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

OPENING 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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STATEMENT OF ISSUES

1. Trial courts routinely use partial stays and other controls on discovery to actively manage cases. Does *any partial* stay necessarily mean that "prosecution . . . of the action [i]s stayed," automatically tolling the running of the five-year mandatory period to bring a case to trial, as the Court of Appeal's majority opinion holds? (*See* California Code of Civil Procedure § 583.340(b).)

2. Did the Court of Appeal properly examine whether a trial court abused its discretion in finding it was not "impossible, impracticable, or futile" for plaintiff to bring her case to trial (as would support tolling under the five-year statute) during brief periods when only some pre-trial proceedings were delayed yet other proceedings could have, and did, move forward? (*See* California Code of Civil Procedure § 583.340(c).)

INTRODUCTION

Litigation – especially complex litigation – needs trial court management, and yet plaintiffs in managed cases should not be excused from the requirement to prosecute their cases diligently. To advance these twin goals of enabling trial court management and ensuring diligent prosecution by plaintiffs, periods during which a trial court actively manages the progress of litigation by entering partial stays or otherwise controls discovery should not automatically constitute a stay of

"prosecution" that always toll the running of the five-year period to bring a case to trial.

The California Legislature has set forth a clear "policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action . . . ." (Code Civ. Proc. § 583.130.) In furtherance of this policy, Code of Civil Procedure section 583.310 provides that an action shall be brought to trial within five years after the action is commenced against the defendant. This five-year period is "mandatory" and is "not subject to extension, excuse, or exception *except as expressly provided by statute*." (Code Civ. Proc. § 583.340(b), emphasis added.) As to stays, section 583.340(b) provides only that, in computing these five years, the time during which "prosecution or trial of the action was stayed or enjoined" shall be excluded. That section does not state that time during a *partial* stay, when other prosecution of the action could and/or does continue, is excluded from the five-year rule.

Plaintiff filed her purported class action lawsuit on February 22, 2000. During the nearly seven years that plaintiff's case was pending, the trial court entered various orders to actively manage the progress of her cases and the jointly managed companion cases, including entering partial stays to control the order of discovery. The Honorable Carolyn B. Kuhl of the Los Angeles Superior Court, who personally managed this case for approximately two years, eventually dismissed plaintiff's case pursuant to

Code of Civil Procedure sections 583.310 and 583.360. She found that periods of time during partial stays did not constitute periods where "*prosecution* . . . was stayed," because the lawsuit had not been completely stayed during those periods.

A divided Court of Appeal reversed Judge Kuhl's determination. (*Bruns v. E-Commerce Exch., et al.* (2nd Dist., Div. 5, Civil Case No. B201952), *fomerly published at* 172 Cal.App.4th 488 (hereafter "Slip Opn.").) The majority opinion held that "a partial stay of an action constitutes a stay of the prosecution of the action within the meaning of section 583.340, subdivision (b)" (Slip Opn., p. 2), notwithstanding that the partial stays here were limited in scope, entered in order to manage the litigation, and facilitated the significant and substantial litigation activity that occurred during these periods.

This central ruling of the Court of Appeal was wholly unprecedented. The decision is the first in California jurisprudence to hold that a partial stay constitutes a stay of "prosecution" that tolls the five-year statute. Every California case that has addressed this issue before has found that only a complete stay of all trial court activity tolls the period in which to bring a case to trial. Indeed, the California Law Revision Commission Comment recognizing that the section 583.340(b) exception for stays of prosecution codified case law cites a case involving a *complete* stay of all trial court activity. No prior California case has ever found a

partial stay tolls the five-year period. In making its determination, the Court of Appeal relied on case law unrelated to this issue, and which, on a close reading, undermines the reasoning of the majority decision below.

To hold that the five-year statute is tolled during periods of time in which the trial court is actively managing a case is inconsistent with the purpose of that statute and would vitiate the five-year statute in both complex and coordinated cases. No such exception is stated in the five-year statute, and the creation of such an exception runs contrary both to logic and public policy. The five-year statute and rules providing for active case management (especially in complex and coordinated cases) share a common goal – to expedite the resolution of cases – and should thus be read in harmony with one another.

The adverse consequences of the new rule created by the Court of Appeal is well illustrated by the facts of this case. Trial judges, including Judge Kuhl for two years, actively managed this case, and during those periods of active management significant litigation activity occurred. Another plaintiff brought its case to trial, but Bruns had not even sought class certification yet, preferring to focus on many rounds of written discovery and a series of sanctions motions. It is not logical to hold that the entire time the trial court managed this case is treated the same way as if no activity happened at all.

If allowed to stand, the rule created by the Court of Appeal will affect countless cases and courtrooms in the California judicial system. Pursuant to the California Rules of Court, a trial court has the duty to actively manage its cases to advance California's public policy of seeing that litigation is quickly resolved. (See CRC 3.400(a), 3.541(b), 3.713(c).) Entering partial stays – that allow specified litigation activities to occur while holding others in abeyance until the appropriate time – is a fundamental and often-used tool to accomplish these case management and public policy goals.

The Court of Appeal's novel holding that such a critical tool of case management always constitutes a stay of "prosecution" under the five-year statute will severely hamper the way in which a trial court manages its cases. Trial courts will not be able to control the orderly progress of difficult cases without, in effect, abandoning the public policy mandated by the five-year statute. Litigants will be able to exploit this limitation to their advantage, and cases like *Bruns* will be able to meander along without diligent prosecution, which is precisely what the five-year rule was enacted to prevent. The inevitable result will be an even more crowded California court system, at a time when judicial resources are already over-burdened.

At a minimum, the determination of whether "prosecution . . . is stayed" should be left to the trial court's discretion. The trial court should at least be granted deference to determine whether, in light of a partial stay

or enjoinment, a plaintiff was able to prosecute her case. Deference to discretion more effectively promotes public policy goals than the new rule of law created by the Court of Appeal whereby every time a trial court's order uses the word "stay" – no matter how limited – there is tolling under the five-year statute. Here, Judge Kuhl properly exercised her discretion in holding that plaintiff had the opportunity to advance her case, and that significant litigation activity had occurred during each of those periods where the Court of Appeal found as a matter of law that "prosecution . . . was stayed."

The Court of Appeal's decision further erred in the application of section 583.340 in addressing two periods where no stay was in effect. Section 583.340(c) provides that, in computing the five years, the time during which it was "impossible, impracticable, or futile" for plaintiff to bring her case to trial also shall be excluded. Relying on her close knowledge of the case, Judge Kuhl found that during the two periods where no stay was in effect, plaintiff had a meaningful opportunity to advance her case and that significant litigation activity had in fact occurred. Moreover, Judge Kuhl found that plaintiff had not satisfied the diligence requirement for tolling under section 583.340(c). Either conclusion independently could support her determination that these periods did not toll the running of the five years to bring a case to trial.

The Court of Appeal reversed this discretionary finding as well. The Court of Appeal held that – based on its own independent review of the record – plaintiff had met her burden of demonstrating that it had been "impossible, impracticable, or futile" to bring her case to trial during these two other periods, and was diligent, such that tolling applied to those periods as well. The Court of Appeal essentially applied a de novo review of an issue that has always been wholly within the discretion of the trial court.

The Court of Appeal therefore created further confusion by applying a de novo standard of review. If the Court of Appeal had reviewed Judge Kuhl's decision for an abuse of discretion, it should and would have determined that Judge Kuhl properly used her discretion in determining that it had not been "impossible, impracticable, or futile" for plaintiff to bring her case to trial during brief periods when only some pre-trial proceedings were delayed yet other proceedings could have, and did, move forward. Judge Kuhl also had ample basis on which to conclude that plaintiff had not been diligent in pursuing her case.

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

FACTS

A. Filing of the Case

On February 22, 2000, plaintiff Dana Bruns, on behalf of herself and a putative class of others similarly situated, filed suit against certain defendants for allegedly sending unsolicited fax advertisements in violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1)(C) ("TCPA"). (Slip Opn., p. 3.) 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") were eventually added as defendants to the lawsuit.

B. Litigation Activity

A detailed summary of what specific activities occurred during which periods of time is set forth in the relevant portion of the Argument section, below. The following brief summary is provided for context.

Within weeks of filing her case, plaintiff served several rounds of discovery, which was shortly thereafter followed by motions to compel responses to such discovery. (Slip Opn., p. 19.) Apparently finding most of the discovery and the motions excessive, the trial court ruled that, except for certain identified interrogatories, all previously propounded discovery, if deemed necessary or advisable, would have to be re-served and that all prior discovery motions were vacated. (Slip Opn., p. 12.)

During this period, substantial other litigation activity continued to occur, including discovery and pleading activities. (*See* Appellant's Appendix filed in the Court of Appeal ("AA"), Volume 1, pages 161-208; 2 AA 296-304, 513; 4 AA 822, 845-866; Respondent's Appendix filed in the Court of Appeal ("RA"), Volume 1, pages 1-7, 140, 163-169; 171-198; Slip Opn., p. 20.)

At the May 24, 2000 hearing on defendants' demurrers and motions to strike the First Amended Complaint, the court set deadlines for amending and responding to the complaint, ordered the parties to submit a proposed Case Management Order ("CMO"), and entered a discovery stay pending entry of the CMO. (Slip Opn., p. 12; 1 RA 230-231.) Between May 24, 2000 and June 16, 2000, the parties engaged in various litigation activity, including working on and filing a joint evaluation conference statement and CMO, further pleading activity and related motions. (1 RA 235-278; 3 AA 725-738.)

On June 16, 2000, the court held the joint evaluation conference, filed the case management order, and lifted the discovery stay. (Slip Opn., pp. 4, 12, 19; 2 RA 280-286.) The case management order stated: "On May 24, 2000, this Court stayed discovery pending entry of a Case Management Order. . . . The stay on discovery is hereby lifted." (*Ibid.*) This order also established a document repository, set in place a protocol for exchanging documents, attached court-approved interrogatories, and created a schedule

for the case. (*Ibid.*) During the next two years, the case proceeded, and defendants took Bruns's deposition.

On June 13, 2002, the trial court issued a stay for all purposes, pending resolution of *Kaufman v. ACS Systems, Inc.*, which would determine whether a plaintiff had a private right of action to bring a claim under the TCPA in state court. (2 AA 314-315.) The Court of Appeal ruled that there was such a private right of action. (*Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886, 895.) The trial court then lifted the stay on October 21, 2003. (2 AA 317.) The parties agree that the five-year statute was tolled during these 495 days of complete stay.

On December 3, 2003, the trial court held a hearing at which certain defendants advised the court that they had submitted a petition for coordination of various TCPA cases involving defendant Fax.com. (Slip Opn., pp. 4, 13; 2 RA 353-356.) The court therefore set a further review hearing for January 15, 2004, and it ordered discovery stayed until that time. (Slip Opn., p. 13; 2 RA 353-356.)

The court did not stay any other litigation activity, and normal litigation activity proceeded. Between December 3, 2003 and January 15, 2004, plaintiff filed her opposition to defendant Fax.com's petition for coordination, and further pleading and discovery activity occurred. (*Ibid.*; 2 RA 368-418; 2 RA 428-444; 2 AA 347-357.)

On January 30, 2004, the trial court set a hearing date for the petition for coordination and ordered: "All hearings, orders, motions, discovery or other proceedings are hereby stayed in all cases subject of the petition for coordination until a determination whether coordination is appropriate." (2 AA 359.) Again, the parties agree to tolling during this 97-day complete stay.

On April 7, 2004, the trial court granted the petition for coordination, and it assigned a coordination trial judge on May 6, 2004. (Slip Opn., pp. 4-5, 21.) The order of assignment stated that "[i]mmediately upon assignment, the coordination trial judge may exercise all the powers over each coordinated action of a judge of the court in which that action is pending." (Slip Opn., p. 5.) After May 6, 2004 plaintiff did call the court requesting a status conference during this span of nearly three months, but plaintiff did not attempt to take any other action or advance her case in any other way.

On August 2, 2004, the court set an initial status conference in the coordinated actions for August 17, 2004. (Slip Opn., p. 13.) The court ordered that discovery "will generally be conducted under court supervision and by court order." (2 RA 459.) The court also ordered that "[t]o facilitate the orderly conduct of this action, all discovery, motion and pleading activity is temporarily stayed pending further order of this court."

(Slip Opn., p. 13.) The parties agree that there was tolling for the 15 days between August 2, 2004 and August 17, 2004.

On August 17, 2004, the court held an initial status conference. (*Ibid.*) The court set various dates and ordered that the stay it entered on August 2 was "lifted for the sole purpose of serving any unserved parties." (*Ibid.*) The court scheduled a November 9, 2004 discovery conference (ordering the parties to meet and confer regarding all outstanding discovery matters) (2 RA 488), and, at the conference, set a December 7, 2004 hearing on plaintiff's discovery motions and ordered Fax.com to produce database information by November 30, 2004. (2 RA 533-535.)

On December 28, 2004, the court gave notice that Judge Carolyn B. Kuhl would be presiding over the coordinated cases effective January 3, 2005. (Slip Opn., p. 5; 2 RA 555, 557.) For the next two years, Judge Kuhl proceeded to actively oversee and administer the orderly progress of the case, including discovery and various pleadings and motions practice. (1 RA 81-85-108; 2 RA 502-504-523; 3 RA 577-579, 668-677, 738-739, 769, 786-788, 827; 4 RA 897-902-927, 1069-1070; 5 RA 1276; 2 AA 405-407, 413-416, 530-532; 3 AA 666-667; 3 Reporter's Transcript ("RT") H-34 to 36.)[1]

[1] Presiding Justice Turner's Dissent in the *Bruns* case (pp. 1-11) contains an in depth discussion of the litigation activity that occurred during this period of time.

In an action coordinated with *Bruns – Amkraut v. Pacific Coast Office Products* – the trial court granted the plaintiffs' motion for class certification. (3 RA 802.) A class in *Amkraut* was certified on November 10, 2005, and the court denied defendants' motion to de-certify the class on February 15, 2006.[2] (2 AA 386-394; 3 RA 860-861; 4 RA 1099-1100.) The coordinated *Amkraut* action was tried to the court on October 6, 2006, and judgment was entered in favor of the Amkraut plaintiffs and against Fax.com. (3 RT 0-1 to 39; 2 AA 546-547.)

At a July 11, 2006 hearing, following the prior decision to end coordination of *Bruns* with other Fax.com cases, the court lifted any partial stays of discovery that were still in effect. (Slip Opn., pp. 5, 14.)

C. Trial Court's Dismissal of Plaintiff's Case

Defendants filed motions to dismiss pursuant to Code of Civil Procedure section 583.310 on November 22, 2006. (Slip Opn., pp. 5-6.) Plaintiff did not request a stay at this time, and the five-year clock continued to run. (Slip Opn., p. 25 n. 17.) The trial court held a hearing on January 25, 2007, and entered a complete stay of the action. (3 RT Q-1 to 40; Slip Opn., p. 24 n.15.) After lengthy argument from counsel, the court

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[2] Judge Kuhl changed her mind about the correctness of class certification in the *Bickelmann* matter, which also was coordinated with *Bruns* and *Amkraut*. Judge Kuhl's denial of class certification in *Bickelmann* was upheld on appeal. (*Bickelmann v. Assil Sinskey Eye Inst.*, No. B200523 (Cal. App. Dec. 15, 2008) 2008 Cal. App. Unpub. LEXIS 10056.)

requested supplemental briefing regarding the specific litigation activity that took place during each of the periods that plaintiff claimed the five-year statute was tolled. (3 RT Q-29 to 32; Q-34 to 35.)

The parties filed supplemental briefs on February 7, 2007. (3 AA 814-819; 4 AA 820-935; see also 1 RA 124-205; 5 RA 1304-1401.) The supplemental submissions to the court included defendant E-Commerce Exchange, Inc.'s ("ECX's") "Notice of Lodgment," which contained over 1,000 pages of documents, and almost 300 exhibits documenting the actual litigation activity in the periods where plaintiff argued for tolling. (1 RA 206 through 5 RA 1303.) Over three months later on May 14, 2007, the court entered a 26-page order granting the motion to dismiss. (4 AA 936-965.) That order contains a detailed analysis of the litigation activity during each period of time for which plaintiff alleged the five-year statute had been tolled. (*Ibid.*)

The trial court held that there were 607 days during which the five-year statutory period was tolled (the periods of time not disputed by the CSB Defendants). (4 AA 964.) Adding 607 days to February 22, 2005 (five years after initial filing), plaintiff should have brought her case to trial by October 23, 2006. (*Ibid.*)

D. Proceedings Before the Court of Appeal and This Court's Grant of Review

Plaintiff appealed from the judgment of dismissal entered in favor of defendants. (Slip Opn., p 7.) On March 23, 2009, the trial court's judgment was reversed and remanded by the Second Appellate District, Division Five, in a 2-1 opinion. (Slip Opn., pp. 24-25.) The Court of Appeal held that a "partial stay of an action constitutes a stay of the prosecution of the action" within the meaning of Code of Civil Procedure section 583.340(b). (Slip Opn., p. 2.) The court held that any stay, including periods where the court directed what discovery would take place and stayed other unpermitted discovery, should not be included in the calculation of the five years. (Slip Opn., pp. 10-12.) The Court of Appeal thus ruled that "prosecution . . . was stayed" for the following periods and excluded such periods from calculation of the five years:

- May 24, 2000 to June 16, 2000 – 23 Days;
- December 3, 2003 to January 15, 2004 – 43 Days; and
- August 17, 2004 to July 11, 2006 – 693 Days.

The Court of Appeal additionally held that during two periods of time, plaintiff "met her burden" of demonstrating that it had been "impossible, impracticable, or futile" to bring her case to trial, such that the five-year rule would not run during these two periods. (Slip Opn., pp. 20, 22.) These periods are:

- March 9 to May 24, 2000 – 76 Days; and
- May 6, 2004 to August 2, 2004 – 88 Days.

Defendants did not petition the Court of Appeal for rehearing.

The CSB Defendants filed a Petition for Review on May 4, 2009, which this Court granted on July 22, 2009.

ARGUMENT

To enforce California's public policy that "a plaintiff shall proceed with reasonable diligence in the prosecution of an action . . ." (Code Civ. Proc. § 583.130), the California Legislature has provided that: "An action shall be brought to trial within five years after the action is commenced against the defendant." (Code Civ. Proc., § 583.310.) Where an action is not brought to trial within five years, dismissal is mandatory. (Code Civ. Proc. § 583.360(b) ("The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."); *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1269 ("Dismissal is mandatory if the action is not brought to trial within the statutory period.").)

In calculating the five-year period, "there shall be excluded the time during which any of the following conditions existed: [¶] (a) The jurisdiction of the court to try the action was suspended. [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Code

Civ. Proc. § 583.340.) Section 583.340(b) refers to "prosecution" being stayed, and prior California courts have only found complete stays qualified for this exception. (*See, e.g., Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000.)

I. DISCOVERY STAYS OR OTHER PARTIAL STAYS, SUCH AS THOSE THAT ARE USED IN ACTIVELY MANAGING CASES, SHOULD NOT ALWAYS CONSTITUTE PERIODS WHERE "PROSECUTION . . . OF THE ACTION [I]S STAYED," AUTOMATICALLY TOLLING THE RUNNING OF THE FIVE-YEAR MANDATORY PERIOD TO BRING A CASE TO TRIAL

A. The Discovery Stays and Other Partial Stays That Occurred In This Lawsuit Should Not Constitute Stays of "Prosecution" That Toll the Five-Year Statute

1. The Five-Year Statute and Rules Regarding Active Case Management Co-Exist to Effect the Same Policy Goals and Should Not Be Construed To Be At Odds With One Another

Entering discovery stays or other partial stays are necessary and oft-used devices of case management in the California court system. These essential tools exist to effect the orderly and speedy resolution of cases, especially complex and coordinated cases. In fact, the California Rules of Court and Judicial Council of California's guidelines encourage – and, indeed, require – trial courts to actively manage their cases to bring them to expeditious resolutions.

For example, in furtherance of delay reduction goals, Rule of Court 3.713(c) provides: "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." (Emphasis added; *see also* Cal. Code Civ. P. § 2019.020(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.").)

On July 12, 2000, the trial court ruled that plaintiff's case was complex. (4 AA 837.) A court's ability to actively manage complex cases is inherent in this designation: "A 'complex case' is an action that requires *exceptional judicial management* to avoid placing unnecessary burdens on the court or the litigants and *to expedite the case*, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." (California Rules of Court ("CRC") 3.400(a) (emphasis added).) Indeed, California courts have interpreted this Rule of Court to allow for broad judicial supervision of trial court proceedings. (*See Volkswagen of Am. V. Superior Court* (2001) 94 Cal.App.4th 695, 704-705 ("[B]y recognizing the need for 'exceptional judicial management' the Judicial Council necessarily acknowledged that courts have the authority to take whatever exceptional management actions are necessary to accomplish that result.").)

The Judicial Council of California's guidelines for judges overseeing complex litigation notes that "[a]ctive judicial involvement in discovery is particularly important in complex litigation," and endorses the use of stays

and staging of discovery (which necessarily involves staying discovery designated for other stages):

> The better course is to impose a brief stay with the notice of the initial case management conference and until further order of the Court. The discovery schedule, decisions on the staging of discovery, and other discovery issues should then be included in the case management order that is served at the close of the case management conference. . . . All of this can be on various tracks according to the overall need for the staging of discovery. For example, in some cases where it is appropriate for certain issues to precede other issues, such as questions of statute of limitations, jurisdiction, or standing, discovery should be staged so that these issues can be determined before other discovery proceeds.

(*See* §8B.4 of the 2008 Update to the Judicial Council of California's "California Judges Benchbook: Civil Proceedings," citing the Deskbook on the Management of Complex Civil Litigation, prepared in 1999 by the Judicial Council's Complex Civil Litigation Task Force.)

The Benchbook expresses particular concern that "discovery can become unfocused and out of control" and "discovery abuse can be a major problem in complex cases." (*Id.*) Trial courts are encouraged to use these management tools (e.g., stays and staging of discovery), so that "discovery can proceed quickly but not haphazardly." (*Id.*)

Similarly, in coordinated cases such as this one, a trial judge "must assume an *active role in managing all steps* of the pretrial, discovery, and trial proceedings to *expedite* the just determination of the coordinated actions without delay." (CRC 3.541(b) (emphasis added).) Again, Courts

of Appeal have emphasized that a trial judge has a duty to actively manage a coordinated case. (*See Bank of America*, 200 Cal.App.3d at 1009 ("[T]he coordination trial judge [shall] assume an active role in managing all steps of pretrial, discovery, and trial proceedings. . . .").)

These Rules of Court and Judicial Council guidelines emphasize the critical importance of ensuring that trial courts are actively engaged in the progress of a lawsuit to enable all stages of litigation, including discovery, to proceed efficiently. Partial stays are the fundamental tool to accomplish this goal. Through partial stays, the court can phase the progress of the litigation and enter orders that certain activity (including specified discovery) is to occur at appropriate times in the litigation. Indeed, this device is likely the best means of managing complex and coordinated lawsuits. In such cases, which can involve numerous parties, the trial court will want to order the sequence in which the parties file pleadings, conduct discovery, and file motions. Not controlling these steps in complex or coordinated cases would create a logistical nightmare for the litigants and the trial court's docket, and would not achieve the timely resolution of the litigation. This potential nightmare is precisely why the Rules of Court require that trial judges actively manage these types of cases.

The expeditious resolution of cases is the same policy sought to be achieved through the five-year statute. California Code of Civil Procedure section 583.310, by requiring that actions be brought to trial within five

years of filing, is in furtherance of the California Legislature's "policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action . . . ." (Code Civ. Pro. § 583.130; *see also Moran v. Superior Court* (1983) 35 Cal.3d 229, 237, quoting *General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 91 ("The aim of section 583 is to 'promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses become dimmed . . .[and] to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.'").) Both the five-year statute and active case management seek to expedite resolution of cases and bring them to timely resolution. Both also seek to ensure that litigants are given the incentive and means to meaningfully advance the case.

Given this common policy goal, the five-year statute and the Rules of Court requiring active management should be read in harmony with one another. In fact, the *Bank of America* court recognized that actively managed coordinated cases should be and are still subject to the five-year statute: "[W]e conclude the Judicial Council rules governing the coordination of civil actions do not conflict with the statutory five-year rule for bringing civil actions to trial; hence, the statutory rule applies to each of the coordinated actions." *Bank of America*, 200 Cal.App.3d at 1009; *see also Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1288-

1289 (rules of law should be read in harmony with one another to the extent possible).)

Instead of harmonizing these policies, the Court of Appeal decision holds that a court exercising its case management duties pursuant to the California Rules of Court and Judicial Council guidelines means that these periods of time are excluded from the five-year period. This places the five-year statute and rules requiring active case management directly at odds with one another.

Not only does such a result not make sense, it has far reaching consequences and creates untold limitations on trial courts' abilities to actively manage their cases, such as Judge Kuhl did here. Under the new rule of law created by the Court of Appeal, any period during which the trial judge manages a case by entering partial stays – which are encouraged and perhaps required by the court's managerial and delay reduction obligations under the Rules of Court – constitutes a stay of "prosecution" that tolls the five-year rule. Many cases (especially complex or coordinated cases) would rarely, if ever, be subject to the five-year statute, given the nature of the judicial oversight function and the reality that trial court management is exercised by deciding what will be done at each stage of an action. It simply should not be the case that the five-year statute does not apply to complex and coordinated cases; such an exception is not expressly

or impliedly part of CCP section 583.310, and such an exception runs contrary to the express intent of that statute.

If the Court of Appeal's decision is not reversed, a trial judge overseeing a complex or otherwise complicated case now has an unreasonable choice to make: she can exercise her management functions over a case by entering partial stays, or she can ensure the case is subject to the five-year rule. She cannot do both. Few, if any, judges want to abrogate the five-year rule. The result will be that trial judges will feel constrained in their exercise of their judicial management functions and effective resolution of cases. In fact, counsel for the CSB Defendants have learned that, since the Court of Appeal's decision was issued, trial judges are now struggling with how to continue to effectively manage their cases without sacrificing the public policy of the five-year statute.

If the Court of Appeal decision is left undisturbed, the result will be a more crowded docket and California court system. The rule created by the Court of Appeal removes the law's strongest incentive for plaintiffs to bring their cases to trial in a timely manner. Lackadaisical counsel will be able to rest assured that when the trial court phases a case or otherwise actively manages it, they do not need to worry about actively pursuing the case. This will give some the opportunity to use harassing litigation tactics to their advantage, as plaintiff did here with her "victory by discovery

sanctions" approach to litigation, in lieu of actively advancing her case to resolution.

There is also no predicting what theories of tolling may be spawned from the Court of Appeal's decision. Litigants will be able to argue that any judicial oversight function tolls the five-year statute, thus further encroaching on the important public policy sought to be advanced by the statute.

Pursuant to the California Rules of Court, the trial court had the authority – and, indeed, the duty – to actively manage this case, which it did throughout the pendency of the action. That efficient administration of the action included periods of judicially-ordained limitations on discovery, while other aspects of the matter could (and were intended to be) advanced. As the trial court properly found, such periods of active management should not toll the five-year statute.

The Court of Appeal decision creates bad law that is not in keeping with California public policy and the California Rules of Court. This Court should reverse the Court of Appeal decision.

2. During the Relevant Time Periods, the Trial Court Actively Managed These Cases, and Significant Litigation Activity Occurred

The actual level of activity during the periods of claimed tolling underscores the error of the Court of Appeal's decision. During each of these periods, the trial court was engaged in the active administration and

management of the case, and significant litigation activity occurred. Yet, under the Court of Appeal's decision, these periods do not count towards the five-year period. These periods are treated as if there was a complete stay at the time – as if no activity occurred at all. This is an absurd result that is completely contrary to the policy of this state.

May 24, 2000 to June 16, 2000 (23 Days)

The trial court actively managed the case during this period by undertaking the following actions:

- Setting deadlines for amending and responding to the complaint (Slip Opn., p. 12; 1 RA 230-231);
- Ordering the parties to submit a proposed Case Management Order ("CMO") (*ibid.*);
- Entering a discovery stay pending entry of the CMO; and
- On June 16, 2000, holding the joint evaluation conference, filing the CMO, and lifting the discovery stay (Slip Opn., pp. 4, 12, 19). This order also established a document repository, set in place a protocol for exchanging documents, attached interrogatories, and created a schedule for the case. (*Ibid.*)

Such active stewardship of a case is well within a court's inherent power to manage litigation, and should not constitute a stay of prosecution. To the contrary, the court took significant, essential steps towards

advancing and structuring the case, and this type of management is typical in cases in order to facilitate their expeditious resolution.

Moreover, during this period of time, the parties were engaged in the type of litigation activity that ordinarily occurs in the early stages of a lawsuit; specifically, the parties were shaping and defining the issues in contention, as well as testing the sufficiency of the complaint. The parties were also addressing discovery related issues, and engaging in activities that are part of the normal development of a case. During this period:

- Counsel for plaintiff and defendants negotiated the terms of a joint evaluation conference statement and proposed CMO (1 RA 235-239, 243, 245-246, 248-253, 255, 257-258, 260);
- The court heard defendants' demurrers on plaintiff's First Amended Complaint (1 RA 230-231);
- The court established a timetable for amending and responding to the complaint (*ibid.*);
- Plaintiff filed a second amended complaint omitting the TCPA cause of action but adding a cause of action for negligence based on the transmission of unsolicited fax advertisements (3 AA 725-738; 1 RA 241);
- Parties filed the joint evaluation conference statement (1 RA 262); and

- Certain defendants filed or joined in demurrers to plaintiff's second amended complaint and a motion to strike portions of that complaint (1 RA 264, 266-268, 270, 272, 274, 276, 278).

The above-mentioned activities are what we would expect in the orderly progression of a lawsuit, such that it is counterintuitive to find that during these periods of time, "prosecution . . . of the action was stayed." All of the litigation activity that could and should have occurred at this stage did occur.

December 3, 2003 to January 15, 2004 (43 Days)

The trial court actively managed the case through the following activities:

- On December 3, 2003, the trial court held a hearing at which certain defendants advised the court that they had submitted a petition for coordination of various TCPA cases involving defendant Fax.com (Slip Opn., pp. 4, 13);
- Court set a further review hearing for January 14, 2005 (Slip Opn., p. 13); and
- Court ordered discovery stayed until that time (*ibid.*).

Through this action, the court exercised its inherent authority to manage the case by prioritizing the decision on the petition for coordination over further discovery efforts. This order was the first step in assisting a future coordination judge to manage the case, as that judge would

unavoidably be confronted with discovery issues. Notably, the court did not stay any other litigation activity. Thus, during this period of time, the parties engaged in the following litigation activity:

- Certain defendants filed an answer to plaintiff's Fourth Amended Complaint (2 RA 368);
- Plaintiff filed related proofs of service of summons (2 RA 428-444);
- Plaintiff filed multiple motions to compel supplemental responses to special interrogatories, form interrogatories, and document requests (2 RA 370-372, 374-376, 378-379, 381-382, 384-386, 388-390, 392-394, 398-400, 402-403, 405-407, 409-411, 413-414, 416-418);
- Plaintiff filed her Review Conference Statement (2 RA 424); and
- Plaintiff filed her opposition to defendant Fax.com's petition for coordination (2 AA 347-357).

Therefore, during this brief period, substantial litigation activity occurred – more than probably occurs in most cases over the winter holiday period. Again, to hold that this period of time constitutes a stay of prosecution, that this period is treated as if it never happened, leads to an absurd result.

August 17, 2004 to July 11, 2006 (693 Days)

During this period of time, the trial court actively managed the case through the following activities:

- On August 17, 2004, the court in the now-coordinated action held an initial status conference (Slip Opn., p. 13);
- Court set various dates and ordered that the complete stay it entered on August 2 was lifted for the purpose of serving unserved parties (*ibid.*);
- Court scheduled a November 9, 2004 discovery conference (ordering the parties to meet and confer regarding all outstanding discovery matters) (2 RA 488);
- Court set a December 7, 2004 hearing on plaintiff's discovery motions and ordered Fax.com to produce database information by November 30, 2004 (2 RA 533-535);
- Court granted plaintiff's discovery motions and made various orders regarding discovery (1 RA 81-85; 3 RA 577-579);
- Court ordered the parties to file proposed discovery plans by April 12, 2005 (2 AA 405-407);
- On April 20, 2005, court ordered a discovery plan, requiring defendants to respond to numerous interrogatories and document requests, allowing plaintiffs to take defendants' depositions, requiring plaintiffs to propose schedules for the depositions they

intended to take, and setting a September 15, 2005 discovery cut-off (2 AA 413-416; 1 RA 88-108);

- On May 18, 2005, the court approved a deposition schedule for the defendant advertisers (3 RA 668-677); and
- At an August 26, 2005 status conference, the court extended the discovery cut-off to November 1, 2005 (3 RA 769, 786-788) and later extended the cut-off to February 1, 2006 (3 RA 827; 3 RT H-34 to 36).

During this two-year period, the trial court routinely and repeatedly demonstrated active control of the litigation to advance the case towards an efficient resolution. For example, throughout her two years overseeing this complex and coordinated litigation, Judge Kuhl managed the orderly progress of discovery, issuing various orders regarding what discovery should occur at what points in time – notably, without objection from plaintiff. As Presiding Justice Turner stated in his dissent: "Judge Kuhl did not stay or enjoin the action; she managed it." (Typed dissent, p.9.)

Moreover, meaningful and substantial litigation activity occurred during this period:

- ECX's and CSB Partnership's motions to set aside entry of defaults were filed and adjudicated between September and November 2004 (2 RA 502-504, 506-508, 515-516, 520-523; 3 AA 666-667);

- Several motions to compel were decided in plaintiff's favor in March 2005 (1 RA 81-85; 3 RA 577);
- Court ordered documents into the depository in March 2005 (3 RA 578);
- Court ordered a discovery plan, allowing plaintiff to take defendants' depositions in April 2005 (2 AA 414-415);
- Plaintiff served notices of depositions in August 2005 (3 RA 738-739);
- Plaintiff moved for sanctions against defendants in December 2005 (4 RA 897-902, 904-909, 911-918, 920-927);
- Plaintiff filed a Fifth Amended Complaint in February 2006 (4 RA 1069-1070); and
- Plaintiff further amended her complaint to replace six fictitiously-named defendants in June 2006 (2 AA 530-532; 5 RA 1276).

In light of the actual litigation progress during this period of time, common sense requires that the five-year statute not be found to have been tolled.

* * *

The timeline above demonstrates the incongruity between the Court of Appeal's unreasonably broad reading of Section 583.340(b) and the reality of managed litigation. It does not make sense to hold that these

periods of active litigation should be considered a stay of "prosecution" and thus excluded from the five-year statute. During each of the three periods above, the trial court took active control of the proceedings of discovery, attempting to ensure that discovery proceeded in an orderly fashion. The freedom to exercise control of litigation is essential to the court's ability to manage a complex or coordinated case. Moreover, substantial and orderly discovery and other litigation activity occurred during these periods of time.[3]

The majority of the Court of Appeal settled upon an overly broad interpretation of the statute, holding that any time the word "stay" is used in an order, tolling occurs. That holding allowed the majority to ignore the reality of what actually happened in this case. Under this interpretation, no matter the scope of the stay, no matter why the stay was entered, and no matter what other activity occurred during the time a "stay" was in effect, the five-year rule would not run. In complex and/or coordinated cases, it would be completely possible under the rule of law created by the Court of Appeal that the clock on a case never starts running. This interpretation of

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[3] Not only did significant litigation activity occur during these periods, but on January 14, 2004 – three years before the trial court's hearing on defendants' motions to dismiss – plaintiff's counsel represented to the court (in opposition to Fax.com's petition for coordination (2 AA 347-357)) that pretrial activities were largely complete such that her case should not be coordinated with other TCPA cases. Plaintiff asserted that her case "has been aggressively litigated, with extensive discovery and law and motion undertaken" and that "[p]re-trial activities . . . are largely completed." (*Ibid.*)

the statute yields an absurd result when, like here, significant and orderly litigation occurred during all phases of the litigation. Prosecution of this action was not stayed in the disputed periods – prosecution of plaintiff's case could and did proceed, pursuant to the trial court's oversight of the case.

Therefore, these time periods should not be exempted from calculation of the five-year rule.

3. The Court of Appeal Decision Impairs the Power of the Trial Court to Voluntarily Dismiss Cases for Lack of Prosecution

In addition to the mandatory dismissal rules governed by section 583.310 *et seq.*, a trial judge also has the discretion to dismiss a lawsuit for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant. (*See* Code Civ. Pro. §§ 583.410, 583.420(a)(2)(B); Cal. Rules of Court 3.1340.) The calculation of the two years is subject to the same tolling available under section 583.340. (Code Civ. Pro. § 583.420(b).)

Because section 583.420(b) also relies on section 583.340 for purposes of calculating whether a period is tolled, if the Court of Appeal's decision is allowed to stand, it will also curtail a trial court's ability to exercise its own statutory discretion to dismiss a case for delay in prosecution. This unprecedented change in the law will result in the

automatic exclusion of any period where any limited stay was in effect, no matter how egregious plaintiff's delay. This result completely distorts the discretionary nature of this statute, and will strip away a trial court's ability in a managed action to decide, in the exercise of its discretion, that a plaintiff has failed to diligently prosecute her case.

The use of the very discovery stays encouraged by the Rules of Court and Judicial Council Guidelines to manage litigation should not automatically give plaintiffs a free pass under these delay-in-prosecution statutes.

B. The Court of Appeal's Holding That Partial Stays are Stays of "Prosecution" Has No Basis or Support in California Law

1. The Statutory Exception Does Not Speak of "Partial" Stays, and No Prior Court Has Applied the Exception to a Partial Stay

The Court of Appeal decision that a partial stay (such as a discovery stay) means that "prosecution . . . of the action [i]s stayed" is not supported by California law. To begin with, the statute itself nowhere states that it applies to "partial" stays.

In enacting 583.340(b), the Law Revision Commission explained that it was intended to "codify existing case law," citing *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204. (Cal. Law Revision Com. com., West's Ann. Code Civ. Proc. (20008 supp.) foll. § 583.340, p. 149.) *Marcus* held that the five year period was tolled during the time an action was stayed in

full pending the outcome of an arbitration proceeding. (*Marcus*, 75 Cal.App.3d at 212-213.) This result makes sense given that, while a complete stay is in effect in the trial court, the plaintiff is utterly unable to advance its case. The Law Revision Commission did not cite to any cases involving a partial stay of trial court activity, because no such cases existed. The Law Revision Commission's citation of *Marcus* as the existing law being codified demonstrates the intent that the phrase "prosecution . . . was stayed" in section 583.340(b) means a complete stay, not a partial stay.

Every California case that has found that there was a stay of "prosecution" has done so only in cases involving complete stays of trial court activity. (*See, e.g., Ocean Services Corporation v. Ventura Port District* (1993) 15 Cal.App.4th 1762 (defendant obtained a writ of supersedeas staying the action completely pending an appeal from a preliminary injunction in a related matter); *Rosenthal v. Wilner* (1988) 197 Cal.App.3d 1327 (complete stay of the lawsuit pending outcome of appeal in another case); *Bank of America, supra*, 200 Cal.App.3d 1000 (a complete stay by operation of express statutory law regarding coordinated cases); *Buttler v. City of Los Angeles* (1984) 153 Cal.App.3d 520 (complete stay during periods where a party is in active military service under Soldiers' and Sailors' Civil Relief Act).)

The Court of Appeal's decision departs from California jurisprudence in this area because, prior to its decision, there were no cases

holding that a stay of "prosecution" under section 583.340(b) includes a mere discovery stay or other partial stay. Instead, "prosecution" of an action has been deemed stayed only in cases where plaintiff was completely unable to advance its case in the trial court (e.g., because plaintiff was waiting while the case was on appeal or after a grant of coordination). This is the correct rule of law – a bright line rule that, as a matter of law, only a complete stay is a stay of "prosecution" under section 583.340(b).

In the instant matter, there was no stay of "prosecution" because plaintiff was not prevented from prosecuting her case – during each of the relevant time periods she was able to advance the prosecution of her case within the framework set forth by the trial court pursuant to the court's active management duties.

2. The Court of Appeal Misapplied Prior Case Law, Including This Court's Decisions in *Melancon* and *Wong*

The Court of Appeal primarily grounded its erroneous decision in a pair of fifty and eighty years old cases from this Court that have nothing whatsoever to do with section 583.340(b): *Melancon v. Superior Court* (1954) 42 Cal.2d 698 and *Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15. 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. Moreover, *Melancon* specifically finds that a stay of prosecution means a stay of the entire action.

In *Melancon*, the trial court ordered plaintiff to furnish security under former section 834 of the Corporations Code (current section 800). (42 Cal.2d at 701.) The trial court also entered a stay of *all activity* at the trial court level pursuant to former Corporations Code section 834(c) (current section 800(f)), which provided: "If any such motion [for security] is filed, no pleadings need be filed by the corporation or any other defendant, and *the prosecution of such action shall be stayed*, until 10 days after such motion shall have been disposed of." (*Id.* at 702, emphasis added.) Plaintiff sought to take depositions before posting security. (*Id.* at 707.) This Court held that a stay of prosecution meant a stay of all activity; thus, plaintiff could not take depositions because to do so "would constitute a step in the 'prosecution' of the action and therefore falls within the stay provisions of section 834." (*Id.*)

In *Wong*, the plaintiff filed a malicious prosecution action in San Joaquin County based on an arrest warrant issued in Sacramento and an arrest in San Joaquin County. (*Wong*, 199 Cal.15 at 16.) The court held that venue in San Joaquin County was proper because "prosecution" (as in "malicious prosecution") "is sufficiently comprehensive to include *every step in an action* from its commencement to its final determination." (*Id.* at 18, emphasis added.) Therefore, because the arrest was part of the actions that gave rise to the malicious prosecution claim, venue in San Joaquin County was proper. (*Id.* At 18-19.)

Melancon and *Wong* therefore both discussed the outer reaches of what activities are encompassed within the concept of "prosecution," whereas here we are concerned with what the minimum requirement is to constitute when "prosecution . . . was stayed." In other words, in these cases, this Court did *not* hold, as the Court of Appeal contends, that a single activity in a case (e.g., discovery) is equal to "prosecution;" rather, it held that a single activity in a case (e.g., discovery) is but one element, or "step," in "prosecution." (*See, e.g., Barber v. Lewis & Kaufman, Inc.* (1954) 125 Cal.App.2d 95, 98.)

These cases support the CSB Defendants' argument regarding what constitutes a stay of "prosecution," in that both cases hold that "the term 'prosecution' is sufficiently comprehensive to include *every step in an action* from its commencement to its final determination." (*Melancon*, 42 Cal.2d at 707-708 (emphasis added); *Wong*, 199 Cal.15 at 18 (emphasis added).) Inserting the language this Court used in *Melancon* and *Wong* into section 583.340(b) demonstrates the correct construction of the statutory exception under this Court's precedent:

> 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) *[every step in an action] . . . was stayed or enjoined.*

A stay of "prosecution" as used in section 583.340(b) thus means a complete stay of activity, and the Court of Appeal's holding is therefore erroneous.

The Court of Appeal further relied on the intermediate appellate decision in *Holland v. Dave Altman's R.V. Center* (1990) 222 Cal.App.3d 477, which reliance is likewise misplaced. In the first instance, that case involved a *complete* stay of the trial court case pending an appeal, not a partial stay. (*Id.* at 482-83.) The Court of Appeal cited *Holland* for its discussion of the meaning of the term "stay" as "an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event." (*Id.* at 482.) However, the context of this statement is important: the court made this statement in opposition to respondent's argument that the court had not stayed the lawsuit pending the appeal, but had merely "continued" the trial date and other case activity. Thus, the court in *Holland* was not concerned with what constitutes a stay of "prosecution" under 583.340(b), but rather whether what the court did was merely continue the entire action or stay the entire action.

In fact, the *Holland* court's further explanation of the statute is contrary to the Court of Appeal's decision here. The *Holland* court explained that the purpose of the statute is "to exclude from the mandatory dismissal provision time periods during which the case *could not be brought to trial*" and described subsection (b) as periods where there is "a

court order barring the trial" and "*prevents* a trial." (*Id.* at 482 (emphasis added).) As is clear from the discussion above describing the activity that occurred during the relevant time periods here, nothing of this sort happened in this case – at no time during the relevant time periods was plaintiff barred or prevented from bringing her case to trial. Indeed, plaintiffs in the companion *Amkraut* case (filed approximately nine months after plaintiff's case) obtained class certification, survived a challenge to class action status, and brought their case to trial – all while Bruns's prosecution of her case was lingering.

Finally, the Court of Appeal cited to *Ocean Services, supra*, 15 Cal.App.4th at 1774, to argue that 583.340(b) tolling is "unconditional" and is "intended to have uniform application." The CSB Defendants do not disagree with this premise to the extent it is applied in the same situation as existed in the *Ocean Services* case – i.e., in a case involving a complete stay of trial court activity pending an appeal from a preliminary injunction in a related matter. *Ocean Service*'s proclamation that the statute is "unconditional" was therefore made in the context of a complete stay, which is the bright-line rule advocated by the CSB Defendants.

The Court of Appeal misconstrued this Court's cases and other Court of Appeal cases to create its new exception to the five-year rule. A close reading of these cases reveals that they support the CSB Defendants'

position that a stay of "prosecution" means a complete stay of the case, and the phrase does not and should not include partial stays.

C. Alternatively, Whether There Has Been a Stay of "Prosecution" Should be Reviewed for an Abuse of Discretion, Which Discretion the Trial Court Properly Exercised Here

The Court of Appeal, undertaking a de novo review, held that any stay is, as a matter of law, a stay of "prosecution" that tolls the five-year statute. If this Court finds that the Court of Appeal correctly held that a partial stay may be deemed a stay of "prosecution" under section 583.340(b), a superior approach to the rule of law created by the Court of Appeal would be to find that such a determination should be reviewed for an abuse of the trial court's discretion.

As discussed above, the rule of law created by the Court of Appeal – that every time there is a stay of any aspect of the litigation, no matter how limited, there is a stay of "prosecution" – creates an exception that will frequently swallow the public policy advanced by the five-year statute. Whether "prosecution . . . of the action was stayed" should therefore at least be a fact-intensive inquiry dependent upon the totality of the circumstances in a case – some partial stays may prevent meaningful advancement of a case, while others facilitate case advancement. The trial court should have discretion to determine whether, despite any partial stays, the plaintiff had

the capability to move its case forward toward final resolution or whether "prosecution" in a broad sense actually was stayed.

The Court of Appeal's new rule of law leads to preposterous results. For instance, a trial court could stay the production of a single document pending the outcome of a motion for a protective order, and such a procedure would then toll the running of the five-year statute. If such a situation does not automatically fall outside the reach of section 583.340(b) (because it is not a complete stay), the CSB Defendants alternatively argue that the trial court should at least have the discretion to determine whether that single, limited stay prevented meaningful "prosecution" of the case.

The Court of Appeal appeared to take into account plaintiff's capability to prosecute her case in determining whether there was a stay of "prosecution" here. For instance, in holding that the August 2, 2004 to July 11, 2006 time period was tolled because of a partial stay and various discovery orders, the Court of Appeal stated: "The stay order prevented plaintiff from fully conducting all of the pretrial activities to which she was entitled. That certain activity specifically authorized by the trial court occurred, does not alter that fact. Thus, 'prosecution . . . of the action was stayed.'" (Slip Opn., p. 16.) While this issue was considered, there was no deference to the trial court's decision. If such an inquiry is to be taken into account, a Court of Appeal should review the trial court's finding regarding what litigation activity the plaintiff was able to conduct for an abuse of

discretion. It was inappropriate for the Court of Appeal to substitute its judgment for that of the trial court judge regarding whether plaintiff was able to advance her case during a particular point in time.

If this Court finds that an abuse of discretion standard of review would be superior to the new rule of law set forth in the Court of Appeal decision, the trial court has already made all findings necessary to reverse the Court of Appeal decision and find that the trial court's dismissal was proper. While the trial court made factual findings in the context of section 583.340(c) (whether it was "impossible, impracticable, or futile" for plaintiff to bring her case to trial), such factual findings would also satisfy section 583.340(b) under the alternate construction proposed here, as the two would be analyzing the same issue: whether plaintiff had the capability to prosecute her case in light of a partial stay.

Applying an abuse of discretion standard of review with respect to whether "prosecution . . . was stayed" by partial stays under section 583.340(b) would not be a redundant determination of that under section 583.340(c). Under the latter, the plaintiff must additionally demonstrate that it was diligent in prosecuting the case, which is not a requirement under 583.340(b). (*Compare Moran*, *supra*, 35 Cal.3d at 238 ("The critical factor in applying these [section 583.340(c)] exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case."); *with Ocean Services Corp.*, *supra*, 15

Cal.App.4th at 1774 (holding that diligence is not a factor in a section 583.340(b) determination).)

The Court of Appeal, the trial court, and the parties agree that whether it was "impossible, impracticable, or futile" for plaintiff to bring her case to trial pursuant to section 583.340(c) is subject to an abuse of discretion standard of review. Given the similarity of the issue (with the exception of the diligence requirement), whether "prosecution . . . was stayed," in the context of partial stays, should likewise be subject to an abuse of discretion standard of review.

For each of the relevant periods, Judge Kuhl undertook a painstaking and detailed examination of whether plaintiff had the capability to bring her case to trial, including what litigation activity occurred during each period of time. Judge Kuhl concluded that, for all relevant periods, plaintiff had the capability to meaningfully advance her case, and significant litigation activity actually occurred during each of these periods. Thus, plaintiff actually did, or was actually able to, prosecute her case during each of these periods. Judge Kuhl's determinations, mostly made with respect to the time period she personally oversaw and managed, should be reviewed for an abuse of discretion. Had the Court of Appeal reviewed the trial court's decision for an abuse of discretion, it necessarily would have concluded that there was ample basis for the trial court's conclusion that the plaintiff

could have advanced her case during each period of time, and that significant litigation activity had occurred.

The CSB Defendants believe that partial stays should not constitute stays of "prosecution" as that was not the Legislature's intent, prior to this Court of Appeal decision no case has ever so found, and such a rule is contrary to California's public policy goals. However, if this Court were inclined to agree with the Court of Appeal that partial stays may be stays of "prosecution," a superior construction to the rule of law created by the Court of Appeal would be to review this issue for the trial court's abuse of discretion. Judge Kuhl properly exercised her discretion in concluding that, based on the record and her actual experience overseeing the litigation, significant litigation activity occurred during each of these periods of time. Prosecution of the action was therefore not stayed.

II. THE TRIAL COURT 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 Applied the Incorrect Standard in Overturning the Trial Court's Determination That It Had Not Been "Impossible, Impracticable, or Futile" for Plaintiff To Bring Her Case To Trial During Certain Time Periods

The Court of Appeal held that it was "impossible, impracticable, or futile" under 583.340(c) for plaintiff to bring her case to trial during two time periods – March 9, 2000 to May 24, 2000 and May 6, 2004 to August

2, 2004.[4] In doing so, the Court of Appeal should have applied an abuse of discretion standard of review: "A trial court's ruling on a motion to dismiss pursuant to these sections will be disturbed only upon a showing of a manifest abuse of discretion." (*Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 164 (citing *Martin v. K&K Properties, Inc.* (1987) 188 Cal.App.3d 1559, 1567); *see also Messih v. Levine* (1991) 228 Cal.App.3d 454, 456 ("A trial court's ruling on a motion to dismiss . . . will be disturbed only upon a showing of a manifest abuse of discretion;" court held that dismissal was proper under CCP section 583.310).)

Under the "abuse of discretion" standard of review, appellate courts will disturb discretionary trial court rulings *only* if plaintiff can demonstrate both "a clear case of abuse" *and* a miscarriage of justice." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court (Marsh & Kidder)* (1970) 2 Cal.3d 557, 566.) Discretion is "abused" only when, in its exercise, the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham, supra*, 2 Cal.3d at

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[4] In the Court of Appeal, plaintiff argued that the three time periods that the Court of Appeal held constituted stays of "prosecution," also constituted periods where it was "impossible, impracticable, or futile" to bring her case to trial. The Court of Appeal did not reach this alternative argument in light of its holding under section 583.340(b). However, the trial court also did not abuse its discretion in holding that it was not "impossible, impracticable, or futile" for plaintiff to bring her case to trial during these time periods, based on the substantial litigation activity that had occurred, as identified above, as well as the other bases discussed in this section.

566; *Walker v. Superior Court (Residential Construction Enterprises)* (1991) 53 Cal.3d 257, 272; *see also Avant! Corp. v. Superior Court (Nequist)* (2000) 79 Cal.App.4th 876, 881-882 ("We could . . . disagree with the trial court's conclusion, but if the trial court's conclusion was a reasonable exercise of its discretion, we are not free to substitute our discretion for that of the trial court.").) Indeed, "[w]hen 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." (*Walker, supra*, 53 Cal.3d at 272.)

The Court of Appeal did not apply an abuse of discretion standard in reviewing whether it was "impossible, impracticable, or futile" under section 583.340(c) for plaintiff to bring her case to trial. Instead, the Court of Appeal inexplicably reviewed Judge Kuhl's determination of this issue under a de novo standard. This approach further confuses the application of this statute, in that it encourages appellate courts to "second-guess" a trial court's determination that a plaintiff did not diligently prosecute her action. A simple reading of the portion of the Opinion addressing the "impossible, impracticable, or futile" requirement makes it clear that the Court of Appeal reviewed the record on a de novo basis. (See Slip Opn., pp. 17-23.) For example, in analyzing the two time periods, the Court of Appeal independently examined the facts and then held that "plaintiff met her burden" of proving that it had been "impossible, impracticable, or

futile" for plaintiff to bring her case to trial. Nowhere in this entire analysis does the Court of Appeal use the word "discretion," consider the trial court's stated reasons for her decision, or analyze whether the trial court abused its discretion in rejecting tolling during these two time periods.

The Court of Appeal thus created confusion in the law by incorrectly analyzing this issue pursuant to a de novo standard of review.

B. Under the Correct Analysis, the Court of Appeal Would Have Held the Trial Court Did Not Abuse its Discretion

Had the Court of Appeal correctly analyzed this issue for an abuse of discretion, it would have readily found that the trial court did not abuse its discretion in finding that it was not "impossible, impracticable, or futile" to bring the case to trial during the two relevant time periods.

The trial court's consideration of these issues was detailed and extensive. The parties filed detailed briefs, and the court heard lengthy oral argument from counsel. Following argument, the court requested supplemental briefing regarding the specific litigation activity that took place during periods that plaintiff claimed the five-year statute was tolled. Again detailed briefs were filed, including ECX's 1,000+ page "Notice of Lodgment," which contained almost 300 exhibits reflecting documented litigation activity during periods of claimed tolling. The court carefully considered the issues and eventually entered a thoughtful and detailed 26-page order granting the motion to dismiss, with itemized analysis of the

litigation activity during each period of time plaintiff alleged tolled the five-year statute.

1. The Trial Court Had Discretion to Find That During the Relevant Time Period Advancement of the Case Was Possible and Accomplished

During the first of the subject time periods (March 9 to May 24, 2000 – 76 days), on March 9, 11, and 24, 2000, plaintiff served demands for inspection of documents, special and form interrogatories, and requests for admissions on certain defendants. (Slip Opn., p. 19.) Thereafter, plaintiff filed 10 motions to compel responses to her discovery. (*Ibid.*) Apparently finding most of the discovery and the motions excessive, on July 12, 2000, the trial court ruled that, except for certain identified interrogatories, all previously propounded discovery would have to be re-served if still "deemed necessary or advisable" and that all prior discovery motions were vacated. (Slip Opn., p. 12; 4 AA 837.)

With respect to this time period, the trial court had the discretion to consider the court's earlier attempts to manage plaintiff's discovery as warranted by the sheer volume of discovery plaintiff had propounded. It is simply not the case that every time a plaintiff receives an unfavorable ruling that renders moot prior litigation tactics, the time period arguably encompassed by the ruling is excluded from the calculation of the statutory five years. This approach would distort the clear intention of the statute

and create a logistical nightmare for courts attempting to apply the five-year rule. From a policy standpoint, this should not be the law.

Moreover, in concluding that it was not "impossible, impracticable, or futile" for plaintiff to bring her case to trial during this time period, the trial court had before it evidence that between March and May 2000 plaintiff:

- Served several sets of written discovery on defendants (1 AA 161-208; 4 AA 822, 845-866);
- Amended her complaint to name additional defendants (2 AA 513);
- Filed a first amended complaint (1 RA 1-7); and
- Received responses to discovery (2 AA 296-304; 1 RA 140, 163-169; 1 RA 140, 171-198; Slip Opn., p. 20).

The trial court had sound bases for rejecting plaintiff's argument that it was "impossible, impracticable, or futile" for her to bring her case to trial during this time period, and for concluding instead that plaintiff engaged in activity during these months in a manner that should properly be included in the calculation of the five-year limit.

The second of the subject time periods (May 6 to August 2, 2004 – 88 days) began when, on May 6, 2004, the court assigned a coordination trial judge. (Slip Opn., pp. 5, 21.) The order of assignment stated that "[i]mmediately upon assignment, the coordination trial judge may exercise

all the powers over each coordinated action of a judge of the court in which that action is pending." (Slip Opn., p. 5.)

Over the next few months, 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.

Thus, with respect to the May 6, 2004 to August 2, 2004 time period, the trial court had the discretion to determine that plaintiff could have taken any action she wished during this time period. Plaintiff was free to serve discovery or deposition notices during this time; she chose not to do so. Nor was there anything preventing her from working on her motion for class certification, or filing motions for default judgment on the defaults that the court previously entered. In short, the trial court properly exercised its discretion in finding that plaintiff chose not to advance her case during this period, and that her failure to do so did not make it "impossible, impracticable, or futile" for her to bring her case to trial.

Moreover, the trial court properly relied on plaintiff's own representation, made three years before the action's dismissal, that her case had "been aggressively litigated, with extensive discovery and law and motion undertaken. Pre-trial activities . . . are largely completed." (Slip Opn., p. 7.) The court did not abuse its discretion by concluding that any

delays in pre-trial proceedings did not make it impossible, impracticable, or futile for plaintiff to bring her action to trial when, despite those delays, her pre-trial activities were largely completed three years before the action's dismissal.

2. The Trial Court Had Discretion to Deem These Periods Ordinary Delays, Which Do Not Make it "Impossible, Impracticable, or Futile" to Bring a Case to Trial, As a Matter of Law

The trial court also had discretion to find that the period about which plaintiff complained were merely ordinary delays inherent in the litigation and thus do not satisfy the impossible, impracticable, or futile standard. "Time consumed by the delay caused by 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.)

The periods here, if anything, were just that. Vacating the discovery is akin to sustaining a demurrer with leave to amend – plaintiff's original pleadings are of no effect, with the opportunity to improve them. (*See also Bank of America, supra*, 200 Cal.App.3d at 1016 ("Generally, delays encountered in discovery are part of the 'normal delays involved in prosecuting lawsuits' and do not excuse failure to bring a case to trial

within the five-year limit.").) Moreover, waiting for a status conference after coordination constitutes "the normal time of waiting" for the court that does not make it impossible, impracticable, or futile, even if plaintiff was not able to advance her case during this time (which, as discussed above, she was).

3. The Trial Court Had the Discretion to Find that Plaintiff Was Not Diligent, Which is Required To Invoke the "Impossible, Impracticable, or Futile" Exception to the Five-Year Rule

Under the "impossible, impracticable, or futile" exception to tolling, plaintiff must demonstrate that she exercised reasonable diligence in prosecuting her case. (*Brown & Bryant, Inc. v. Hartford Accident & Indem.* (1994) 24 Cal.App.4th 247, 251.) While reasonable diligence alone is insufficient to protect a party from involuntary dismissal for failure to bring the action to trial within five years, it provides guidance for assessing the exceptions of impossibility, impracticability, or futility. (*Moss*, *supra*, 47 Cal.App.4th at 502.)

The trial court had discretion to infer from the record that "[p]laintiff did not use 'due diligence to expedite [her] case to a final determination.'" (4 AA 961 (citing *Standard Oil Co. v. Superior Court* (1976) 61 Cal.App.3d 852, 857.)) By way of example, the trial court had evidence before it that plaintiff failed to take any steps to have her class certified – a

necessary step for her case.[5] Under California law, a motion for class certification must be filed as soon as practicable after commencement of a purported class action. (*See, e.g., City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 453.) Indeed, "[p]rompt and early determination of the class is essential" in order to permit class members to elect whether to proceed as members of the class, to intervene with their own counsel, or to be excluded from the class action. (*Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006, 1010.) Plaintiff failed to take any steps towards having the class certified.

There were long periods during which plaintiff could have sought class certification or taken steps in that direction. For whatever reason, she chose not to do so. These time periods include: (1) the 27 months between the filing of her complaint and June 13, 2002, when a stay was issued pending resolution of a case determining whether a plaintiff had a private right of action to bring a claim under the TCPA in state court (*Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886, 895); (2) the period from October 22, 2003 to January 29, 2004; and (3) the entire period between May 7, 2004 and the hearing on defendants' motions to dismiss on January 25, 2007 (with the exception of a brief 15-day stay in August 2004).

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[5] The CSB Defendants do not concede that plaintiff is entitled to class certification. (*See, e.g., Bickelmann*, 2008 Cal. App. Unpub. LEXIS 10056.)

Plaintiff can offer no reason why an essential step in bringing her case to resolution – seeking class certification – was not even begun by the time defendants filed their motions to dismiss. By contrast, the plaintiffs in a companion case - *Amkraut* - did so in a far more compressed time frame. In light of the grant of class certification in a companion case, any diligent plaintiff should have sought the benefit of favorable case-advancing rulings in such companion cases. Plaintiff made absolutely no effort to do so.

There was no shortage of further instances of dilatory conduct to support the trial court's decision. By way of example:

1. In May 2000, CSB Partnership produced documents that provided plaintiff with the same type of evidence on which the plaintiff in *Amkraut* was able to proceed to trial on in October of 2006.[6] (*See* 1 RA 126-127, 133, 142, 144-160.) The documents produced included invoices indicating that CSB Partnership had requested Fax.com to send fax advertisements on its behalf. (1 RA 163-169.) As plaintiff already possessed the faxes advertising the business of CSB Partnership, allegedly received on her home office fax machine, she did not require anything further from these entities. The trial court had ample basis to infer that her failure to bring her case to trial was the result of her dilatory conduct.

2. On December 1, 2003, Fax.com petitioned for coordination of this action with thirteen other actions. (2 AA 335-346; 2 RA 359.) In light of plaintiff's later argument that her case was significantly more advanced than the others and that

[6] The CSB Defendants in no way concede that this evidence would support a successful class certification motion, much less enable plaintiff to prevail against them if her lawsuit were to proceed on the merits. (*See Bickleman v. Assil Sinskey Eye Inst.* (Dec. 15, 2008) 2008 Cal. App. Unpub. LEXIS 10056.)

coordination should be denied in light of the prejudicial impact it would have on the timely resolution of her case (2 AA 347-357), plaintiff should have been especially keen on advancing her case while the petition for coordination was pending. Instead, she failed to advance her case in ways she could have, even given the discovery limitations in place.

3. The court's May 18, 2005 order setting depositions of the defendants required plaintiff's counsel to commence the depositions before the close of discovery on September 15, 2005. (3 RA 671.) Plaintiff did not notice these depositions until August 10, 2005 – almost three months after the court's order. (3 RA 738-739.) Defendants could not attend the twelve depositions as unilaterally scheduled. (*See* 3 RT Q-20 to 21.) However, the court subsequently extended the discovery cut-off to November 1, 2005, and then to February 1, 2006; as of July 11, 2006, the court opened up discovery entirely. (3 RA 769, 786-788, 827; 3 RT H-34 to 36; 3 RT M-6.)

   At no time did plaintiff seek to reschedule these depositions, and they never went forward. (See 3 RT Q-18, Q-20 to 21.) Over the nearly seven years between filing her case and the dismissal, plaintiff never took a single deposition of defendants or third-parties, even though defendants promptly had deposed Bruns on February 12, 2002.

Even after 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. Under California law, plaintiff had an affirmative duty to make every reasonable effort at *every stage of the case* to bring her case to trial within five years, even during the last month of the statutory life. (*Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526.) She did not do so.

The trial court also was well within her discretion in finding that it was not "impossible, impracticable, or futile" for plaintiff to bring her case to trial in light of plaintiff's singular focus during the entirety of this lawsuit: seeking and obtaining discovery sanctions. In lieu of substantively advancing her case, plaintiff's focus was on obtaining sanctions through discovery motions against an overwhelmed small firm practitioner that Fax.com had appointed for all defendants. Plaintiff filed motions to compel and for sanctions, and then idly waited for the court to grant them, taking few steps in the interim. The trial court had more than adequate basis on which to reject plaintiff's self-serving characterization of her diligence. Indeed, the trial judge overseeing the coordinated cases was in a unique position to contrast this approach with what was accomplished by other plaintiffs in the companion cases.

One of the purposes of the failure-to-prosecute statutes is "to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time." (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 91.) Having made the tactical decision to substitute repetitive sanctions motions for the diligent advancement of her case towards class certification and, if granted, to trial, plaintiff must live with the consequences of that decision.

Here, the trial court did not "exceed[] the bounds of reason" in finding that plaintiff failed to exercise due diligence in prosecuting her

case. By seeking sanctions rather than class certification, and neglecting the opportunity to conduct even a single deposition of the many defendants that she sued, the plaintiff provided more than ample support for the trial court's discretionary determination that plaintiff had failed diligently to prosecute her action.

Importantly, reversing the Court of Appeal's disposition on the issue of diligence alone is an independent basis for reversing the determination as to these time periods, as well as for affirming the trial court's determination that plaintiff was not entitled to discretionary tolling for the three time periods of partial stays. Plaintiff's lack of diligence, and the inability to prove an abuse of discretion by the trial court in so finding, prevents plaintiff from being entitled to section 583.340(c) tolling for any period.

* * *

The Court of Appeal created confusion in the law by incorrectly analyzing this issue, and substituted its judgment for the trial court, which was entirely improper pursuant to an abuse of discretion standard of review. If the Court of Appeal had reviewed this issue for an abuse of discretion, it would have determined that the trial court had ample basis to conclude that plaintiff had not met her burden of demonstrating the "impossibility, impracticability, or futility" exemption to the five-year statute.

CONCLUSION

A court's active management of its cases by entering partial stays or otherwise controlling its cases should not toll the running of the five years to bring a case to trial. By holding that any type of partial stay tolls this period, the Court of Appeal has effectively vitiated the five-year statute for many classes of cases and has severely hampered a trial court's ability to manage its cases. The Court of Appeal decision also lacks any basis in law, as prior to its decision, no previous California court had held that a partial stay tolls the running of the five years. At the very least, whether a partial stay tolls the running of the five years should be reviewed for an abuse of discretion, which the trial court properly exercised here.

Moreover, the Court of Appeal clearly reviewed an issue de novo that should have been reviewed for an abuse of discretion. Under the correct analysis of this issue, it is clear that the trial court did not abuse its discretion. The Court of Appeal decision therefore departs from well-established precedent and should be reversed to prevent the development of confusion in the law.

The CSB Defendants therefore respectfully request that this Court reverse the Court of Appeal decision and order that plaintiff's case is dismissed.

Dated: September 21, 2009

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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 13,845 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, the Statement of Issues, attachments, or this certification page.

Dated: September 21, 2009

Max H. Stern

PROOF OF SERVICE

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

I am a citizen of the United States, over the age of 18 years, and not a party to interested in the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear Tower, Suite 2000, San Francisco, California 94105. I am readily familiar with this firm's practices for collecting and processing correspondence for mailing with the United States Postal Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the following documents:

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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.

Dated: September 21, 2009

JoAnna Y. Soliman

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