Supreme Court Copy

Civil No. S172684

In the Supreme Court of the State of California

DANA BRUNS,
Plaintiff and Appellant

vs.

E-COMMERCE EXCHANGE, INC., et al.,
Defendants and Respondents

REPLY BRIEF ON THE MERITS

From an Order of the Court of Appeal,
Second Appellate District, Division Five, Case No. B201952

Reversing the Judgment of the
Los Angeles County Superior Court
Case No. JCCP 4350
Honorable Carolyn B. Kuhl

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Unfair Competition Case: Service on the Attorney General and the Orange County District Attorney required by Business & Professions Code section 17209

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CSB Partnership; Chris & Tad Enterprises; CSB & Ellison, LLC; CSB & Hinckley, LLC; CSB & Humbach, LLC; CSB & McCray, LLC; and CSB & Perez, LLC (collectively, the "CSB Defendants") respectfully submit this reply brief on the merits.

INTRODUCTION

The decision of this Court in this case will have a lasting effect on how California trial courts manage cases – all cases, and especially complex and coordinated cases. The tool of choice for trial courts in managing unwieldy cases (and sometimes uncooperative litigants or counsel) has been the partial stay – deciding what should be done, in what order, and then ordering counsel not to do otherwise. Plaintiff and the Court of Appeal would impose a heavy cost on this fundamental tool, exempting all periods of partial stay from the five-year rule. Defendants submit this deterrent to partial stays is not required by statute nor is it good policy. Plaintiff attempts to downplay this cost by minimizing the importance of partial stays, but experience shows that trial courts do not agree.

A class action plaintiff – particularly one the trial court finds is not diligent – may wish to be free from any control by the trial court, and think that the use of partial stays is excessive and unnecessary; plaintiff makes such arguments herself. But the trial courts have the obligation to administer and manage litigation, and the mandatory exceptions to the five-

year rule should not be expanded to disadvantage the use of their management tool of choice. It is easy to speculate about other hypothetical case management options, but none has the practical efficiency and effect of a partial stay – deciding what is "out of bounds" for the current period of time. This Court should be guided in its decision by the experience of trial courts, and it can and should harmonize the litigation disposition goals of the five-year rule with the need for partial stays in case management by not extending mandatory tolling of the rule to partial stays.

Neither the legislative history of the statute, nor a parallel but different court rule, nor the cases cited by the Court of Appeal require mandatory tolling for partial stays in the course of case management. The only relevant history was an expressed intent to codify existing law, and no existing case extended mandatory tolling to partial stays. The court rule for mandatory tolling of limited stays pending coordination (Rule 3.515) does not support reading section 583.340(b) to implicitly encompass limited stays when that court rule is materially different in explicitly doing so. And the cases cited by plaintiff in support of a broad reading of "prosecution" were considering entirely different issues; when read closely, to the extent they should be considered at all, their broad meaning supports defendants' position that a partial stay is less than and not a stay of the broad term "prosecution."

The Court of Appeal decision further should be reversed because it creates uncertainty and lack of uniformity in the law. While the Court of Appeal held that the particular partial stays that were in effect in this case automatically tolled the five-year statute, the decision is not clear as to what partial stays will trigger mandatory tolling, creating ambiguity as to what effect the decision ultimately will have. The best way to read the statute to create uniformity and predictability in the law is to overturn the Court of Appeal decision and to hold that only complete stays toll the five-year statute. This would re-affirm existing precedent in a consistent way that has a sound basis in public policy.

The facts of this case – the activity that actually happened during the partial stays – illustrate the error in the Court of Appeal's new rule of law, and the potential absurdity of this unprecedented rule in future application. During the partial stays, plaintiff responded to demurrers, amended the complaint, submitted case management statements, received responsive pleadings and discovery responses, filed motions to compel and had them decided, filed defaults and had them adjudicated, served deposition notices, and so on. Plaintiff may have wanted to focus on more written discovery and more motions to compel for more sanctions, but the trial court wanted the parties to move on; the fact that a plaintiff has to be forced by partial stays to refrain from abusive litigation and/or move a case forward should not exempt her from the five-year rule time deadline for these periods.

In addition to its unprecedented and erroneous application of mandatory tolling, the Court of Appeal applied the incorrect standard of review for purposes of discretionary tolling to the determination of whether it was impossible, impracticable, or futile for plaintiff to bring the case to trial during other periods of time. Had the Court of Appeal properly reviewed the issue, it would have found that it was not impossible, impracticable, or futile for plaintiff to bring the case to trial in any disputed periods. During these time periods, significant and orderly litigation occurred. Plaintiff was, moreover, not diligent in advancing her case. In support of her diligence, plaintiff cites to the only action she ever took in this case: propounding voluminous discovery followed by motions for sanctions. Plaintiff's singular focus on discovery sanctions does not demonstrate diligence but, rather, the failure to meaningfully advance her case. The trial court who knew this case best had every right to not invoke discretionary tolling, and the Court of Appeal erred in reversing that determination without deference to the trial court.

For these reasons, the Court of Appeal decision should be reversed, and the plaintiff's lawsuit should be ordered dismissed.

ARGUMENT

I. THE USE OF PARTIAL STAYS FOR ACTIVE CASE MANAGEMENT SHOULD NOT RESULT IN TOLLING UNDER SECTION 583.340(B), AND THERE IS NO SUPPORT FOR THIS APPROACH IN PRECEDENT

A. Partial Stays are a Critical Tool of Case Management That Would be Detrimentally Curtailed if the Court of Appeal Decision is Upheld

Partial stays – through which trial courts control what proceedings occur at which points in time – are at the heart of case management and are nearly ubiquitous in coordinated, complex, and other managed cases.[1] Periods where such partial stays are in place should not constitute periods where "prosecution. . . [is] stayed" thereby tolling the running of the five-year statute.[2]

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[1] Despite plaintiff's suggestion to the contrary, active management can and should occur in any case, not just complex and coordinated cases. (See CRC 3.713(c) ("It is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition."); see also Cal. Code Civ. P. § 2010.020(b) ("[T]he court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice.").) Thus, the Court of Appeal's decision has the potential to affect every managed case in the California state court system.

[2] Contrary to plaintiff's argument, defendants are not suggesting that whether partial stays toll the five-year statute depends on whether such stays are entered in a case where there is active case management. Defendants believe that the partial stays should not constitute a period where "prosecution . . . [is] stayed" no matter the case or context in which it is entered. The frequent and necessary use of stays to effect case management is but one reason that the Court of Appeal's holding is untenable.

Plaintiff's primary argument against this sound policy is that, in her opinion, the use of partial stays is not necessary because a partial stay is not the *only* tool of case management at a trial judge's disposal. This argument falls well short of justifying bad policy. In the first instance, plaintiff's argument ignores the efficiency and effectiveness of partial stays, as well as the frequency with which trial courts utilize this procedure. A partial stay – telling the parties what they cannot do for the time being – is perhaps the most straightforward and result-oriented way in which to ensure the orderly progress of litigation and to prevent parties and their counsel from undertaking burdensome and distracting litigation tactics.

While plaintiff claims such a procedure is unnecessary, the Deskbook on the Management of Complex Civil Litigation ("Deskbook") repeatedly advocates the use of this important case management tool. For example, the Deskbook contains a sample case management order that contains a section entitled "Stay of Written Discovery": "All written discovery, except for that discovery required or permitted under this order, is stayed except by order of the court upon recommendation of the discovery referee for good cause shown." (Appendix at B1; see also § 3.13 ("Consider staying all additional discovery. . . . except as otherwise specified by the case management order pending further court order."); § 3.52 (recommending that in mass tort litigation the court may "stay formal discovery and grant extensions of time for responding to complaints and

motions . . . .").) It is soundly against the public policy of California, which aims to effectively move cases to speedy resolutions, to hold that the basic tools of case management offered by the Deskbook serve to toll the five-year statute. Yet this is exactly what the Court of Appeal held and plaintiff argues.

By suggesting that courts should not use stays, but should use other procedures to manage a case, plaintiff is substituting her own judgment for that of the duly empowered trial court faced with a complicated or unruly case. A trial judge should be able to use all case management tools at her disposal, including stays, without being forced to choose between case management in the way that she deems most efficient and the policy of the five-year statute. As set forth in the defendants' opening briefs, arguing that partial stays toll the five-year statute is effectively placing the policy goals of the five-year statute and case management at odds with one another. These concepts can and should be harmonized to work in tandem to achieve the just and speedy resolution of lawsuits. A trial judge should be able to exercise her discretion regarding the best way to do so, whether that be through partial stays or other tools of case management, without foregoing the parameters of the five-year rule.

Plaintiff specifically proposes that trial courts may use the hypothetical alternative case management tools of "phasing," "sequencing,"

"staging," or "prioritizing."[3] Plaintiff's proposals in this regard are telling; there is little to no substantive difference between "phasing," "sequencing," "staging," and "prioritizing," on the one hand, and entering partial stays, on the other. All of these approaches appear to consist of holding certain trial court activities in abeyance while others are allowed to proceed. All of them effectively result in a "stay" of some aspect of the case.[4]

What plaintiff appears to be suggesting is that whether there is mandatory tolling under section 583.340(b) depends on the words used by the court – dependent upon whether, for example, the court "sequences" the case so that the pleadings stage is concluded prior to discovery or whether the court enters a "stay" of discovery pending conclusion of the pleadings stage. This again is bad policy. Whether there is mandatory tolling should not depend on the terminology used by the trial court. Moreover, the fact that plaintiff is advocating for these "alternative" case management tools is

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[3] Plaintiff states that the Deskbook fails to list stays in the "lists [of] the variety of oft-used techniques for managing complex litigation (i.e., identifying, defining and narrowing issues)." (Ans. Brief at 54.) The section cited by plaintiff (§ 2.41), however, addresses specifically "identifying, defining and narrowing" issues, not general case management as asserted by plaintiff. For this reason, the referenced list also does not cite the "phasing," "sequencing," "staging," and "prioritizing" that plaintiff argues should be utilized in lieu of stays.

[4] Alternatively, if plaintiff is proposing that these options differ from stays in that they are suggestive and not prescriptive, then plaintiff is really saying that a trial court should have to waive the five-year rule to control uncooperative parties and counsel. This is neither reasonable nor necessary.

really a concession that plaintiff recognizes that use of case management tools should not automatically toll the five-year statute and that there is no sound basis for doing so.

Plaintiff's further argument that partial stays do not expedite or facilitate case resolution defies both common sense and practical experience.[5] There is a reason that the Deskbook encourages and judges frequently use partial stays to manage the cases in their courts: it is not to prejudice the litigants or ensure that a case lingers longer on the court's docket, but rather to assist the timely progress of litigation and see that a case proceeds expeditiously towards resolution. Plaintiff's argument in this regard is also directly at odds with her advocating the use of alternatives, such as phasing or sequencing. Whatever alleged negative effects result from a stay would result equally with these other procedures.

Plaintiff also argues that defendants have failed to demonstrate why complete stays are not "active case management." This argument is a red herring that does not address the policy issue being decided by this Court, and it is incorrect. For one, complete stays often arise out of reasons unrelated to a court's management, such as a complete stay during periods

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[5] Even plaintiff herself recognized the benefits of partial stays in this very case. At a September 19, 2006 hearing, held after the stay for discovery other than that judicially permitted had been lifted, plaintiff complained about the discovery that the CSB Defendants served on plaintiff, and she suggested to the court that there should be a discussion "whether or not we need to reimpose the discovery stay." (See Reporter's Transcript at N-6.)

where a party is in active military service. (*See, e.g., Buttler v. City of Los Angeles* (1984) 153 Cal.App.3d 520 (stay under Soldiers' and Sailors' Civil Relief Act).) Second, a complete stay totally suspends the progress of litigation, while partial stays directing what should be done are meant to facilitate case progress. Lastly, and most importantly, the language of the statute undisputedly provides for mandatory tolling during a complete stay; it is the dispute over application to partial stays that makes policy considerations, such as facilitating case management, relevant.

As set forth in the defendants' opening briefs (as well as the briefing in the Court of Appeal and the dissent in the Court of Appeal), significant litigation activity occurred during each of the three periods the Court of Appeal found tolled the five-year statute. Courts should "avoid a[statutory] interpretation that would lead to absurd consequences." *People v. Coronado* (1995) 12 Cal.4th 145. The Court of Appeal's decision and approach advanced by plaintiff – whereby periods where the case is proceeding are considered periods where "prosecution . . . was stayed" – would have such an absurd consequence. To avoid the inevitable absurd consequence of actively litigated cases being exempted from the five-year rule, the Court of Appeal's broad interpretation of mandatory tolling under section 583.340(b) should be overturned.

B. Plaintiff Cannot Find Support for Her Reading of the Statute in Legislative History, CRC 3.515, or Case Law

Plaintiff argues there is support for the Court of Appeal's holding in legislative history, a rule of court (CRC 3.515, formerly CRC 1514), and case law, each having nothing whatsoever to do with the five-year statute. Notably, the Court of Appeal never discussed or relied on either legislative history or CRC 3.515. In any event, none of these sources provides support for the Court of Appeal's opinion or overrides the strong policy reasons that favor the interpretation advanced by defendants.

1. The Legislative History of the Statute Supports Defendants' Reading of the Statute As Limiting Automatic Tolling To Complete Stays

Plaintiff fails to point to a single reference in the legislative history of section 583.340 that provides support for the Court of Appeal's decision. There is nothing in the legislative history that states or suggests that the legislature intended section 583.340(b) to allow for tolling for periods when only partial stays are in place. Plaintiff's efforts to glean meaning from isolated words in the legislative history are unconvincing at best.

Plaintiff argues at great length her interpretation that the term "proceedings" (which is used in the legislative history) and "prosecution" (which is used in the statute) mean the same thing, in an effort to convince this Court that the statute should be read as requiring tolling upon any stay of any "proceedings." Her arguments – that these terms represent a

"difference without distinction" and are "used interchangeably" – are belied by section 583.240(b). That statute provides for tolling in calculating the time limit for serving a summons and complaint, and states that the following periods of time will be excluded: where "*prosecution* of the action *or proceedings* in the action was stayed . . . ." (Emphasis added.)

It is a fundamental rule of statutory interpretation that words will not be deemed mere surplusage. (*See, e.g., Metcalf v. County of San Joaquin* (2008) 42 Cal. 4th 1121, 1135 ("[C]ourts should avoid a [statutory] construction that makes any word surplusage.").) Thus, the separate use of these two terms in the disjunctive in this provision strongly supports interpreting them to have distinct meanings. In contrast, section 583.340(b) only requires tolling when "prosecution . . . was stayed." Section 583.340(b), therefore, should not be read to apply to a mere partial stay of some "proceedings" in a case.

While almost any argument from the legislative history that never explicitly considered partial stays is nebulous at best, one fact is beyond dispute: in enacting 583.340(b), the Law Revision Commission explained that it was intended to "codif[y] existing case law," and cited *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204. (Cal. Law Revision Com. com., West's Ann. Code Civ. Proc. (2008 supp.) foll. § 583.340, p. 149.) *Marcus*

unquestionably involved a complete stay pending the outcome of an arbitration, not any partial stay.[6] (*Marcus*, 75 Cal.App.3d at 212-213.)

Plaintiff argues at length that the reference to *Marcus* was a "late" insertion, and that the comment previously stated merely that it was "codify[ing] existing case law," without reference to a specific case. The fact remains that the citation to *Marcus* was added, yet no reference to partial stays ever was. Even putting aside the citation to *Marcus*, plaintiff has pointed to no case the legislature could have intended to codify that did *not* involve a complete stay. The legislature at all times explicitly intended to codify existing law (as opposed to expanding the common law), and existing law was limited to those cases involving complete stays of a lawsuit. Indeed, no case prior to the Court of Appeal decision had ever held that something less than a complete stay automatically tolls the running of the five-year statute. Plaintiff's argument that the statute should extend to partial stays – a concept never addressed in any pre-enactment case – is fundamentally at odds with the legislative history expressing an intent only to codify existing law at the time of enactment.

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[6] Plaintiff argues that, if section 583.340(b) was a codification of *Marcus*, the statute would only apply to toll the five years during a stay pending an arbitration. Unlike defendants' construction of the statute, this position is not even remotely supported by a plain reading of the statute, nor does *Marcus* suggest that its rule for complete stays will apply only to stays for purposes of arbitration.

2. The Wording of Rule 3.515 Does Not Require or Even Support a Broad Construction of the Different Wording of Section 583.340(b)

Rule 3.515 has no effect on the interpretation of section 583.340(b), and plaintiff's arguments to the contrary are not persuasive. There is nothing explicit or implicit in either Rule 3.515 or section 583.340(b) (or their legislative histories) that one was to have an effect on the other or that, as plaintiff has misstated, the rule was intended to be "integrated" into the statute. Moreover, reading the provisions of each to have independent and somewhat different application does not offend any notions of statutory interpretation.

Rule 3.515 addresses stays and the effects of stays pending a decision on a petition for coordination. Plaintiff argues that Rule 3.515 provides that the court may order a stay that "suspends all proceedings" or may order a stay of "limited" proceedings pursuant to subsection (h) and that "any stay of proceedings" in effect pursuant to this rule (including such "limited" stays) will not be included "in determining whether the action stayed should be dismissed for lack of prosecution" pursuant to subsection (j). Thus, plaintiff argues, because both "limited" and complete stays are exempt from the five-year statute under Rule 3.515, "stays" as used in section 583.340(b) should be construed to apply to both partial and complete stays. Setting aside whether plaintiff's interpretation of Rule 3.515 is correct, plaintiff's argument lacks basis in law or logic.

First, Rule 3.515 is limited to stays entered pending a decision on coordination and does not, and does not purport to, have broader application. In addition, the fact that Rule 3.515 specifically and explicitly differentiates between "limited" and complete stays (see CRC 3.515(h)) suggests that the Rule should be given a different interpretation than section 583.340(b), which does not mention partial or limited stays. The legislature had the benefit of Rule 3.515 in crafting the wording of section 583.340(b) and thus easily could have adopted similar clear wording. It did not, confirming the legislature's intent to only codify existing law as to complete stays and not to parallel the broadened application of Rule 3.515 to "any stay" including the limited stays the rule explicitly discusses.

Plaintiff makes much ado about the fact that Rule 3.515's predecessor was referenced in a consultant's report (Garrett H. Elmore's report). However, this report notes only that: "Judicial Council rules governing particular procedures affecting civil actions, such as coordination of civil actions pending in different trial courts and judicial arbitration, sometimes provide for 'time period' exclusions from the statutory time period." (AA 14.) Plaintiff fails to acknowledge that this was a passing reference in the introduction of the report that was never further discussed, and that neither is there any indication in this report or otherwise that Rule 3.515's language was relied on in formulating the language of section 583.340(b), nor is there any indication that the new section of the five-year

rule exceptions was meant to be as broad as the court rule in what "time period" would automatically toll the deadline for purposes of coordination petitions.

Aside from plaintiff's conclusory assertion that reading section 583.340(b) to apply only to complete stays is inconsistent with Rule 3.515, plaintiff never explains why this is so. Section 583.340(b) provides for tolling in specific situations outlined in that statute, including periods during which there are complete stays of an action. Rule 3.515 has limited application to address treatment of stays pending a petition to coordinate, and thus has independent meaning in providing for broader automatic tolling than then-existing law, or the new statutory section 583.340(b) that codified then-existing law.

There is no principle of law and nothing in the language or legislative history of either Rule 3.515 or section 583.340(b) that should lead this Court to find that the latter is expanded by a prior court rule and requires tolling for both partial and complete stays. In fact, as discussed above, the different language of the statute and rule suggests that they should be read differently. Plaintiff's argument that the Court of Appeal decision is supported by Rule 3.515 is thus unpersuasive.

3. The Cases Cited by the Court of Appeal and Plaintiff Do Not Compel or Support Mandatory Tolling for Partial Stays

The Court of Appeal and plaintiff relied on *Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15 and *Melancon v. Superior Court* (1954) 42 Cal.2d 698 for their position that "prosecution . . . [is] stayed" by a partial stay. Plaintiff does not specifically address the CSB Defendants' arguments regarding why these cases do not support the Court of Appeal's decision, and, thus, the CSB Defendants will not repeat in detail the arguments from their Opening Brief. (See Opening Brief at pp. 36-39.)

However, as discussed in the Opening Brief, these cases do not stand for the proposition that a stay of any one step in an action is a stay of prosecution; rather, they hold that "prosecution" embraces the entirety of litigation. This is evident from the language and facts of these cases. Under the reasoning of these cases, only a stay of the entirety of litigation would be a stay of prosecution.

Notwithstanding that these cases support defendants' position rather than refute it, the CSB Defendants submit that these decades-old cases have nothing whatsoever to do with section 583.340(b), or even the concept of stays, and so are not probative as to the best and proper interpretation of this statute. Further, there is no evidence that either one of these cases were looked to in drafting this statute. Thus, reliance on these cases is wholly misplaced.

C. The Court of Appeal's Holding is Bad Policy Because it Creates Uncertainty in the Law

Plaintiff argues that interpreting section 583.340(b) to apply to only complete stays would create uncertainty in the law. However, this argument appears to be an exercise in misdirection. As explained below, it is the novel rule of law created by the Court of Appeal that would have the detrimental effect of uncertainty, not the position advanced by defendants.

In the first instance, what constitutes a complete stay of a lawsuit (as opposed to a partial stay of a lawsuit) is a matter of common sense. A stay where no trial court proceedings are allowed to proceed constitutes a complete stay, while all others constitute a partial stay. Moreover, the concept of a complete stay has been developed pursuant to a body of case law interpreting and applying the five-year statute. Thus, under defendants' interpretation, this body of case law will guide future courts and litigants when deciding whether mandatory tolling applies, and discretionary tolling precedent will guide decisions as to all other stays. In contrast, there is almost no body of case law with respect to mandatory tolling based on partial stays – for example, whether tolling is mandatory for a stay of even a single deposition, of a type of discovery, or only of a broad aspect of the litigation process, as well as whether management by sequencing or phasing is a partial stay. As stated above, prior to the Court of Appeal's decision, there were no cases that had found that a partial stay tolls the five-

year statute. There is thus very little for litigants and courts alike to look to in determining whether tolling applies.

The uniformity and predictability of the CSB Defendants' position is aptly demonstrated by this case. Here, defendants at no time disputed that there were, in fact, complete stays entered in this lawsuit that tolled the five years. For example, no party disputes that there was tolling during periods where there was a stay for all purposes pending the resolution of an appeal that would determine whether a plaintiff had a private right of action to bring a claim under the TCPA in state court, as well as a complete stay pending a decision on the petition for coordination.

In contrast, the rule of law created by the Court of Appeal and advanced by plaintiff would result in uncertainty and a lack of uniformity. Plaintiff argues that the Court of Appeal's holding is limited to "stays of the elements of pretrial proceedings – pleading, discovery and/or motion practice." (See Ans. Brief at p. 41.)[7] This is reading a holding into the Court of Appeal's decision that simply is not there. The Court of Appeal did not address the outer limits of its holding, instead concluding that the stays that were at issue in this case tolled the five-year statute. This itself

[7] Plaintiff also appears to suggest that the Court of Appeal holding may be unique to her case: "this action does not involve stays of singular events . . ." and "under the circumstances of this action . . . ." (Ans. Brief at pp. 38, 40.) This suggests that plaintiff believes the question of mandatory tolling should be resolved on a case-by-case basis, an approach that clearly does not result in uniformity.

breeds substantial uncertainty about how the new doctrine created by the Court of Appeal will be and should be applied.

Plaintiff's interpretation of the Court of Appeal's decision also is contrary to what happened in this case. Plaintiff argues that the Court of Appeal's decision dictates only that *complete* stays of *discovery* should toll the running of the five-year period. However, even where discovery stays were entered in this case, these were general stays of discovery with the court granting permission for approved discovery, so that discovery did happen pursuant to the trial court's active case management. For instance, between August 17, 2004 and July 11, 2006, when plaintiff alleges there was a complete discovery stay in place, the court ordered certain defendants to respond to interrogatories, requests for admission, and document requests, documents were produced, and depositions were scheduled. (1 RA 81-85; 3 RA 577, 616-617; 2 AA 414-415.)

This one example epitomizes why the Court of Appeal's decision and plaintiff's argument do not make sense. As in this case, many trial courts, especially when discovery is getting out of control, enter a general stay on discovery and then specify reasonable discovery that will be permitted. (See Deskbook, Sample CMO at Appendix B1, which takes this approach.) Thus, in many cases, a "complete" discovery stay does not result in no discovery occurring. It is unclear how the Court of Appeal decision would apply in such a case.

At its essence, the rule of law created by the Court of Appeal has anomalous results where partial stays are used to manage litigation. Although litigants are allowed – indeed directed – to meaningfully advance certain aspects of their case, such as certain discovery, while holding others in abeyance, those periods of time do not count towards the five year statute; such periods are treated as if they never happened at all.

Plaintiff argues that providing for tolling only for complete stays will "snare the cautious, vigilant and diligent." This is not true. As set forth above, it is the novel rule of law created by the Court of Appeal that will have this effect because, if the Court of Appeal decision stands, there will no longer be predictability in applying the statute. On the other hand, the uniform rule of law advocated by defendants – that only complete stays toll the statute – will allows litigants to know when the five years is about to run (absent discretionary tolling). Under defendants' construction of the statute, a cautious, vigilant and diligent plaintiff would approach the court with any concerns it has regarding the court's active management and what effect that is having on the ability of plaintiff to advance its case. This option was also available to plaintiff, but she never voiced any objections with the trial court's partial stays or other active management of the case.

The Court of Appeal has opened the door to the novel concept that a partial stay must toll the five-year statute, and, if this decision is not overturned, it will be years if not decades before the parameters of this new

rule will be fully explicated by published cases. There are a multitude of different procedures or proceedings that may be characterized as a partial stay, and there is no telling what will fall within the ambit of the Court of Appeal's decision. The better and more proper interpretation is to make clear that mandatory tolling only exists for complete stays, and that tolling for the wide range of possible partial stays is subject to the sound discretion of the trial courts under section 583.340(c).

D. The Activity That Occurred During These Time Periods Demonstrates That it was Error to Deem These Periods Stays, or Periods Where it Was "Impossible, Impracticable, or Futile" to Bring The Case to Trial

As outlined in the Court of Appeal's decision, there were three time periods that the Court of Appeal held constituted periods where "prosecution . . . was stayed": (1) May 24, 2000 to June 16, 2000;[8] (2) December 3, 2003 to January 15, 2004; and (3) August 17, 2004 to July 11, 2006.

Plaintiff suggests that the trial court "confused" section 583.340(b) and section 583.340(c) with respect to these time periods; however, this is not a correct or fair characterization of the record. The trial court held that these three time periods did not constitute periods where "prosecution . . .

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[8] Plaintiff argues that the Court of Appeal incorrectly found that the end date for this period was June 16, 2000, not July 12, 2000. In her answer to Defendants' petition for review, plaintiff did not ask this Court to address this additional issue and has therefore waived her right to do so. (CRC 8.500(a)(2).)

was stayed" because they consisted of only partial stays, not complete stays. (See 4 AA 952, 959-960.) It then undertook a detailed analysis of the litigation activity that occurred during these periods to conclude they were also not periods where it was "impossible, impracticable or futile" to bring the case to trial. (See 4 AA 952 et seq.)

As set forth in the defendants' opening briefs, the extent of case management and litigation activity that occurred during these periods of time demonstrates how illogical it would be either to hold that these constitute periods of time where "prosecution . . . was stayed" or that during these periods of time it had been "impossible, impracticable, or futile" to bring the case to trial.

For example, during the May 24, 2000 to June 16, 2000 period, the parties were still engaging in typical pleading activities that normally occur at the outset of a case, such as demurrers, amended complaints, and preparation of a joint evaluation conference statement. (1 RA 230-231, 241, 262, 264, 266-268, 270, 272, 274, 276, 278; 3 AA 725-738.) Between December 3, 2003 to January 15, 2004, more activity occurred than likely usually does over a winter holiday period, including filing answers to amended pleadings, filing motions to compel certain discovery, filing of a Review Conference Statement, and plaintiff's filing of her opposition to the petition for coordination. (2 RA 368-418, 424, 428-444; 2 AA 347-357.)

During the August 17, 2004 to July 11, 2006 period, several hearings were held, discovery motions were heard, discovery plans were prepared and ordered by the trial court, documents were produced, written discovery was ordered, depositions were ordered, the discovery cut-off was moved several times, E-Commerce Exchange ("ECX") and CSB's defaults were filed and adjudicated, and an amended complaint was filed and parties were added. (See, e.g., Reporter's Transcripts; 2 AA 405-407, 413-415, 530-532; 1 RA 81-85, 88-108; 2 RA 502-523; 3 RA 577-579, 668-677, 769, 786-788, 827; 4 RA 1069-1070; 5 RA 1276.)

Plaintiff argues that nothing happened between August 2, 2004 and January 2, 2005 and that the judge only lifted the complete stay in effect from August 2 to August 17, 2004 for the purpose of serving un-served parties. Again, when the court lifted the stay, even for this limited purpose, there was no longer a complete stay in effect. Thus, as a matter of law, this period should not fall within section 583.340(b). This decision was part of the court's case management and was entirely within the court's discretion; after all, why should discovery or motion practice go forward without all parties to the action? Plaintiff's argument also completely ignores the fact that litigation activity did occur during this period, including the filing and adjudication of the defaults entered against certain defendants.

As set forth above, it is illogical to designate periods where meaningful litigation activity occurred as periods where "prosecution . . .

was stayed." Because significant and orderly litigation occurred during these time periods, they should not constitute stays that toll the running of the five-year statute and also do not constitute periods where it was "impossible, impracticable, or futile" to bring the case to trial.

E. As an Alternative Approach, the Trial Court's Decision on Whether Periods of Partial Stays Toll the Statute Should Be Reviewed for Abuse of Discretion

The CSB Defendants emphasize that their alternative argument – that the trial court should be given discretion to determine whether partial stays should toll the five-year statute – is an argument of last resort. But, if partial stays can require tolling, this alternative represents the only way to make sense of what the Court of Appeal held and what plaintiff is arguing.

As discussed above, there is substantial uncertainty regarding the Court of Appeal decision and its effect. The Court of Appeal appears to have held that, in its judgment, the partial stays in effect during the relevant time periods should toll the statute. If such is to be the rule, especially if the application of mandatory tolling is to be decided on a case-by-case basis, it is only logical to defer to the trial court's sound discretion in making the determination of what is a "partial stay." This approach creates no more uncertainty than the rule of law created by the Court of Appeal, and it harmonizes the new rule of law with existing precedent on case-by-case determinations of litigation management.

II. THE COURT OF APPEAL DID NOT PROPERLY EXAMINE WHETHER IT WAS "IMPOSSIBLE, IMPRACTICABLE, OR FUTILE" FOR PLAINTIFF TO BRING HER CASE TO TRIAL DURING CERTAIN TIME PERIODS.

A. The Court of Appeal Did Not Properly Apply the Abuse of Discretion Standard of Review

The Court of Appeal incorrectly applied a de novo standard to review tolling under section 583.340(c) when such should have been reviewed for an abuse of discretion. The CSB Defendants do not dispute that the Court of Appeal purported to apply the abuse of discretion standard; however, the Court of Appeal failed to actually apply that standard in reaching its conclusion. While plaintiff argues to the contrary, she cannot point to a single instance in the Court of Appeal's decision where the Court of Appeal actually applied an abuse of discretion standard of review or, indeed, deferred to the trial court's judgment in any way. Plaintiff simply cites the abuse of discretion standard of review and the portion of the Court of Appeal decision explaining that standard.

As set forth in the CSB Defendants' opening brief on the merits, the Court of Appeal never once in its analysis used the term "discretion" in describing the trial court's ruling. It also appeared to apply a de novo standard of review by independently examining the facts. The Honorable Carolyn Kuhl had before her thousands of pages, hundreds of exhibits, and years of experience with this case to assist her in making her discretionary

determinations. The Court of Appeal inappropriately substituted its judgment for that of the trial court's.

Had the Court of Appeal properly examined the trial court's findings for an abuse of discretion, it would have readily found that it was not "impossible, impracticable, or futile" for plaintiff to bring her case to trial during these time periods.

B. The Trial Court Properly Exercised its Discretion in Finding it Was Not "Impossible, Impracticable, or Futile" for Plaintiff to Bring Her Case to Trial During the Relevant Time periods.

1. March 9, 2000 to May 24, 2000

Every time a plaintiff receives an unfavorable ruling that renders prior litigation tactics moot, the period of time arguably encompassed by the ruling should not be excluded from the calculation of the statutory five years. In her Answer, plaintiff argues that she is not "complain[ing] about unfavorable/erroneous rulings." (Ans. Brief at p. 86.) However, that is exactly what she is complaining about. She explains that after the court sustained defendants' demurrers to plaintiff's complaints, the court "simultaneously nullified Plaintiff's discovery and vacated her discovery motions." (Ans. Brief at 93.) This is precisely complaining about an unfavorable ruling that rendered her prior tactics moot. Periods affected by such an act should not be deemed periods where it was "impossible, impracticable, or futile" to bring a case to trial. Finding every continued or

denied discovery motion to always trigger tolling would wreak havoc on trial courts and their application of section 583.340(c).

In addition, the trial court had discretion to weigh the consequences of trial judge's actions that affected this period of time against the litigation that actually occurred in concluding that it had not been "impossible, impracticable, or futile" for plaintiff to bring her case to trial during this period of time. The Court of Appeal ignored this other activity, including that plaintiff filed amended pleadings and that some discovery was answered. (2 AA 296-304, 513; 1 RA 1-7, 140, 163-169, 171-198.)

Plaintiff misconstrues the holding of *Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545 that the discretionary tolling standard does not require "strict impossibility." Read in context, *Brunzell* holds that, in addition to "impossibility," tolling also occurs for "impracticability and futility," which this Court stated meant "excessive and unreasonable difficulty or expense." (*Id.* at 554.) During this two-month period, it was not excessively and unreasonably difficult or expensive for plaintiff to advance her case. In fact, she did so by amending her pleadings and receiving responses to discovery.

Moreover, as pointed out by ECX in its Opening Brief, the activities that occurred with respect to this period of time can be categorized as case management that is within the trial court's sound discretion. Plaintiff is simply wrong that such case management arguments cannot apply to this

period because it predates coordination of this lawsuit or a complex designation. Case management is called for in every case. (See CRC 3.713(c).) Such case management should not be found to make it "impossible, impracticable, or futile" for plaintiff to bring her case to trial. It was within the trial court's discretion to determine that re-service of discovery after dismissal of certain causes of action was the most efficient and effective means of handling the discovery at that stage.

2. May 27, 2004 to August 2, 2004[9]

The trial court also properly exercised its discretion in holding that it was not "impossible, impracticable, or futile" for plaintiff to bring her case to trial during this period of time. The trial judge had before her the fact that during this period, other than requesting a status conference, plaintiff did not attempt to take any action, or advance her case in any way. During this period, plaintiff was free to undertake other litigation activity to advance her case, such as serving discovery or deposition notices, or working on her motion for class certification. She opted to do nothing.

If anything, this period represents an ordinary delay inherent in litigation that cannot, as a matter of law, satisfy the impossible, impracticable, or futile standard: "Time consumed by the delay caused by

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[9] The Court of Appeal held that this period of tolling began May 27, 2004, not May 6, 2004. Again, plaintiff did not ask this Court to review that issue and has waived her opportunity to challenge the Court of Appeal's decision in that regard.

ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and *the normal time of waiting for a place on the court's calendar* are not within the contemplation of these exceptions." (*Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 502, quoting *Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526 (emphasis added).)

In the busy and overburdened California court system, it is frequently the case that the trial court is not available at a party's request for weeks and sometimes months. This includes, for instance, waiting for a case management or motion hearing. This delay is ordinary and should not toll the five-year statute. At the very least, the trial court should have discretion to determine the significance of such delays.

3. The Trial Court Did Not Abuse its Discretion in Finding That Plaintiff Was Not Diligent

As set forth in the CSB Defendants' Opening Brief, the trial court had discretion to infer from the record that plaintiff did not use due diligence, as is required to invoke tolling under the impossible, impracticable, and futile provision. Plaintiff cites to the voluminous discovery she served and discovery motions she brought as evidence of her purported diligence. But, there are at least two ways to look at plaintiff's actions, and the Court of Appeal should have deferred to the reasonable view taken by the trial court.

To demonstrate diligence, plaintiff must prove more than simply filing voluminous and burdensome discovery, and then filing motions on such discovery:

> A plaintiff's diligence should not be judged solely by whether or not that plaintiff has conducted or completed formal discovery. . . . Thus, whether formal discovery has been conducted is but one important factor in the "totality of the circumstances" to be considered in deciding whether to dismiss "for delay in prosecution." It must not be the only determinant nor should it be given undue emphasis in making the determination of excusable delay or good cause.

(*Salinas v. Atchison, Topeka and Santa Fe Railway Company* (1992) 5 Cal.App.4th 1, 11-12 (finding that plaintiff had not been diligent but that plaintiff's failure to conduct much discovery was not the only factor that should be considered in making that determination).) Yet, filing discovery and related motions is the only thing that plaintiff points to as evidencing her purported "diligence." It is evident from the record – and plaintiff's own description of her actions – that plaintiff was singularly focused on seeking discovery sanctions in lieu of meaningfully advancing her case.

Moreover, plaintiff had a duty to advance her case at "every stage." (*See, e.g., Fannin Corp. v. Superior Court* (1974) 36 Cal.App.3d 745, 750, citing *Raggio v. Southern Pacific Co.* (1919) 181 Cal. 472, 475 ("[The] duty rests upon a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination.").) However, there were long periods of time during which plaintiff could have done more but

chose not to, or simply failed to take any action at all. For example, plaintiff obtained ECX's and CSB's defaults on January 15, 2004 but then never sought entry of default judgments, and the defaults ultimately were set aside on November 8, 2004. (See Typed opn., p. 22.) In rejecting plaintiff's argument that this period should be tolled, the Court of Appeal, apparently exercising its own judgment on the issue, held: "Plaintiff took no steps to obtain entry of default judgments and, thus, was not reasonably diligent in the prosecution of her action." (Typed opn., p. 23.)

Plaintiff also failed to take any number of other actions to progress her case toward resolution. For example, plaintiff failed to seek class certification and failed to take any defendant's deposition. Given plaintiff's highly speculative allegations that the defendants withheld or "spoliated" documents, such depositions should have been high on plaintiff's to-do list. Yet in the seven years that plaintiff's case was lingering, plaintiff never took a single deposition. Even after the defendants filed their motions to dismiss in this case, plaintiff failed to take steps to convince the court that she was diligently prosecuting her case and readying it for trial. In keeping with her previous conduct, plaintiff did nothing to substantively advance her case.

Plaintiff's statements regarding the addition of CSB-related entities to the lawsuit are misleading. She states that the "delayed addition of the new defendants was the direct result of willful misrepresentations made to

Plaintiff by CSB." The CSB Defendants do not discuss this in great detail because this issue is not before this Court; however, plaintiff's statements are false. In fact, as the Court of Appeal briefing demonstrates, plaintiff had knowledge, and admitted to having knowledge, of some of these defendants and waited years to add them into the lawsuit, proving she was not misled by the alleged failure to identify them all. (Respondents' Brief at pp. 43-55.)

Plaintiff can point to nothing she did to meaningfully advance disposition of her case on the merits. Instead, she merely sought sanction after sanction. This is far from the diligence that is required in order to use the "impossible, impracticable, or futile" prong of section 583.340. Most importantly, it constituted ample grounds for the trial court's decision, and so – under the proper application of the abuse of discretion standard – the Court of Appeal should not have disturbed that decision.

CONCLUSION

For the reasons set forth in defendants' opening briefs and above, the CSB Defendants respectfully submit that the Court of Appeal decision should be reversed and the plaintiff's lawsuit should be ordered dismissed.

Dated: January 21, 2010

DUANE MORRIS LLP

By: _____

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.520(c)(1), I certify that this brief contains approximately 8,146 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, the Statement of Issues, attachments, or this certification page.

Dated: January 21, 2010

Max H. Stern

PROOF OF SERVICE

Bruns v. E-Commerce Exchange, Inc., et al.
California Supreme Court Case No. S172684

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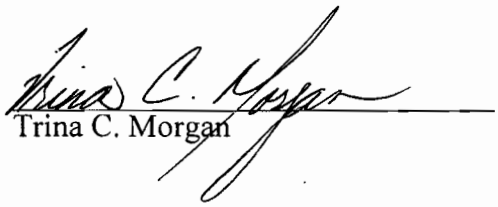
Dated: January 21, 2010



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