S172684

[Service on the Attorney General and the Orange County District Attorney required by Business & Professions Code section 17209]

IN THE SUPREME COURT OF CALIFORNIA

DANA BRUNS,
Plaintiff and Appellant,

v.

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

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B201952

OPENING BRIEF ON THE MERITS

HORVITZ & LEVY LLP
BRADLEY S. PAULEY (BAR NO. 187298)
ROBERT H. WRIGHT (BAR NO. 155489)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
bpauley@horvitzlevy.com
rwright@horvitzlevy.com

BREMER WHYTE BROWN & O'MEARA LLP
NICOLE WHYTE (BAR NO. 156503)
ALISON HURLEY (BAR NO. 234042)
20320 S.W. BIRCH STREET, SECOND FLOOR
NEWPORT BEACH, CALIFORNIA 92660-1787
(949) 221-1000 • FAX: (949) 221-1001
nwhyte@bremerandwhyte.com
ahurley@bremerandwhyte.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
E-COMMERCE EXCHANGE, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE
SUPREME COURT OF CALIFORNIA

DANA BRUNS,
Plaintiff and Appellant,

v.

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

OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

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 Code Civ. Proc., § 583.340, subd. (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 pre-trial proceedings were delayed yet other

proceedings could have, and did, move forward? (Code Civ. Proc., § 583.340, subd. (c).)

INTRODUCTION

In February 2000, plaintiff filed this asserted class action against E-Commerce Exchange, Inc. (ECX) and others for allegedly transmitting unsolicited fax advertisements to plaintiff and the purported class. The trial court determined the action was complex and coordinated it with 13 other actions involving similar claims. In November 2006, ECX moved to dismiss the action on the ground it was subject to mandatory dismissal for plaintiff's failure to bring it to trial within five years. At the January 2007 hearing on the motion to dismiss—almost seven years after the complaint was filed—plaintiff still had not requested a trial on her claims. The trial court properly granted the motion and dismissed the action.

As part of its judicial management of these complex and coordinated actions, the trial court used common case management tools such as the coordination and active supervision of discovery. Plaintiff has never shown that this judicial management had any effect other than to move the case efficiently and expeditiously forward.

Nonetheless, the Court of Appeal relied on this judicial management as a basis for reversing the order of dismissal, applying the mandatory dismissal statute's exception that tolls the five-year period during stays of prosecution. The court held that exception applies even when only part of the action is stayed, and

notwithstanding that the partial stay is the result of the trial court's efforts to effectively manage complex and coordinated matters as required by the California Rules of Court.

But the trial court found that its judicial management did *not* stay the coordinated actions. In reaching its contrary conclusion, the Court of Appeal disregarded the evidence supporting the trial court's findings and essentially undertook a de novo review, despite established precedent requiring review for an abuse of discretion. The trial court was better situated than the Court of Appeal to assess the progress of the trial court action; the trial court's finding that there was no stay is entitled to deference.

Moreover, the Court of Appeal's holding that a *partial* stay automatically tolls the five-year period conflicts with the statute, which limits the tolling exception to periods only when "prosecution . . . was stayed or enjoined," and the legislative history, which shows the exception applies only "if the proceeding were stayed." A partial stay that allows and promotes efficient prosecution of the action is not a stay of prosecution within the meaning of the dismissal statute.

If not rejected by this court, the Court of Appeal's holding will undermine important judicial management techniques for ensuring that lawsuits are brought to an efficient and speedy conclusion rather than languishing in the trial courts. This concern is particularly important in complex and consolidated matters where trial courts have an enhanced obligation to actively manage litigation. If any partial stay during judicial management automatically were to toll the five-year period regardless of the

plaintiff's diligence, the five-year statute and active judicial management will work at cross-purposes, with the judicial management of an action excusing a plaintiff's lack of diligence in bringing the action to trial.

The mandatory dismissal statute also provides for tolling when it is impossible, impracticable, or futile to proceed to trial. This court has held that the critical factor for assessing the applicability of these exceptions is reasonable diligence. Here, the trial court found it was "clear that Plaintiff did not use 'due diligence to expedite [her] case to a final determination' . . . [and] there were periods of time where Plaintiff was clearly dragging her feet in this matter." (4 AA 961.)

Despite the trial court's finding, the Court of Appeal held that the trial court abused its discretion by not tolling the five-year period for impossibility, impracticability, or futility purportedly resulting from the trial court's judicial management of the matter. In so doing, the Court of Appeal erred for three independent reasons. First, substantial evidence supported the trial court's finding that plaintiff was not reasonably diligent. Second, during each of the alleged periods of impossibility, impracticability or futility identified by the Court of Appeal, there was, or could have been, significant litigation progress. Third, active case management does not make it impossible, impracticable, or futile to proceed to trial.

Because plaintiff did not timely bring her action to trial within five years, the trial court properly dismissed her complaint.

STATEMENT OF THE CASE

A. February 22, 2000 to March 8, 2000: plaintiff files a complaint. (No tolling claimed—15 days.)

On February 22, 2000, plaintiff Dana Bruns, on behalf of herself and an asserted class of others similarly situated, filed suit against ECX, Flagstar Bank (Flagstar), and Clayton Shurley's Texas BBQ (Clayton), for allegedly transmitting fax advertisements in violation of the Telephone Consumer Protection Act, 47 U.S.C.A. § 227(b)(1)(C) (TCPA). (1 AA 148-153.)

B. March 9, 2000 to May 24, 2000: plaintiff conducts discovery and files an amended complaint. (Plaintiff claims tolling—76 days.)

Beginning on March 9, 2000, plaintiff served written discovery requests on defendants. (1 AA 161-208; 4 AA 822, 846-866.) In March and April 2000, plaintiff named CSB Partnership (CSB) and Fax.com as defendants. (2 AA 513.) On April 6, 2000, plaintiff filed a first amended complaint alleging two causes of action based on the transmission of unsolicited fax advertisements: (1) violation of the TCPA; and (2) violation of California's Unfair Competition Law, Business and Professions Code section 17200 et. seq. (UCL). (1 RA 1-7; 5 RA 1424.)

On April 13, 2000, ECX responded to plaintiff's interrogatories. (2 AA 296-304.) On May 15, 2000, CSB responded to plaintiff's document requests. (1 RA 163-169.) Three days later, CSB produced responsive documents. (1 RA 140, 171-198.)

C. May 24, 2000 to June 16, 2000: prosecution of the action continues but discovery is stayed in advance of a case management conference at which discovery is to be ordered. Plaintiff files a second amended complaint. (Plaintiff claims tolling—23 days.)

On May 24, 2000, the court heard demurrers to the first amended complaint. (1 RA 230-231.) The court sustained the demurrers without leave to amend as to the first cause of action under the TCPA and with leave to amend as to the second cause of action under the UCL. (1 RA 231.)

At that hearing, the court also required the parties to submit a proposed case management order, and stayed discovery until entry of that order. (1 RA 231.) Because of the discovery stay, the court declined to hear ten discovery motions that plaintiff had filed. (1 RA 230-231.) None of those motions were directed against ECX. (1 RA 230.)

Beginning on May 31, 2000, the parties negotiated the terms of the proposed case management order and a joint evaluation conference statement. (1 RA 235-239, 243-260.) On June 2, 2000, 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 725-737; 1 RA 241.) On June 9, 2000, the parties filed the joint evaluation conference statement. (1 RA 262.)

From June 14 to June 16, 2000, ECX and other defendants filed or joined in demurrers to plaintiff's second amended complaint and a motion to strike portions of that complaint. (1 RA 264-278.)

On June 16, 2000, the court held the joint evaluation conference, filed the case management order, and lifted the discovery stay. (2 RA 283 ["The stay on discovery is hereby lifted"]; see 2 RA 280-286.) The case management order established a document depository and procedures for the exchange of documents. (2 RA 281-282.) The order also required all parties to answer within 40 days an attached set of interrogatories. (2 RA 282-286.)

D. June 16, 2000 to July 12, 2000: discovery continues and the court orders that discovery pre-dating the case management conference should be re-served if still needed. (Plaintiff claims tolling—26 days.)

From June 20 to June 29, 2000, the parties met and conferred regarding defendants' demurrers to, and motion to strike portions of, the second amended complaint. (2 RA 289-304; see also 2 RA 306-310.)

On June 30, 2000, plaintiff filed oppositions to the demurrers and motion to strike. (2 RA 312, 315.) One week later defendants filed a reply. (2 RA 319.) On July 12, 2000, the court sustained the

demurrers in part, with leave to amend, rendering the motion to strike moot. (2 RA 321.)

That same day, the court ruled that the matter was complex and ordered that all discovery served prior to the case management order, if still "deemed necessary or advisable to the propounding party, would need to be re-served." (4 AA 837.)

E. July 13, 2000 to June 12, 2002: discovery continues and plaintiff files her third amended complaint. (No tolling claimed—699 days.)

On July 13, 2000, plaintiff named California Home Finders, E&N Financial, and Optometrist at South Coast Plaza as defendants. (1 RA 15.) On August 25, 2000, plaintiff filed her third amended complaint. (1 RA 17-25; 5 RA 1419.) Plaintiff again alleged causes of action for violation of the UCL and for negligence based on the transmission of unsolicited fax advertisements. (1 RA 21-24.)

In December 2000, ECX, Flagstar, Fax.com, CSB, Elliot McCrosky, an individual and dba California Home Finders and E&N Financial (McCrosky), and Daniel E. Quon, O.D., Inc., dba Optometrist at South Coast Plaza (Quon), answered the third amended complaint. (1 RA 33-47.)

On August 27, 2001, Fax.com served interrogatory responses regarding its telecommunication service providers (1 AA 226-229) and its current and former officers and employees (1 AA 229-235).

F. June 13, 2002 to October 21, 2003: prosecution of the action is stayed pending an expected appellate decision on the issue of standing. (Tolling is undisputed—495 days.)

On June 13, 2002, the court issued a stay for all purposes, pending the resolution of *Kaufman v. ACS Systems, Inc.*, which would determine whether a plaintiff had a private right of action to bring a TCPA claim in state court. (2 AA 314-315.)

The following year, the *Kaufman* court recognized such a private right of action. (See *Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886, 895.) On October 21, 2003, the trial court lifted the stay. (2 AA 317.)

G. October 22, 2003 to December 2, 2003: the action proceeds, plaintiff files a fourth amended complaint, and Fax.com files a petition for coordination. (No tolling claimed—41 days.)

On October 28, 2003, plaintiff filed a fourth amended complaint adding a cause of action for violation of the TCPA. (2 AA 318-334.)

On November 29, 2003, Fax.com petitioned for coordination of this action with 13 other actions all involving claims under the TCPA against Fax.com and advertisers who allegedly used Fax.com. (2 AA 335-346.)

H. December 3, 2003 to January 30, 2004: prosecution of the action continues but discovery is stayed until January 15, 2004, plaintiff reports that her pre-trial activities are substantially completed, and default is entered against ECX and CSB. (Plaintiff claims tolling—58 days.)

On December 3, 2003, Fax.com filed a notice of submission of its petition for coordination. (2 RA 359.) That same day, the court set a January 15, 2004 review conference and, until then, stayed all discovery. (2 RA 353, 361; see also 2 RA 356.)

About one week later, the court also set a January 15, 2004 hearing date on four motions that plaintiff had filed before the discovery stay to compel Clayton, Flagstar, McCrosky, and Quon to respond to document requests. (2 RA 363; 5 RA 1412.)

On December 18, 2003, Fax.com, Flagstar, Clayton, McCrosky, and Quon answered plaintiff's fourth amended complaint. (2 RA 368.)

On December 23, 2003, plaintiff filed motions to compel supplemental responses to special interrogatories, form interrogatories, and document requests by Quon (2 RA 370-379), responses to special interrogatories and document requests by Flagstar (2 RA 381-386), and responses to document requests by Fax.com (2 RA 392-394), as well as a motion for an order deeming facts to be admitted by Flagstar (2 RA 388-390).

On January 8, 2004, plaintiff filed motions to compel supplemental responses to document requests by Clayton and

McCrosky (2 RA 413-418) and responses to special interrogatories and document requests by Fax.com (2 RA 398-400, 405-407), as well as motions for orders deeming facts to be admitted by Fax.com (2 RA 402-403, 409-411). That same day, plaintiff filed a statement addressing issues to be heard at the review conference. (2 RA 424.)

On about January 14, 2004, plaintiff filed her opposition to Fax.com's petition for coordination. (2 AA 347-357.) Plaintiff argued that her case was the oldest of all of the cases that Fax.com was seeking to coordinate and that many of the other cases were "new and undeveloped." (2 AA 349.) Plaintiff asserted: "The *Bruns* . . . matter . . . has been aggressively litigated, with extensive discovery and law and motion undertaken. Pre-trial activities . . . are largely completed." (*Ibid.*) Plaintiff argued that if her case were coordinated with the other cases, she would be "penalized with unnecessary delay as counsel in the other actions undertake pre-trial activities which have been substantially completed in *Bruns*." (*Ibid.*)

At the January 15, 2004 review conference, the court lifted the discovery stay. (2 RA 450-451.) The court denied plaintiff's motions to compel Clayton, Flagstar, McCrosky, and Quon to respond to document requests. (2 RA 451.) The court continued the hearing on plaintiff's other discovery motions. (2 RA 451-452.)

On January 15 and January 23, 2004, plaintiff sought and obtained the entry of default against ECX and CSB for their failure to answer the fourth amended complaint. (3 AA 673-677.)

I. January 30, 2004 to May 6, 2004: prosecution of the action is stayed until the assignment of a coordination trial judge. (Tolling is undisputed—97 days.) May 6, 2004 to August 2, 2004: the stay is lifted. (Plaintiff claims tolling—88 days.)

On January 30, 2004, the court set a hearing date for the petition for coordination and ordered that "[a]ll 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.)

In April 2004, the court granted the petition for coordination. (3 AA 634-639.) On May 6, 2004, the court assigned a coordination trial judge. (2 AA 361-363.) 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." (2 AA 361.)

J. August 2, 2004 to August 17, 2004: prosecution of the action is stayed pending an initial status conference in the coordinated actions. (Tolling is undisputed—15 days.)

On August 2, 2004, the court set an initial status conference in the coordinated actions for August 17, 2004. (2 RA 458.) The court ordered counsel to meet and confer in person no later than 10 days before the initial status conference to discuss discovery, trial

dates, alternative dispute resolution, and further case management issues, and to prepare a joint initial status conference report. (2 RA 458-460.) 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." (2 RA 461.)

On August 10, 2004, the parties conferred regarding the joint initial status conference report. (2 RA 465.) Two days later, they filed that report. (2 RA 464-470.)

On August 17, 2004, the court held the initial status conference. (2 RA 484-486.) The court set: an October 4 hearing in one of the other coordinated actions for a motion for preliminary injunction; October 22 hearings in this action for motions to set aside the entry of default; and October 22 hearings in the other coordinated actions for motions for attorney's fees and to lift the stay for purposes of enforcing a judgment. (2 RA 484-485.) The court set a discovery conference for November 9, 2004. (2 RA 485.) The court also ordered that "[t]he [s]tay is lifted for the sole purpose of serving any unserved parties." (*Ibid.*)

K. August 17, 2004 to July 11, 2006: the court actively manages the litigation and vacates the entry of default against ECX and CSB, plaintiff abandons twelve noticed depositions and, at the end of the five-year period, adds seven new defendants. (Plaintiff claims tolling—693 days.)

In late August 2004, notice was given that, at the scheduled November 9, 2004 discovery conference, the court would "hear argument about all outstanding discovery issues in all cases coordinated under the above caption, and will make rulings thereon." (2 RA 488.) Accordingly, all parties were "ordered to meet and confer about outstanding discovery issues prior to the noticed hearing." (*Ibid.*)

In September 2004, ECX and CSB filed motions to set aside the entry of default against them. (2 RA 502-503, 506-507, 515; see also 2 RA 520-522.) On November 8, 2004, the court granted the motions. (3 AA 666-667.) On that same day, the court ruled in the other coordinated matters on motions for relief from the stay to collect appeal costs and for an award of attorney's fees. (3 AA 580, 666-667.)

On about November 4, 2004, plaintiff filed an "Enumeration of Disputes for Resolution at Discovery Conference," identifying 17 discovery motions for which plaintiff sought rulings. (2 RA 528-531.) On November 9, 2004, the court held the discovery conference. (2 RA 533-535.) At that conference, the court set a further December 7, 2004 hearing on plaintiff's discovery motions.

(2 RA 533.) The court also ordered that Fax.com produce database information by the end of November. (2 RA 533-534.)

On November 12, 2004, plaintiff filed a declaration in support of her discovery motions. (2 RA 537.) On December 7, 2004, the court continued the hearing on those motions to February 4, 2005. (2 RA 549, 553.)

On December 28, 2004, the court gave notice that Judge Carolyn B. Kuhl would preside over the coordinated cases effective January 3, 2005. (2 RA 555, 557.) On January 28, 2005, Flagstar, Fax.com, Quon, Clayton, McCrosky, and CSB filed supplemental points and authorities in opposition to plaintiff's discovery motions. (2 RA 562.) The hearings on those motions were subsequently continued to February 23, 2005 and then to March 3, 2005. (2 RA 565, 567; 3 RA 571, 575.)

At a March 3, 2005 status conference and discovery hearing, the court granted plaintiff's discovery motions in part and ordered that: Flagstar and Fax.com respond without objection to certain requests for admission; Flagstar, Quon, and Fax.com respond without objection to certain special interrogatories; Quon respond without objection to certain form interrogatories; and Flagstar, Quon, Fax.com, Clayton, McCrosky, and CSB respond without objection to certain document requests and produce responsive documents for inspection. (1 RA 81-85; 3 RA 577.) The court also ordered that all Fax.com documents in storage be delivered to the document depository and that any responsive pleadings be filed no later than April 4, 2005. (3 RA 578.)

On March 8, 2005, the court ordered that proposed discovery plans be filed by April 12, 2005. (2 AA 405-407.) At an April 15, 2005 status conference addressing the discovery plan, the court ordered that a revised plan be filed within three days and any objections to the revised plan be filed four days after that. (3 RA 602.) The court also set a May 9, 2005 hearing for an order to show cause why sanctions should not be imposed against Fax.com for its failure to deposit documents in the document depository as previously ordered. (3 RA 602-603.)

On April 20, 2005, the court ordered a discovery plan requiring defendants to respond to numerous interrogatories and document requests. (2 AA 413-416; 1 RA 88-108.) The discovery plan allowed plaintiffs to take defendants' depositions and required plaintiffs to propose schedules for the depositions they intended to take. (2 AA 414-415.) The court set a discovery cut-off for September 15, 2005. (2 AA 415.)

On April 28, 2005, ECX gave notice that it had deposited its insurance policy in the document depository, as required by the discovery plan. (3 RA 616-617.)

At the May 9, 2005 order to show cause hearing, counsel for Fax.com represented that only a former employee of the company had access to the company's documents. (3 RA 642-643.) The court ordered that the former employee relinquish his control of the documents and that they be transferred to the document depository. (3 RA 643.)

On May 18, 2005, the court approved a deposition schedule for the defendant advertisers. (3 RA 668-677; 2 AA 417-426.) In the

other coordinated matters, specific dates were set for each deposition. (3 RA 669-671.) However, because plaintiff's counsel in this matter had not arranged specific dates for any of the thirteen depositions he intended to take (see 3 RA 670-671), the court ordered that counsel for the parties meet and confer regarding the scheduling of these depositions (3 RA 671). The court further ordered that each deposition begin before the September 15, 2005 discovery cut-off. (*Ibid.*) Finally, the court ordered that if the parties could not agree on suitable deposition dates, plaintiff's counsel was to notify the court by June 20, 2005. (*Ibid.*)

At a June 13, 2005 status conference, the court ordered that plaintiff's liaison counsel could request issuance of an order to show cause why sanctions should not be imposed against any defendant that failed to comply with court-ordered discovery. (3 RA 692, 699-700.) On June 14, 2005, Fax.com filed a privilege log. (3 RA 694-697.) At a July 21, 2005 status conference, the court ordered Fax.com to deliver its phone records to the document depository. (3 RA 720.) On August 2, 2005, Fax.com served notice that it had done so. (3 RA 728.) On that same day, ECX served its responses to the discovery-plan document requests. (3 RA 730-731.)

On August 10, 2005, almost three months after the court's order approving the deposition schedules in the other coordinated actions, plaintiff served notice of twelve depositions of the persons most knowledgeable for defendants including ECX. (3 RA 738-739.) The depositions were to take place between August 26 and September 6. (*Ibid.*) These depositions never took place. (See 3 RT

Q-18, Q-20 to Q-21; cf. 3 AA 581.) And at no later point did plaintiff take any other depositions. (See *ibid.*)

At an August 26, 2005 status conference, the court extended the discovery cut-off to November 1, 2005. (3 RA 769, 786-788.) On September 1, 2005, ECX served its responses to the discovery-plan interrogatories. (3 RA 782-784.)

On September 22, 2005, in a coordinated action, *Amkraut v. Pacific Coast Office Products* (*Amkraut*), the court granted the motion of the *Amkraut* plaintiffs for class certification. (3 RA 802.)

At an October 25, 2005 status conference, the court, at the request of plaintiffs' liaison counsel in the coordinated actions, extended the discovery cut-off to February 1, 2006. (3 RA 827; 3 RT H-34 to H-36.)

On November 10, 2005, the court certified the class in the companion *Amkraut* case. (2 AA 386-394; 3 RA 860-861.)[1]

On December 8, 2005, plaintiff filed multiple motions seeking sanctions for failure to comply with the court's discovery orders. Specifically, plaintiff moved for both an order deeming facts to be admitted and for monetary sanctions against Fax.com, Flagstar, and their counsel James Casello, and separately for both terminating and monetary sanctions against Flagstar, CSB, Quon, Clayton, and Casello. (4 RA 897-927; see also 4 RA 957-960.)

---

[1] A defendant in the *Amkraut* case filed a motion to de-certify the class on January 13, 2006 (4 RA 998-1003), plaintiffs filed an opposition on February 3, 2006 (4 RA 1064), and the defendant filed a reply on February 10, 2006 (4 RA 1072-1073). The court denied the motion on February 15, 2006. (4 RA 1099.)

At the January 4, 2006 hearing on these motions (4 RA 897, 904, 911, 920), the court ordered further briefing and continued the hearing to January 24, 2006 (4 RA 962-963). At the continued hearing, the court granted the motions in part, deeming as admitted certain requests for admissions against Fax.com and Flagstar and awarding plaintiff monetary sanctions against Fax.com and Casello. (1 RA 109-110; see also 4 RA 1075.)

On January 24, 2006, plaintiff moved for leave to amend her complaint "to specify each defendants' maximum potential liability." (4 RA 1016; see 4 RA 1069-1070.) The following month, the court granted plaintiff's motion. (4 RA 1078.) Plaintiff's fifth amended complaint named ECX, Flagstar, Clayton, Fax.com, CSB, McCrosky, and Quon. (2 AA 438.) Plaintiff alleged three causes of action against all defendants: violation of the TCPA, violation of the UCL, and negligence. (2 AA 438, 443-450.)

At a February 15, 2006 status conference, the court granted ECX's request for leave to propound written discovery regarding plaintiff's damage calculations. (4 RA 1078.) The same day, ECX answered the fifth amended complaint. (4 RA 1087.)

At plaintiff's request, the court set a March 24, 2006 hearing for an order to show cause why contempt and monetary sanctions should not be imposed against Fax.com, McCrosky, and their counsel, Casello, for failing to comply with the court's discovery orders. (4 RA 1079, 1093-1098.) At the March 24, 2006 hearing, the court denied without prejudice the request for contempt sanctions because plaintiff had not personally served the orders to show cause. (4 RA 1119-1120.) However, the court awarded

plaintiff monetary sanctions against Casello and continued the contempt hearing until April 28, 2006. (4 RA 1120-1121.)

On April 2, 2006, plaintiff moved for terminating and monetary sanctions against Flagstar, CSB, Quon, Clayton, and Casello. (4 RA 1145-1152; see also 5 RA 1176-1191.) On April 28, 2006, the court heard the motion and granted plaintiff's request for terminating sanctions against Flagstar, Quon, and Clayton, but denied the request as to CSB. (5 RA 1217-1218.) The court also awarded plaintiff monetary sanctions against all four of these defendants and Casello. (*Ibid.*) In addition, the court granted in part plaintiff's continued request for contempt sanctions against Fax.com, McCrosky, and Casello, issuing a monetary contempt sanction against Fax.com and monetary sanctions against Fax.com and Casello. (5 RA 1218-1219.)

On June 15, 2006, plaintiff named seven new defendants: CSB & Perez, LLC; CSB & Hinckley, LLC; CSB & McCray, LLC; CSB & Ellison, LLC; CSB & Humbach, LLC; and Chris & Tad Enterprises (collectively, with CSB, "the CSB entities") and Mark Nichols. (2 AA 454-456; 1 RA 115-117.) On that same day, plaintiff filed a motion to compel further responses to interrogatories from McCrosky and for monetary sanctions against McCrosky and his counsel Casello. (5 RA 1269-1274; see also 5 RA 1290-1291, 1298-1299.)

On July 6, 2006, plaintiff filed a status report in advance of a July 14, 2006 status conference. (5 RA 1293-1296.) Plaintiff advised the court that she had added seven new defendants, six of whom she had not yet served. (5 RA 1293-1294.) Plaintiff also

stated that she had filed another motion to compel discovery against McCrosky, was preparing motions for issue, evidentiary, and monetary sanctions against three other defendants represented by Casello, intended to propound additional written discovery to defendants, and wanted to subpoena defendants' telephone records. (5 RA 1294-1295.)

At a July 11, 2006 hearing, the court ruled it would stop its active management of discovery in this action and "just open discovery at this point." (3 RT M-6; see 3 RT M-8 to M-9.)

Throughout this period, the parties engaged in ongoing meet and confer efforts regarding plaintiff's discovery demands. (See, e.g., 2 RA 526; 3 RA 619-620, 627-628, 704, 722-723, 725-726, 766-767, 776, 778-780; 4 RA 936-938.)

L. July 12, 2006 to January 24, 2007: one of the coordinated actions proceeds to trial and ECX files its motion to dismiss. (No tolling claimed—196 days.)

On October 6, 2006, the coordinated *Amkraut* action was tried to the court. (3 RT O-1 to O-39.) The court entered judgment in favor of the *Amkraut* plaintiffs and against Fax.com. (2 AA 546-547; 3 RT O-35 to O-37.)

On November 22, 2006, ECX moved to dismiss plaintiff's fifth amended complaint pursuant to Code of Civil Procedure sections 583.310 and 583.360. (1 AA 122-123; 4 AA 998.) ECX showed that the five-year period for plaintiff to bring her action to trial had passed. (1 AA 122-123.) Flagstar, the CSB entities, Fax.com, Quon,

Clayton, and McCrosky joined ECX's motion. (2 AA 488-488A, 548-549, 552-553.)

M. January 25, 2007 to May 14, 2007: the court hears the motion to dismiss, orders a stay of all proceedings, and grants the motion. (Tolling undisputed—109 days.) The Court of Appeal reverses.

On January 25, 2007, the court heard defendants' motion to dismiss. (3 RT Q-1 to Q-40.) The court requested supplemental briefing regarding the specific litigation activity that took place during periods that plaintiff claimed the five-year period was tolled. (3 RT Q-29 to Q-32, Q-34 to Q-35.) The court also ordered a complete stay in the proceedings so that additional time would not count toward the five-year period. (4 AA 951; 3 RT Q-39 to Q-40.)

On February 7, 2007, the parties filed supplemental briefs. (3 AA 814-819; 4 AA 820-935; 1 RA 124-205; 5 RA 1304-1401.) In response to the court's request for specific information regarding litigation activity, ECX also lodged with the court over 1,000 pages of documents and almost 300 exhibits. (See 1 RA 206 to 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.) The court found that the five-year period was tolled for a total of 607 days: (1) 495 days from June 13, 2002 to October 21, 2003; (2) 97 days from January 30, 2004 to May 6, 2004; and (3) 15 days from August 2, 2004 to August 17, 2004. (4 AA 964; see 4 AA 954-959.) Because plaintiff filed her action on February 22, 2000, the original

five-year period expired on February 22, 2005. Adding the 607 days by which the five-year period was tolled, plaintiff was required to bring her action to trial by October 22, 2006 (or the following Monday, October 23, 2006). (4 AA 964.)

The court ruled that the action was subject to mandatory dismissal because plaintiff failed to seek a trial on her claims by October 23, 2006, or any other date before the hearing on the motion to dismiss: "Prior to that date [October 23, 2006] (and even after), Plaintiff did not ask this court to specially set this matter for trial or move for class certification. Despite having ample opportunity to do so, Plaintiff failed to timely bring this action to trial." (4 AA 964.)

The court rejected plaintiff's arguments that the action was stayed for more than 607 days or that it was impossible, impracticable, or futile for plaintiff to bring her claims to trial. (4 AA 952-965.) Among other things, the court found it was "clear that Plaintiff did not use 'due diligence to expedite [her] case to a final determination' . . . [and] there were periods of time where Plaintiff was clearly dragging her feet in this matter." (4 AA 961.)

Plaintiff appealed from the resulting judgment. (4 AA 974-975; see 4 AA 970-971.)

The Court of Appeal reversed. By a 2-1 vote, the Court of Appeal held in a published opinion 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, subdivision (b), and therefore, the trial court erred in dismissing the action under section 583.360." (Typed opn., 2-3.) The Court of

Appeal majority so held even though the partial stays here were the result of the trial court's efforts to effectively manage these complex and coordinated matters. The Court of Appeal majority also held, contrary to the trial court's ruling, that the management of the case during two periods established impossibility, impracticability, or futility within the meaning of section 583.340, subdivision (c), and thus tolled the mandatory dismissal statute. (Typed opn., 19-22.)

Presiding Justice Turner dissented. He wrote: "The issue in this case is simple: Is a coordinated complex action stayed or its progress enjoined within the meaning of Code of Civil Procedure section 583.340, subdivision (b) because it is subject to now well established case management practices? My answer is, 'No.' [Fn. omitted.]" (Typed opn., 1 (dis. opn. of Turner, J.).)

LEGAL DISCUSSION

I. THE JUDICIAL MANAGEMENT HERE FURTHERED PROSECUTION OF COMPLEX AND COORDINATED CASES, DID NOT STAY PROSECUTION, AND DID NOT AUTOMATICALLY TOLL THE MANDATORY DISMISSAL STATUTE.

A. An action must be dismissed if not brought to trial within five years, unless the court's jurisdiction is suspended, prosecution or trial of the action is stayed, or trial is impossible, impracticable, or futile.

"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 that time, dismissal is mandatory. (Code Civ. Proc., § 583.360, subd. (b) ["The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute"].)

In calculating the five-year period, "[t]he action is 'commenced' upon plaintiff's filing the original complaint against defendant." (*Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, 1010 (*Bank of America*).) In addition, "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).)

"The aim of section 583 is to 'promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed . . . [and] to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.' " (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 237 (*Moran*), quoting *General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 91.)

B. A partial stay that allows prosecution of an action is not a stay of prosecution and does not toll the dismissal statute.

As noted, the five-year period is tolled while "[p]rosecution or trial of the action was stayed or enjoined." (Code Civ. Proc., § 583.340, subd. (b).) These unambiguous terms toll the five-year period only for a stay of prosecution, not for a partial stay.

This court has defined the term "prosecution" as being "comprehensive," and extending to " 'every step in an action from its commencement to its final determination.' " (*Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708, quoting *Ray Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, 18; *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 229.)

A stay is "an indefinite postponement of an act" (*Holland v. Dave Altman's R. V. Center* (1990) 222 Cal.App.3d 477, 482) and " ' "a temporary suspension of a procedure in a case" ' " (*People v. Crites* (2006) 135 Cal.App.4th 1251, 1255-1256, quoting *People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1421).

These established definitions are controlling. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19.)[2] Because prosecution includes every step in an action, and a stay is a suspension of procedure, section 583.340 tolls the five-year period only when the prosecution of every aspect of the action is suspended.

This construction effectuates legislative intent. The statute's purpose is to promote the prompt trial of claims. (*Moran, supra*, 35 Cal.3d at p. 237.) Of the three tolling exceptions, however, only the one for impossibility, impracticability, or futility requires the plaintiff to prove reasonable diligence. (*Id.* at p. 238.) Tolling for a stay of prosecution, by contrast, "is automatic and not subject to a 'reasonable diligence' restriction." (*Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1775 (*Ocean*); accord, *Spanair S.A. v. McDonnell Douglas Corp.* (2009) 172 Cal.App.4th

---

[2] In construing a statute, the courts attempt to "ascertain and effectuate legislative intent." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) To do so, "courts ordinarily give the words of a statute the usual, everyday meaning they have in lay speech. [Citation.] But that rule has an important exception . . . : when a word used in a statute has a well-established *legal* meaning, it will be given that meaning in construing the statute." (*Arnett v. Dal Cielo, supra*, 14 Cal.4th at p. 19, original emphasis; see also *People v. Wheeler* (1992) 4 Cal.4th 284, 302 [" 'legal terms in a statute are presumed to have been used in their legal sense' "].)

348, 359.) But it makes no sense to automatically relieve the plaintiff of the duty to exercise reasonable diligence during a *partial* stay because the plaintiff can still move the case forward as to those matters that are not stayed. Treating a partial stay as if it were a total stay of prosecution thus undermines the Legislature's purpose of promoting the prompt trial of claims. (*Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1375 [the court " 'must also consider the consequences that will flow from a particular statutory interpretation' " and should prefer an interpretation that " 'will result in wise policy rather than mischief or absurdity' "].)

The legislative history of the mandatory dismissal statute confirms that a partial stay does not automatically toll the five-year period or eliminate the plaintiff's duty to exercise reasonable diligence in bringing the case to trial.[3] When the Legislature amended the statute in 1984 to include an express exception for periods in which prosecution or trial of the action was stayed or enjoined, the Senate Committee on Judiciary Analysis stated that the exception applies only "if the *proceeding* were stayed . . . ." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1366 (1983-1984 Reg. Sess.) as amended Feb. 14, 1984, p. 4; 1 AA 45, emphasis added.)

---

[3] "In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute." (*Hale v. Southern Cal. IPA Medical Group, Inc.* (2001) 86 Cal.App.4th 919, 927; see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1 [taking judicial notice of analysis of Senate Committee on Judiciary].)

The Senate Republican Caucus Analysis made the same point. (Sen. Republican Caucus, Analysis of Sen. Bill No. 1366 (1983-1984 Reg. Sess.) p. 2; 1 AA 48.) As these legislative analyses confirm, the Legislature created an exception to the mandatory dismissal statute for a complete stay of the proceedings, but not for a partial stay.

In addition, the Law Revision Commission has explained that this exception for periods in which prosecution or trial of the action is stayed or enjoined "codifies existing case law," and has given a single example of the case law being codified: *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204. (Cal. Law Revision Com. com., 16A West's Ann. Code Civ. Proc. (2009 supp.) foll. § 583.340, p. 153.) *Marcus* did not involve a discovery stay but a "motion to stay proceedings." (*Marcus*, at p. 207.) The Law Revision Commission comment thus confirms that a stay of prosecution is synonymous with a stay of all proceedings, not merely a partial stay of one aspect of the proceedings.

The Court of Appeal's holding nonetheless equates a partial stay with a stay of all proceedings. But they are not equivalent. The suspension of just one aspect of an action does not preclude the plaintiff from diligently pursuing those parts of the action that are not stayed. As a result, a partial stay is not the equivalent of a stay of prosecution and does not automatically toll the five-year period without regard to the plaintiff's diligence.

The Court of Appeal cited " 'the general policy favoring trial over dismissal.' " (Typed opn., 11, quoting *Ocean, supra*, 15 Cal.App.4th at p. 1774, internal quotations omitted.) But, by definition, the mandatory dismissal statute is an exception to that

policy and demarcates the point at which the policy favoring disposition on the merits gives way to "the policy of the state that a plaintiff shall proceed with *reasonable diligence* in the prosecution of an action . . . ." (Code Civ. Proc., § 583.130, emphasis added; see *ibid.* ["the policy favoring trial or other disposition of an action on the merits" applies "[e]xcept as otherwise provided by statute"]; Code Civ. Proc., § 583.360, subd. (b) [the mandatory dismissal statute is "not subject to extension, excuse, or exception except as expressly provided by statute"].)

The Court of Appeal also cited the importance of "certainty." (Typed opn., 11.) But that factor undercuts the Court of Appeal's opinion. Certainty is not advanced by the Court of Appeal's amorphous holding that "a stay of *certain* types of proceedings within an action" is a stay of prosecution. (*Ibid.*, emphasis added.) Even the Court of Appeal shied away from holding that *any* stay is a stay of prosecution. (Typed opn., 11, fn. 6 ["we do not reach the issue of whether a stay with respect to a specific discovery device—such as a stay of a particular person's deposition—is a stay under section 583.340, subdivision (b)"].) On that key issue, the Court of Appeal's majority opinion creates uncertainty, rather than certainty, and leaves trial courts without guidance.

When given its established meaning, a stay of prosecution is a suspension of all litigation activity. Accordingly, the exception to the five-year period for a stay of prosecution cannot apply where litigation activity is ongoing. The Court of Appeal's contrary construction would automatically toll the mandatory dismissal statute based on any partial stay of prosecution, regardless of the

plaintiff's diligence, and would frustrate the Legislature's goal of promoting the prompt trial of claims.

C. The Court of Appeal incorrectly applied the abuse of discretion standard of review by independently deciding that there was a partial stay during management of the coordinated actions when substantial evidence supports the trial court's finding that there was no stay.

A trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. (*Messih v. Levine* (1991) 228 Cal.App.3d 454, 456 (*Messih*), quoting *Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 164 (*Lauriton*) [" 'A trial court's ruling on a motion to dismiss . . . will be disturbed only upon a showing of a manifest abuse of discretion' "].) Under this standard, "[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 v. Superior Court* (1991) 53 Cal.3d 257, 272.)

The Court of Appeal held that the action was stayed in part for almost two years during the management of the coordinated proceedings from August 17, 2004 to July 11, 2006. (Typed opn., 5, 13-14.) But ample evidence supports the trial court's finding that there was no stay. (4 AA 960.)

On August 2, 2004, Judge McCoy, who had been assigned to the matter as the coordination trial judge (2 AA 361), ordered a brief stay of "all discovery, motion and pleading activity" in advance

of the August 17, 2004 initial status conference in the coordinated proceedings (2 RA 461; see 2 RA 484-485). On January 3, 2005, Judge Kuhl was assigned to the matter. (2 RA 555, 557.) In ruling on the motion to dismiss, Judge Kuhl excluded from the five-year period the 15-day stay from August 2 to August 17, 2004. (4 AA 959, 964.) But Judge Kuhl expressly found that this stay ended on August 17, 2004, when Judge McCoy held an initial status conference in the coordinated actions. (2 RT 484-485; 4 AA 960.) At that conference, the court set dates for hearings on multiple motions and a discovery conference (2 RA 484-485), at which the court would "hear argument about all outstanding discovery issues" (2 RA 488).

From this point forward, far from barring all proceedings, the trial court actively managed and facilitated litigation efforts. (See, *ante*, pp. 14-20.) Indeed, Presiding Justice Turner's dissenting opinion takes over seven pages simply to chronicle the litigation activity during the period of this "stay." (Typed opn., 1-8 (dis. opn. of Turner, J.).) As Justice Turner stated in his dissent: "In my view, after Judge McCoy's initial order—nothing has been stayed." (*Id.* at p. 8.) "Judge Kuhl never issued an order preventing any plaintiff from seeking class certification or a trial." (*Id.* at p. 9.)

Because Judge Kuhl both managed the coordinated actions and ruled on the motion to dismiss, she was better situated than the Court of Appeal to determine the existence or non-existence of a trial court stay. (See 4 AA 965; 2 RA 555, 557.) The Court of Appeal thus invaded the province of the trial court by independently deciding the preliminary factual question of whether there was a stay, instead of reviewing the record for substantial evidence to

support the trial court's decision and resolving evidentiary conflicts in support of the judgment.

D. Partial stays that facilitate the management of complex and coordinated actions are not stays of prosecution and do not automatically toll the mandatory dismissal statute.

The Court of Appeal held that the trial court's judicial management of complex and coordinated actions in fact constituted a stay of prosecution. (Typed opn., 15-17.) But judicial management does not stay prosecution and does not automatically toll the mandatory dismissal statute.

Trial judges are encouraged to take an active role in the management of complex actions. A "complex case" is one that "requires *exceptional judicial management* to avoid placing unnecessary burdens on the court or the litigants . . . ." (Cal. Rules of Court, rule 3.400(a), emphasis added.) "In complex litigation, *judicial management should begin early* and be applied continuously and actively, based on knowledge of the circumstances of each case." (Cal. Stds. Jud. Admin, § 3.10(a).) The goal is "to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." (Cal. Rules of Court, rule 3.400(a).)

This court has recognized the importance of complex case management. "The complex litigation procedure is intended to facilitate pretrial resolution of evidentiary and other issues, and to

minimize the time and expense of lengthy or multiple trials." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 966 (*Rutherford*); accord, *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 14 (*Asbestos Claims*).)

Case management is equally important in coordinated proceedings. "The coordination 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." (Cal. Rules of Court, rule 3.541(b).)[4]

The Deskbook on the Management of Complex Civil Litigation states that in complex actions "[t]he judge's role in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings is *crucial*." (Judicial Council of Cal., Deskbook on the Management of Complex Civil Litigation (2007) § 1.04, p. 1-3 (Deskbook), emphasis added.)[5] The Deskbook advises that "the court's 'inherent managerial powers' can be invoked to ensure the court assumes an *aggressive role* at the earliest possible time to efficiently move the case to settlement or trial." (*Id.*, § 2.04, p. 2-8, emphasis added.)

---

[4] The mandatory dismissal statute applies to coordinated actions. (*Bank of America, supra*, 200 Cal.App.3d at p. 1010 ["we 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"].)

[5] The California Judicial Council has authorized the Administrative Office of the Courts to distribute the Deskbook to all judges. (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 705.)

A key step in this process "is the scheduling of the initial case management conference with counsel." (Deskbook, *supra,* § 1.04, p. 1-3; see Cal. Rules of Court, rule 3.750(a).) "The primary objective of the conference is to develop . . . a plan for the just, speedy, and economical determination of the litigation." (Deskbook, *supra,* § 1.04, p. 1-4.)

Partial stays are also important case management tools. For example, the order scheduling the initial case management conference "should generally . . . [¶] . . . [¶] [o]rder the *suspension* of all discovery and motion activity pending further order of the court." (Deskbook, *supra,* § 2.21, pp. 2-18 to 2-19, emphasis added.) Doing so allows the court to identify the key issues and "to avoid unnecessary and burdensome discovery procedures in the course of preparing for trial of those issues." (Cal. Rules of Court, rule 3.750(c).)

Partial stays remain useful long after the initial case management conference. Trial courts are encouraged to consider "the appropriateness of . . . the staging and timing of various aspects of discovery." (Deskbook, *supra,* § 2.51, p. 2-30.2; see also Cal. Rules of Court, rule 3.750(b)(5) [the court should consider "[t]he schedule for discovery proceedings to avoid duplication"].)[6]

Although the purpose of both the mandatory dismissal statute and judicial management is to expedite litigation (see, e.g., *Moran,*

---

[6] "On the control of discovery, the Advisory committee's Comment states: ' "Courts handling complex cases should exercise effective, direct control over the discovery process. . . ." ' " (*Asbestos Claims, supra,* 219 Cal.App.3d at p. 19, quoting Judicial Council of Cal., Advisory Com. com. to former Cal. Stds. Jud. Admin., § 19(h).)

supra, 35 Cal.3d at p. 237; *Rutherford, supra*, 16 Cal.4th at p. 966), the Court of Appeal's construction of the statute places the two at cross-purposes. The Court of Appeal does so by holding that a partial stay during the judicial management of complex and coordinated proceedings constitutes a stay of prosecution that automatically tolls the mandatory dismissal statute's five-year period regardless of the plaintiff's diligence. If allowed to become law, the Court of Appeal's holding will discourage trial judges from active case management in complex and coordinated actions and undermine the Legislature's goal of promoting the prompt trial of those cases.

E. The partial stay from May 24, 2000 to June 16, 2000 did not stop plaintiff from prosecuting her action.

The Court of Appeal held that a discovery stay lasting from May 24 to June 16, 2000 was a stay of prosecution that automatically tolled the five-year period. (Typed opn., 12-13, 24.) But this discovery stay was part of judicial management intended to promote the action's prosecution and did not stop plaintiff from pursuing her action.

On May 24, 2000, the trial court ordered the parties to submit a proposed case management order, and imposed a discovery stay until entry of that order. (1 RA 230-231.) On June 16, 2000, the court filed the case management order and lifted the discovery stay. (2 RA 283.)

The temporary suspension of discovery during the preparation of the case management order significantly advanced the prosecution of the case. Among other things, the order required the parties to answer within 40 days a set of interrogatories attached to the order. (2 RA 282-286.) The order also established a document depository and procedures for the exchange of documents. (2 RA 281-282.)

Moreover, the prosecution of the action proceeded in other ways during this 23-day period. The parties negotiated the terms of the proposed case management order and a joint evaluation conference statement (see 1 RA 235-239, 243-260), the parties filed the joint evaluation conference statement (1 RA 262), plaintiff filed her second amended complaint (3 AA 725-737; 1 RA 241), and defendants filed a demurrer and motion to strike portions of that complaint (1 RA 264-278). Because the prosecution of the action continued during this brief discovery stay, and the stay was part of judicial management intended to promote the action's prosecution, the five-year period was not tolled. (See *ante*, §§ I.B, I.D.)

F. The partial stay from December 3, 2003 to January 15, 2004 did not halt the prosecution of the action.

The Court of Appeal held that a 43-day discovery stay from December 3, 2003 to January 15, 2004 was a stay of prosecution that automatically tolled the five-year period. (Typed opn., 13.) Like the first discovery stay, this second stay did not prevent plaintiff from pursuing her action.

The trial court ordered the stay at a December 3, 2003 review hearing upon the filing of Fax.com's notice of submission of its petition for coordination. (2 RA 353, 355-356, 359.) Prosecution of the action continued while the stay was in effect. On December 18, Fax.com, Flagstar, Clayton, McCrosky, and Quon filed an answer to plaintiff's fourth amended complaint. (2 RA 368.) On December 23, plaintiff filed discovery motions against Quon, Flagstar, and Fax.com. (2 RA 370-394.) On January 8, 2004, plaintiff filed a review conference statement (2 RA 424) and additional discovery motions against Fax.com, Clayton, and McCrosky (2 RA 398-418). On about January 14, plaintiff filed her opposition to Fax.com's petition for coordination. (2 AA 347-354.) The discovery stay terminated the next day. (2 RA 450-451.)

Because the discovery stay was part of judicial management intended to promote the action's prosecution, and did not suspend prosecution of the action, it did not toll the five-year period. (See *ante*, §§ I.B, I.D.)

G. The judicial management from August 17, 2004 to July 11, 2006 did not stop the prosecution of the action.

In holding that the action was stayed for almost two years during the management of the coordinated proceedings from August 17, 2004 to July 11, 2006 (typed opn., 13-14), the Court of Appeal not only ignored the trial court's express finding that there was no stay, but erroneously equated the active management of the litigation with a stay of prosecution.

As Presiding Justice Turner stated in his dissent: "Judge Kuhl did not stay or enjoin the action; she managed it." (Typed opn., 9 (dis. opn. of Turner, J.).) For example, at the November 9, 2004 discovery conference, the trial court ordered that Fax.com produce database information. (2 RA 533-534.) In March 2005, the court ordered that Flagstar, Clayton, Fax.com, CSB, McCrosky, and Quon respond without objection to various discovery requests and that Fax.com documents be delivered to the document depository. (1 RA 81-85; 3 RA 577.) In April 2005, the court implemented a discovery plan requiring defendants to respond to additional interrogatories and document requests (2 AA 413-416; 1 RA 88-108) and to submit to depositions (2 AA 414-415; 1 RA 102).

During this period, the trial court also heard and granted plaintiff's motions. For example, in February 2006, the court granted in part plaintiff's sanctions motions, deeming as admitted certain requests for admissions against Fax.com and Flagstar and awarding plaintiff monetary sanctions against Fax.com and Casello. (1 RA 109-110; see also 4 RA 1075.) In April 2006, the court granted plaintiff's motions for terminating sanctions against Flagstar, Quon, and Clayton and for monetary sanctions against Flagstar, CSB, Quon, and Clayton and their counsel Casello. (5 RA 1217-1219.)

The trial court's active involvement in managing the coordinated proceedings did not prevent plaintiff from prosecuting her action, but instead assisted her in doing so.

II. IT WAS NOT IMPOSSIBLE, IMPRACTICABLE, OR FUTILE FOR PLAINTIFF TO BRING HER ACTION TO TRIAL WITHIN FIVE YEARS.

A. The tolling exception for impossibility, impracticability, or futility requires proof of causation and reasonable diligence.

The Court of Appeal held that the trial court abused its discretion by not finding the five-year period imposed by the mandatory dismissal statute tolled during two periods when it was purportedly "impossible, impracticable, or futile" to bring the case to trial. (Code Civ. Proc., § 583.340, subd. (c); typed opn., 17-22.) In this, too, the Court of Appeal was mistaken.

The plaintiff has the *burden* of proving it was impossible, impracticable, or futile to bring an action to trial within the statutorily mandated five-year period. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 590 (*Perez*); *Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 329 (*Tamburina*); *Messih, supra*, 228 Cal.App.3d at p. 457.) This determination "is generally *fact specific*, depending on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles." (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 438 (*Howard*), emphasis added.)

Accordingly, the trial court's ruling on these exceptions is reviewed for an abuse of discretion. (*Perez*, at pp. 590-591; *id.* at

p. 591, fn. 9 ["We disagree with [cross-complainant] that the independent review standard is appropriate here where we are considering whether the [trial] court correctly decided—based upon a review that included evidentiary matters—that the five-year statute had run and that the impossibility exception did not apply to certain periods claimed by [cross-complainant]"]; *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1271 (*Sanchez*); *Hughes v. Kimble* (1992) 5 Cal.App.4th 59, 71 (*Hughes*) ["the determination of whether the prosecution of an action was indeed impossible, impracticable, or futile during any period of time, and hence, the determination of whether the impossibility exception to the five-year statute applies, is a matter within the trial court's *discretion*. Such determination will not be disturbed on appeal unless an abuse of discretion is shown" (emphasis added)].)

In *Moran*, this court held that "[t]he *critical factor* in applying these exceptions to a given factual situation is whether the plaintiff exercised *reasonable diligence* in prosecuting his or her case." (*Moran, supra*, 35 Cal.3d at p. 238, emphases added; see also *Perez, supra*, 169 Cal.App.4th at p. 590; *Tamburina, supra*, 147 Cal.App.4th at p. 336; *Sanchez, supra*, 109 Cal.App.4th at p. 1270; *Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 502.) "This duty of diligence applies 'at all stages of the proceedings,' and the level of diligence required increases as the five-year deadline approaches." (*Tamburina*, at p. 336.) Thus, a plaintiff cannot seek tolling of the five-year period for delays that the plaintiff with reasonable diligence might have avoided. (*Lauriton, supra*, 215 Cal.App.3d at p. 165.)

The plaintiff also has the burden of showing a causal connection between any circumstances alleged to constitute impossibility, impracticability, or futility and the failure to bring the case to trial. "A circumstance of impracticability will not toll the statutory five-year deadline unless the plaintiff shows a 'causal connection' between the circumstance and moving the case to trial." (*Tamburina, supra*, 147 Cal.App.4th at p. 333; accord, *Perez, supra*, 169 Cal.App.4th at p. 594 [the plaintiff must, "in addition to presenting the circumstance, show a causal connection"]; *Sanchez, supra*, 109 Cal.App.4th at p. 1272 [" 'Bringing the action to trial must be impossible, impracticable, or futile for the reason proferred' " (emphasis omitted)].)

B. Substantial evidence supports the trial court's finding that only plaintiff's lack of reasonable diligence prevented her from trying her case within five years.

1. Plaintiff acknowledged that she had "substantially completed" pre-trial preparations in January 2004, more than three years before her action's dismissal.

The trial court found it "clear that [p]laintiff did not use 'due diligence to expedite [her] case to a final determination.' " (4 AA 961.) Ample evidence supports that finding.

To begin with, plaintiff reported to the court that she had substantially completed her pre-trial activities three years before

the January 2007 hearing on ECX's motion to dismiss, yet plaintiff never requested a trial on her claims. Specifically, in January 2004, plaintiff opposed Fax.com's petition for coordination on the ground that "pre-trial activities . . . have been *substantially completed* in *Bruns*." (2 AA 349, emphasis added.) The trial court did not abuse its discretion by finding that plaintiff was not reasonably diligent when she failed to request a trial, or even to seek class certification, for three years while, by her own admission, her pre-trial activities were substantially completed.

2. Plaintiff inexplicably failed to take the necessary steps to move her action toward class certification and trial.

As the trial court properly found, "there were periods of time where [p]laintiff was clearly dragging her feet in this matter." (4 AA 961.)

First, plaintiff was dilatory in not moving to certify a class when doing so was a prerequisite to trying her claims. (See *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1074 (*Fireside*) ["trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice *before* ruling on the substantive merits of the action" (emphasis added)].) Having failed even to move for class certification, plaintiff was far from ready to try her claims.

Second, plaintiff was dilatory in taking depositions. On April 20, 2005, the trial court authorized plaintiffs in the

coordinated matters to take defendants' depositions and ordered that plaintiffs propose schedules for the depositions they intended to take. (2 AA 413, 414-415.) On May 18, 2005, the court approved the deposition schedules in the other coordinated matters. (3 RA 668-671.) However, because plaintiff's counsel in this matter had not arranged dates for any depositions, the court ordered the parties to meet and confer regarding deposition scheduling. (3 RA 670-671.) The court also ordered that if the parties could not agree on suitable deposition dates, plaintiff's counsel was to notify the court by June 20, 2005. (3 RA 671.)

On August 10, 2005, more than 80 days after the court's order approving deposition schedules in the other coordinated matters, and more than 50 days after the deadline for seeking the court's assistance in setting deposition dates, plaintiff belatedly served notice of 12 depositions of the persons most knowledgeable for defendants. (3 RA 738-739.) Plaintiff then failed to take *any* of those depositions. (See 3 RT Q-18, Q-20 to 21; cf. 3 AA 581.) This utter lack of diligence belies plaintiff's assertion that it was somehow impossible, impracticable, or futile for her to bring her action to trial within five years.

3. Plaintiff's lack of diligence *increased* as the end of the five-year period neared.

Further underscoring the correctness of the trial court's ruling, as plaintiff approached the end of the five-year period, she seemed oblivious of the need to bring her case to trial. (See

Tamburina, supra, 147 Cal.App.4th at p. 336 ["the level of diligence required increases as the five-year deadline approaches"].) Indeed, she took steps that made it virtually impossible to try her case before the deadline.

In a July 6, 2006 status report filed as the deadline approached, plaintiff advised the court that she had just added seven new defendants, six of whom had yet to be served, and claimed she needed to propound more written discovery. (5 RA 1293-1295.) These pleading amendments and discovery efforts could have begun six years earlier.

Further, plaintiff did not request that the court either clarify the calculation of the five-year period or specially set the action for trial at any time before the period expired. (See *Sanchez, supra*, 109 Cal.App.4th at p. 1274 [" ' "Where a plaintiff possesses the means to bring a matter to trial before the expiration of the five-year period by filing a motion to specially set the matter for trial, plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability" ' "].)

For these reasons, plaintiff failed to meet her burden on the critical factor of reasonable diligence. Accordingly, the trial court did not abuse its discretion by rejecting plaintiff's argument that it was impossible, impracticable, or futile to bring her case to trial within five years.

C. The order vacating the discovery requests served at the outset of the litigation did not render it impossible, impracticable, or futile to bring the case to trial within the statutory period.

The Court of Appeal held that the trial court abused its discretion by not tolling the mandatory dismissal statute from March 9 to May 24, 2000. (Typed opn., 19-20.) During this period, plaintiff served discovery requests that were soon vacated in connection with the initial case management conference. (4 AA 837; see 2 RA 280-283.) The Court of Appeal erred. This brief delay did not make it impossible, impracticable, or futile for plaintiff to proceed to trial.

"Discovery is often the greatest source of cost and delay in civil litigation. Active judicial involvement in discovery is particularly important in complex litigation. . . . [T]here is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (Deskbook, *supra,* § 2.50, p. 2-30.2.) Here, plaintiff had served written discovery requests before the initial case management conference. (1 AA 161-207; 4 AA 822, 846-866.) ECX and CSB had responded to some of these requests. (2 AA 296-302; 1 RA 140, 163-169, 171-198.) But based on these discovery requests plaintiff had noticed ten motions against defendants other than ECX. (4 AA 821-822, 844; 1 RA 230; see also AOB 10-11.) In short, discovery was unfocused and out of control as reflected by the pending discovery motions.

A key purpose of case management is "to expedite the case." (Cal. Rules of Court, rule 3.400(a).) Likewise, the purpose of the case management conference is "to develop . . . a plan for the just, *speedy*, and economical determination of the litigation." (Deskbook, *supra*, § 1.04, p. 1-4, emphasis added.) Here, the case management conference did exactly that, streamlining discovery by creating a document depository, establishing a method for exchanging documents, and requiring that all parties respond to interrogatories. (2 RA 280-286.) Contrary to the Court of Appeal's view, the trial court properly found that its active management of discovery expedited the litigation and, a fortiori, did not make it impossible, impracticable, or futile for plaintiff to proceed to trial.

Moreover, and in any event, this brief delay in initial discovery was inconsequential. (See *Sanchez*, *supra*, 109 Cal.App.4th at p. 1272 [requiring causal connection].) In January 2004, long after the initial case management conference and the vacated discovery, but still more than *three years* before the hearing on ECX's motion to dismiss, plaintiff reported to the trial court that "[p]re-trial activities . . . are largely completed." (2 AA 349.) The purported discovery delays therefore did not make it impossible, impracticable, or futile for plaintiff to bring her case to trial within five years.

D. The assignment of the coordination trial judge did not make it impossible, impracticable, or futile to bring the case to trial.

The Court of Appeal held that the trial court abused its discretion by not finding the five-year period tolled between May 27, 2004, after the assignment of the coordination trial judge, and the August 2, 2004 setting of an initial conference before that judge. (Typed opn., 21-22.) But the trial court got it right; the assignment of the coordination trial judge *ended* any stay of proceedings.

Although an order granting a petition for coordination automatically stays all proceedings in that action (Cal. Rules of Court, rule 3.529(b)), "[o]nce the coordination trial judge is assigned, the automatic stay *ends* and the judge at this point is obligated to move the coordinated cases to trial as quickly as possible" (*Bank of America, supra*, 200 Cal.App.3d at p. 1009, emphasis added; see Cal. Rules of Court, rule 3.540(b)).

Consistent with this rule, the order here assigning a coordination trial judge 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." (2 AA 361.) In granting the motion to dismiss, the trial court thus properly concluded the five-year statute was tolled only until the May 6, 2004 order of assignment. It was not impossible, impracticable, or futile for plaintiff to proceed to trial after this point because the assignment ended the stay.

The Court of Appeal nonetheless held the five-year period was tolled from May 27 to August 2, 2004 because of a delay following that assignment. (Typed opn., 21-22.) On May 27 and June 23 of that year, plaintiff's counsel apparently telephoned the court to inquire about resetting discovery motions for hearing but "was told that the Court was awaiting transfer to it of the court files from the various lawsuits and that the Court couldn't do anything until it had the files." (4 AA 826.) The coordination trial judge then did not set a conference until August 2, 2004. (2 RA 458.)

But this delay does not show impossibility, impracticability, or futility. The coordination trial judge was required to hold "a preliminary trial conference preferably within *30 days* after issuance of the assignment order . . . ." (Former Cal. Rules of Court, rule 1541(a) [in effect when the coordination trial judge was assigned on May 6, 2004], amended and renumbered rule 3.541(a), eff. Jan. 1, 2007, emphasis added.) Plaintiff could have submitted a proposed agenda and order for that conference "[a]t *any time* following the assignment of the coordination trial judge." (*Ibid.*, emphasis added.) The proposed agenda and order could have covered "such matters of procedure and *discovery* as may be appropriate." (*Ibid.*, emphasis added.)[7]

---

[7] The California Rules of Court, rule 3.541(a), now states: "The coordination trial judge must hold a case management conference within 45 days after issuance of the assignment order. . . . At any time following the assignment of the coordination trial judge, a party may serve and submit a proposed agenda for the [case management] conference and a proposed form of order covering such matters of procedure and discovery as may be appropriate."

Instead, plaintiff did nothing. Plaintiff did not advance the litigation by requesting a preliminary conference with the coordination trial judge or by submitting a proposed agenda addressing outstanding issues such as her discovery motions. Rather, a lawyer for a party in another of the coordinated matters belatedly requested the conference, which the trial court then promptly scheduled. (4 AA 826, 916-917.) Plaintiff cannot show it was impossible, impracticable, or futile to proceed to trial when she failed to use the procedures available for expediting the litigation. Likewise, she cannot complain about delay when, with reasonable diligence, she could have prevented it. (See *ante*, § II.A.)

E. The entry of default against ECX and CSB did not make it impossible, impracticable, or futile to bring the case to trial.

Plaintiff argues the five-year period was tolled when default was entered against ECX and CSB. (AOB 43-46.) Both the Court of Appeal and the trial court properly rejected this argument. (Typed opn., 22-23; 4 AA 962-964.) After the entry of default, plaintiff was not reasonably diligent in seeking class certification and a default judgment.

In *Howard*, this court held that the exception to the five-year period for impossibility, impracticability, and futility applies after the entry of default only when the plaintiff acts reasonably in obtaining a default judgment. (*Howard*, *supra*, 10 Cal.4th at pp. 438-439.) Thus, only "a *reasonable* period of time between the

defendant's default and the entry of the default judgment should . . . be excluded from the calculation of the five-year period." (*Ibid.*) This is consistent with the general rule that reasonable diligence is the critical factor in applying these exceptions. (See, e.g., *Moran, supra*, 35 Cal.3d at p. 238.)

This court in *Howard* cited with favor *Hughes, supra,* 5 Cal.App.4th 59, which held that, upon the entry of default, a plaintiff must use "reasonable efforts to proceed to a hearing on damages and obtain a default judgment." (*Id.* at p. 69.) "[T]he time between entry of a default and entry of a default judgment should be excluded from the five-year time to bring a case to trial *if and only if* the court finds that the plaintiff used due diligence to obtain entry of the judgment, and that in spite of such due diligence, it was impossible, impracticable, or futile to obtain a judgment." (*Id.* at p. 71, emphasis added.)

A default judgment will support tolling because it terminates the proceedings and obviates any need for further diligence. The entry of default as in the present case, by contrast, "is simply a ministerial act preceding the actual default judgment." (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 960.) As a result, the entry of default here did not relieve the plaintiff of her duty to act with reasonable diligence.[8]

---

[8] In arguing below that the entry of default automatically tolled the five-year period, plaintiff cited *Maguire v. Collier* (1975) 49 Cal.App.3d 309. (AOB 44-46.) But *Maguire* preceded this court's decision in *Howard*. Moreover, *Maguire* is irrelevant because the plaintiff in that case obtained a default judgment and thus brought

(continued...)

Moreover, in an asserted class action, upon the entry of default, the plaintiff must also use reasonable efforts to move for class certification. "[I]n the case of an asserted class action, there still must be decided, following default, as a jurisdictional matter, the suitability of the lawsuit as a class action . . . ." (*Kass v. Young* (1977) 67 Cal.App.3d 100, 109; accord, 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 314, p. 926 ["A judgment by default in a class action, without a hearing to certify the class and without notice to class members, is void"]; see also *Fireside*, *supra*, 40 Cal.4th at p. 1074 ["class action proceedings should decide whether a class is proper and, if so, order class notice *before* ruling on the substantive merits of the action" (emphasis added)].)

Here, ECX was in default for 298 days, from January 15, 2004 to November 8, 2004. (3 AA 581, 666-667, 673.) A stay of prosecution was in effect for 112 of these days. (See 4 AA 964; see also 4 AA 956-959.) If this 112-day stay of prosecution is excluded, the period of default was 186 days (298 - 112 = 186) or roughly six months. This six-month period was ample time for a diligent plaintiff to certify a class, proceed to a hearing on damages, and obtain a default judgment. Moreover, because default had not been entered against all defendants, plaintiff was still required to exercise reasonable diligence in bringing her action to trial against the other defendants. Yet plaintiff did none of these things. As a result, the trial court correctly found that plaintiff did not act with

---

(...continued)
the litigation to its conclusion. (*Maguire*, at p. 312.) Plaintiff never did so here.

reasonable diligence and did not meet her burden of showing impossibility, impracticability, or futility.

F. The court's management of the complex and coordinated actions did not make it impossible, impracticable, or futile to bring the case to trial.

Contrary to plaintiff's argument below, the partial stays that resulted from the trial court's active management of this matter do not establish impossibility, impracticability, or futility. Instead, they demonstrate the trial court's efforts to expedite and efficiently manage the litigation.

As discussed above, a trial judge assigned to complex and coordinated matters must assume an active role in managing all steps of the litigation. (Cal. Rules of Court, rules 3.400(a), 3.541(b); see *ante*, § I.D.) The trial court here explained this role as follows: "The court has found that this is complex litigation, and so to manage discovery in a cost effective way the court listens to parties about what's needed in the case and orders discovery. This is not unusual for complex cases . . . ." (2 RT C-4.) The time spent in connection with such procedures facilitates rather than hinders the goal of speedy trials in complex actions.

Plaintiff argued below that the trial court's management of the litigation stayed all discovery and motion practice from August 2004 to at least July 2006. (AOB 4-5.) But the record contradicts her claim. During this period, the court repeatedly ordered discovery (see, e.g., 2 AA 413-416; 1 RA 81-85, 88-108; 2 RA 533-

534; 3 RA 577) and heard motions (see, e.g., 1 RA 109-110; 2 RA 484-485; 4 RA 1075; 5 RA 1217-1220).

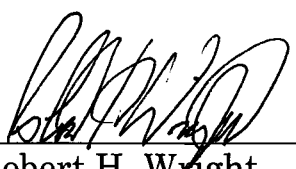
Because the prosecution of the action continued during the periods that plaintiff claims it was impossible, impracticable, or futile to bring the action to trial, and because the procedures about which she complains were designed to expedite the prosecution of her case, plaintiff has not shown that the judicial management of the action made it impossible, impracticable, or futile to proceed to trial. As a result, the trial court did not abuse its discretion by granting the motion to dismiss.

CONCLUSION

For the foregoing reasons, the Court of Appeal's judgment that the trial court erred in granting defendants' motion to dismiss should be reversed.

October 5, 2009

HORVITZ & LEVY LLP
BRADLEY S. PAULEY
ROBERT H. WRIGHT
BREMER WHYTE BROWN & O'MEARA LLP
NICOLE WHYTE
ALISON HURLEY

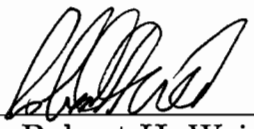
By: 
Robert H. Wright

Attorneys for Defendant and Respondent
E-COMMERCE EXCHANGE, INC.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 12,908 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

October 5, 2009



Robert H. Wright

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On October 5, 2009, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 5, 2009, at Encino, California.

Jill Gonzales

SERVICE LIST
Bruns v. E-Commerce Exchange, Inc., et al.
Supreme Court Case No. S172684
Second District Court of Appeal Case No. B201952

Kevin M. Tripi Law Offices of Kevin M. Tripi 2030 Main Street, Suite 1040 Irvine, CA 92614	Attorneys for Plaintiff and Appellant **DANA BRUNS**
Max H. Stern Jessican E. LaLonde Duane Morris LLP One Market Street Spear Tower, Suite 2000 San Francisco, CA 94105-1104	Attorneys for Defendants and Respondents **CSB PARTNERSHIP; CHRIS & TAD ENTERPRISES; CSB & ELLISON, LLC; CSB & HINCKLEY, LLC; CSB & HUMBACH, LLC; CSB & MCCRAY, LLC; CSB & PEREZ, LLC**
James H. Casello Casello & Lincoln 1551 North Tustin Avenue, Suite 480 Santa Ana, CA 92705-8636	Attorneys for Defendants and Respondents **FAX.COM; DANIEL QUON; DANIEL E. QUON, O.D., INC., DBA OPTOMETRIST AT SOUTH COAST**
Jon Cederberg Quinn Emanuel Urquhart Oliver & Hedges, LLP 865 South Figueroa Street, 10th Floor Los Angeles, CA 90017-2543	Attorneys for Plaintiff and Respondent **FLAGSTAR BANK**
Nicole Whyte Alison Hurley Bremer Whyte Brown & O'Meara LLP 20320 S.W. Birch Street, Second Floor Newport Beach, CA 92660	Attorneys for Defendant and Respondent **E-COMMERCE EXCHANGE, INC.**

Court of Appeal
Second Appellate District
Division Five
300 South Spring Street
Second Floor, North Tower
Los Angeles, CA 90013-1213

Case No. B201952

The Honorable Carolyn B. Kuhl
Los Angeles Superior Court
Central Civil West, Department 323
600 South Commonwealth Avenue
Los Angeles, California 90005
(213) 351-8501

Case No. JCCP 4350

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, California 90013-1230

Tony Rackauckas
Orange County DA
Office of the District Attorney
401 Civic Center Drive
Santa Ana, California 92701