]. The Los Angeles Superior Court Mediation Program endorsed by Code Civ. Proc., § 1775 et seq., provides mediators who donate three hours of their time pro bono. (http://www.lasuperiorcourt.org/adr/forms/laadr005.pdf , as of June 24, 2014.)

[27] See, Code Civ. Proc., § 1775.5. This section is consistent with the statute pertaining to judicial arbitration, Code Civ. Proc., § 1141.11, which makes sense given that the mediation statutes generally are similar to the judicial arbitration statutes. (*Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1130.)

(1941) 46 Cal.App.2d 648, 650-651.) Likewise, the Legislature does not view early mediation as an event that tolls the running of the five-year statute under Code Civ. Proc., § 583.310. Particularly telling for our purposes is what the Legislature has enacted with regard to the effect of mediation on the running of the five-year statute. The Legislature's intent in that regard is expressed in Code Civ. Proc., § 1775.7, which states:

> (a) Submission of an action to mediation pursuant to this title shall not suspend the running of the time periods specified in Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2, except as provided in this section.
>
> (b) If an action is or remains submitted to mediation pursuant to this title more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a statement of nonagreement is filed pursuant to Section 1775.9 shall not be included in computing the five-year period specified in § 583.310.

It is crucial not to overlook the significance of this section. Again, LBHI and Aurora recognize that it appears that Title 11.6 of the Code of Civil Procedure applies only to cases that are amenable to judicial arbitration because they fall within its jurisdictional threshold (see, e.g., Code Civ. Proc., § 1775.3, referring to Code Civ. Proc., § 1141.11), and this is not such a case. That this case does not fall within the code's jurisdictional limits is of no moment, however, for a number of reasons.

Through § 1775.7, the Legislature has instructed that with regard to a case ordered

to mediation at any time before reaching the benchmark of four years and six months after its filing date, the mediation of the dispute, even if ordered by the court, does ***not*** suspend the running of the time period to bring the case to trial. No rational basis appears for the rule to be different where, as here, the parties voluntarily ask the court to order the case to mediation, and the court does so, than if the court orders the case to mediation pursuant to the statute. Certainly, appellant has not argued that it does. In fact, he has not even mentioned Code Civ. Proc., § 1775.7. And, even in cases where mediation has been voluntarily undertaken by the parties rather than through the enforcement of Code Civ. Proc., § 1775 et seq., this and other Courts have looked to the statutes as a basis for determining the Legislative policies of this State regarding mediation. (See, e.g., *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14-15; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415; *In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 903, Code Civ. Proc., § 1775(c).)

Given the fundamental rules of statutory construction that the court should ascertain the intent of the§ 1775.7 Legislature so as to effectuate the purpose of the law and apply the plain meaning of the words used,[28] that courts should examine the statutes in their context and apply them in harmony with other statutes on the same subject,[29] and

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[28] *Bruns*, supra, 51 Cal.4th 717, *People v. Skiles* (2011) 51 Cal.4th 1178, 1189-1190; *Gonzalez*, supra, 122 Cal.App.4th 1124, 1129.

[29] *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 309-310; *Santa Clara Valley Transp. Authority v. Public Utilities Com. State of California* (2004) 124 Cal.App.4th 346, 359-360.

that similar words or phrases in statutes dealing with the same subject matter ordinarily will be given the same interpretation,[30] and given that the Legislature has, through § 1775.7, manifested its intent with respect to the circumstances under which court-ordered mediation should toll the running of the five-year period or otherwise bring one of the exceptions in § 583.340(c) into play, no reason appears to reach a different result in this case. After all, the statutory scheme in § 1775 et seq., shows that the Legislature believes that mediation is a useful and important part of the dispute resolution process that should be employed by the parties and the courts and has expressed a strong public policy in favor of that process. (*In re Marriage of Woolsey*, supra, 220 Cal.App.4th 881, 903, citing Code Civ. Proc., § 1775(c); *Foxgate Homeowners' Ass'n, Inc.*, supra, 26 Cal.4th 1, 14["Implementing alternatives to judicial dispute resolution has been a strong legislative policy since at least 1986."].) As part of that process, the Legislature deems that court-ordered mediation should not impede the running of the five-year period to bring the case to trial under Code Civ. Proc., § 583.310 unless the case is within six months of the five-year expiration date when the order to mediate is made. (Code Civ. Proc., § 1775.7.) In the latter case, the simple fact is that the Legislature wants to continue the policy of encouraging mediation (§ 1775(d)) for reasons of cost savings to the parties (§ 1775(c)), enjoying judicial economy (§ 1775(f)), and decreasing court congestion. (§ 1775(c).)

In manifesting that intent, the Legislature has told the parties that unless the case is

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30 *Ex parte Phyle* (1947) 30 Cal.2d 838, 845; *Stillwell v. State Bar* (1946) 29 Cal.2d 119, 123.

within six months of the running of the five-year statute, it does ***not*** consider the time spent in mediation as rendering it impossible, impracticable, or futile to bring the case to trial. This rationale makes sense given the purpose of mediation is to resolve disputes and save judicial resources, but the parties would be loath to resort to it near the end of the five-year period if they had the specter of mandatory dismissal facing them. For those circumstances, the Legislature has granted the safe harbor of retroactive tolling under § 1775.7(b). (*Gonzalez v. Superior Court, supra*, 122 Cal.App.4th at 1130.[31]) Not so early on, however; in that case, the five-year period continues to run. So it is here.

As such, this was not even a true stay at all, and certainly, it was not a stay "used to stop prosecution of the action altogether," as this Court concluded was what § 583.340(b) was intended for in *Bruns*, supra, 51 Cal.4th 717, 730. Besides that, the Legislature has deemed that mediation, even when ordered by the court, does not make it impossible, impracticable, or futile to bring the case to trial unless the order for mediation is within the last six months of the statutory life of the case. Therefore, trial court here properly exercised its discretion in making the determination that the period of the partial stay for mediation should not be excluded from the five-year period. Its judgment should be affirmed.

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31 While an argument could be made that in cases where the parties voluntarily—as opposed to by court order—submit a case to mediation less than 6 months before § 583.310's five-year period expires, Code Civ. Proc., § 1775.7(b) expresses a legislative policy that it is "impracticable or futile" to bring the case to trial during the period of mediation, this is not such a case. Here, the case was less than two years old when the plaintiff obtained the partial stay, and the parties submitted the dispute to mediation. That being so, the Legislative policy is plain that pursuant to § 1775.7(a), the five-year period continued to run.

V.

BECAUSE APPELLANTS DELAYED THEIR PROSECUTION OF THIS CASE PAST THE FIVE-YEAR LIMIT, THE TRIAL COURT WAS CORRECT TO DISMISS IT

As noted, appellant's efforts in this case have been all about delay, and with good reason. Although the Gaines family received nearly $1,060,000.00 in total consideration for their equity in the property that is the center of this dispute, they have continued to live in and otherwise enjoy the benefits of the property without paying a single dime while this case languished. (1 AA 76:26-77:1.) Their dilatory conduct makes the trial court's decision to dismiss this case not only appropriate but mandatory.

A. The Gaineses Were On the Verge of Losing Their Home.

Recall the facts that were before the trial court. The subject of this case is a duplex the Gaineses owned located at 1259-1261 South Longwood Avenue, Los Angeles, California.[32] (1 AA 1:23-2:1.) They resided in a portion of the duplex. By February 2006, the Gaineses were on the verge of losing their home. (1 AA 8:18.) Due to health problems and other personal stress, they were two months behind on their home mortgage payments. (1 AA 64:22-25.) Their home was encumbered by a first trust deed in the approximate amount of $554,000.00 held by Countrywide Home Loans, Inc. Milton Gaines, who was 74 years old at the time, had cancer and heart trouble. (1 AA 8: 16-18.)

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[32] The factual statements are largely taken from the unproven pleadings since the plaintiff has never endeavored to prove any of the allegations of the various pleadings in this case during the more than five years this case has been pending.

His wife, Fannie Marie Gaines, was 68. The amount of their arrearage was $7,464.80. (1 AA 65:1-6.)

The Gaineses tried to refinance and were allegedly told initially by Countrywide employee A.J. Roop that they had been preapproved. (1 AA 66:17-20.) Later, however, Roop informed them that Countrywide had rejected their refinance application. (1 AA 68:15-19.) Now seriously behind on their payments and growing desperate, plaintiffs appealed to Roop, who told them that her fiancé, defendant Josh Tornberg, might be able to help them. (1 AA 68:21-26.) Roop explained that Tornberg worked with defendant Craig Johnson through defendant Ray Management, which assisted people who were having trouble getting loans. (1 AA 68:23-26.)

In June or July 2006, Tornberg, Johnson, and Ray Management contacted the Gaineses to begin the process of obtaining a new loan for them. (1 AA 3-5.) On or about July 6, 2006, a Notice of Default and Election to Sell Under Deed of Trust was recorded against the property, advising the Gaineses that they were now behind by more than $16,500.00 on their loan. (1 AA 71:10-14.) Less than a week later, Tornberg, Johnson, and Ray Management delivered the unfortunate news to the Gaineses that they too were unable to obtain a loan for them. (1 AA 71:19-24.) Instead, Tornberg offered to purchase the Gaineses' property. (*Id.* at p. 717) Tornberg, Johnson, and Ray Management presented an offer by the terms of which Tornberg would pay $950,000.00 for the property, which would include $100,000.00 for needed repairs that the Tornberg group would oversee, and they would lease the property back to the Gaineses with an option for the Gaineses to repurchase it. (1 AA 71:24-72:3.) Not wanting to sell their home (1 AA

10:18-21) but seeing that they had no other options, the Gaineses accepted the offer. The sale closed on August 7, 2006 (1 AA 75:8; 1 AA 137:I), and the Gaineses' loan from Countrywide, which had been in default, was paid through the escrow (1 AA 48), thereby preventing the foreclosure.

B. Having Saved the Property From Foreclosure, Mrs. Gaines Sets Out to Get It Back Without Paying For It.

Mr. Gaines died on August 25, 2006 (1 AA 75:4), just 18 days after the sale closed. About two months after the sale closed, Mrs. Gaines hired a lawyer (2 AA 236:12-14), and she filed this action on November 13, 2006 (1 AA 1), just over three months after the transaction had closed. (1 AA 46:I.)

In order to finance the purchase of the Longwood property and to pay off Countrywide, Tornberg took out a loan secured by the property in the sum of $855,000.00 (1 AA 46:202) against a purchase price of $950,000.00. (1 AA 23:1C.) Of the $855,000.00 loan, nearly all of it benefitted the Gaineses: $567,995.96 was paid to satisfy their obligation to Countrywide (4 AA 784:17-18); $4,221.65 went to satisfy the unpaid property taxes that were in arrears (1 AA 47:1303); $2,500.00 was released early from the escrow to the Gaineses (1 AA 47:1305); and $279,930.32 went into their pocket as cash proceeds from the sale (1 AA 46:603). Thus, $854,647.93 of the $855,000.00 loan benefitted the Gaineses directly, meaning that just $352.07 of the loan proceeds went elsewhere, such as into transactional costs. And, while Mrs. Gaines complained that $100,000.00 from the transaction was released from escrow back to Tornberg (1 AA 91), she also alleged that this was part of the deal, since the money was supposed to be used

by Tornberg, Johnson, and Ray Management for repairs. (1 AA 76:24-77:1.)[33]

Subsequent to the purchase of the Longwood property, Tornberg almost immediately refinanced the purchase money loan with a new loan in the amount of $865,000.00 to get a lower rate (1 AA 76:7-12), and he obtained a second mortgage of $150,000.00 (1 AA 76:7-12); the deed of trust securing the latter loan was released by the lender which settled out of this litigation. (3 AA 458:19-24.) Meanwhile, the $865,000.00 loan was ultimately transferred to respondent LBHI and serviced by Aurora, although Aurora had physical possession of the note and deed of trust for a time.[34]

As noted, the Gaineses netted more than $280,000 in cash from the sale of the property.[35] Thereafter, they continued to reside in the property[36] rent, mortgage and tax free until their respective deaths—Milton's on August 25, 2006,[37] and Fannie Marie's on November 29, 2009.[38] Indeed, under the terms of the Gaineses' lease, Tornberg even had to pay for the water. (1 AA 36:Utilities And Services.)

In the original complaint, plaintiff sued Tornberg, Johnson, Ray Management

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33 It appears that in actuality, the sum released through the escrow was $90,000.00, and it was paid to Ray Management. (1 AA 47:1308.)

34 AAA 869-876.

35 1 AA 46:603; 1 AA 47:1305. See also 1 AA 8:6-9.

36 1 AA 76:26-77:1.

37 See, e.g., 1 AA 76:3-5.

38 See, OBM at 31(b).

Group, Inc., Roop,[39] Countrywide Home Loans, and Fidelity National Title Insurance Company. (1 AA 1:16-19.) Before her death, however, Fannie Marie Gaines settled her claims with Countrywide for $375,000.00,[40] of which the parties stipulated that $175,000.00 was for non-economic damages for emotional distress, and $200,000.00 was for loss of equity. (4 AA 782, 784:19-26.) Thus, as a result of the sale of the property to Tornberg, the Gaineses obtained total consideration of $1,056,926.28, including:

- Payoff of the Gaineses' loan from Countrywide that was in default: $567,995.96 (4 AA 784:17-18);
- Early payout of sale proceeds to the Gaineses: $2,500.00 (1 AA 47:1305);
- Payoff of Gaineses' property tax default: $4,221.65 (1 AA 47:1303);
- Cash to Gaineses at close of escrow: $279,930.32 (1 AA 46:603);
- Recovery of lost equity from settlement with Countrywide: $200,000.00 (4 AA 784:19-21).

With more than $1 Million in benefits and more than seven years of rent-free occupancy of the property, there is little wonder that first plaintiff and then the appellant

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39 A.J. Roop was erroneously named A.J. Roof, which was later changed to the correct spelling. (Cf., 1 AA 1:17 and 1 AA 58:18.)

40 The settlement occurred just one month after Countrywide was sold to Bank of America ("FBI probing bailout firms", http://money.cnn.com/2008/09/23/news/companies/fbi_finance/index.htm), as of June 16, 2014), which had just received $20 Billion from the Federal government through the Troubled Asset Relief Program (TARP) and a $100 Billion guarantee against losses from so-called "toxic assets" about six months before the settlement. ("Bank of America gets big government bailout," http://www.reuters.com/article/2009/01/16/us-banks-idUSTRE50F1Q720090116, as of June 16, 2014.)

dragged their feet.[41] Together, they truly have had their cake while eating it too.[42]

C. Plaintiff Applies for a Partial Stay.

After plaintiff named and served Aurora, at the suggestion of Aurora's General Counsel, Scott Drosdick,[43] the appearing parties agreed to a 120-day partial stay, and plaintiff made an ex parte application for the stay to the trial court, which was granted. (2 AA 250-280.) That the stay was not a complete stay of the litigation is made clear by the facts:

1. All previously served and outstanding discovery was to be answered during the partial stay (2 AA 279:14-15);

2. The parties were ordered to participate in good faith in a mediation of all claims during the partial stay (2 AA 279:18-19);

3. The parties participated in court-ordered mediation on May 30, 2008, during the partial stay (3 AA 458:11-18);

4. The plaintiff conducted settlement discussions during the partial stay with certain parties outside of the court-ordered mediation and ultimately reached an

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41 Again, LBHI and Aurora do not mean to suggest that Tornberg, Johnson, or Ray Management were faultless in all of this. (See fn. 8, *supra.*) For instance, it certainly appears that they had no apparent qualms about taking another $150,000.00 out of the property.

42 Cf., *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 232, where Justice Traynor admonished that a party "cannot have his cake and eat it too."

43 Mr. Drosdick is not a member of the State Bar of California and never appeared as counsel of record for Aurora in this case.

agreement with some of them (3 AA 458:18-22);

5. The plaintiff filed dismissals of the settling parties during the partial stay (3 AA 458:22-24);

6. The trial court set a Post Mediation and Trial Setting Conference on July 16, 2008, during the partial stay (2 AA 279:16-17); and

7. The trial court held the Post Mediation and Trial Setting Conference on July 16, 2008, that was attended by four counsel.

In short, the partial stay did not prevent any of the parties or the trial court from being active in the litigation. The partial stay expired by its terms on August 1, 2008, 120 days after the April 3, 2008 order granting it. (2 AA 279:14-15.) This is consistent with the law. (*People v. Santana* (1986) 182 Cal.App.3d 185, 190 ["A stay is a temporary suspension of a procedure in a case until the happening of a defined contingency."] Here, that contingency was the passage of 120 days from the date of the stay.) While appellant argues that the partial stay lasted longer—until it was lifted by Judge Heeseman on November 10—the record does not provide any basis to support the partial stay being in effect longer than the 120-day period. Thus, whether Judge Heeseman made an order purporting to lift the partial stay on November 6 is irrelevant given that the partial stay had already expired by its own terms, and there is nothing in the record that supports appellant's contention that it really lasted 217 days.

In any case, both the trial court and the Court of Appeal ruled that the partial stay did not preclude the appellant from promptly bringing this case to trial. This result is consistent with the decision in *Bruns*, supra, 51 Cal.4th 717, 724, where this Court

concluded that the exception under Code Civ. Proc., § 583.340(b) to mandatory dismissal under Code Civ. Proc., § 583.310 applies only when "a stay encompasses all proceedings in the action and does not include partial stays." What is more, the trial court followed this Court's instruction and gave due consideration to whether the partial stay made it impossible, impracticable, or futile for plaintiff to get the case to trial and concluded it did not. The Court of Appeal agreed with the trial court's conclusion. Substantial evidence supports their conclusion. Therefore, both lower courts properly refused to exclude the period of the partial stay from the five years that the plaintiff and appellant had to bring the case to trial. This was not an abuse of discretion, and the ruling should be affirmed.

VI.

THE ABUSE OF DISCRETION STANDARD REQUIRES THAT THE RULING OF THE TRIAL COURT BE UPHELD

In his dissent in the Court of Appeal, Justice Rubin complained that the abuse of discretion standard has become so muddled as to be meaningless. (*Gaines,* 165 Cal.Rptr.3d at 565 ff.) Instead, he advocated for a standard that would give the appellate courts virtually unfettered discretion to overrule the trial courts' exercise of their discretion. Should this Court reach the issue, LBHI and Aurora suggest that such an evisceration of the abuse of discretion standard is not only uncalled for, but it is inconsistent with more than a century and a half of California jurisprudence.

As this Court has explained to the bench and bar, the Legislature has, through Code Civ. Proc., § 583.340(c), given "the trial court discretion to exclude additional

periods [of time], including periods when partial stays were in place, when the trial court concludes the bringing of the action to trial was 'impossible, impracticable, or futile.'" (*Bruns*, supra, 51 Cal.4th 717, 726.) Under subdivision (c), the trial court must determine what is impossible, impracticable, or futile in light of all circumstances of the case, including the acts and conduct of the parties and the nature of the proceedings. (*Bruns*, supra, 51 Cal.4th 717, 730.) Whether the plaintiff used reasonable diligence in prosecuting the case is a critical factor to be considered, but that factor alone does not preclude involuntary dismissal; instead, it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility. (*Bruns*, supra, 51 Cal.4th 717, 730-731.) The trial court is in the best and most advantageous position to decide whether to apply any of the three exceptions, and its decision will be upheld unless the plaintiff proves that the trial court abused its discretion. (*Bruns*, supra, 51 Cal.4th 717, 731, citing *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 590-591.)

"Discretion, if it is to survive, cannot be tightly controlled, only watched." (Mellinkoff's Dictionary of American Legal Usage (1992), p. 5.[44]) Although Justice

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44 Prof. Mellinkoff's definition of "abuse of discretion" is worth pointing out in its entirety for its poignancy, clarity, and wit in describing a difficult concept:

> **abuse of discretion**: a flexible limit to the exercise of discretion. The area of discretionary decision lies between the poles of fixed rule and personal whim that the law calls *capricious*. Over that vast no-man's-land, the law hovers with tolerant watchfulness. The judge denying a stay, the administrator devising regulations to bring a statute to life, the trustee investing money, has a discretion to decide this way or that, within deliberately ill-defined limits of the accustomed ways of doing things. Discretion, if it is to survive, cannot be tightly controlled, only watched. As the exercise of discretion moves in the direction of personal whim, the law

Rubin in his dissent advocated ratcheting up the appellate courts' control of trial court discretion too tightly, thankfully, this Court has set out plain rules of judicial watchfulness. Early in the State's history, this Court described the discretion granted to the trial court, saying:

> The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*,[45] but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial

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> becomes more watchful. Suddenly, the limit has been reached and passed. That almost unpredictable event is called *abuse of discretion.* Progress toward the pit is so gradual that an exercise of discretion must be unexpected and extreme to arouse interest. The jolt factor is typically expressed in hyperbole. <The sentence is such as to shock the conscience, arbitrary and capricious, a gross abuse of discretion./The investments were not merely imprudent but utterly capricious, an abuse of discretion.> Since jolt factors tend to be personal, there can be abuse of *abuse of discretion,* sometimes a convenient rebuff to an innovative lower court decision. That risk is a flexible price of a flexible limit to a flexible rule of decision. (Id.)

In spite of Prof. Mellinkoff's more general definition intended for a broader audience, however, California has rather well-defined if somewhat misunderstood limits of discretion, as will be discussed.

[45] Literally, "of grace," that is, out of grace or goodwill, as a favor as distinguished from as a matter of right. (Mellinkoff's Dictionary of American Legal Usage, *supra*, at p. 443.)

> mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other.

Bailey v. Taaffe (1866) 29 Cal. 422, 424.

Thus, the burden the party complaining of the trial court's exercise of its discretion must carry to obtain a reversal is a heavy one. Appellant must show ***beyond a reasonable doubt***[46] that the trial court's exercise of its discretion in deciding the way it did was so off-course that an impartial mind would not hesitate to decide the case in favor of appellant. *Bailey* teaches that this unhesitant, beyond a reasonable doubt showing is what amounts to an abuse of discretion; anything short of that requires that the trial court's decision be upheld. (*Id.* at p. 422) This Court has restated the test in other stringent ways.

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46 "Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of [the trier of fact] in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'" (Pen. Code, § 1096.) California Criminal Jury Instruction 220 puts it this way: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." 220. Reasonable Doubt Judicial Council of California Criminal Jury Instruction § 220.

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479, citing *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598, and *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) All circumstances before the trial court must be considered in deciding whether it abused its discretion, and if substantial evidence supports the trial court's determination, it will be upheld. (*In re Marriage of Connolly*, supra, 23 Cal.3d 590, 597-598, citing *In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 494 and *Troxell* v. *Troxell* (1965) 237 Cal.App.2d 147, 152.) This is because a reviewing court will not substitute its judgment for express or implied factual findings that are supported by substantial evidence, and a trial court's application of the law to the facts is reversible only if arbitrary and capricious. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159, citing *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.)

As this Court has explained, the abuse of discretion standard is not a unified standard. The deference it calls for varies according to the aspect of a trial court's ruling under review. (*Haraguchi*, supra, 43 Cal.4th 706, 709-712.) What this means is that, "The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi*, supra, 43 Cal.4th 706, 711-712, footnotes citing numerous cases omitted.) The discretion to be exercised is the trial court's, not the appellate court's. (*Haraguchi*, supra, 43 Cal.4th 706, 712 ["These concerns justify

vesting the *trial courts* with broad discretion to protect against procedural unfairness...." (Emphasis in original.).]) Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court where there are judgment calls pertaining to the evidence (*Shamblin*, supra, 44 Cal.3d 474, 479), unless it is convinced beyond a reasonable doubt that the trial court abused its discretion in making the findings. (*Bailey v. Taafe, supra.*) Concluding beyond a reasonable doubt that the trial court abused its discretion in making particular factual determinations would be appropriate only where substantial evidence does not support the findings (*Nestle*, supra, 6 Cal.3d 920 with all presumptions favoring upholding the trial court's decision. (*Denham*, supra, 2 Cal.3d 557) This is particularly so where, as here, the trial court's conclusion does not result in a miscarriage of justice. (*Martindale v. Superior Court* (1970) 2 Cal.3d 568, 574.)

Simply stated, the standard advocated by Justice Rubin in his dissent would gut the above principles. For example, in discussing the "whimsical, capricious, arbitrary" standard, he states, "I am doubtful that any judge in our state has made a ruling out of whimsy or caprice. Whim, for example, is 'a capricious or eccentric and often sudden idea or turn of the mind.' [Citation.] This does not describe judicial decision making. If we are truly engaging in appellate review to weed out the whimsical or capricious decision, I doubt we would ever find abuse of discretion." (*Gaines*, supra, 165 Cal.Rptr.3d 544.) But isn't that the point?

More than a century and a half of California jurisprudence, built upon the foundation of *Bailey v. Taafe, supra*, and similar cases, teaches that the whole goal of the

abuse of discretion standard is to give broad deference to the trial court's decision whenever possible. The cases from this Court cited in the previous paragraphs pointedly demonstrate that appellate courts should be loath to enter the realm of discretion to substitute their own conclusions for that of the trial court, and it is only in those extremely rare cases where a party demonstrates beyond a reasonable doubt a lack of substantial evidence to support the trial court's ruling or the improper application of the law which could only be determined in the way the appellant contends that a trial court may be said to have abused its discretion, which is to say, that its application of the law to the facts was arbitrary or capricious. Against this heavy burden, all a respondent must demonstrate is a reasonable basis for the trial court's action. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) This is so because if there is such a reasonable basis—indulging all presumptions and intendments in favor of the trial court's decision where the record is silent (*Denham*, supra, 2 Cal.3d 557, 564)—the trial court has not "exceeded the bounds of reason." (*Shamblin*, supra, 44 Cal.3d 474, 478-479.)[47] In other words, the respondent gets the benefit of the doubt (*Denham*, supra, 2 Cal.3d 557, 564), whereas the appellant must prove the trial court was wrong beyond a reasonable doubt. (*Bailey*, supra, 29 Cal. 422, 424.) This Court in *Denham* called this "not only a general principle of appellate practice but an ingredient of the constitutional

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[47] The noun form of "reason" is defined as "a: a statement offered in explanation or justification, b: a rational ground or motive, c: a sufficient ground of explanation or of logical defense; *especially*: something (as a principle or law) that supports a conclusion or explains a fact, d: the thing that makes some fact intelligible." (http://www.merriam-webster.com/dictionary/reason , as of June 24, 2014.)

doctrine of reversible error." (*Denham*, supra, 2 Cal.3d 557, 564.)

Unfortunately, a few appellate courts have shown a tendency to play fast and loose with what should be the most stringent standard of review. Cases cited by Justice Rubin in his dissent here provide examples. In *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, disapproved in part in *Shamblin v. Brattain, supra*, the trial court granted a motion to dismiss under the discretionary two year dismissal statute. Plaintiff appealed. The Court of Appeal took the occasion first to bad mouth at length the time-honored abuse of discretion standard as applied in California. Then, in the portion of the opinion disapproved by this Court, the appellate court ruled that because it was equally capable of drawing evidentiary conclusions based on the declarations as the trial court, it was not required to defer to the trial court's evidentiary conclusions drawn from those declarations, so the abuse of discretion standard did not apply at all; instead, the appellate court decided to treat the trial court's decision as "largely a question of law subject to plenary appellate scrutiny." (*Hurtado*, supra, 167 Cal.App.3d 1019, 1027.)[48] In short, the *Hurtado* court eviscerated the abuse of discretion standard altogether, resting its decision

[48] This Court's rejection of *Hurtado*'s judicial sleight of hand was voiced in *Shamblin* as follows: "The trial court, with declarations and supporting affidavits, was able to assess credibility and resolve any conflicts in the evidence. Its findings relating to lack of notice are entitled to great weight. Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations. [Fn. 4: Any contrary implication in *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019 is hereby disapproved.]" *Shamblin*, supra, 44 Cal.3d 474, 479[Emphasis in original].

to do so on a pillar this Court has since seen fit to tear down and substituting its own discretion for that of the trial court.

Similarly, in *People v. Jacobs* (2007) 156 Cal.App.4th 728, also cited admiringly by Justice Rubin (*Gaines*, supra, 165 Cal.Rptr.3d 544), Jacobs was convicted of certain crimes before Judge Champlin. On the day of Jacobs' scheduled sentencing, Judge Champlin was not available to sentence him. Instead, Judge Kroyer was presiding, and over the objection of defense counsel that the trial judge should do the sentencing, Judge Kroyer, citing jail overcrowding, proceeded to sentence Jacobs rather than wait for Judge Champlin's return the following week. Jacobs appealed.

After recounting the facts, the Court of Appeal noted that the letter of the law supported Judge Kroyer's decision, as the defendant had no right to be sentenced by the trial judge. (*Jacobs*, supra, 156 Cal.App.4th 728, 733, citing, *inter alia*, *People v. Downer* (1962) 57 Cal.2d 800, 816.) The Court then turned to a consideration of whether the trial court should have nevertheless granted an implied oral motion to continue the sentencing. Noting that the ruling rested in the sound discretion of the trial court and would be reversed only if there were a showing of abuse of discretion *and* prejudice to the defendant (*Jacobs*, supra, 156 Cal.App.4th 728, 735-736), the Court first described the various partial formulations of the abuse of discretion standard.[49] It then observed, "We

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[49] "As to what is required to show such abuse, it has been said that a trial court abuses its discretion only when it's ruling " ' "fall[s] 'outside the bounds of reason.' " ' [Citation.]" [Citations.] More colorfully, it has been said that discretion is abused only when the trial court's ruling is arbitrary, whimsical or capricious." [Citations.] (156 Cal.App.4th at 736.)

would be hard-pressed to apply those adjectives to Judge Kroyer here." (156 Cal.App.4th at 736.) The court also noted that Judge Kroyer had acted upon a legitimate concern for the sentencing to proceed as scheduled in order to alleviate jail overcrowding, and he was informed of the facts based on his reading and consideration of the probation report and his inquiry of counsel as to whether there was anything in the probation report's statement of facts that was inconsistent with the evidence, to which defense counsel responded by identifying a few discrepancies. Based on this evidence, the Court of Appeal concluded, "In sum, we cannot conclude that Judge Kroyer was arbitrary. Or whimsical. And he certainly was not a capricious." (*Id.* at p. 728)

Having found that Judge Kroyer's ruling was both in accordance with the law and factually supported, the Court of Appeal nevertheless brushed aside these concerns to arrive at the destination where it wanted to go. Along the road, it visited the wayward *Hurtado*, found comfort in the language of *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287,[50] borrowed a sentence out of context *Department of Parks &*

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[50] As an interesting counterpoint, *City of Sacramento v. Drew* was a case that, while discussing *Hurtado*, legitimately concluded that the trial court *had* abused its discretion. In *Drew*, after defendant appeared in a validation action and successfully challenged the City's effort to levy real property assessments to fund school construction, the trial court refused to grant his motion for attorney's fees under Code Civ. Proc., § 1021.5. On appeal, the Court first discussed the abuse of discretion standard, noting that the City, relying on *Hurtado,* wanted to limit the reach of the standard to those situations where the trial court's action was whimsical, arbitrary, or capricious. (207 Cal.App.3d at p. 1297.) The appellate court rejected this effort to narrow its consideration, however, and concluded that because the trial court's ruling was supportable neither factually (the trial court had admittedly speculated, without evidence, that it would have reached the same conclusion without Drew's involvement in the case, a point as to which the Court of Appeal looked askance) nor legally (the trial court misapplied the law), the trial court did abuse its discretion in denying the motion. In performing its analysis, the Court aptly

Recreation v. State Personnel Bd. (1991) 233 Cal.App.3d 813[upholding the trial court's exercise of its discretion], waved as it passed *Bailey v. Taafe, supra*, and concluded that because Judge Kroyer did not follow the "preferred" procedure, he must have abused his discretion. (*Jacobs*, supra, 156 Cal.App.4th 728, 735-738.) But, as we have seen, where a trial court's decision is supported by the evidence and consistent with the law—both of which were found by the appellate court to be the case in *Jacobs*—that the trial court did not follow a "preferred" procedure does not meet *Bailey*'s beyond a reasonable doubt standard for finding an abuse of discretion. The law is not so sterile, after all, as to allow for only "preferred" procedures when others are legally allowed and other legitimate factors come into play, and the *Jacobs*' Court's finding that the trial court was neither arbitrary nor capricious in its ruling means that it was the Court of Appeal which acted "outside of the bounds of reason." These are the mental gymnastics a court must go through to ignore the trial court's proper exercise of its discretion. Thus, to follow the path advocated by Justice Rubin in his dissent here would be to render the abuse of discretion standard meaningless. This Court has plainly defined that standard, and most courts are able to apply it properly. The majority in *Gaines* was one such court.

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recited how to apply the abuse of discretion standard, saying:

> The pertinent question is whether the grounds given by the court for its [decision] are consistent with the substantive law... and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under [the law], read in light of the purposes and policy of the statute. (*City of Sacramento*, supra, 207 Cal.App.3d 1287, 1298.)

First, as the discussion in this brief demonstrates, there is ample evidence in the record to support the trial court's factual determinations that the plaintiff and appellant were less than diligent in bringing this case to trial. Second, the trial court indicated in its ruling that it was giving due consideration to this Court's decision in *Bruns*, and it decided those issues against appellant. As respondents have shown, under the circumstances of this case, the policy of this State as expressed by our Legislature is that time spent mediating a case should ***not*** be excluded from the five-year period unless it is within the last six months of the case's statutory life, which clearly was not the case here. And, even if this Court were to believe it would have decided the case differently, the trial court's conclusion here was not so off base as to allow a conclusion beyond a reasonable doubt that it could only decide in favor of appellant. Certainly, the Court of Appeal did not think so in this case. In short, appellant has failed to carry his burden of showing beyond a reasonable doubt that the trial court abused its discretion.

VII.

CONCLUSION

No miscarriage of justice occurred in this case. The plaintiff willingly participated in a scheme to save her property from an otherwise inevitable foreclosure. That scheme netted nearly than $1,060,000 in financial benefits, including substantial amounts of cash, not to mention the continued use and possession of the property. She succeeded in using the litigation to reap even more benefits; the $1,060,000 figure does not include the $175,000 in emotional distress damages she recovered through the settlement with Countrywide, paid at a time when that company's new owner, Bank of America, was

awash with TARP funds and seeking to rid itself of "toxic" problems. (See footnote 40, *supra.*) She was able to lead the balance of her natural life residing in her home and live on the substantial cash sums that she received from its sale and the subsequent litigation. Upon plaintiff's death, appellant took up where she left off. Clearly, once the Countrywide settlement was completed—on the eve of the trial that plaintiff announced she was ready to have proceed—neither plaintiff nor appellant was anxious to move this case along.

Faced with conflicting evidence as to whether the partial stay for mediation should be excluded from the five-year period to bring the case to trial, the trial court made a judgment call based on a reasoned consideration of the evidence, and applying the policy of the law to encourage plaintiffs to move their cases to trial. It read this Court's decision in *Bruns*, and in the exercise of its discretion based on the facts before it, the trial court determined that the partial stay for mediation did not qualify to exclude the 120 day period either under § 583.340(b) or under the statutory exclusion for periods when bringing the case to trial was impossible, impracticable, or futile allowed by Code Civ. Proc., § 583.340(c). Not only was its decision supported by the substantial evidence laid out above, but it was consistent with the law and the legislative policy pertaining to mediation not being excluded from the five-year period as expressed through Code Civ. Proc., § 1775.7 and with the policy requiring a plaintiff to diligently prosecute her or his case. Appellant, in marshaling the facts only to support his point of view without consideration of the opposing facts set out above, has not demonstrated that a contrary result must inevitably be reached, that is, that the trial court could only have decided the

case in appellant's favor but did not. Thus, he has failed to carry his burden of showing that the trial court abused it discretion beyond a reasonable doubt. Certainly the Court of Appeal did not think so. The judgment should therefore be affirmed.

Dated: July 3, 2014

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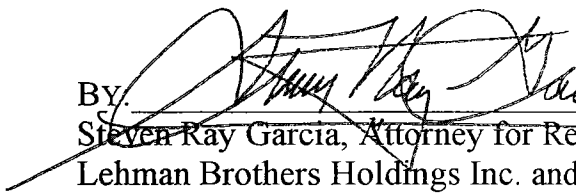

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1), CAL. RULES OF COURT

I, Steven Ray Garcia, counsel for respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC, certify that the foregoing brief is prepared and proportionally spaced Times New Roman 13 point type and based on the word count of the word processing system used to prepare the brief, exclusive of tables, is 12,614 words long.

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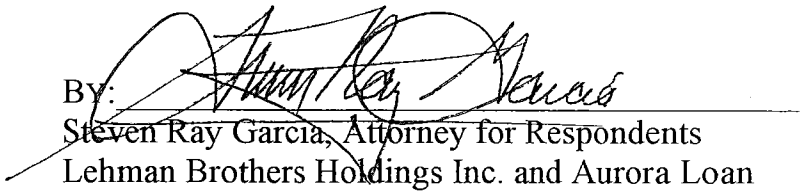

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I am over 18 years of age and not a party to the above entitled action. I am employed in the County where the mailing took place. My business address is 301 North Lake Ave., Seventh Floor, Pasadena, CA 91101. On July 7, 2014, I mailed from Pasadena, California, the following document: ANSWERING BRIEF OF RESPONDENTS LEHMAN BROTHERS HOLDINGS INC., AND AURORA LOAN SERVICES LLC ON THE MERITS.

I served the documents by enclosing them in an envelope and placing the envelope for collection and by overnight mail following our ordinary business practices. I am readily familiar with this businesses practice of collecting and processing correspondence for overnight mail. On the same date that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with Norco Delivery Service in a sealed envelope with postage fully prepaid.

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

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