S172684

IN THE

SUPREME COURT OF CALIFORNIA

DANA BRUNS,

Plaintiff and Appellant,

vs.

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

APPELLANT'S CONSOLIDATED ANSWER BRIEF ON THE MERITS

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Service of this brief upon the California Attorney General and the Orange County District Attorney is required by Bus. & Prof. Code §17209.

TABLE OF AUTHORITIES

California Statutes

Legislative History Materials

I. ISSUES PRESENTED

Because defendants' statement of the issues presented is so argumentative and encumbered with rhetoric, we rephrase the statement of issues as follows:

1. Did the Court of Appeal correctly conclude that the tolling provisions of Code of Civil Procedure §583.340(b) apply to all stays of prosecution, partial and complete?

2. Are complex and coordinated civil actions exempt from the tolling provisions of section 583.340?

3. Did the Court of Appeal correctly conclude that the trial court abused its discretion by failing to omit from its five-year dismissal computation, various time periods during which it was impossible, impracticable or futile for Plaintiff to proceed to trial?

4. Did the Court of Appeal correctly conclude that time remains within the statutorily specified five-year period to bring Plaintiff's action to trial?

II. INTRODUCTION

The expeditious prosecution of civil actions is vital to the proper administration of justice. Toward this end, the Legislature has decreed that all civil actions must be brought to trial within five years of their

commencement. This requirement applies to all civil actions.

The Legislature has also decreed that, in computing the time within which an action must be brought to trial, all time periods during which prosecution or trial of the action was stayed or enjoined, or, during which it was impossible, impracticable or futile to proceed to trial, must be excluded from the five-year computation. (See Cal. Civ. Proc. §583.340(b) and (c).) These statutory excuses are equally vital to the administration of justice since they afford time-elasticity and flexibility to mitigate the harshness of the mandatory dismissal sanction in all situations where mechanical application of the five-year statute would yield injustice.

Seven stays of prosecution were imposed in this action. Some were complete; others were partial. The principal issue in this appeal is whether, as the Court of Appeal held, a partial stay of prosecution such as a stay of all motion, pleading or discovery practice, constitutes a stay of the prosecution of the action within the meaning of section 583.340, subdivision (b), of the Code of Civil Procedure.

The Court of Appeal's decision should be affirmed because it is consonant with the ordinary meaning of the statute's language, consistent with legislative history and intent, reconciles the stay provisions of section 583.340(b) with those of CRC rule 3.515(j), eliminates uncertainty,

and promotes consistency of application of the statutory excuse.

Defendants seek to alter the Court's focus, emphasizing that this is a complex and coordinated action. Defendants assert that partial stays of prosecution are common, but critical, case management tools - tools that the trial used to "manage" Plaintiff's action. Defendants contend that if the Court of Appeal's decision - that the five-year period is tolled during periods of partial stays of prosecution - is not reversed, trial courts will forfeit their ability to manage and control complex litigation.

Defendants' argument is both melodramatic and misguided. A wide range of case management techniques are available to trial courts to manage, stage, time and control pretrial activities, including discovery, motion and pleading practice. A stay order, whether partial or complete, is one tool in an overflowing judicial tool chest. And, it is a poor tool because it impedes, rather than expedites, case development. If, in the course of managing a complex action a court became concerned about tolling, it need only employ one of its other, many tools.

Our existing system of law is well integrated and effective. It balances the requirement of prompt resolution of lawsuits with the recognition that matters beyond a plaintiff's control can impede case development and retard case resolution. With this recognition, and to

ensure fairness, elasticity/flexibility is built into the law through the mandatory tolling provisions of section 583.340 and CRC rule 3.515. Defendants seek to remove this flexibility from complex and coordinated actions.

Nothing under the law exempts complex or coordinated civil lawsuits from the tolling provisions of section 583.340. The need for elasticity is at least as great in complex civil actions as it is in general civil litigation, particularly since judicial action taken to facilitate complex case management goals of containing costs and reducing burden can retard case development.

Defendants' approach, which would strip complex and coordinated actions of essential elasticity from tolling, would encumber case management by forcing trial courts to choose between competing policy goals such as economy (containing costs) and expediting case resolution. This dilemma is averted by the Court of Appeal's decision, which frees trial courts to manage their cases such that all case management goals are met. The Court of Appeal's approach also reconciles the dismissal statutes with the bedrock policy of the law which favors trial on the merits. Defendants extol dismissal over trial.

III. STATEMENT OF FACTS

A. Nature of Action.

This is a putative class action which seeks relief from businesses which engage in the unlawful pattern and practice of sending unsolicited advertisements to telephone facsimile machines. This pattern and practice violates the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. §227(b)(1)(C). Relief is sought under the TCPA pursuant to 47 U.S.C. §227(b)(3), and, under California's Unfair Competition Act, *Business & Professions Code* §§17200 et seq.

Plaintiff-Appellant, Dana Bruns (Plaintiff), is the recipient of unsolicited advertisements which were faxed to her by defendants.

B. The Proceedings Below.

On February 22, 2000, Ms. Bruns, on behalf of herself and on behalf of a putative class of others similarly situated, commenced this civil action in Orange County Superior Court (Case No. 00CC02450) against defendants E-Commerce Exchange, Inc. (ECX), and others, for transmitting unsolicited fax advertisements in violation of the TCPA. (1 AA 148)

On May 24, 2000, Judge William McDonald, who was then presiding over this action, imposed a partial stay of prosecution under which all discovery, discovery issues and motions in this lawsuit were

stayed. (3 AA 593, ln. 13) Concurrent with the stay order, the court refused to hear and vacated, eight discovery motions which Plaintiff had brought. (3 AA 815, and 4 AA 821:18 - 822:7) On June 16, 2000, the Court vacated two remaining motions to compel discovery responses which Plaintiff had brought, pursuant to the May 24, 2000 stay order. (4 AA 822:4-7, and 844) On July 12, 2000, the court lifted the May 24, 2000 stay, ordered that all discovery that had previously been propounded by Plaintiff would have to be re-served, and reiterated that all discovery motions which had previously been brought by Plaintiff remained vacated. (4 AA 822:8-11, and 837:15-18)

On June 13, 2002, Judge C. Robert Jameson, who was then presiding over this lawsuit, imposed a complete stay of the action pending resolution of *Kaufman v. ACS Systems, Inc.*[1], which was then on appeal before the Second District Court of Appeal. (4 AA 823:17-20, and 868) On October 21, 2003, the stay was lifted. (4 AA 823:20-22, and 871)

On December 3, 2003, a review hearing was held during which Judge Jameson stayed all discovery. (4 AA 824:4-7, and 873) This partial stay of prosecution was lifted on January 15, 2004. (4 AA 824:12-14, and

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Kaufman v. ACS Systems, Inc. (2003) 110 Cal.App.4th 886, which addressed whether a plaintiff has a private right of action for a violation of the TCPA in state court.

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On December 3, 2003, defendant Fax.com, Inc. (FCI) filed a Notice of Submission of Petition for Coordination. (2 AA 335) On January 30, 2004, Judge Jameson ordered that, "All hearings, orders, motions, discovery or other proceedings are hereby stayed in all cases subject of the petition for coordination until determination whether coordination is appropriate." (2 AA 359) This stay was imposed at FCI's request under rule 3.515 of the *California Rules of Court*. (2 AA 335:27 -336:4)

On April 7, 2004, Judge Jameson issued an Order Granting Petition For Coordination. (3AA 579:2-4, and 634-638) On May 6, 2004, Judge Charles McCoy was appointed as the coordination trial judge in this matter. (3 AA 579:9-12, and 641-646)

During the 88-day period between May 6, 2004 and August 2, 2004, this action, and the other coordinated TCPA cases, were held in abeyance pending transfer of court files to Judge McCoy. (4 AA 826:13 - 827:9; RT Q-12:6 - Q-13:1) The coordination trial court stated that it couldn't do anything until it had the court files from the various coordinated lawsuits. (*Id.*) On this basis, the coordination trial court declined requests from Plaintiff to set for hearing, seventeen discovery motions she had filed before coordination. (*Id.*)

On August 2, 2004, Judge McCoy stayed all discovery, motion and pleading activity in the coordinated TCPA cases, including this lawsuit. (4 AA 922:13-14) The discovery stay remained in effect until July 11, 2006, when it was lifted in this action by the then-assigned trial judge, Judge Carolyn Kuhl. (3 AA 670:10-11) The stay on motion and pleading activity was never lifted and remained in effect until this action was dismissed. (3 AA 580:20 - 581:2)

On November 22, 2006, ECX filed a motion for an order dismissing Plaintiff's fifth amended complaint on the grounds that the five-year period for bringing this action to trial had passed. (1 AA 122) The remaining defendants joined ECX's motion to dismiss. (2 AA 548 and 552) On November 22, 2006, CSB Partnership (CSB) and CSR-related entities - CSB & Perez LLC, CSB & Hinckley LLC, CSB & McCray LLC, CSB & Ellison LLC, CSB & Humbach LLC, and Chris & Tad Enterprises (collectively, the "CSB Related Defendants") - filed a separate motion to dismiss Plaintiff's fifth amended complaint on the grounds that Plaintiff failed to serve the CSB Related Defendants with a summons and complaint within the three-year time period specified under Code of Civil Procedure §583.210, and on the grounds that Plaintiff had not brought her action to trial within five years. (2 AA 488)

On December 6, 2007, Plaintiff filed her consolidated opposition to defendants' motions to dismiss. (3 AA 557)

On January 25, 2007, defendants' motions to dismiss were heard. (4 AA 1022) No decision was rendered at the hearing; rather, the Court requested supplemental briefing. (RT Q-34:6-8) At the hearing, the court, on its own motion, imposed a complete stay in the proceedings[2]. (RT Q-39:24 - Q-40:10)

On May 14, 2007, the court granted defendants' motions to dismiss. (4 AA 936-967) On June 26, 2007, the final judgment on Plaintiff's claims was entered. (4 AA 968-973)

IV. ARGUMENT

A. The Court of Appeal Correctly Determined That The Tolling Provisions of C.C.P. §583.340(b) Apply to Both Partial And Complete Stays of Prosecution.

1. The Ordinary Meaning of The Statute's Words Confirms The Court of Appeal's Decision.

Code of Civil Procedure §583.340(b) states:

> "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
> * * *
> (b) Prosecution or trial of the action was stayed or enjoined."

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[2] The stay remained in effect until June 26, 2007, when the final judgment on Plaintiff's claims was entered.

The construction of section 583.340(b), and the legislative intent behind the statute, can be ascertained from the ordinary meaning of its key words, "stay" and "prosecution." As stated by this Court in *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340,

> "The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations omitted.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations omitted.]"

The term, "stay" is defined in Black's Law Dictionary (5th ed. 1979) p. 1267, as follows:

> "A stay is a suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point. It can be used to stop the prosecution of the action altogether, or to hold up only some phase of it, such as an execution about to be levied on a judgment."

This definition was quoted, in part, in *Holland v. Dave Altman's R.V. Center* (1990) 222 Cal.App.3d 477, 482, where the court was called to interpret the term, 'stay,' within the meaning of §583.340:

> "The parties cite no reported decisions construing the term 'stay' as used in section 583.340, and we have found none. However, the term appears to have a commonly understood meaning as an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event. Thus, in People v. Santana (1986) 182 Cal.App. 3d 185, [227 Cal.Rptr. 51], a case involving the stay of a sentence, the court concluded that '[a] stay is a temporary

> suspension of a procedure in a case until the happening of a defined contingency.' Black's Law Dictionary (5th ed. 1979) page 1267 defines the term as 'a suspension of the case or some designated proceedings within it.' ...
>
> This construction fits neatly within the evident purpose of section 583.340, which is to exclude from the mandatory dismissal provision time periods during which the case could not be brought to trial. The absence of trial court jurisdiction to try it (the contingency covered by subdivision '(a)') is one reason; a court order barring the trial (by a stay or injunction) is another. Each of these is an example of impossibility, impracticality or futility in bringing the case to trial. The final provision recognizes 'any other reason' that it was impossible, impracticable or futile to bring the case to trial. What all of these provisions have in common is the **practical inability** of the parties to proceed to trial. Each prevents a trial, and each is recognized as a basis to toll the running of the statutory period. [Citation omitted.]" [3]
> (Bold and underscore added.) 222 Cal.App.3d 477 at 482

Under *Holland*, a "stay" within the meaning of §583.340 is an indefinite suspension of the entirety of the case ***or*** designated acts/proceedings within it that yield the *practical* inability (as opposed to "complete" or "absolute" inability) to proceed to trial.

As for the term, "prosecution," ECX argues in its opening brief on the merits (OBM) that the term refers, *en masse*, to the entirety of the

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[3] At pages 39 and 40 of its brief, CSB utilizes a Lego-style approach to advocacy: it selectively quotes bits and pieces of statements from *Holland* and reassembles them into a new and different creation, *viz*, a "finding" in *Holland* that the only stays which toll the five-year dismissal period are those that "prevent a trial."

litigation process. (ECX OBM 27) Combined with the term, "stay," ECX argues, "[b]ecause 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." *Id.* ECX errs in its narrow, restrictive interpretation of "prosecution." The term has a dual meaning: the term refers both to the totality of a legal action as well as the individual steps and activities by which an action advances from its commencement to conclusion. Thus, for example, a lawsuit is being "prosecuted" when discovery is propounded. It is also being prosecuted when law and motion practice is being engaged, when pleading activity is undertaken, and when other litigation activities are performed[4]. This duality was confirmed by this Court in *Ray Wong v. Earle C. Anthony* (1926) 199 Cal. 15.

Wong involved an action for malicious prosecution which stemmed from the malicious filing of a criminal complaint against Mr. Wong, the ensuing issuance of an arrest warrant, the arrest, and criminal trial of Mr. Wong. The question before this Court was whether the malicious prosecution action was properly venued in San Joaquin County - the county

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[4] By necessary extension, a stay (*i.e.*, suspension) of any of these elements of pretrial procedure constitute a stay of prosecution.

selected by plaintiff. In addressing this question, this Court noted that the underlying malicious criminal complaint was filed, and the arrest warrant was issued, in Sacramento; plaintiff was arrested in Stockton and incarcerated in San Joaquin County, and; plaintiff was then transferred back to Sacramento County where he was incarcerated, tried and acquitted. (199 Cal. 15, 16-17.) In reaching its decision, this Court instructed that, "[t]he term, 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination." (199 Cal. 15, 18.) This Court then reasoned that venue was proper in both Sacramento and San Joaquin counties because "prosecution" of the underlying criminal action had occurred in both counties. *Id.* at p. 19.

Wong makes clear that "prosecution" refers not only to the totality of a legal action, but to the individual events and steps taken during the pendency of a legal action. Thus, pleading, motion and discovery practice *each* constitute "prosecution" of a lawsuit[5].

The duality of the term, "prosecution" - one which refers to the individual steps taken in an action as well as the totality of those steps - is further confirmed by this Court's decision in *Melancon v. Superior Court*

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[5] By logical necessity, the suspension (*i.e.*, stay) of discovery, motion, or pleading practice are each "stays of prosecution."

(1954) 42 Cal.2d 698. In *Melancon*, the plaintiff stockholder sought to compel the trial court to enforce his claimed right to take depositions in his derivative shareholder's lawsuit. Prosecution of the action had been stayed by the trial court pending the posting of security by plaintiff, pursuant to former Corporations Code §834(c), which stated:

> "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." (Underscore and italics added.)[6]

In denying the relief sought in *Melancon*, this Court stated,

> "[Plaintiff] further urges that he is entitled to proceed with the depositions he seeks, in the course of preparing for the eventual trial of the derivative action, even though he has not as yet complied with the order for the posting of security. It seems clear, however, that the taking of depositions for such purpose would constitute a step in the 'prosecution' of the action and therefore falls within the stay provisions of section 834. (See Ray Wong v. Earle C. Anthony, Inc. (1926), 199 Cal. 15, 18, in which it is stated that 'The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination.') It therefore appears that the [trial] court has properly refused to proceed further with respect to the depositions until such time as [Plaintiff] may comply with the order respecting security." (42 Cal.2d 698. 707-708) (Emphasis added.)[7]

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The operative language of Corp. Code §834(c) - "prosecution of such action shall be stayed" - utilizes the same words as C.C.P. §583.340(b) - "prosecution," "action," and "stayed."

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Quoting *Wong, Melancon* affirms that "prosecution" refers not only to the totality of a legal action, but to individual steps and activities taken during the pendency of a legal action. *Melancon*'s determination that the taking of depositions constitutes "prosecution" of an action affirmatively answers a key issue in this appeal: whether discovery constitutes "prosecution of an action."

The construction, effect and intent of §583.340(b) is manifest from the common meaning of the words of the statute, as interpreted by the courts' decisions in *Holland, supra, Wong, supra* and *Melancon, supra.* All time periods during which there is a suspension of the elements of pretrial proceedings - such as suspension of discovery, motion or pleading practice - must be excluded from the five-year dismissal computation.

This construction of section 583.340(b) is consonant with the statute's legislative history (*see, infra*) as well as the provisions of the parallel court rule, *California Rule of Court* rule 3.515[8].

At page 36 of its OBM, CSB falsely states, "*Melancon* specifically finds that a stay of prosecution means a stay of the entire action." At page 37 of its brief, CSB further mis-describes *Melancon*: "This Court held that a stay of prosecution meant a stay of all activity...." The quoted, underscored language, above, establishes the opposite: the taking of depositions was deemed "prosecution" by this Court.

[8] Effective January 1, 2007, CRC rule 1514 has been re-designated (*i.e.*, renumbered) as rule 3.515.

2. The Court of Appeal's Decision Harmonizes The Provisions of C.C.P. §583.340(b) With Those of CRC Rule 3.515.

a. Language And Structure of Rule 3.515.

CRC rule 3.515 states in pertinent part:

"(a) Motion for stay

Any party may file a motion for an order under Code of Civil Procedure section 404.5 staying the proceedings in any action being considered for, or affecting an action being considered for, coordination, or the court may stay the proceedings on its own motion. The motion for a stay may be included with a petition for coordination or may be served and submitted to the Chair of the Judicial Council and the coordination motion judge by any party at any time prior to the determination of the petition.

* * *

(h) Effect of stay order

Unless otherwise specified in the order, a stay order suspends all proceedings in the action to which it applies. A stay order may be limited by its terms to specified proceedings, orders, motions or other phases of the action to which the stay order applies.

* * *

(j) Effect of stay order on dismissal for lack of prosecution

The time during which **any** stay of proceedings is in effect under the rules in this chapter must not be included in determining whether the action stayed should be dismissed for lack of prosecution pursuant to chapter 1.5 (§ 583.110 et seq.) of title 8 of part 2 of the Code of Civil Procedure."

(Bold and underscore added.)

Under subdivision (a), a party may file a motion for an order under C.C.P. §404.5 "staying the proceedings" in any action being considered for coordination. Can a party move the court for a partial stay of proceedings, or is the only available relief a 'complete' stay, *i.e.*, a stay of *all* proceedings? Subdivision (a) does not specify the answer. The answer to this question is provided in subdivision (h), which specifies that a stay order may suspend all proceedings in the action, or it may be limited by its terms to specified proceedings, orders, motions or other phases of the action. Subdivision (h) further instructs that if no limitations/restrictions on the stay of proceedings are specified in the stay order, the order is deemed to be a complete stay - *i.e.*, one which suspends all proceedings in the action. The final subdivision of rule 3.515 - subdivision (j) - specifies the effect of a stay order on the time limitation for bringing an action to trial. Subdivision (j) repeats the omnibus phrase, "stay of proceedings," from subdivision (a) and specifies that the time during which <u>*any*</u> stay of proceedings is in effect under these rules must be excluded from the five-year time computation. Since rule 3.515 permits both partial and complete stays, the word "any" coupled with the phrase, "stay of proceedings" makes clear the Judicial Council's intent to exclude from the dismissal time computation, the time during which any stay of proceedings - partial or complete - was imposed.

This conclusion is not only manifest from the express language and structure of the rule, but the rule making history of rule 3.515 confirms this.[9]

b. The Rule Making History of Rule 3.515.

The following historical overview of rule 1500 *et seq.* is provided at page 1 of the Judicial Council of California's "Report and Recommendation concerning Rule for Coordination of Civil Actions Having Common Questions of Fact or Law" dated October 23, 1973:[10]

> "At its May 1973 meeting the Judicial Council, upon recommendation of the Superior Court Committee, tentatively adopted comprehensive new rules of procedure for the coordination of civil actions pending in different trial courts that share a common question of fact or law. The legislation that requires the Council to provide such rules will become operative on January 1, 1974.

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The conclusion is further supported by the decision in *Bank of America v. Superior Court* (*Urich*) (1988) 200 Cal.App.3d 1000. There, the trial court in a related lawsuit - the El Dorado action - stayed depositions until a specified date, "unless [a] petition for coordination has been earlier filed and ruled on." *Id.* at 1013. On appeal, the stay of depositions in El Dorado was deemed to be "a stay of proceedings in the El Dorado action until the coordination petition was decided." *Id.* If a stay of a particular type/category of discovery - depositions - constitutes a stay of proceedings, then, by logical necessity, a stay of all discovery must constitute a "stay of proceedings."

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A copy of the Report and Recommendation (with attachments/exhibits) is included at 1 ARA 4-69.

> The Council's approval of the proposed rules was announced in the A.O.C Newsletter and in various legal newspapers, and the full text of the proposed rules was published with brief explanatory comments in the State Bar Journal and in the Los Angeles Daily Journal. In addition, copies of the rules were mailed to approximately 75 judges, attorneys, law professors and others who had indicated a special interest in the development of procedures for coordinating multiple civil actions. Written comments were received from seven attorneys, and the State Bar submitted its own suggested rules that were prepared by a special committee appointed by the Board of Governors to review the Judicial Council's proposed rules. The staff has continued to study this matter in light of all comments received and has recommended final adoption of the proposed rules with certain changes as explained below.
>
> The rules suggested by the State Bar appear to be generally in agreement with the Council's proposed rules with regard to most of the basic principles and procedures that are involved. There are, however, certain significant differences between the two sets of proposed rules. Informal discussions between the Council's staff and the State Bar's staff have narrowed the significant areas of differences to the following matters: (a) terminology; (b) applicability of local rules; (c) designation of site of hearings and trials; (d) "remand" orders; (e) liaison counsel; (f) stay orders; and (g) challenges under Code of Civil Procedure Section 170.6. These latter three topics have also been discussed by certain of the attorneys who submitted written comments on the proposed rules."
>
> (ARA 5-6)

The Council's Report and Recommendation then addresses each of the enumerated areas of differences. With regard to stay orders, the Report and Recommendation states in pertinent part:

> "As several of the comments received have emphasized, however, **any stay** of proceedings can be **potentially harmful** to the litigants in the affected actions, and it is apparent that the power to order a stay should be reasonably circumscribed and should be exercised with caution. For these reasons, the Council's proposed rules require that an application for a stay order must be supported by a memorandum of points and authorities and by affidavits establishing that a stay order is 'necessary and appropriate.' The proposed rules also impose a 30-day time limit upon any stay order issued without a hearing if a party objects, and the party's objection may be filed at any time (Rule 1527). Nevertheless, the attention devoted to stay orders by those offering comments on the Council's proposed rules would suggest that certain further restrictions upon stay orders should be expressed in the rules, as follows:
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> * * *
>
> (5) As suggested by Attorney Marshall Grossman in his letter of August 30, 1973 (p.33), it appears the rules should contain a provision specifying that **any** period during which **any** stay is in effect should be **disregarded for purposes of applying** Code of Civil Procedure **Section 583** (dismissal for failure to bring action to trial). This suggested addition to the rules would prevent any possible injustice that might result from a stay of proceedings in an action that might otherwise be subject to dismissal under this section"
>
> (Bold and underscore added.) (ARA 9-11)

The proposed rules were then modified to address these concerns/recommendations, and the Council's Report and Recommendation includes a copy of the modified rules. (*See*, ARA 17 to 36.) As this Court will note, the provisions of subdivisions (a) and (c) of revised rule 1514 were adopted without change. With regard to subdivision (f), the operative

(final) version is nearly identical to the version appended to the Council's Report and Recommendation:

> "(f) The time during which any stay of proceedings is in effect ~~pursuant to~~ under ~~these rules~~ the rules in this chapter ~~shall not~~ must not be included in determining whether the action stayed should be dismissed for lack of prosecution pursuant to chapter 1.5 (§ 583.110 et seq.) of title 8 of part 2 of the Code of Civil Procedure ~~Section 583~~."

The Council's Report and Recommendation details the historical circumstances under which rule 1514 was drafted, specifies the Council's concerns and goals as they relate to this rule, and provides the best understanding of the rule's meaning and intent. As quoted above, the Council's unequivocal intent was to exclude, "any period during which any stay is in effect ... for purposes of applying Code of Civil Procedure Section 583." (Report and Recommendation at p.7; ARA 11.)

c. The Significance of Rule 3.515.

CRC rule 3.515(j) states:

> "The time during which any stay of proceedings is in effect under the rules in this chapter must not be included in determining whether the action stayed should be dismissed for lack of prosecution pursuant to chapter 1.5 (§ 583.110 et seq.) of title 8 of part 2 of the Code of Civil Procedure."

Sections 583.310 and 583.340 are contained within Chapter 1.5 of

Title 8 of part 2 of the *Code of Civil Procedure*. In computing the time during which an action must be brought to trial, *any* coordination stay (*i.e.*, a stay imposed under rule 3.515(a) or 3.529(b)) must be excluded from the five-year time computation under *Code of Civil Procedure* §583.340(b). This is of critical significance. Partial or limited stays (*e.g.*, stays of discovery and/or stays on motion or pleading practice) imposed under CRC rule 3.515(a) are excluded from the five-year time computation under CRC rule 3.515(j) and C.C.P. §583.340(b). It would be anomalous for partial/limited stays of prosecution (*e.g.*, a stay of discovery) imposed under CRC rule 3.515 to be excluded from the five-year time computation under C.C.P. §583.340(b) while non-rule 3.515 partial stays (*e.g.*, discovery stays not imposed under rule 3.515) were included in the time computation under §583.340(b).

Fundamental rules of statutory construction mandate that C.C.P. §583.340(b) be interpreted in a manner which averts anomalies with CRC rule 3.515. As instructed by this Court in *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089:

> "Finally, and perhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so

that all may be harmonized and anomalies avoided."

See also, State of South Dakota v. Brown (1978) 20 Cal.3d 765, 775 ("It is a fundamental rule of statutory construction that statutes should be construed to avoid anomalies.") CRC rule 3.515 and C.C.P. §583.340(b) are readily harmonized by interpreting each to exclude from the five-year dismissal computation, all periods of time during which a stay of prosecution - partial, or complete - was in effect.

CRC rule 3.515 predates C.C.P. §583.340 by a decade. The Historical Notes to rule 3.515 state that it was adopted effective January 1, 1974. From January 1, 1974 until January 1, 2005, the pertinent provision of the Rule read as follows:

> "Rule 1514[11]. Stay orders
> * * *
> (c) Unless otherwise specified in the **stay** order, a stay order suspends all proceedings in the action to which it applies. A stay order may be limited by its terms to specified proceedings, orders, motions or other phases of the action to which the **stay** order applies." (Bold added.)

On January 1, 2005, court rule 1514 (now, rule 3.515) was amended

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[11] *See*, footnote no. 8, regarding renumbering of the Rules of Court.

to delete the words, "stay," where they are shown in bold, above[12]. Subdivision (c) was also re-lettered and became subdivision (h). As amended in 2005, the rule[13] now reads in pertinent part:

> "Unless otherwise specified in the order, a stay order suspends all proceedings in the action to which it applies. A stay order may be limited by its terms to specified proceedings, orders, motions, or other phases of the action to which the order applies."

As a matter of statutory construction, it is to be assumed that the legislature was aware of the provisions of CRC rule 1514 when it enacted C.C.P. §583.340(b). As noted by the court in *In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360, 367,

> "We assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes."

In the present situation, there was not only constructive knowledge of CRC rule 1514(f), but actual knowledge, when section 583.340(b) was proposed, drafted, and enacted. The legislative history of section 583.340 confirms this.

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12 Other minor changes were made to other subdivisions of rule 1514 which are not pertinent here.

13 CRC rule 3.515(h).

3. The Legislative History of Section 583.340(b) Affirms The Correctness of The Court of Appeal's Decision.

The following historical overview is provided at page 3 of the California Law Revision Commission's ("CLRC") Memorandum "81-14," dated 2/27/82:[14]

> "The Law Revision Commission was authorized in 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The reasons for the authorization were the failure of the statutes to accurately reflect the exceptions and excuses and the existence of court discretion, the confusing interrelation of the statutes, and the generally unsatisfactory state of the law, requiring frequent appellate decisions for clarification.
>
> The Commission retained Garrett H. Elmore as a consultant to prepare a study of this area of law. Mr. Elmore was formerly counsel for the State Bar Committee on Administration of Justice and has been involved in legislative amendments of the dismissal for lack of prosecution statutes...."
>
> (AA 4)

CLRC Memorandum "81-14" contains a copy of Mr. Elmore's

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[14] A copy of the memorandum is included at 1 AA 2-23. Consideration of these materials is appropriate since, "both the legislative history of the statute and *the wider historical circumstances of its enactment* are legitimate and valuable aids in divining the statutory purpose." *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 (Italics added.)

study, which analyzed the then-existing law, and suggested revisions.[15] At page three, footnote 8, of his study, Mr. Elmore makes specific reference to CRC rule 1514(f):

> "Judicial Council rules governing particular procedures affecting civil actions, such as coordination of civil actions pending in different trial courts and judicial arbitration, sometimes provide for "time period' exclusions from the statutory time period. [Fn. 8]
>
> [Fn. 8] See, e.g., Cal. Rule of Court 1514(f), Cal. Rule of Court 1601(d), referring to time period of Section 583. Compare Cal. Rule of Court 1233 (family law act) incorporating both code sections." (AA 14)

At page 22 of his report, Mr. Elmore states:

> "No. 18. Exclusion of Certain Time Periods From Mandatory time For Trial. Should a broader 'exclusion' than 'amenability to process of the court' and 'suspension of jurisdiction of the court' be stated for subdivision (b) and subdivision (c) of Section 583? The following is a rough draft:
>
> '(a) There shall be excluded from such five years (three years) on a nonduplicative basis
>
> (i) The time during which the jurisdiction of the court to try the action was suspended
>
> (ii) The time during which **prosecution or the trial of the action, was stayed or enjoined** by order of court, operation of law, statute, rule or regulation."
>
> (Underscore in original, bold added.) (AA 33)

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[15] A copy of Mr. Elmore's study may be found at 1 AA 11-35.

With full knowledge of CRC 1514(f), Mr. Elmore recommended the statutory language which has been placed in bold, above. This proposed language was adopted and used by the CLRC in its *Recommendation relating to Dismissal for Lack of Prosecution*, dated September 1982, concerning proposed Section 583.360 of the Code of Civil Procedure (16 Cal. L. Revision Com. Reports 2234).[16]:

> "583.350. Computation of time
>
> 583.350. In computing the time within which an action shall be brought to trial pursuant to this article, 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." (AA 109)

In June 1983, the CLRC issued its *Revised Recommendation relating to Dismissal for Lack of Prosecution*. In its *Revised Recommendation* (17 Cal. L. Revision Com. Reports 403)[17], the CLRC renumbered as Section

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16

A copy of the CLRC's 1982 *Recommendation relating to Dismissal for Lack of Prosecution* may be found at 1 AA 83-121.

17

A copy of the CLRC's 1983 *Revised Recommendation relating to Dismissal for Lack of Prosecution* may be found at 1 AA 49-82.

583.340, the text of former proposed Section 583.350, and it changed the word, "shall" to "must" where shown in bold, as follows:

> "583.340. Computation of time
>
> 583.340. 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:
>
> (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." (Bold added.)
>
> (AA 78)

No other changes were made to [proposed] Section 583.340, which was then added into law by Statutes 1984, Chapter 1705, §5, Senate Bill 1366 (Keene).

It should be noted that section 583.340(b) uses the term, "prosecution," in connection with stay orders while CRC 3.515 uses the term, "proceedings." The legislative history for section 583.340(b) confirms that this is a difference without distinction. In this regard, when the California Law Revision Commission was drafting the statute which could become C.C.P. §583.340(b), its staff prepared a report which states in pertinent part:

> "The proposed law expressly recognizes an excuse for delay caused by a stay or injunction of **proceedings** and by litigation over the validity of service, as well as delay caused by the impossibility, impracticability, or futility of timely prosecution for other reasons." (Bold added.)
>
> (CLRC Staff Draft Tentative Recommendation relating to Dismissal for Lack of Prosecution (5/82); ARA 85.)

Again, in September 1982, the CLRC's staff prepared a report which states in relevant part:

> "Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or futile. Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties. Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three year service statute. The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of **proceedings** and by litigation over the validity of service. Under the proposed law the excuse of impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and liberally construed as applied to the bringing to trial requirement in recognition of the fact that service is ordinarily within the plaintiff's control (particularly if the statutory limit is increased from three to four years) whereas bringing a case to trial frequently is hindered by causes beyond the plaintiff's control." (Bold added, underscore in original.)
>
> (CLRC Staff Draft Recommendation relating to Dismissal for Lack of Prosecution (9/9/82); 1 ARA 111.)

As each of the CLRC's recommendations confirm, the law which the CLRC proposed and the legislature adopted includes an excuse for delay caused by a stay of *proceedings.*

Further, during state Senate deliberations, the stay provisions of §583.340(b) were understood by the Senate to apply to "proceedings." This is reflected in the Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366 (as introduced), which states in relevant part:

> "3. Mandatory time for bringing action to trial
>
> This bill would establish a five year period in which an action would have to be brought to trial. If a new trial was granted in the action because they mistrial or an appeal, the trial would have to commence within three years after the order was entered.
>
> The parties would be allowed to extend that time by a written or oral stipulation. The time could also be extended for six months if the proceeding were stayed, bringing the trial [sic] to action [sic] was impossible, or if the jurisdiction of the court was suspended.
>
> In action would be dismissed by the court if it was not brought to trial within a time prescribed in this article." (Emphasis added.) (1 AA 41)

See also, Memorandum of the Senate Committee on Judiciary re: Senate Bill 1366 (as amended February 14, 1984) (1 AA 45), and Senate Republican Caucus analysis of SB 1366. (1 AA 48)

The terms, "proceedings," "proceeding" and "prosecution" were used interchangeably. This was natural and foreseeable since the words have analogous meanings in the context of civil litigation. To be sure, Black's Law Dictionary (Sixth Ed., St. Paul, Minn.,West Publishing Co. 1990) defines "prosecution" as it relates to civil litigation as follows:

> "Prosecution: . . . The term is also used respecting civil litigation, and includes every step in action, from its commencement to its final destination."

The term, "proceeding," is defined in Black's Law Dictionary (Sixth Ed., St. Paul, Minn.,West Publishing Co. 1990) as follows:

> "[The] [t]erm 'proceeding' may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. Rooney v. Vermont Investment Corp., 10 Cal.3d 351, 110 Cal.Rptr. 353, 365, 515 P.2d 297."

Black's definition not only cites this Court's decision in *Rooney*, but quotes it. *See*, 10 Cal.3d 351 at 367.

The legislative history confirms that no differential treatment was intended for stays imposed under C.C.P. §583.340(b) as contrasted with those imposed under CRC rule 3.515. Indeed, with knowledge of CRC 3.515, the proposed, and later adopted, statute could have easily been

modified by adding the qualifying word, "complete," to the term "stay" in subpart (b) of section 583.340[18]. But, this was not done and the statute does not state "complete stay." Rather, §583.340(b) simply excludes from the time computation, the periods during which prosecution "was stayed or enjoined."

It must be noted that any interpretation of §583.340(b) which conditioned exclusion of the time period upon the stay being 'complete' would cloud the statute with untenable confusion and uncertainty. What would constitute a 'complete' or 'entire' stay? Would a stay of discovery, pleading and motion activity qualify as a 'complete' or 'entire' stay? Would something more, or less, be needed? Would an order imposing a stay have to use the word 'complete, 'entire' or "absolute" to qualify under §583.340(b)? If a 'complete' or 'entire' stay was imposed, but review hearings or status conferences were held during the stay, would the stay no longer be deemed 'complete' or 'entire' within the meaning §583.340(b)?[19]

18

Or, it could have created such an anomaly by adding the word, "entire," to §583.340(b) so that the statute would read, "Prosecution or trial of the *entire* action was stayed or enjoined." This was not done, however. Section 583.340(b) does not contain the words "complete" or "entire." The absence of these conditional terms ensures that stay orders are given consistent effect.

19

This very issue exists in this case. In his dissenting opinion, Justice Turner

What minimal actions or events would change the characterization of a stay from 'complete' or 'entire' to 'non-complete' or 'partial'? Any construction of section 583.340(b) which required the stay of prosecution to be "complete" would lay a minefield, one which would snare the cautious, vigilant and diligent, as well as the cavalier.

In *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, the court rejected a defendant's attempt to breathe uncertainty into C.C.P. §583.340(b). Citing to the statute's legislative history, the court admonished:

> "Code of Civil Procedure section 583.340, subdivision (b), provides that the five-year period 'shall be' tolled if '[p]rosecution or trial of the action was stayed or enjoined.' The statute is unconditional and is intended to have uniform application. ' 'This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.' (17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.) It also is consistent with the general policy favoring trial over dismissal. (§ 583.130.)" [Citation omitted.]"[20] (Emphasis added.) 15 Cal.App.4th 1762 at 1774

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mistakenly cites activities such as status conference hearings as evidence that Judge McCoy's August 2004 stay of discovery, motion and pleading practice had been lifted. (172 Cal.App.4th 488, 512.)

20

ECX ignores the legislature's expressed goals (intent) of imbuing the statutory excuse with certainty and facilitating judicial economy by minimizing the need for hearings. At pages 27-28 of its brief, ECX states,

> "Of the three tolling exceptions, however, only the one for

The court in *Ocean Services Corp.* further instructed,

> "Tolling is automatic and not subject to a 'reasonable diligence' restriction."
>
> 15 Cal.App.4th 1762, 1775

A "stay" means a "stay" under §583.340(b). There is no hair splitting under the statute. All stays of prosecution - partial and complete -

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> impossibility, impracticability, or futility requires the plaintiff to prove reasonable diligence. . .Tolling for a stay of prosecution, by contrast, 'is automatic and not subject to a 'reasonable diligence' restriction.' [citations omitted.] 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." (Italics in original.)

The third excuse of impossibility, impracticability and futility is a catch-all excuse, unlimited in range of potential circumstances yielding tolling. Because the circumstances of potential tolling under the catch-all excuse are unspecified, a hearing is necessary to ascertain whether tolling is warranted under the catch-all provision. By contrast, the first two excuses under section 583.340 are particularized/specified: the five-year period is tolled where jurisdiction is suspended, or prosecution/trial is stayed/enjoined. Having identified these specific, particularized events as circumstances yielding tolling, no hearing is necessary to ascertain applicability, thereby accomplishing the legislative goals of certainty, uniformity and economy. It should also be noted that differential treatment of partial and complete stays of prosecution would yield tolling anomalies under section 583.340(b) and CRC rule 3.515. (Supra at pp. 21-22.)

are excluded from the five-year time computation. The absence of hair splitting imbues the statute with uniformity, predictability, consistency and reliability. It is also logically and legally consistent with the stay provisions of CRC rule 3.515, thereby averting anomalous treatment of stays under the dismissal statutes.

The purpose of the five-year dismissal statute is to ensure that actions are diligently prosecuted. Section 583.340 adds flexibility to the dismissal statutes, ensuring fairness by excluding periods of time when certain events (*e.g.*, the court's jurisdiction has been suspended, and/or stays of prosecution have been imposed) have restricted or impaired a Plaintiff's case development and thus impeded her ability to pursue a trial within the statutorily specified deadline. CRC rule 3.515, which is integrated into C.C.P. §583.340, recognizes that stays of proceedings - whether partial or complete - impair and impede trial within the statutorily specified deadline. As such, the rule expressly excludes from the dismissal time computation, all periods of time during which any stays of prosecution - partial or complete - were in effect.

4. Defendants Misrepresent The Statute's Legislative History.

In its brief, ECX states:

> "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. When the Legislature amended the mandatory dismissal 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.) The Senate Republican Caucus Analysis made the same point. (Sen. Republican Caucus, Analysis of Sen. Bill No. 1366 (1983-1984 Reg. Sess.) p.2; 1AA 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." (ECX OBM 28-29)

ECX's statement approaches attempted fraud upon this Court. The cited legislative materials do not restrict the statute's stay provisions to complete stays of proceedings. The portion of the State Committee on Judiciary's analysis which is cited by ECX reads as follows:

> "3. Mandatory time for bringing action to trial
>
> This bill would establish a five year period in which an action would have to be brought to trial. If a new trial was granted in the action because of a mistrial or an appeal, the trial would have to commence within three years after the order was entered.
>
> The parties would be allowed to extend that time by written or oral stipulation. The time could also be extended for six months if the proceeding were stayed, if bringing the trial

> [sic] to action [sic] was impossible, or if the jurisdiction of the court was suspended.
>
> An action would be dismissed by the court if it was not brought to trial within a time prescribed in this article."
>
> (1 AA 45)

The analysis of the Senate Republican Caucus which is cited by ECX reads as follows:

> "Mandatory time for bringing action to trial
>
> This bill would establish a five year period in which an action would have to be brought to trial. If a new trial was granted in the action because of a mistrial or an appeal, the trial would have to commence within three years after the order was entered.
>
> The parties would be allowed to extend that time by written or oral stipulation. The time could also be extended for six months if the proceeding were stayed, if bringing the trial [sic] to action [sic] was impossible, or if the jurisdiction of the court was suspended.
>
> An action would be dismissed by the court if it was not brought to trial within a time prescribed in this article."
>
> (1 AA 48)

Contrary to ECX's assertion, the cited/quoted materials do not state that the statute's tolling provisions for stays only applies if the entirety of the action is stayed. Indeed, the cited materials contain no analysis or

summary of the intended scope of section 583.340(b).

The two cited excerpts of legislative history do not support ECX's conclusion. Their only relevance is that they provide additional confirmation that the terms, "prosecution," "proceeding" and "proceedings" were used interchangeably by the legislature.

5. Defendants Misstate The Court of Appeal's Decision.

In its brief, CSB states that the Court of Appeal "held that any stay is, as a matter of law, a stay of 'prosecution' that tolls the five-year statute." (CSB OBM 41) CSB then argues,

> "[T]he 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 and exception that will frequently swallow the public policy advanced by the five-year statute.
>
> * * *
>
> The Court of Appeal's new rule 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." (CSB OBM 41-42)

This is a straw argument. First, this action does not involve stays of singular events such as the production of a document or class of documents. Rather, broad stays of the elements of pretrial proceedings - discovery,

motion and pleading practice - were imposed:

Stay 1:	All "discovery, discovery issues and motions" are stayed. (3 AA 593:13)
Stay 2:	A total/complete stay of the action is imposed. (4 AA 823:17-20, 868)
Stay 3:	All discovery is stayed. (4 AA 824:4-7, and 873)
Stay 4:	"All hearings, orders, motions, discovery or other proceedings" are stayed under former Cal. Rule of Court rule 1514. (2 AA 359)
Stay 5:	Coordination is ordered and the action remains completely stayed pending appointment of coordination trial judge. (3 AA 579, 634-638, 641-646)
Stay 6:	All discovery, motion and pleading activity is stayed.[21] (4 AA 922:13-14)
Stay 7:	A complete stay of the action is imposed. (3 RT Q-39:24 - Q-40:10)

There is no disagreement in this action that the five-year period was tolled during the second, fourth, fifth and seventh stays of prosecution.

21

The discovery stay was subsequently lifted on July 11, 2006. (AA 670:10-11) The stay on motion and pleading activity was never lifted and remained in effect until this action was dismissed. (AA 580:20 - 581:2)

Rather, the parties' chief disagreement concerns whether the five-year period was tolled under section 583.340(b) during the other/remaining stays of prosecution. It is this question, under the circumstances of this action, to which the Court of Appeal's decision is primarily addressed.[22]

Second, the Court of Appeal did *not* hold that "any stay" is a stay of prosecution within the meaning of C.C.P. §583.340(b). Rather, the court held that a partial stay of an action is a stay of prosecution under section 583.340(b):

> [W]e hold 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), and therefore, the trial court erred in dismissing the action under section 583.360."
> 172 Cal.App.4th. 488, 492.

Later in its opinion, the Court of Appeal stated:

> "That a stay of certain types of proceedings within an action – a partial stay of an action – is a stay of prosecution under subdivision (b) of section 583.340, is consistent with the general policy favoring trial over dismissal for failure to prosecute an action."[23] 172 Cal.App.4th. 488, 499.

22

The Court of Appeals decision also addresses whether the five-year period was tolled during certain other time periods under section 583.340(c).

23

ECX partially quotes this statement, mischaracterizes it as the Court's "holding," criticizes it as "amorphous," and contends that it "creates uncertainty, rather than certainty, and leaves the trial courts without

Under the Court of Appeal's decision, partial stays of prosecution, *i.e.*, stays of the elements of pretrial proceedings - pleading, discovery and/or motion practice - constitute stays of prosecution within the meaning of section 583.340(b). CSB comprehends the court's ruling, but miscasts it to facilitate a straw argument.

a. Defendants' Unnecessary And Untenable 'Solution.'

After misstating the Court of Appeal's ruling and erecting a straw argument - that tolling during stays of singular events such as the production of a single document will undermine the dismissal statutes and stymie case management - CSB proposes a solution: that the trial courts be given discretion to (a) undertake a "fact-intensive inquiry dependent upon the totality of the circumstances of the case" to determine whether prosecution of the action was stayed (CSB OBM 41-42), and (b) weigh and 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." (*Id.*)

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guidance." (ECX OBM 30) The Court's actual holding - "we hold 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)" (172 Cal.App.4th. 488, 492) - is clear, concise, and makes certain that all stays of prosecution, partial and complete, toll the five-year period.

Although not expressly stated, CSB's clear intent is to have its proposals applied to both stays of singular events such as a stay of production of a single document, and to partial stays of prosecution (*i.e.*, stays of the elements of pretrial procedure - discovery, pleading and motion practice). CSB's proposals - that stay orders be intensively evaluated and weighed to determine whether tolling should be permitted - is in direct conflict with, and subverts, the legislature's asserted intent.

In that regard, the legislature intended the tolling provisions of section 583.340 to be unconditional, certain, and consistent in application. Citing the statute's legislative history, the court in *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762 stated:

> Code of Civil Procedure section 583.340, subdivision (b), provides that the five-year period 'shall be' tolled if '[p]rosecution or trial of the action was stayed or enjoined.' The statute is unconditional and is intended to have uniform application. ' 'This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.' (17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.)" (Emphasis added.) 15 Cal.App.4th 1762, 1774

The very purpose of CSB's proposal to undertake a "fact-intensive inquiry" would be to determine whether a court ordered partial stay of prosecution was sufficiently restrictive to be deemed a "stay" within the

meaning of §583.340(b). Subjective evaluations would determine which stays of prosecution tolled the five-year period and which did not. Rather than minimizing the need for a judicial hearings, CSB's proposal would require them, thus rendering nugatory, the legislative goal of judicial economy. More importantly, subjective determinations of the manner proposed by CSB would lay a minefield, stripping the statute of certainty, predictability and uniformity.

Reasonable minds frequently disagree on matters of degree, extent, magnitude and relative impact. CSB's proposal invites the problem of different courts reaching different conclusions, yielding non-uniform application to the tolling statute.

The resulting inconsistency and ensuing uncertainty wrought by CSB's first proposal would be compounded by its second proposal, *viz*, that partial stays of prosecution be weighed to determine whether, despite the stay, plaintiff had the capability to move her case forward toward final resolution. (CSB OBM 41-42) Subjective weighing of the relative impact of stays would strip the statute of uniformity and render tolling an individualized question, determined on a case-by-case basis. Not only would individualized case-by-case determinations foster inconsistency and uncertainty through differential determinations between different courts, the

very process of undertaking the determinations would subvert the legislative goal of minimizing " the need for a judicial hearing to ascertain whether or not the statutory period has run." 17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.

6. The Law Revision Commission's Comment.

The Law Revision Commission's Comment to C.C.P. §583.340(b), as presently constituted, states:

> "Subdivision (b) codifies existing case law. See, e.g., Marcus v. Superior Court, 75 Cal.App.3d 204, 141 Cal.Rptr.890 (1977)"

Defendants suggest that the comment reflects an intent to restrict the statute's tolling provisions to "complete" stays. (CSB OBM 34-36; ECX OBM 29) Any such suggestion is without merit.

The facts, circumstances and "law" of *Marcus* had no part in the contemplation or formulation of the proposed statute. When the Law Revision Commission prepared its initial statutory recommendation - its, "Staff Draft Tentative Recommendation relating to dismissal for Lack of Prosecution" - in May 1982 (ARA 76- 100), *Marcus* was not part of its formulation. The Commission's [initial] comment to subsection (b) of proposed §583.340 (then denominated §583.330) simply stated,

"Subdivision (b) codifies existing case law." ARA 96. *Marcus* was not mentioned in the Commission's comment. *Id.* Likewise, there was/is no discussion or mention of *Marcus* in any of the Commission's historical records/papers. *See*, 1 AA 2-121, and ARA 4-138.

When the Commission issued its next formulation - its, "Staff Draft Recommendation relating to dismissal for Lack of Prosecution" - on September 9, 1982 (ARA 101- 138), it made no mention of *Marcus*. ARA 126. The Commission's comment simply states, "Subdivision (b) codifies existing case law." *Id.*

Likewise, when the Law Revision Commission issued its September 27, 1982, "Recommendation relating to dismissal for Lack of Prosecution" (1 AA 89- 121) it made no reference to *Marcus*. *See*, AA 118. The Commission's comment simply states, "Subdivision (b) codifies existing case law." *Id.*

Marcus appears for the first time in a draft of the Commission's June 1983 "Revised Recommendation relating to dismissal for Lack of Prosecution." (1 AA 49-82.) Included among many handwritten interlineations is the handwritten insert, "See, e.g., Marcus v. Superior Court, 75 Cal.App.3d 204, 141 Cal.Rptr.890 (1977)" which appears after the Commission's longstanding comment, "Subdivision (b) codifies

existing case law."[24] AA 78. The handwritten interlineation stands bare, unaccompanied by any discussion in any of the Commission's historical records/papers. 1 AA 2-121, and ARA 4-138.

Marcus is cited in the 'final' comment as an example of case law, hence the "see, e.g." It is "an" example of case law, as distinguished from "the" case law. This is made clear by the absence of *any* discussion or contemplation of *Marcus* in the statute's legislative history. This silence is significant because it stands in stark contrast to the Commission's overt and direct consideration of specific case law in the formulation of the policies and provisions of the dismissal statutory schema. ARA 76-86, 101-112.

Marcus was not part of the decisional process; it was not discussed or contemplated and had no role in the formulation of the statute. Rather, *Marcus* appears in the statute's history as an eleventh hour, interlineated citation; a mere example of case law, rather than its intended or philosophical basis.

Section 583.340(b) is not a codification of the *Marcus* decision. *Marcus* involved a very specific and narrow set of circumstances: a stay

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This addition was carried over into subsequent drafts and is part of the Commission's "final" comment. (Cal. Law Revision Com. com., 16 West's Ann. Code Civ. Proc., 2009 Cumulative Pocket Part foll. § 583.340.)

pending the outcome of arbitration proceedings[25]. If §583.340(b) was a codification of the *Marcus* decision, then the only stays that would be excluded from the five-year dismissal computation would be those imposed during the pendency of an arbitration. Not even defendants have the temerity to declare that C.C.P. §583.340(b) is limited to arbitration-based stays.

B. Active Case Management.

In their effort to avert application of the tolling provisions of section 583.340, defendants contend that the stays that were issued on May 24, 2000, December 3, 2003, and August 2, 2004, were part of the trial court's "judicial management" of Plaintiff's action (ECX OBM 2), constitute "case management 'tools'" (ECX OBM 35) and are not subject to tolling.[26] (*Id.*)

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[25] The issue in *Marcus* was whether all parties to judicial proceeding were entitled to a stay under C.C.P. §1281.4, irrespective of whether they were a party to the arbitration agreement or not. The court held in the affirmative. After concluding that the provisions of §1281.4 are mandatory, it gave short shrift to a concern voiced by the plaintiff that the issuance of a stay pending arbitration would subject him to risk that the five-year period under C.C.P. §583(b) would expire. In dicta, the court stated that the five-year period could not run when a stay order was in effect because it was impossible or impracticable to proceed to trial. *Marcus*, 75 Cal.App.3d 204 at 212-213.

[26] By contrast, defendants do not include in their argument, the complete stays of prosecution that were imposed on June 2, 2002 (4 AA 823:17-20, 868), January 30, 2004 (2 AA 359), April 7, 2004 (3 AA 579, 634-638, 641-646), and January 25, 2007 (3 RT Q-39:24 - Q-40:10). Although these

Defendants argue that tolling during partial stays of prosecution cannot be 'permitted' because it would undermine what, according to defendants, is an essential judicial management technique for ensuring lawsuits are brought to speedy conclusion. (ECX OBM 3) Defendants' argument fails under examination.

Courts seek to achieve four things through active management of complex and coordinated lawsuits: expedite the case, keep costs reasonable, avert unnecessary burdens upon the court and litigants, and promote effective decision making. The need for active case management to achieve these goals yields the very definition of whether an action is "complex" under CRC rule 3.400(a).[27]

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stays were imposed in a complex action and were part of the trial court's case management, defendants tacitly admit that (a) these orders remained stay orders, despite being part of the court's judicial management of a complex action, and (b) as orders staying prosecution, their respective time periods must be excluded from the five-year computation under section 583.340(b).

An order staying some, or all, pretrial activities is a "stay of prosecution." An order staying prosecution remains such, irrespective of whether it is imposed during the course of judicial management of a complex or coordinated action. If the five-year statute is tolled in complex/coordinated actions during periods of compete stays of prosecution imposed during judicial management of the action, so too, must the period of any partial stay of prosecution be excluded from the five-year computation under section 583.340(b).

[27]Rule 3.400(a) provides,

"A 'complex case' is an action that requires exceptional judicial

Defendants' arguments focus on the first judicial goal of expediting resolution of cases, which defendants assert is consonant with the purpose of the five-year dismissal statute - to ensure cases are brought to timely resolution. Unquestionably, many case management orders have as their objective, the goal of expediting case resolution. However, courts also issue orders which are directed to the goals of containing costs, averting unnecessary burdens, and promoting effective decision making. Such orders can have the side-effect of impeding case development.[28]

Stays of prosecution are *not* judicial management tools which expedite case resolution. They restrict litigants from undertaking some, or all, pretrial activities and thus impede, or stop, case development, depending upon whether the stay of prosecution is partial or complete.[29]

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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."

[28] As with life, trade-offs are inevitable. The pursuit of one goal can compromise another. For example, the goal of keeping costs reasonable and/or avoiding unnecessary burden can be at odds with the goal of expediting case resolution. Each of these goals are important, yet can be antagonistic. Effective case management demands consideration and balancing of antagonistic goals.

[29] In its brief, ECX states, "Plaintiff has never shown that [stays of discovery during] judicial management had any effect other than to move the case efficiently and expeditiously forward." (EXC OBM 2) ECX is incorrect.

Stays of prosecution are a means by which a court can, under some circumstances, advance and promote the goals of cost containment and burden reduction/avoidance.[30] Thus, for example, the trial court attempted to facilitate the goal of economy by staying all discovery practice on December 3, 2003.[31] (4 AA 873)

Defendants seek to elevate the importance of partial stays of prosecution by depicting them as critical case management tools in complex

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Plaintiff has explained that the court's stays of discovery and discovery motions gravely impaired and retarded her ability to obtain key evidence needed for successful trial of her claims, thereby making it impracticable/futile for her to pursue a trial date.

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It is, however, a poor technique, reflective of poor case management. Cost containment and effective decision making flow from effective case management. The essence of effective case management is the prompt identification and resolution of issues. The Judicial Council's Deskbook on the Management of Complex Civil Litigation (Deskbook) states, [t]he sine qua non of the management of complex litigation rests on the definition of the issues in the litigation." (§2.20, p.2-18) The "Management Tip" to section 2.20 (Deskbook p.2-18), states,

> "Effective case management requires the definition and clarification of disputed issues and then the structuring of pretrial activities to narrow and resolve as many disputed issues as possible."

The primary techniques for identifying and narrowing issues are listed at section 2.41 (pp. 2-27 to 2-29) of the Deskbook. Conspicuously absent from the enumeration are stays of prosecution (partial or complete).

31

During a review hearing, the court stayed all discovery at the request of defendant FCI, which filed its petition for coordination that same day. Through its order, the court sought to contain costs pending determination of FCI's petition.

actions.[32] Toward this end, defendants cite to the Deskbook, particularly its suggestion that a court's notice of its initial case management conference include a stay of all discovery and motion activity pending further order of the court. (ECX OBM 34-35) Defendants proffer this suggestion as evidence that partial stays of prosecution are 'critical' case management tools. Defendants' attempted characterization withers under examination.

The pre-conference stay suggested in the Deskbook is merely to preserve the status quo pending the initial case management conference, is intended to be brief, and is to be lifted at the close of conference. This is made clear in *California Judges Benchbook: Civil Proceedings – Discovery*, "Management of Discovery" §8B.4, p.142 (Supp. 2008) [quoting from the Judicial Council's Deskbook], which states in pertinent part:

> "Some plaintiff attorneys in complex civil cases attempt to get a quick start on very early discovery, depositions, document requests, and so on, usually in the minimum time allowed by statute. The reverse side of the priority discovery issue is that some defense attorneys request a total stay on all discovery.

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CSB goes so far to say that partial stays of prosecution are "likely the best means for managing complex and coordinated lawsuits." (CSB OBM 20) By hyping the significance and role of partial stays of prosecution and predicting grave consequence to case management in complex litigation if the legislative mandate of tolling is not countermanded, defendants hope to incite this Court to act as a super-legislature.

> The defense will often request a total stay until al pleadings are resolved, which in many situations involve months of delay.
>
> 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 (see section 21.21 of this deskbook)."

Stay orders are regarded as "special procedures" in the management of complex actions, as made clear at section 2.22 (p.2-19) of the Deskbook, which states in pertinent part:

> "The court may also sua sponte or, after consultation with counsel, initiate special procedures at the outset of the case, pending the initial conference, such as the following:
>
> * * *
>
> • Preclude or suspend discovery requests and responses until after the initial conference, except as permitted by order of the court in exceptional circumstances." (Emphasis added.)

In their effort to depict partial stays of prosecution as critical case management tools, defendants point to "staging" of discovery. For example, EXC states,

> "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.' [Citations omitted.]" (ECX OBM 35)

CSB likewise argues,

> "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." (CSB OBM 20)

The Deskbook describes "staging" as prioritization of discovery:

> "The court should consider staging discovery to facilitate early resolution of legal issues. Counsel should be pressed to identify the discovery necessary to support a summary judgment or summary adjudication motion on a key issue. That discovery can then be given priority, perhaps eliminating the need for certain other discovery." (Emphasis added.) (Judicial Council of Cal., Deskbook on the Management of Complex Civil Litigation §2.40, p. 2-27.)

"Staging" of discovery involves identifying and prioritizing for resolution, the key issues in the litigation, defining the discovery needed to resolve/address those identified/prioritized issues, and conducting discovery in accordance with the prioritization. A stay is not imposed; rather, discovery simply proceeds according to prioritization. Thus, for example, the parties may be directed (ordered) to first undertake discovery on the issue of standing or statute of limitations before engaging discovery on broader issues. Likewise, the court may sequence discovery by requiring document exchange/inspection before depositions. The method, manner and extent to which the court manages/sequences discovery is virtually limitless in possibility.

It is, of course, *possible* to "stage" discovery through the use of partial stays, as defendants contend. But, the use of stays to do so is unnecessary; trial courts are amply able to prioritize, time and direct discovery, *i.e*, stage discovery, without use/imposition of stay orders.[33]

"Phasing," "sequencing," "staging" and "prioritizing" – four different words which mean the same thing in the management of civil litigation. None of them require the imposition of stays.

The Court might find it helpful to know that the Deskbook lists the variety of oft-used techniques for managing complex litigation (*i.e.*, identifying, defining and narrowing issues). (§2.41, pp.2-27 to 2-29) None involve the use of stays. Against this backdrop, it simply is not true that partial stays of prosecution are essential or indispensable case management tools. It is *an* approach to staging; nothing more.

1. The Requirements of Rule 3.700 Are Met Through Tolling.

Defendants argue that tolling during periods of partial stays of prosecution in complex/coordinated actions is inimical to the purpose of

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[33] Use of partial stays is but one approach to staging. Countless approaches exist, all of which accomplish the same objective. If tolling becomes a concern, it can easily be averted through use of a non-stay approach to staging/sequencing.

active judicial management, which, according to defendants, is to expedite case resolution. A stay of prosecution, whether partial or complete, is itself, inimical to the goal of expediting case resolution because it impedes case development. Although stays of prosecution, impede case development, they can, as noted above, advance other goals such as cost containment and burden reduction/avoidance. These goals are not inimical to judicial management of complex or coordinated actions; rather, they are consonant with them.[34]

Tolling during periods of stays of prosecution, partial or complete, is consistent with the mandate of CRC rule 3.700 which requires that case management rules be "applied in a fair, practical, and flexible manner so as to achieve the ends of justice." These virtues - fairness, practicality and flexibility - dovetail the very purpose of the tolling statute, which is to add flexibility to the mandatory dismissal statute, thereby ensuring fairness, such that the ends of justice are served.

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[34] The goals of cost containment and undue burden avoidance are included in the objectives of case management in complex actions. CRC rule 3.400(a). Although stays can advance these two goals, better techniques are available to trial courts.

2. Neither The Complex Civil Litigation Task Force Nor The Judicial Council Regard Tolling As Inimical To Complex Civil Litigation Case Management.

The Judicial Council has published a fact sheet - entitled, "Complex Civil Litigation Program" - which describes this state's efforts to manage complex civil litigation actions more effectively and efficiently.[35] The fact sheet is noteworthy in that it states:

> "In response to the recommendations of the Business Court Study Task Force, Chief Justice Ronald M. George appointed the Complex Civil Litigation Task Force and charged it with identifying ways for trial courts to manage complex cases more efficiently and effectively. In October 1999, after extensive study, the task force recommended, and the Judicial Council approved:
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> * * *
>
> • Adopting new California Rules of Court, effective January 1, 2000, including a rule that defines a complex case as one requiring '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' (Cal. Rules of Court, rule 3.400(a));
>
> • Amending relevant rules and seeking conforming legislation" (Emphasis added.)

In accordance with the Judicial Council's directive, the task force's

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35 The fact sheet can be found at www.courtinfo.ca.gov/reference/factsheets.htm.

recommendations were implemented, including the addition of several rules of court. See, e.g., rules 3.400-3.403 and 3.502. Despite "extensive study," no amendment was sought, recommended or made to CRC rule 3.515, including subdivisions (h) and (j) of that rule. Despite "extensive study," no amendment was sought or made to *any* rules regarding the use, effect or consequence of stays of prosecution (partial or complete). And, despite "extensive study," no amendment was sought, or made, to the tolling provisions of C.C.P. §583.340, as applied to complex actions.

Tolling during periods of stays of prosecution, whether partial or complete, are not inimical to the purpose or goals of active case management in complex civil actions. If it was, the Complex Civil Litigation Task Force and the Judicial Council would have recommended and implemented, amendments to the rules of court and, conforming legislation would have pursued.

3. Nothing Exempts Complex Civil Litigation From The Tolling Provisions of §583.340.

Nothing in the Code of Civil Procedure, the California Rules of Court, or case law exempts from the tolling provisions of section 583.340, orders issued under active case management of complex/coordinated civil actions. If in the course of actively managing a complex or coordinated

action a stay of prosecution is imposed, the mandatory provisions of section 583.340(b) require exclusion of the time period during which the stay was in effect.[36]

Likewise, if judicial action makes it impossible, impracticable or futile to bring the action to trial, the time period of the impediment is required to be excluded from the five-year dismissal computation under section 583.340(c), irrespective of whether the action was taken in the course of active case management.

The tolling provisions of the statute are unconditional. *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, 1774. A stay of prosecution is a stay of prosecution under C.C.P. §583.340(b), irrespective of whether or not it was imposed in the course of active case management. To hold otherwise - to give differential treatment to stays of prosecution depending upon whether they were, or were not, issued in the course of active case management - would be to render the statute's tolling provisions conditional and situationally dependent.[37]

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The Court of Appeal so held in its opinion. 172 Cal.App.4th 488, 503.

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Denial of tolling due to 'active case management' would (i) nullify the certainty of excuse sought by the legislature through amendment of the dismissal statutes, (ii) invite injustice by depriving plaintiffs of the statute's

As detailed in the following section, stays of prosecution were imposed on May 24, 2000, December 3, 2003, August 2, 2004, and January 25, 20007. Under the unconditional provisions of section 583.340(b), the period during which each of these stays of prosecution was imposed must be excluded from the five-year computation.

C. The Court of Appeal Correctly Determined That Time Remains Within The Statutorily Specified Five-Year Period to Bring This Action to Trial.

Seven stays of prosecution were imposed in this lawsuit. There were also multiple periods of time during which it was impossible, impracticable or futile to bring this lawsuit to trial. Under section 583.340, the trial court was required to exclude/omit each and all of these time periods from its five-year computation. However, the trial court excluded only three time periods from its computation.[38] In doing so, the trial erroneously concluded

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protections/excuses in complex or coordinated actions, and (iii) elevate dismissal over trial on the merits as the preferred policy of this state.

[38] The trial court properly excluded the 495-day period between June 13, 2002 and October 21, 2003, during which a complete stay of prosecution was imposed (AA. 964), and the 97-day period between January 30, 2004, and May 6, 2004, during which proceedings were stayed pending coordination of the *Bruns* lawsuit with other TCPA actions (*Id.*). The trial court also excluded a 15-day period between August 2, 2004 and August 17, 2004 (*Id.*); however, the trial court erred regarding the length of the tolling period as explained at pages 70-72 of this brief.

that Plaintiff had exceeded the five-year period for bringing her action to trial.

The Court of Appeal properly determined that when the following time-exclusion periods are subtracted from five-year computation, this action remains timely, *i.e.*, time remains within the statutorily specified five-year period to bring this action to trial.[39]

1. The 49-day Period Between 5/24/00 And 7/12/00.

A stay of "all discovery, discovery issues and motions" was imposed in this action on May 24, 2000.[40] (3 AA 593:13) The trial court's dismissal order asserts that the stay ended on June 16, 2000.[41] (4 AA 942) This assertion is based upon the minute order for the May 24 hearing which states that discovery is ordered stayed until entry of a CMO. (*Id.*) A CMO was entered on June 16, 2000. The May 24 minute order is, however, only the starting point to the issue of when the stay was lifted. Other facts

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39 These time periods are in addition to, and supplement, those discussed at pages 83-90 and 96-102 of this brief.

40 In accordance with the stay order, no discovery or discovery motion practice could be, or was, initiated during this period.

41 The Court of Appeal likewise regards June 16, 2000 as the date the stay was lifted. (172 Cal.App.4th 488, 500)

require a different conclusion.

First, in contrast to the language of the May 24 minute order, the notice of ruling for the May 24 hearing, which ECX prepared,[42] states:

> "All discovery, discovery issues and motions are stayed pending further order of the Court." (3 AA 593:13)

CSB likewise believed, and took the position during litigation that, "discovery is stayed pending further order of the Court." (3 AA 753)

Second, on June 16, 2000, the trial court simultaneously entered a CMO and, based upon, and in accordance with, the May 24 stay order, vacated two additional discovery motions which were set for hearing on June 21, 2000. (4 AA. 822:4-7, 844) The fact that the May 24 stay order provided the basis upon which two further discovery motions were vacated confirms that the stay order survived entry of the CMO. Indeed, the May 24 stay could not simultaneously end on June 16 and be applied on June 16 to discovery motions which were set for hearing at a later date. The trial court's actions on June 16 confirm its intent to maintain/continue the stay post-CMO entry.

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Defendants cannot now be heard to contend to the contrary, *i.e.*, that the stay was limited in time to entry of a CMO. To permit such would endorse gamesmanship by allowing them to blow hot and cold on the facts.

Third, on July 12, 2000, the trial court ordered that all discovery which had been propounded by Plaintiff prior to the stay would have to be re-served, if Plaintiff felt such discovery was "necessary or advisable." (4 AA 822:8-11, 837:15-18) Although accomplished in a backhanded manner, the July 12, 2000 order restored Plaintiff's right to propound discovery. By restoring this right, the May 24 stay was lifted.

Against this factual backdrop, the length of the stay has been miscalculated as 23 days rather than 49 days.

a. Exclusion of time under C.C.P. §583.340(b).

In its order dismissing this lawsuit, the trial court acknowledged that a stay was imposed on May 24, 2000. However, the court declined to exclude the period from its five-year computation stating:

> "Despite the discovery stay being in effect from May 24, 2000 to June 16, 2000, it was not impossible, impracticable or futile, to progress toward bringing this action to trial pursuant to section 583.340(c). Significant litigation activity occurred during this period, as reflected in the record. For example, on May 31, 2000, Plaintiff prepared and sent a proposed Joint Evaluation Conference Statement to Defendants for review (ECX Supplemental Brief, Notice of Lodgment, Exh. F), a revised version of which was filed on June 9, 2000. (*Id.*, Exh. G.) On June 2, 2000, Plaintiff filed her Second Amended Complaint. (*Id.*, Exh. D.) On June 14, 2000, Defendants ECX, Flagstar, and Fax.com, Inc. filed a Demurrer and Motion to Strike portions of Plaintiff's Second Amended Complaint. (*Id.*, Exhs. H, H1.) Defendants CSB Partnership and Defendant Clayton Shurley's Texas BBQ filed Joinders to

> the Demurrer and Motion to Strike portions of Plaintiff's Second Amended Complaint on June 15, 2000 and June 16, 2000, respectively. (*Id.*, Exhs. I, I1, J, J1.)
>
> Therefore, the discovery stay imposed by Judge McDonald on May 24, 2000 and lifted on June 16, 2000 did not serve to toll the five-year statutory period." (Emphasis added.) (4 AA 953-954)

As the underscored language makes clear, the trial court improperly commingled the provisions of section 583.340(b) with those of section 583.340(c) and misapplied the provisions of section 583.340(c) to deny exclusion of the time period under section 583.340(b).

(1) The provisions of §583.340(b) are independent of those of §583.340(c).

Code of Civil Procedure §583.340 states:

> "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:
>
> (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." (Emphasis added.)

As the underscored language indicates, the period during which '*any*' of the three enumerated conditions/situations existed must be excluded from the dismissal time computation. As written, each condition

is independent of the other. Indeed, rather than ending each of the listed conditions with a comma and the word "and," subparagraphs (a), (b), and (c) end with a period.

(2) The provisions of §583.340(b) are applicable to the May 24, 2000 stay order.

As detailed, above, the Court of Appeal correctly concluded that a 'stay' means a 'stay' under §583.340(b). There is no hair splitting under the statute; all stays of prosecution - complete and otherwise - are excluded from the five-year computation. Having correctly made this determination, the Court of Appeal excluded from the dismissal computation, the time period during which it believed the first stay of prosecution was in effect:

> "Because a discovery stay is a stay of prosecution under section 583.340, subdivision (b), the trial court should have excluded the 23 days from May 24, 2000, to June 16, 2000, from the five-year period within which plaintiff was to bring her action to trial." 172 Cal.App.4th 488, 500.

Although the ultimate conclusion of the Court of Appeal is correct - that the period during which the first stay of prosecution was in effect must be excluded from the five-year computation - the length of the stay was miscalculated, as explained at length, above, and is 49 days, rather than 23.

In its quest to avert tolling, ECX states that this stay was part of trial

court's active case management and was "intended to promote the action's prosecution and did not stop plaintiff from pursuing her action." (ECX OBM 36) ECX's statement ignores the fact that there was no case management order in this action until June 16, 2000 (2 RA 0280), and, this action was deemed "complex" until July 12, 2000. (4 AA 837, ¶6) An order can't be part of a trial court's active case management of a complex action where the action has not yet been designated complex or a case management order has not been entered.

Further, as detailed more fully at pages 91 to 94 of this brief, rather than promoting this action's prosecution, the stay was imposed concurrent with the court's order eliminating Plaintiff's TCPA claim, and was based upon the mistaken belief that elimination of Plaintiff's TCPA cause of action rendered Plaintiff's discovery and discovery motions moot, and thus, was directed to the goal of 'economy.'

b. Exclusion of time under C.C.P. §583.340(c).

Exclusion of the 49-day period between May 24, 2000 and July 12, 2000 from the five-year dismissal time computation is not only mandated under section 583.340(b), but is also required under the independent provisions of section 583.340(c).

During this time period, Plaintiff was prevented from (i) propounding new discovery, (ii) seeking or obtaining responses to discovery she propounded before the stay, (iii) filing discovery motions, or (iv) obtaining rulings on discovery motions she had brought before the stay.

Discovery is arguably the most critical pre-trial prosecution activity. Without it, a plaintiff is deprived of evidence essential to the effective and successful trial of her action. Because the trial court's orders prevented Plaintiff from propounding *any* discovery or pursuing *any* discovery law and motion, the orders rendered it impossible, impracticable and futile for her to pursue a trial date or successfully try this action during this time period.[43]

c. The exclusions specified under §583.340 are mandatory.

The time exclusions enumerated in §583.340 are mandatory and unconditional. As stated in *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, 1774, the provisions of §583.340(b) are "unconditional and [are] intended to have uniform application."

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As discussed infra, the excuse of impossibility/impracticability does not require strict impossibility, which erroneous standard - actual impossibility - the trial court applied.

Further, as instructed in *Rose v. Scott* (1991) 233 Cal.App.3d 537, 543:

> "Section 583.340, subdivision (c) codifies the case law pertaining to the impossibility, impracticability or futility of bringing a case to trial within five years of filing the action. [Citations omitted.] The language of the statute is mandatory. Thus, under this subdivision, 'the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial.' [Citations omitted.]"

Under the mandatory provisions of §583.340(b), the 49-day period between May 24, 2000 and July 12, 2000 during which there was a partial stay of prosecution must be excluded from the five-year dismissal time computation.

Alternatively, the 49-day period between May 24, 2000 and July 12, 2000 must be excluded from the five-year dismissal time computation under the mandatory, independent, provisions of §583.340(c), because the trial court's orders nullified Plaintiff's outstanding discovery and prevented her from re-propounding her discovery or propounding new discovery, thus rendering it impossible, impracticable and futile for her to pursue a trial date or successfully try this action during this time period.

2. The 43-day Period Between 12/3/03 And 1/15/04.

On December 3, 2003, a review hearing was held during which the trial court stayed all discovery. (4 AA 824:4-7, and 873) This partial stay of prosecution was lifted on January 15, 2004.[44] (4 AA 824:12-14, and 878)

In its order dismissing this lawsuit, the trial court acknowledged that a stay was imposed on December 3, 2003. But, the court declined to exclude the period from the five-year computation stating in relevant part:

> "On December 3, 2003, Judge Jameson ordered a discovery stay. (Tripi Decl. 1, Exh. 11, 12/03/03 Minute Order: 'All discovery is stayed,') On January 15, 2004, Judge Jameson lifted the discovery stay. (*Id.*, Exh. 12 at 2, 01/15/04 Minute Order: 'The Court lifted the discovery stay ....')
>
> Despite the discovery stay being in effect from December 3, 2003 to January 15, 2004, it was not impossible, impracticable or futile for Plaintiff to make progress toward bringing this action to trial pursuant to section 583.340(c)." (Emphasis added.) (4 AA 955)

The underscored language shows that the trial court improperly commingled the provisions of section 583.340, subdivision (b) with those of subdivision (c), and misapplied the provisions of subdivision (c) to deny

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No discovery could be, or was, initiated/undertaken during 43-day period because of the stay order.

exclusion of the time period under section 583.340(b).[45] Since the provisions of section 583.340(b) are both mandatory and independent of those of section 583.340(c), the trial court's failure to exclude this 43-day period from its five-year dismissal computation was an abuse of discretion.

a. Exclusion of time under C.C.P. §583.340(b).

Section 583.340(b) mandates that all periods during which there is a stay of prosecution be excluded from the five-year period. A formal, written stay of prosecution was imposed by the trial court during the period December 3, 2003 and January 15, 2004. (4 AA 873) Exclusion of this 43-day period from the five-year period is mandated by section 583.340(b). The Court of Appeal correctly recognized this, stating:

> "The trial court should have excluded the 43 days from December 3, 2003 to January 15, 2004, from the five-year period within which plaintiff was to bring her action to trial because, as we have held, a discovery stay is a stay of prosecution under section 583.340, subdivision (b)." 172 Cal.App.488, 500-501.

b. Exclusion of time under C.C.P. §583.340(c).

The trial court's order of December 3, 2003 prevented Plaintiff from

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45 An identical error was made by the court with regard to the stay orders of May 24, 2000, and August 2, 2004.

conducting *any* discovery during this 43-day period. By disabling Plaintiff from accumulating evidence needed to prove her claims, the trial court's order made it impracticable and futile for Plaintiff to pursue a trial date, and the denial of discovery rendered it impossible for her to successfully try this action.

This disability was judicially created and wholly beyond Plaintiff's control. The trial court's subsequent failure to exclude this 43-day period under the mandatory provisions of section 583.340(c), was an abuse of discretion.[46]

3. The 151-day Period Between 8/2/04 And 1/2/05.

On August 2, 2004, the first coordination trial judge, Judge McCoy, imposed the following stay of prosecution:

> "To facilitate the orderly conduct of this action, all discovery, motion and pleading activity is temporarily stayed pending further order of this court." (4 AA 922:13-14)

The trial court's dismissal order acknowledges the August 2 stay, but erroneously asserts that it ended on August 17, 2004:

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The Court of Appeal made no determination whether this time period is subject to exclusion under section 583.340, subdivision (c). (172 Cal.App.4th 505, fn. 13)

> "The court gave its 'further order' and the temporary stay was lifted when the court held its Initial Status Conference on August 17, 2004. (ECX Supplemental Brief, Notice of Lodgment, Exh. CCC, 08/17/04 Minute Order at 2: 'The Stay is lifted **for the sole purpose** of serving any unserved parties.') Therefore, only the period from August 2, 2004, the date of Judge McCoy's Initial Status Conference order temporarily staying proceedings, to August 17, 2004, the date of the Initial Status Conference when Judge McCoy lifted a temporary stay, comes to toll the five-year statutory period." (Underscore and bold added.) (4 AA 959)

As the highlighted language[47] makes clear, the entirety of the stay was not lifted; rather, the stay was *modified* for "the sole purpose" of permitting the litigants to serve any unserved parties. In all other respects, the stay remained in full force and effect.

The trial court's assertion that the entirety of the stay was lifted on August 17, 2004 ignores Judge McCoy's narrow, limiting language, "for the sole purpose." There would have been no reason to include this limiting language *if* the court's intent was to eliminate the stay. Indeed, if the court intended to remove the stay of prosecution, it would have simply said that the stay is lifted. The court didn't do this, however. Instead, it very narrowly modified its stay of prosecution to permit service of un-served parties.

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[47] This language comprises ¶5 of the August 17 minute order. (3 AA 663)

Further, the trial court's assertion ignores the provisions in the preceding paragraph - ¶4 - of Judge McCoy's minute order:

> "The Court sets October 22, 2004 at 1:45 p.m., in this department to hear any Motions Re Lifting Stay so as to Enforce Existing Judgment. Briefing shall be per Code." (3 AA 663)

There would have been no reason to include the provisions of paragraph 4 in the August 17 minute order *if* the court intended to eliminate the entirety of the stay in the next paragraph. Indeed, as of August 17, 2004, the stay provisions of Judge McCoy's August 2 Order were the only restrictions imposed upon the litigants. *If* the court's intent was to lift the entirety of those restrictions - the stay - then, the litigants would have been free to pursue enforcement of existing judgments. However, the fact that on August 17, 2004, Judge McCoy set a future date to hear motions to lift the stay for the limited purpose of judgement enforcement, renders manifest, the court's intent to maintain and continue the stay from and after August 17, 2004.

With the exception of the referenced modifications, the August 2, 2004 stay order remained in effect throughout Judge McCoy's tenure as

coordination trial judge in the coordinated TCPA Cases.[48] Judge McCoy's last day as coordination trial judge in this litigation was January 2, 2005. (2 AA 383)

a. Exclusion of the 151-day period between 8/2/04 and 1/2/05 was required under C.C.P. §583.340(b).

Section 583.340(b) mandates exclusion of the time period during which Judge McCoy's stay order was in effect. As noted above, exclusion is mandatory under the statute. The trial court conceded this in its dismissal order, but erred in its determination of the length of time which must be excluded from the dismissal time computation:

> "Accordingly, the period between August 2, 2004 and August 17, 2004, or 15 days, should count to toll the five-year statutory period." (4 AA 959)

As detailed above, the stay was never rescinded during Judge McCoy's tenure as coordination trial judge in this litigation.[49] Of

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48 No new discovery was initiated/undertaken during this 151-day period due to Judge McCoy's stay order. On November 4, 2004, a discovery conference was held in which outstanding, unresolved pre-coordination, pre-stay discovery issues were addressed by the court. (1RA 0211, 2 RA 0533-0535) However, no 'new,' *i.e.*, post-coordination discovery was authorized, approved or initiated as a result of the conference.

49 Defendants can point to no order by which the stay was lifted.

consequence, the full 151-day period must be excluded from the five-year dismissal time computation under section 583.340(b).

The Court of Appeal concurred with this analysis and correctly held that this 151-day period must be excluded from the five-year period under section 583.340(b). (172 Cal.App.4th 488, 501-502)

b. Exclusion of time under C.C.P. §583.340(c).

The trial court's order of August 2, 2004 prevented Plaintiff from performing critical pretrial activities such as pleading activity and propounding/conducting new discovery. Under section 583.340(c), the 151-day period between 8/2/04 and 1/2/05 should have been excluded from the five-year computation because the denial of these pretrial activities stymied Plaintiff's case development, and rendered it impossible, impracticable and futile to pursue a trial date or bring this action to trial.

4. The 554-day Period Between 1/3/05 And 7/11/06, And Thereafter.

a. Overview.

The stay of discovery, motion and pleading activity which Judge McCoy imposed on August 2, 2004, remained in place when Judge Kuhl

inherited the coordinated TCPA Cases.[50] That portion of Judge McCoy's August 2 order which stayed discovery remained in effect until July 11, 2006, when it was lifted by Judge Kuhl. (3 AA 670:10-11) Judge McCoy's stay on motion and pleading activity was never lifted and remained in effect until the time this action was dismissed. 554 days elapsed between January 3, 2005 and July 11, 2006. Under section 583.340(b), this 554-day period must be excluded from the computation of time within which this lawsuit must be brought to trial.[51]

b. The 56-day period between 1/3/05 and 2/28/05.

The transition of the coordinated TCPA Cases from Judge McCoy to Judge Kuhl rendered this lawsuit dormant during January and February 2005. Because Judge McCoy's stay of prosecution remained in place, no discovery could be, or was, propounded during January. Likewise, the stay precluded motion and pleading practice.[52] No conferences or hearings were

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50 Judge Kuhl was appointed coordination trial judge in the TCPA Cases effective January 3, 2005. (2 AA 383)

51 Further, each day after July 11, 2006 must be excluded from the five-year time calculation under §583.340(b), because the stay on motion and pleading activity was never lifted.

52 Judge Kuhl did not lift Judge McCoy's August 2 stay order during this 56-

held during this 56-day period.

The Court of Appeal correctly excluded this time period from the five-year dismissal computation in accordance with the mandatory provisions of section 583.340(b).

c. The 498-day period between 3/1/05 and 7/11/06.

Judge Kuhl took no affirmative action and kept the coordinated TCPA actions dormant until March 3, 2005, when she held her first hearing - a status conference. (1 RA 0212; 2 RT A-1 to A-58) During that hearing, Judge Kuhl granted 17 previously unresolved, pre-coordination, pre-stay discovery motions of Plaintiff Bruns.[53] (1RA 0212, 2 RA 0577-0579) Judge Kuhl did not lift the August 2 stay prior to, or at, the March 3 hearing. (*Id.*) No 'new,' *i.e.*, post-coordination, discovery was authorized, approved or initiated as a result of the hearing.

On March 8, 2005, Judge Kuhl next took action by holding a telephonic status conference. (3 RA 0584) Judge Kuhl did not lift the

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day period.

[53] Each of the motions was filed/served while Plaintiff's action was still pending in Orange County Superior Court, and long predated both coordination of the TCPA Cases, and Judge McCoy's August 2 stay order.

August 2, 2004 stay order during the telephonic conference. (1 RA 0213:2-9; 2 RT B-1 to B-27)

On April 15, 2005, the court next took action and held a status conference. (2 RT C-1 to C-38) Judge Kuhl did not lift Judge McCoy's August 2 stay during the telephonic conference. (*Id.*)

On April 20, 2005, Judge Kuhl next took action by entering a discovery order. (1 RA 0088-0108) The order required defendants to respond to limited, judicially specified (ordered) discovery. (1 RA 0091-0102) The trial court did not otherwise lift the discovery stay imposed on August 2, 2004. Indeed, the court's intent to maintain Judge McCoy's stay of discovery is manifest by Judge Kuhl's statement in the April 20 discovery order that, "[a]dditional discovery may be appropriate later in the litigation, after document and deposition discovery is substantially completed."[54]

On May 28, 2005, Judge Kuhl executed an order setting specified depositions. (3 RA 0668-0677) The trial court did not otherwise lift the discovery stay imposed on August 2, 2004, and the parties were not

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No reference is made to discovery or pleading practice in the April 20 order; nothing in the order lifts the stay on motion and pleading practice Judge McCoy imposed on August 2, 2004.

permitted to propound/conduct other discovery, and did not undertake other new discovery.

On February 15, 2006, Judge Kuhl modified the August 2, 2004 stay order to permit ECX to propound written discovery to Plaintiff. (1 RA 0222, 4 RA 1078) Later during this period, the August 2, 2004 stay was further modified to permit CSB to propound written discovery to Plaintiff.

With the exception of the enumerated modifications, discovery remained subject to Judge McCoy's August 2 stay order, until July 11, 2006, when the trial court "lifted the stay on discovery, and ordered that the parties may conduct open discovery." (3 AA 670:10-11) The remaining portion of the August 2, 2004 order which stayed motion and pleading activity was not lifted by the court, and remained in effect until dismissal of the action.[55] (*Id.*)

Defendants make much ado over the fact that during the stay period, there were hearings, conferences and litigation activity. Defendants point to this as 'proof' that Judge McCoy's stay order of August 2 was not in effect, and thus, argue that tolling under section 583.340 does not apply to this

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55 By operation of §583.340(b), this remaining period is also subject to tolling.

period.[56] Despite their sea of words, defendants cannot point to any order by which the stay of discovery was lifted prior to July 11, 2006. Likewise, defendants cannot point to any order which lifted the August 2, 2004 stay of motion and pleading practice. Defendants can't do this despite the fact that the transcripts for each court hearing are part of this appellate record as are the various orders issued by both Judge McCoy and Judge Kuhl.

The Court of Appeal correctly recognized that Judge McCoy's stay of prosecution remained in effect during this time period, despite the existence of litigation activity:

> "Although within the stay period, there was limited discovery, status conferences, and certain pleading-related activity, the fact remains that Judge McCoy's August 17, 2004, order lifted the stay for a limited purpose and respondents have not identified any subsequent order - apart from Judge Kuhl's July 11, 2006 order - that lifted the stay. The stay order prevented plaintiff from fully conducting all of the pretrial activities to which she was entitled. That certain activity

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Absent from defendants' lengthy arguments is recognition that there are three things a court can do relative to stay orders: (1) impose a stay; (2) lift a stay; and/or (3) modify a stay. Defendants can point to no order by which the August 2, 2004 stay of discovery was lifted before July 11, 2006. And, defendants can point to no order by which the August 2, 2004 stay of motion and pleading practice was ever lifted. Instead, defendants can point to orders by which Judge McCoy's stay order was modified. See, e.g., 3 AA 663) 'Modify' is not the same as 'eliminate.' Restrictions/limitations remain after a stay is modified. The same is not true when a stay is lifted - the impediment/restriction no longer exists.

> specifically authorized by the trial court occurred, does not alter that fact. Thus, 'prosecution . . . of the action was stayed.' (§583.340.)" 172 Cal.App.4th 488, 502-503.

The Court of Appeal got it right. Judge McCoy's stay of prosecution remained during this time period and prevented Plaintiff from conducting all of the pretrial activities to which she was entitled. Under the mandatory provisions of section 583.340(b), this time period must be excluded from the calculation of time within which this lawsuit must be brought to trial.

d. The 152-day period between 1/25/07 and 6/26/07.

On January 25, 2007, the trial court imposed the seventh stay in this lawsuit. On that date, the court completely stayed this lawsuit. (RT Q-39:24 - Q-40:10) The stay remained in effect until June 26, 2007, when the final judgment on Plaintiff's claims was entered. (4 AA 968-973)

Under the mandatory provisions of section 583.340(b), the 152-day period between January 25, 2007 and June 26, 2007 must be excluded from the five-year time computation.

D. The Court of Appeal Correctly Applied The Abuse of Discretion Standard of Review.

1. Introduction.

In computing the time during which an action must be brought to

trial, the time during which it was impossible, impracticable, or futile to bring the action to trial must be excluded from the five-year time computation. This is mandated by *Code of Civil Procedure* §583.340(c).

Plaintiff asserts that there were periods of time during which it was impossible, impracticable or futile to bring her lawsuit to trial, which, by operation of section 583.340(c), were required to exclude/omit from the five-year dismissal computation. Plaintiff contends that the trial court abused its discretion by failing to omit these time periods from its five-year computation.

The Court of Appeal agreed with Plaintiff and held that the trial court abused its discretion by failing to exclude (a) the 76-day period between March 9, 2000 and May 24, 2000, and (b) the 67-day period between May 21, 2004 and August 2, 2004, from the five-year dismissal computation. Through this appeal, defendants seek review of this determination.

2. The Abuse of Discretion Standard of Review.

In *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394, the abuse of discretion standard of review was summarized as follows:

> "It is often said that a trial court's exercise of discretion will be reversed only if its decision is 'beyond the bounds of

> reason.' [Citation omitted.] This description of the standard is complete, however, only if 'beyond the bounds of reason' is understood as something in addition to simply 'irrational' or 'illogical.' While an irrational decision would usually constitute an abuse of discretion, the legal standard of review encompasses more than that: 'The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action ....' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion.' [Citation omitted.] For example, a court could be mistaken about the scope of its discretion and the mistake could be entirely 'reasonable'--that is, it adopts a position about which reasonable judges could differ. But a reasoned decision based on the reasonable view of the scope of discretion is still an abuse of judicial discretion when it starts from a mistaken premise, even though nothing about the exercise of discretion is, in ordinary-language use of the phrase, 'beyond the bounds of reason.' [Citation reference omitted.] In other words, judicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion. [Citations omitted.]" (Emphasis added.)

Here, the principles of law upon which the trial court's discretion rested are embodied in section 583.340(c). At issue is the construction of the statute and its application to the facts of this case.

The Court of Appeal abundantly understood the task before it, stating:

> "'In reviewing the lower court's dismissal of [an] action for failure to prosecute, the burden is on appellant to establish an abuse of discretion. [Citation.] We will not substitute our opinion for that of the trial court unless a clear case of abuse is shown and unless there is a miscarriage of justice. [Citation.]' [Citation.]" [Citation omitted.] The incorrect

> interpretation of the application of a statute is an abuse of discretion. [Citation omitted.]" *Bruns*, 172 Cal.App.4th 488, 496-497

The Court of Appeal also had a firm grasp of the dismissal statutes, stating:

> "The plaintiff has the burden of proving that it was impossible, impracticable, or futile to bring an action to trial within the five-year period in sections 583.310 and 583.360. [Citation omitted.] The impossibility, impracticability, and futility exceptions to the five-year dismissal statute "must be interpreted liberally, consistent with the policy favoring trial on the merits." [Citation omitted.] '[T]he critical factor in applying these exceptions is whether the plaintiff exercised reasonable diligence in prosecuting her case. Thus, the five-year dismissal statute may not be applied if plaintiff is unable to bring her suit to trial due to causes beyond her control, nor should it penalize conduct that is entirely reasonable.' [Citation omitted.]; Sanchez v. City of Los Angeles (2003) 109 Cal.App.4th 1262, 1273 ["For the tolling provision of section 583.340 to apply, there must be 'a period of impossibility, impracticability or futility, over which plaintiff had no control . . . .'"].)
> "The determination whether it was 'impossible, impracticable, or futile' to bring a case to trial within a given time period 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. [Citation.]" [Citation omitted.] An action is not tolled for delays that a plaintiff, with reasonable diligence, might have avoided. [Citation omitted.]" *Bruns*, 172 Cal.App.4th 488 at 504

With these principles in mind, the Court of Appeal then considered, and correctly concluded, that the trial court had abused its discretion by failing to exclude two time periods totaling 143 days from its five-year

dismissal computation due to impossibility, impracticability or futility.

a. The 76-day Period Between March 9, 2000 And May 24, 2000.

Plaintiff commenced discovery at the first moment permitted under the Code of Civil Procedure. On March 9, 2000, she propounded document inspection demands, special interrogatories, requests for admission and form interrogatories to Defendant-Respondent Clayton Shurley's Texas BBQ (CSTB). (4 AA 822:14-17, and 846-853) On March 11, 2000, she propounded document inspection demands, special interrogatories, requests for admission and form interrogatories to Defendant-Respondent Flagstar Bank (Flagstar). (4 AA 822:17-20, and 855-862) On March 24, 2000, she propounded further inspection demands to CSTB and Flagstar. (4 AA 822:20-22, and 864-866) Plaintiff's discovery was stonewalled, forcing her to seek judicial intervention. On April 26, 2000, Plaintiff filed/served five motions to compel responses to her discovery. (4 AA 821:23-24) Each of the motions were set for hearing on May 24, 2000. (*Id.*) On April 28, 2000, Plaintiff filed/served three more motions to compel responses to her discovery requests. (4 AA 821:24-26) These motions were also set for hearing on May 24, 2000. (*Id.*) On May 12, 2000, Plaintiff filed/served two motions to compel responses to her discovery. (4 AA 821:26-p.822:2) These motions were set for hearing on June 21, 2000. (*Id.*)

On May 24, 2000, the trial court stayed "all discovery, discovery issues and motions in this lawsuit." (3 AA 593:13) The court also refused to hear, and vacated, the eight discovery motions which were set for hearing that day - May 24. (3 AA 815, and 4 AA 821:18-822:7) On June 16, 2000, pursuant to the May 24, 2000 stay order, the court vacated the two remaining discovery motions which were set for hearing on June 21, 2000. (4 AA 822:4-7, and 844) On July 12, 2000, the court reiterated that all previous discovery motions remained vacated and moot, and the court ordered that all of Plaintiff's prior discovery would have to be re-served if Plaintiff felt such discovery was "necessary or advisable." (4 AA 822:8-11, and 837:15-18)

Defendants' position is that, by vacating Plaintiff's discovery and discovery motions and requiring her to re-serve her discovery, the trial court acted within its discretion to manage this action and that case management does not toll the five-year dismissal rule. Defendant CSB then takes it a step further, stating:

> "With regard 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." (CSB OBM 49-50)

This is a false argument. Plaintiff has not complained about unfavorable/erroneous rulings. And, Plaintiff has never disputed that Judge McDonald acted within the ambit of his authority/discretion by imposing a discovery stay, refusing to hear and vacating Plaintiff's ten discovery motions, and voiding and forcing Plaintiff to re-propound her discovery. The issue has been, and remains, whether Judge McDonald's actions rendered it impossible, impracticable or futile to bring this action to trial during this 76-day period.

The trial court's Opinion and Order states:

> "Despite the discovery stay being in effect from May 24, 2000 to June 16, 2000, it was not impossible, impracticable or futile, to progress toward bringing this action to trial pursuant to section 583.340(c). Significant litigation activity occurred during this period, as reflected in the record. For example, on May 31, 2000, Plaintiff prepared and sent a proposed Joint Evaluation Conference Statement to Defendants for review (ECX Supplemental Brief, Notice of Lodgment, Exh. F), a revised version of which was filed on June 9, 2000. (*Id.*, Exh. G.) On June 2, 2000, Plaintiff filed her Second Amended Complaint. (*Id.*, Exh. D.) On June 14, 2000, Defendants ECX, Flagstar, and Fax.com, Inc. filed a Demurrer and Motion to Strike portions of Plaintiff's Second Amended Complaint. (*Id.*, Exhs. H, H1.) Defendants CSB Partnership and Defendant Clayton Shurley's Texas BBQ filed Joinders to the Demurrer and Motion to Strike portions of Plaintiff's Second Amended Complaint on June 15, 2000 and June 16, 2000, respectively. (*Id.*, Exhs. I, I1, J, J1.)

> Therefore, the discovery stay imposed by Judge McDonald on May 24, 2000 and lifted on June 16, 2000 did not serve to toll the five-year statutory period.
> In her Supplemental Brief, Plaintiff newly asserts that Stay No. 1 should actually toll the five-year statutory period starting from March 9, 2000, because the discovery stay coupled with the court's vacating Plaintiff's discovery motions forced Plaintiff to re-propound her discovery and rendered it impossible impracticable and futile for Plaintiff to proceed to trial during this lengthier time period. (Plaintiff's supplemental Brief, 2:3; Tripi Decl. 2, ¶11.) This new argument, however, is not convincing given the analysis above. This period, regardless of when Plaintiff claims it started, does not toll the five-year statutory period." (Emphasis added.) (4 AA 953-954)

Because other litigation activity had occurred during this 76-day time period, the trial court concluded that Judge McDonald's orders had not rendered it impossible, impracticable or futile to proceed to trial. As such, the court denied tolling during this period.

The trial court's interpretation of section 583.340(c) is fundamentally incorrect. The "impossibility, impracticability and futility" standard is *not* equated with strict impossibility. *Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 552. Rather, the statutorily codified exception relates to whether it was unreasonable or unduly difficult to proceed to trial. *Id.* Thus, the issue wasn't whether any litigation activity had occurred during this time period; Judge McDonald's orders did not need to inhibit or prevent *all* litigation activity since section 583.340(c) does not require strict

impossibility. Rather, the pertinent inquiries were whether Judge McDonald's orders hindered Plaintiff's prosecution and made it unduly difficult for her to proceed to trial, and whether Plaintiff had been diligent.[57]

By nullifying Plaintiff's discovery, vacating her ten discovery motions, and by forcing Plaintiff to re-propound her discovery[58], the trial court negated Plaintiff's efforts to obtain evidence critically essential to the development, prosecution and trial of her representative and class action claims, and thus made it impracticable and futile for Plaintiff to pursue a trial date or successfully try this action during this time period.[59]

In this regard, Plaintiff generally possesses the evidence needed to prove her individual claims arising from the unlawful fax transmission of

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The trial court's analysis, quoted above, asserts that there was "[s]ignificant litigation activity" during this period. It is axiomatic that Plaintiff cannot be simultaneously active and dilatory. Implicit in the trial court's finding that there was "[s]ignificant litigation activity" is the determination that Plaintiff was diligent.

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The very fact that Plaintiff filed ten discovery motions (with ten sets of underlying discovery and compliance with meet-and-confer requirements) within the first three months of her lawsuit speaks volumes about her prosecutorial diligence. The sheer intensity with which Plaintiff prosecuted her action commands a finding of diligence.

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The fact that there was other activity during this period does not alter the fact that the trial court's orders rendered nugatory, Plaintiff's efforts to obtain discovery of evidence and information critical to the prosecution and trial of her claims. It is this disability which compels tolling under the statute.

unsolicited advertisements to her by defendants. Plaintiff has the unlawful junk faxes that were sent to her by defendants, and she can offer evidence (her own testimony) to the effect that she never requested the junk faxes, never consented to their transmission, and never had a business relationship with defendants. In contrast to her personal claims, evidence needed for Plaintiff's representative and class action claims, *e.g.*, defendants' databases of facsimile numbers (compiled through 'war dialing') and the transmission logs/records of defendants' fax-blasting activities to the public, are peculiarly within defendants' possession and control. Without discovery of this evidence, class certification, pursuit of a trial date, and trial, was/is impracticable and futile.[60]

In contrast with the trial court, the Court of Appeal understood the proper inquiries - whether the court's orders during this time period rendered it impossible, impracticable or futile to pursue trial, and whether Plaintiff had acted diligently - which it correctly answered as follows:

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It is for this very reason that defendants have gone to herculean lengths to avoid, delay and frustrate discovery. Defendants' refusals to discharge their discovery obligations have necessitated over 64 motions to compel discovery (4 AA 1004, 1020; 5 RA 1402- 1406) and applications for contempt citations re: discovery misconduct. (4 AA 1005, 1007, 1009, 1011) In addition, persistent refusals to provide court-ordered discovery and to comply with other discovery orders resulted in the imposition of terminating sanctions against certain defendants. (5 RA 1217)

"Discovery is an essential component of bringing an action to trial. Plaintiff commenced her action on February 22, 2000, and first propounded discovery on March 9, 2000. Plaintiff could not have begun discovery any earlier and, thus, was reasonably diligent in prosecuting her action. [Citation omitted.] The trial court's orders of May 24, 2000, and June 16, 2000, as clarified by the trial court's July 12, 2000, order, rendered nugatory plaintiff's discovery activity during the period from March 9, 2000, to May 24, 2000, i.e. prior to the stay. The trial court's actions were beyond plaintiff's control [citation omitted], and the delay in discovery brought about by the trial court's orders was not a delay that plaintiff, with reasonable diligence, might have avoided. [Citation omitted.]

"Respondents acknowledge that the trial court's orders voided plaintiff's discovery during the contested period, but argue that other litigation activity was conducted during the period, including other discovery. Respondents point out that during the contested period, ECX answered plaintiff's interrogatories on April 13, 2000, CSB Partnership responded to plaintiff's first set of document requests on May 15, 2000, and CSB Partnership produced responsive documents on May 18, 2000. The discovery to which respondents refer was responded to prior to the trial court's orders. That other litigation activity, including certain discovery, was conducted during the period of March 9, 2000, to May 24, 2000, does not change the fact that the trial court's orders, in effect, rendered all of plaintiff's discovery--apart from discovery already completed at the time of the trial court's orders--inoperative. The trial court's action eliminated what was done during an earlier period; obviously it was impossible for plaintiff to conduct discovery during a period that had already passed.

* * *

"Because plaintiff acted with reasonable diligence and could not have avoided the delay in discovery, plaintiff met her burden her of proving that it was impossible, impracticable, or futile with respect to the discovery at issue during the 76 days from March 9, 2000, to May 24, 2000. [Citation omitted.] Accordingly, the trial court should have excluded that period from the five-year period within which plaintiff was to bring her action to trial." *Bruns*, 172 Cal.App.4th 488, 505-506.

The trial court failed to exclude the 76 day period from March 9, 2000 to May 24, 2000 from its five-year dismissal computation based upon its incorrect interpretation and application of the tolling statute. Correctly applying the abuse of discretion standard of review, the Court of Appeal found and corrected the trial court's error.

(1) ECX's advocacy by sophistry.

On appeal, ECX attempts to recast the trial court's orders which nullified Plaintiff's discovery, vacated her discovery motions, and forced Plaintiff to re-propound her discovery, as active case management of complex litigation. (ECX OBM 46-47) ECX's attempted recharacterization is fundamentally flawed. The 76-day time period at issue *preceded* entry of the trial court's case management order and designation of this lawsuit as a complex matter[61]. (4 AA 837, ¶6) An order can't be part

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The discovery rendered nugatory by the trial court was propounded on March 9, 2000 (4 AA 822:14-17, and 846-853), March 11, 2000 (4 AA 822:17-20, and 855-862), and March 24, 2000 (4 AA 822:20-22, and 864-866) With regard to the vacated discovery motions, five were served/filed on April 26, 2000 (4 AA 821:23-24), and three were served/filed on April 28, 2000 (4 AA 821:24-26).

On May 24, 2000, the trial court vacated eight discovery motions (3 AA 815, and 4 AA 821:18-822:7) and issued its order staying all discovery, discovery issues and motions in this lawsuit (3 AA 593:13).

A case management order was first entered on June 16, 2000. (2 RA 0280)

of a trial court's active case management of a complex action where the action has not yet been designated complex or a case management order has not been entered.

After recasting the trial court's actions, ECX argues that the 76-day period should be included within the five-year dismissal computation. In support of its argument, ECX cites section 2.50 of the Deskbook.[62] Section 2.50 states in its entirety:

> "Discovery is often the greatest source of cost and delay in civil litigation. Active judicial involvement in discovery is particularly important in complex litigation. Ideally, issues drive discovery. In complex litigation, however, the issues may not be well defined when the case is first filed and may become better defined only after some initial discovery has occurred. This means there is a risk, particularly early in the life of a complex case, that discovery can become unfocused and out of control." (Underscore added.) *Id.*

After quoting the underscored language, ECX implies that the trial court expunged Plaintiff's discovery because it "was unfocused and out of control." (ECX OBM 46) ECX then suggests that the negation of Plaintiff's discovery and discovery motions advanced the "key purpose" of active case management of complex actions, which ECX asserts is "to

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This action was deemed "complex" on July 12, 2000. (4 AA 837, ¶6)

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Judicial Council of Cal., Deskbook on the Management of Complex Civil Litigation (2007) §2.50, p. 2-30.2.

expedite the case." (ECX OBM 46-47) ECX concludes that the 76-day period should be included in the five-year computation because the court's actions "expedited the litigation and, a fortiori, did not make it impossible, impracticable or futile for plaintiff to proceed to trial." (ECX OBM 47)

ECX engages advocacy by sophistry. ECX is well aware that the trial court did not expunge Plaintiff's discovery because it was unfocused or out of control. Rather, the court sustained defendants' demurrers to Plaintiff's first cause of action without leave to amend, thereby eliminating Plaintiff's TCPA claim[63]. (3 AA 592-593; 4 AA 831-832) The court simultaneously nullified Plaintiff's discovery and vacated her discovery motions, mistakenly believing that elimination of Plaintiff's TCPA cause of action rendered Plaintiff's discovery and discovery motions moot. ECX and the other defendants urged this erroneous conclusion and the actions/orders by which Plaintiff's discovery was rendered nugatory.

Although Plaintiff's first cause of action for violation of the TCPA

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The trial court eliminated Plaintiff's TCPA claim, mistakenly believing that there isn't a private right of action for violation of the TCPA in California. During 2002, Plaintiff unsuccessfully sought leave to amend her complaint to reassert her TCPA cause of action (1 RA 0048-0080; 3 AA 602) Thereafter, following issuance of the opinion in *Kaufman v. ACS Systems, Inc.*, supra, which confirmed the private right of action, Plaintiff again sought leave to amend, and amended, her complaint to reassert a claim for violation of the TCPA. (3 AA 617, 619)

was eliminated by demurrer, Plaintiff continued to assert a cause of action under the UCL based upon the same statutory violations as her first cause of action. (4 AA 841) The discovery nullified by the court was critical to proof of Plaintiff's UCL claim. Rather than expediting the litigation by streamlining discovery, as ECX suggests, the court's orders delayed and retarded case development by forcing Plaintiff to re-propound essential discovery. As the Court of Appeal correctly observed, "[t]he trial court's action eliminated what was done during an earlier period; obviously it was impossible for plaintiff to conduct discovery during a period that had already passed." 172 Cal.App.4th 488, 506.

(2) ECX's approach to tolling was expressly repudiated by the Law Revision Commission.

ECX trivializes the 76-day period, describing it as a "brief delay in initial discovery [that] was inconsequential." (ECX OBM 47) ECX regards this period of delay as 'inconsequential' because it occurred early in the litigation, and more than three years remained before the hearing on its motion to dismiss. (*Id.*) ECX concludes that, "[t]he purported discovery delays therefore did not make it impossible, impracticable, or futile for plaintiff to bring her case to trial within five years." (*Id.*)

Under ECX's construct, court-effected delays in prosecution which

occur early in litigation do not qualify for tolling under the impossibility, impracticability and futility excuse because a plaintiff has a remaining 'reasonable time' within which to bring her action to trial. The 1984 revision of the dismissal statutes repudiates this approach to tolling, and presents the statutory excuse without any such timing qualification; the time during which it was impracticable to proceed to trial is excluded in all instances, regardless of when the disability arose. The Law Revision Commission explained,

> "Under existing law the time during which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory period so that the plaintiff still had a ' reasonable time' to get the case to trial, the tolling rule doesn't apply. The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses, it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run." 17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.[64]

Contrary to ECX's suggestion, the Court of Appeal properly determined that the 76-day period should be excluded from the five-year computation. The Court's interpretation and application of the law is well reasoned, consistent with the statute's legislative history, and facilitates the

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[64]*See*, 1 AA 61-62.

general policy of this State favoring trial over dismissal (C.C.P. §583.130):

> "Discovery is an essential component of bringing an action to trial....The trial court's orders of May 24, 2000, and June 16, 2000, as clarified by the trial court's July 12, 2000, order, rendered nugatory plaintiff's discovery activity during the period from March 9, 2000, to May 24, 2000, i.e. prior to the stay. The trial court's actions were beyond plaintiff's control [citation omitted], and the delay in discovery brought about by the trial court's orders was not a delay that plaintiff, with reasonable diligence, might have avoided [citation omitted].
> * * *
> The trial court's action eliminated what was done during an earlier period; obviously it was impossible for plaintiff to conduct discovery during a period that had already passed.
> * * *
> Because plaintiff acted with reasonable diligence and could not have avoided the delay in discovery, plaintiff met her burden her of proving that it was impossible, impracticable, or futile with respect to the discovery at issue during the 76 days from March 9, 2000, to May 24, 2000. [Citation omitted.] Accordingly, the trial court should have excluded that period from the five-year period within which plaintiff was to bring her action to trial." *Bruns*, 172 Cal.App. 488, 505-506.

b. The 88-day Period Between May 6, 2004 And August 2, 2004.

On May 6, 2004, Judge Charles McCoy was appointed as the coordination trial judge. (3 AA 579:9-12, and 641-646) On May 27, 2004, Plaintiff contacted the coordination trial court to inquire of the procedure for resetting for hearing, multiple discovery motions she had brought before coordination had been ordered and which had never been heard. (4 AA 826:13 - 827:9) The court responded that it was awaiting transfer to it of

the court files for the various coordinated lawsuits and that it couldn't do anything until it had the files. (*Id.*)

On June 23, 2004, Plaintiff again contacted the coordination trial court to determine whether the files for this lawsuit - the *Bruns* action - had been received. (*Id.*) The court responded in the negative. (*Id.*) Plaintiff was in the process of further 'following-up' with the coordination trial court when her counsel received a copy of a letter dated July 28, 2004 from attorney Barry Himmelstein to the court.[65] In that letter, Mr. Himmelstein noted that the preferred time for holding a preliminary trial conference had passed nearly sixty days ago (citing former CRC rule 1541(a)) and requested that the court set a hearing for a pending motion for preliminary injunction.[66] (4 AA 826-827, and 916-917)

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[65] Mr. Himmelstein is plaintiff's counsel in a coordinated action not a party to this appeal.

[66] ECX asserts that Plaintiff is not entitled to tolling during this period, claiming that she was not diligent in seeking the resetting of her discovery motions. (ECX OBM 49-50) ECX's assertion fails to recognize the actual, direct efforts taken by Plaintiff on May 27, 2004 and June 23, 2004 to reset her discovery motions, and instead, derides Plaintiff, suggesting that she should have indirectly sought the resetting of her motions by requesting a preliminary trial conference and submitting a proposed agenda and order which reset her discovery motions for hearing. (*Id.*) ECX's argument ignores the fact that the coordination trial court twice stated that it could not take action until it received the court files in the coordinated actions, and it refused to take action, and held Plaintiff's action, and the other coordinated actions, in abeyance pending receipt of court files. (4 AA 826:13 - 827:9)

On August 2, 2004, the coordination trial court issued its initial status conference order which stayed Plaintiff's action pending further order of the court. (4 AA 919) Based on Plaintiff's communications with the trial court during this 88 day period, Plaintiff understood that the coordinated actions before Judge McCoy, including the *Bruns* lawsuit, were in abeyance pending transfer of court files. (4 AA 827)

The coordination trial court's stated inability to act, and its failure/refusal to set motions for hearing during this period, paralyzed this lawsuit. Indeed, all pleading and motion practice was precluded by the court's refusal/inability to set matters for hearing.

Delay in transfer of files between the courts was wholly outside Plaintiff's control. So too, the coordination trial court's refusal to set motions for hearing or otherwise take action absent receipt of court files for the coordinated cases was entirely beyond Plaintiff's influence/control. The case paralysis wrought by file transfer delay during this 88-day period made it impossible, impracticable and futile to proceed to trial. Under *Code of Civil Procedure* 583.340(c), this 88-day period was required to be excluded from the dismissal time computation.

Thereafter, the coordination trial court took action after apparent receipt of the court files. (4 AA 919-923)

The trial court declined to exclude this 88-day period from its five-year dismissal computation stating:

> "Plaintiff asserts that the period from when Judge McCoy was assigned as coordination trial judge to the period when Judge McCoy held his Initial Status Conference on August 2, 2004, should toll the five-year statutory period because it was impossible, impracticable and futile for Plaintiff to proceed to trial. (Tripi Decl. 2, ¶32.)
> In *Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, 1009, 1011, the Court of Appeal noted that the automatic stays under California Rule of Court 1529(b) [Stay of Proceedings] [footnote omitted] do not toll the five-year period beyond the date of assignment of the coordination trial judge. The court noted that '[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. Under our interpretation, rule 1529(b) does not conflict with the statutory five-year period for bringing civil actions to trial; rather, it accommodates the statute.' (*Id.* at 1009.)
> Accordingly, the automatic stay in this action ended when Judge McCoy was assigned as coordination trial judge on May 6, 2004. Judge McCoy did not impose a stay after being assigned as coordination trial judge until August 2, 2004. On that date, Judge McCoy stayed the proceedings until the August 17, 2004 Initial Status Conference....
> * * *
> Therefore, under *Bank of America*, the five-year period should not be tolled for the period between May 6, 2004, when Judge McCoy was assigned, and August 2, 2007 [sic, 2004], when Judge McCoy" imposed a stay prior to the initial status conference.'" (Emphasis added.) (AA 958-959)

Although the underscored text, above, confirms that the trial court was aware of the nature of Plaintiff's argument, the trial court's analysis is singularly directed to issues which Plaintiff did not raise, *viz*, (a) whether a

stay remained in effect during the 88-day period, and (b) whether the 88-day period should be excluded from the five-year calculation under C.C.P §583.340(b).

Plaintiff has never contended that a stay remained in place during the 88-day period between May 6, 2004 and August 2, 2007, and Plaintiff has never argued that the 88-day period should be excluded from the five-year computation under C.C.P §583.340(b).[67] Rather, Plaintiff's position has been, and remains, that the case paralysis wrought by the coordination trial court's refusal to take action pending file transfer made it impossible, impracticable and futile to proceed to trial during this 88-day period , and, that under *Code of Civil Procedure* §583.340(c), this 88-day period was/is required to be excluded from the dismissal time computation.

In contrast with the trial court, the Court of Appeal understood the proper inquiries - whether the court's orders during this time period rendered it impossible, impracticable or futile to pursue trial, and whether Plaintiff had acted diligently. Holding that the 67-day period between May 27, 2004 and August 2, 2004 should have been excluded, the Court of

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In this appeal, ECX likewise raises a non-issue, stating "the trial court got it right; the assignment of the coordination trial judge ended any stay of proceedings." (Italics in original. (ECX OBM 48) Plaintiff does not, and never has, contended that the 88-day period is subject to tolling under section 583.340(b).

Appeal stated[68]:

> "We agree with plaintiff that the trial court held her action in abeyance pending receipt of her court file and the court files of the other coordinated actions. Plaintiff was reasonably diligent in prosecuting her action during this period, contacting the trial court on May 27, 2004, to schedule a hearing of discovery motions and contacting the trial court again on June 23, 2004, to determine if the trial court had received her court file. [Citation omitted.] Plaintiff's inability to proceed with her discovery motions during this time was beyond her control [Citation omitted.], and the delay in discovery brought about by the absence of her court file was not a delay that plaintiff, with reasonable diligence, might have avoided [Citation omitted.]
> We disagree with plaintiff, however, as to the period during which the abeyance in her action tolls the five-year period. 'The text of section 583.340 impels the view that there must be a causal connection between the circumstance upon which plaintiff relies and the failure to satisfy the five-year requirement. Bringing the action to trial must be impossible, impracticable, or futile for the reason proffered.' (*Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, 473 [addressing a claim of tolling under subdivision (c) of section 583.340]; see also *Sanchez v. City of Los Angeles, supra,* 109 Cal.App.4th at pp. 1271-1272.) Because plaintiff's counsel was unaware until May 27, 2004, that the trial court would take no action with respect to plaintiff's case because it did not have plaintiff's court file, there was no causal connection between the abeyance in her action from May 6, 2004, to May 27, 2004, and plaintiff's failure to bring her action to trial within five years.
>
> Because plaintiff acted with reasonable diligence and could

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The Court of Appeal included the 21-day period between May 6, 2004 and May 27, 2004 in its dismissal computation, but excluded the 67-day period between May 27, 2004 and August 2, 2004.

> not have avoided the abeyance in her action during the period from May 27, 2004, to August 2, 2004, plaintiff met her burden her of proving that it was impossible, impracticable, or futile to bring the discovery motions at issue during this period. [Citation omitted.] Accordingly, the trial court should have excluded the 67-day period from May 27, 2004, to August 2, 2004, from the five-year period within which plaintiff was to bring her action to trial." *Bruns*, 172 Cal.App.4th at 507-508.

The trial court mistakenly failed to exclude any portion of the period between May 6, 2004 and August 2, 2004 from its five-year dismissal computation based upon a misapprehension of the pertinent/correct issues. Properly applying the abuse of discretion standard of review, the Court of Appeal corrected the trial court's error.

3. Defendants' Challenge of The Court of Appeal's Decision is Without Merit.

Defendants seek fault with the Court of Appeal's decision, suggesting that the Court independently reviewed the trial court's denial of tolling under section 583.340(c), improperly invaded the trial court's discretion, and improperly substituted its judgment for that of the trial court concerning whether certain trial court orders rendered it impossible, impracticable or futile for Plaintiff to proceed to trial. Defendants' arguments are without merit.

a. Other Litigation Activity.

Defendants argue that the fact that other litigation activity occurred

during the 76-day period between March 9, 2000 and May 24, 2000, affords a sound evidential basis for the trial court's conclusion that it was not impossible, impracticable or futile to bring this action to trial. Since there was a purported evidential basis for the trial court's conclusion, defendants argue that the Court of Appeal improperly invaded the trial court's discretion.

Defendants' argument shares the same fatal flaw as the trial court's ruling. As explained above, the impossibility, impracticability and futility standard of section 583.340(c) is not equated with strict impossibility. *Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 552. Rather, the 'impossibility' exception relates to whether it was unreasonably or unduly difficult to proceed to trial. *Id.*

The incorrect interpretation and/or application of a statute constitutes an abuse of discretion. *In re Lugo (2008)* 164 Cal.App.4th 1522, 1536, fn. 8; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393-394. The Court of Appeal properly found that the trial court had abused its discretion by incorrectly interpreting and applying section 583.340(c).

b. Period of Abeyance.

With regard to the 67-day period between May 27, 2004 and August

2, 2004, defendants suggest that the Court of Appeal usurped the trial court's discretion by holding that the 67-day period should have been excluded from the five-year computation. In this regard, defendants assert:

> "[T]he 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." (CSB OBM 51)

The entirety of the trial court's ruling regarding this time period is quoted above at page 99 of this brief. As this Court will note, and contrary to defendants' assertion, no such finding was made by the trial court.

The Court of Appeal could not usurp the trial court's discretion by substituting it judgment/determination on finding that was never made by the trial court.[69]

c. Statement re: Pretrial Readiness.

CSB attempts to get traction off a statement made by Plaintiff in opposition to the petition for coordination to the effect that her pre-trial activities were largely complete. CSB twists this assertion to 'support' its

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CSB charges that Plaintiff chose not to advance her case during this time period. This statement is unfounded. The coordination trial court refused to take action until it was in receipt of the case files on the newly coordinated lawsuits. (4 AA 826:13 - 827:9) Thus, obtaining default judgments, enforcement of discovery, law and motion practice, and pleading practice were all precluded activities during this period of abatement.

argument that there was an evidential basis for the trial court's determination that it was not impossible, impracticable or futile to bring this action to trial. CSB' reference is provocative until the statement is placed in context.

At the time that coordination was opposed, there were seventeen discovery motions which had been brought by Plaintiff , but which had not yet been heard. Plaintiff 's statement was dependant upon certain assumptions, namely that: (a) the discovery motions would be granted and that full and complete substantive response would be promptly made to the discovery, and (b) that there would be no further restriction of discovery, pleadings or motion activity. Although the seventeen motions were ultimately heard and granted on March 13, 2005, the requested substantive information and evidence (*e.g.*, computer databases and computer back-up, and Faxcasters) has never been provided. Further, additional stays were imposed after coordination which severely handicapped Plaintiff 's case development.

Further, and more directly, CSB's argument fails because it is offered in evidential support of the trial court's mistaken belief that tolling is permitted under section 583.340(c) only where there is literal impossibility.

d. Special Circumstances Hindered Plaintiff Warranting Tolling Under Section 583.340(c).

Defendants argue that the trial court "had discretion to find that the period[s] about which plaintiff complained were merely ordinary delays inherent in the litigation and thus do not satisfy the impossible, impracticable, or futile standard." (CSB OBM 52) The trial did not make this finding. Rather, as quoted at pages 62 to 63, and 86 to 87, of this brief, the trial court rested its determination that it was not impossible, impracticable or futile to proceed to trial during this period on the sole basis that there had been other litigation activity during this time period. The Court of Appeal could not usurp a discretionary determination that was never made by the trial court.

Further, despite CSB's attempted characterization, orders by which nearly three months of discovery, discovery meet-and-confer efforts, and discovery motion practice were rendered nugatory, are not routine, common, typical or "ordinary delays inherent in litigation" (CSB OBM 52). To the contrary, Judge McDonald's orders were uncommon, out of the ordinary, and not frequently recurrent in California civil litigation.

Likewise, the coordination trial court's refusal to act or otherwise set motions for hearing pending receipt of court files in the coordinated actions is not common, routine, typical or an ordinary or "regular" litigation event.

To the contrary, expeditious action is expected of coordination trial courts, and is the norm. Indeed, CRC rule 3.541(a) mandates that the coordination trial judge hold a case management conference within 45 days after being assigned to the coordinated actions.

e. The Policies Underlying C.C.P. §583.340(c).

Defendants seek strict and inflexible application of the dismissal statutes, particularly the provisions of *Code of Civil Procedure* sections 583.310 and 583.360. Defendants' proposed approach ignores the policy pronouncement of C.C.P.§583.130, which states in pertinent part:

> "[T]he policy favoring trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter."

Defendants' desired construction of the dismissal statutes minimizes and seeks a narrow and restrictive interpretation and application of the tolling provisions of C.C.P. §583.340. Notably, defendants' construction of section 583.340(c) equates the tolling standard of "impossibility, impracticability and futility" with literal and absolute impossibility. Defendants' approach/interpretation not only ignores the settled case law (*see, e.g., Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 552) but ignores the legislative history of section 583.340(c) which makes clear that

the courts are to give the excuse of "impossibility, impracticability and futility" a liberal interpretation and, make "a reasonable allowance for the time of delay caused by 'special circumstances that hindered the plaintiff.'" (*See*, Cal. Law Rev. Com. Memorandum "81-20" (ARA 71)

Section 583.340(c) is designed to afford time-elasticity and flexibility to mitigate the harshness of the dismissal sanction in all situations where a mechanical application would yield injustice. The special circumstances which hindered Plaintiff's ability to pursue trial dates during the periods March 9, 2000 to May 24, 2000, and May 27, 2004 to August 2, 2004, were beyond Plaintiff's control, were not caused by any act or omission to act of Plaintiff, and could not have been avoided by Plaintiff. The Court of Appeal properly applied the policies and law underlying the impossibility, impracticability exception and correctly determined that tolling is required during the two referenced periods. The Court of Appeal's decision should not be disturbed.

f. Plaintiff's Diligence.

The register of action (ROA) from when this action was pending in Orange County Superior Court (5 RA 1402-1425) and the ROA from the time of coordination (AA 990-1025) each manifest the ongoing, frequent action taken by Plaintiff before the trial court. Indeed, the ROAs confirm

that, to the extent not prevented by stays, Plaintiff propounded extensive discovery, sought enforcement of discovery through discovery law and motion, opposed repeated legal challenge of her claims, sought amendment of her pleadings, resisted stay orders, and pursued her own pleading law and motion.[70]

With regard to discovery law and motion, over the course of this lawsuit, Plaintiff has brought 64 motions to compel discovery response, (4 AA 1004, 1020; 5 RA 1402- 1406), as well as applications for contempt citations re: discovery misconduct (4 AA 1005, 1007, 1009, 1011), and motions for terminating sanctions based upon egregious discovery misconduct (4 AA 1006, 1008, 1012). Plaintiff's motions to compel were granted, and, terminating sanctions were imposed against certain defendants. (5 RA 1217-1219)

Defendants waged a war of attrition by forcing Plaintiff to seek judicial intervention on everything from basic discovery to pleading practice. Plaintiff consistently met the challenge, shouldered the responsibility, and pursued judicial relief. Against this backdrop, the record

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When the ROAs are correlated with stay orders, it becomes manifest that there have been *no* lengthy, protracted, or extended periods of inactivity by Plaintiff. This conclusion is further confirmed by review of the many litigation documents contained in the second through fifth volumes of Respondents' Appendix.

simply does not afford any basis for determining that Plaintiff did not diligently prosecute this lawsuit. To the contrary, the record manifests Plaintiff's diligence, both in relation to the periods of impossibility, impracticability and futility and, over the course of this lawsuit.

It should be noted that the trial court's Order re: dismissal (4 AA 940-965) discusses seven time periods during which Plaintiff contends the five-year dismissal period was tolled. No finding of dilatory conduct, or criticism of Plaintiff's diligence, is made by the trial court regarding the first six time periods:

- Period one: 5/24/00 to 6/16/00 (4 AA953-954);
- Period two: 6/13/02 to 10/21/03 (4 AA 954-955);
- Period three: 12/3/03 to 1/15/04 (4 AA 955-956);
- Period four: 1/30/04 to 4/7/04 (4 AA 956-957);
- Period five: 4/7/04 to 5/6/04 (4 AA 957); and,
- Period six: 5/6/04 to 8/2/04 (4 AA 957-959)

With regard to the seventh time period - the period 8/2/04 to 7/11/06[71]- the trial court denied tolling of the five-year deadline, "because it was not impossible, impracticable or futile, to progress toward bringing this action to trial." (4 AA 960) The court found that it was not impossible,

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[71](4 AA 959-961)

impracticable, or futile to bring the action to trial because "litigation activity was very substantial" during this time period. (*Id.*)

Implicit in the trial court's finding that "litigation activity was very substantial" is the determination that Plaintiff was diligent. There cannot be both an abundance and dearth of litigation activity. Plaintiff could not simultaneously undertake substantial litigation activity and be dilatory.

Nevertheless, the following criticism was levied against Plaintiff:

> [T]here were periods of time where Plaintiff was clearly dragging her feet in this matter. On August 26, 2005, this Court held a Further Status Conference and extended the discovery cut-off date from September 15, 2005 to November 1, 2005. [Reference omitted.] Again on October 25, 2005, this court extended the discovery cut-off for all cases to February 1, 2006. [Reference omitted.] During this period, Plaintiff did not take advantage of opportunities the court had provided to seek to sanction defendants' failure to comply with discovery orders or the court-ordered deposition schedule.
> * * *
> While Plaintiff had difficulty forcing certain defendants to comply with discovery, it was at all times Plaintiff's burden to prepare her case, including by seeking to enforce court-ordered written discovery and to take court-ordered depositions." (4 AA 961)

The trial court's criticism is inconsistent with, and refuted by, the record.

During a status conference held on April 15, 2005, the trial court instructed that it was going to enforce discovery through OSCs. The court

stated:

> "We're going to continue to have status conferences in [the coordinated TCPA cases] so that you can tell me about problems you're having. But rather than having motions to compel, what were going to have is a request for the court to issue an order to show cause re sanctions for non-compliance [with court-ordered discovery]." (2 RT C-10:17-21)

On May 3, 2005, Plaintiff promptly took advantage of the court's invitation and made a written request for an OSC regarding defendants' non-compliance with court-ordered discovery. (2 AA 435-436) At the next status conference - held June 13, 2005 - counsel for Plaintiff reminded the court of his request for the setting of an OSC re: non-compliance, and sought judicial enforcement of court ordered discovery. (2 RT D-4: 7-22; D-7:26-28; D-13:28 - D-15:4; D-20:3-13)

During the August 26, 2005 status conference, Plaintiff apprised the court of discovery issues/problems she had, and she sought judicial assistance. (2 RT F-22:14 - F-26: 12)

During the October 25, 2005 status conference, Plaintiff apprised the court of discovery issues/problems she was having. (3 RT H-34:19 - H-35:13)

On December 8, 2005, Plaintiff filed/served a motion for terminating sanctions against certain defendants due to their non-compliance with discovery orders. (4 RA 917-927) Plaintiff also brought three motions for

orders deeming facts admitted[72]. (4 RA 962)

On January 24, 2006, Plaintiff applied to the court for (a) an OSC re: contempt and monetary sanctions against defendant Daniel McCrosky for non-compliance with discovery orders (4 RA 1036-1037; 1049-1050), and (b) an OSC re: contempt and monetary sanctions against defendant Fax.com, Inc. for non-compliance with discovery orders. (4 RA 1038-1039)

On April 2, 2006, Plaintiff filed/served a renewed motion for terminating sanctions based upon defendants' non-compliance with discovery orders[73]. (4 RA 1145-1152; 5 RA 1222-1230) Plaintiff also brought three motions for orders deeming facts admitted[74]. (4 RA 962)

On April 5, 2006, applied for an OSC re: issuance of contempt citation and monetary sanctions for non-compliance with discovery orders. (5 RA 1154-1159)

On June 15, 2006, brought a motion for an order compelling further responses to interrogatories. (5 RA 1269-1274)

The trial court's criticism that Plaintiff did not seek enforcement of discovery mis-recalls the continuum of action, outlined above.

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[72]These motions were granted on January 24, 2006. (4 RA 1046-1047)

[73]The motion was granted on April 28, 2006. (5 RA 1217-1220)

[74]These motions were granted on January 24, 2006. (4 RA 1046-1047)

Defendants assert that the trial court had discretion to find that Plaintiff was not diligent. (CSB OBM 53) No such finding was made by the court concerning the first six time periods. And, the trial court's criticism of Plaintiff during the seventh time period is factually unfounded, as noted above.

(1) Class certification and trial in the *Amkraut* action.

In their quest to depict Plaintiff as dilatory, defendants note that the plaintiffs in one of the coordinated actions - the *Amkraut* action - moved for class certification and then, tried their action. Defendants argue that the trial court had discretion to find that Plaintiff was not diligent because she did not move for class certification[75]. Likewise, defendants argue the failure to proceed to trial supports a finding that Plaintiff did not diligently prosecute her action. (CSB OBM 53-55)

No such findings were made by the trial court, and the actions in *Amkraut* do not yield the conclusions posited by defendants.

Defendants have neglected to inform this Court that plaintiffs in

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Defendants erroneously assume Plaintiff must move for certification. This assumption ignores the fact that Plaintiff is also prosecuting individual and representative claims.

Amkraut first moved for class certification on March 3, 2005[76]. (4 AA1024; 3 RA 577; 2 RT A-21, A-44) This is significant because discovery was stayed in the coordinated TCPA Cases, including the *Amkraut* and *Bruns* lawsuits, on August 2, 2004 by the coordination trial judge. (4 AA 922:13-14) The only way the *Amkraut* plaintiffs could move for class certification at that early date was if their pre-coordination discovery yielded evidence sufficient to support that motion. By contrast, in this litigation, defendants' strategy of discovery misconduct and withholding/spoliation of evidence has yielded the delay in seeking class certification.

With regard to 'trial' in *Amkraut*, defendants fail to indicate that the proceeding was a mere default prove-up rather than a trial. (3RT O-1 to O-39)

Amkraut is different litigation with different circumstances. Additional stays and default periods exist in this lawsuit which do not exist in *Amkraut*. Significant differences between the *Amkraut* and *Bruns* lawsuits are not mentioned by defendants.

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Judge Carolyn Kuhl became coordination trial judge effective January 3, 2005. (2 RA 0557) Prior to Judge Kuhl's appointment, Judge McCoy stayed all discovery, pleading and motion practice in the coordinated TCPA actions. (4 AA 922:13-14) Judge Kuhl held the coordinated TCPA actions in abeyance until March 3, 2005 when she held her first Status Conference in the coordinated TCPA actions. The *Amkraut* motion, of necessity, was prepared before coordination.

(2) Discovery and discovery motions.

In its brief, CSB quips that the trial court "[a]pparently [found] that most of Plaintiff's discovery and [discovery] motions [were] excessive." (CSB OBM 49) The trial court has *never* taken this view, which is a purely fictional creation of CSB. At page 55 of its brief, CSB charges that Plaintiff's focus was "on obtaining sanctions through discovery motions against an overwhelmed small firm practitioner." CSB's comment is curious since Plaintiff is represented by a sole practitioner, and, the trial court granted Plaintiff's numerous discovery motions and imposed terminating sanctions against various defendants based upon their egregious discovery misconduct[77]. (4 AA 1006)

Later in its OBM, CSB criticizes Plaintiff for taking inadequate discovery. In this regard, CSB attempts to make much ado over the fact that Plaintiff has not rescheduled or taken depositions. (CSB OBM 56) The staging of discovery for optimal utility is within counsel's discretion. The

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CSB further states that the trial acted within its discretion in finding that it was not impossible impracticable, or futile for Plaintiff to bring her action to trial because her focus was purportedly on seeking and obtaining discovery sanctions. (CSB OBM 57) No such finding was made by the court; rather, the trial court's criticism of Plaintiff was that she had not availed herself of the court's invitation to sanction defendants for non-compliance with court ordered discovery. (Supra, pp.111-112) Further, the trial court found Plaintiff's motions meritorious and granted them.

Court of Appeal agreed with Plaintiff that over two years remain within which to bring this action to trial. When this action is remanded to the trial court, Plaintiff will continue to stage discovery, including depositions, to optimal advantage.

(3) Addition of parties during 2006.

In its brief, ECX notes that in July 2006, seven new defendants were added and Plaintiff articulated a need for further discovery. In an effort to depict Plaintiff as dilatory, ECX states, "[t]hese pleading amendments and discovery efforts could have begun six years earlier." (ECX OBM 45) ECX has failed to inform this Court that the delayed addition of the new defendants was the direct result of wilful misrepresentations made to Plaintiff by CSB, and that Plaintiff acted immediately upon discovery of the fraud.[78]

(4) Special trial setting.

ECX further attempts to depict Plaintiff as dilatory by stating that, "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. (ECX OBM 45) Rather than being dilatory, Plaintiff was well aware of her obligation to bring her action to trial within five years,

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[78]For more information, see, 3 AA 587-590.

had analyzed the dismissal statutes, and determined that more than two years remained within which to proceed to trial. Since neither "clarification" nor special trial setting was needed, it was not sought.

E. Defendant Induced Delay.

Defendants know they control evidence essential for the successful prosecution and trial of this action.[79] Defendants' primary defense strategy has been to delay, or thwart, essential discovery. Defendants have done this by habitually serving discovery responses comprised of boilerplate objections and/or empty rhetoric, failing/refusing to comply with discovery orders, and spoliation of evidence.[80]

Defendants' strategy of misconduct has forced Plaintiff to bring 64 motions to compel discovery response, (4 AA 1004, 1020; 5 RA 1402-1406), as well as applications for contempt citations re: discovery misconduct (4 AA 1005, 1007, 1009, 1011), and motions for terminating sanctions based upon egregious discovery misconduct (4 AA 1006, 1008, 1012). Plaintiff's motions to compel were granted, and, terminating sanctions were imposed against certain defendants. (5 RA 1217-1219) Not

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[79]See, pages 88 to 90 of this brief for further information.

[80] A example of defendants' discovery gamesmanship is described at 2 RT, pp. A-22 to A-25.

only has defendants' strategy deprived Plaintiff of essential evidence, it has dramatically encumbered the litigation process and significantly slowed its progress.[81] Defendants' have further retarded prosecution through dishonesty[82], and by inviting/requesting each of the stays imposed by Judge McDonald and Judge Jameson.

Defendants are the purposeful protagonists of delay in this action. They are like bullies who run other motorists off the road in fits of anger and then complain of damage to their car. Reversal of the Court of Appeal's decision would reward defendants' calculated misconduct and yield a tutorial on defense through misconduct.

Defendants' conduct is highly relevant to the issue of dismissal. As stated in *Westinghouse Electric Corp. v. Superior Court* (1983) 143 Cal.App.3d 95, 109-110:

> "If it is appropriate to consider the conduct of the attorney taking the default in evaluating the negligence of an attorney seeking relief from the default, the conduct of the attorney seeking dismissal is equally relevant in this case."
>
> * * *

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[81] Although time consumed by ordinary incidents in litigation, including discovery disputes, are generally not excluded from the five-year period, the delays caused by defendants' pandemic discovery misconduct is far from 'ordinary.' Defendants' unbridled discovery misconduct has been extreme and outrageous.

[82] For an example of dishonesty yielding delay, see 3 AA 588-590, 688-702.

> [W]e believe that conduct of all parties was properly considered by the trial judge to support his implied finding that it was impracticable to get this case to trial within the five-year period."

Defendants cannot be heard to complain of delay in bringing this action to trial, delay they invited and fomented. The Court of Appeal's decision is fair and just and should be affirmed.

F. The Practical Consequences of This Appeal.

Defendants argue that the Court of Appeal's decision - that the five-year period is tolled during all stays of prosecution, partial and complete - is a departure from, and incongruous with, existing law regarding mandatory dismissal of actions. It's not. The Court of Appeal's decision honors the plain meaning of the tolling statute's language, is consistent with legislative intent as manifest from the statute's legislative history, harmonizes the statute's provisions with those of CRC rule 3.515(j), eliminates uncertainty, and promotes consistency of application of the statutory excuse.[83]

Defendants argue that the Court of Appeal's decision must not be affirmed since it will frustrate, if not defeat, the ability of trial courts to

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[83] By fostering certainty of application, judicial economy is achieved by eliminating the need for hearings to ascertain applicability of the statutory excuse. This very benefit was intended by the Legislature during the gestation of section 583.340. See, 17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.

actively manage complex cases. The contrary is true.

Our existing system of law is adeptly integrated. It requires the prompt resolution of lawsuits, yet mitigates the harshness of mandatory dismissal where mechanical application of the five-year rule would yield injustice.

A full range of case management tools are available to trial courts. Some case management techniques are directed to the goal of expediting case resolution and have the intended effect. Others, such as stay orders, are directed to the case management goals of cost reduction/containment and burden avoidance/mitigation and have the side-effect of slowing case development/resolution. Courts are free to use a full spectrum of case management techniques to discharge all case management goals because of the elasticity built into the dismissal statutes by subparts (b) and (c) of section 583.340. Only by removing elasticity from the dismissal statutes will trial courts be hindered in their active management of complex cases.

Defendants' approach, which seeks to strip complex and coordinated actions of essential elasticity from tolling, would encumber case management by forcing trial courts to choose between competing policy goals such as economy (containing costs) and expediting case resolution. This dilemma is averted by the Court of Appeal's decision, which preserves

elasticity and frees trial courts to manage their cases such that all case management objectives are met.

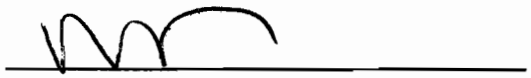
The Court of Appeal's approach also reconciles the mandatory dismissal statute with the bedrock policy of the law which favors trial on the merits over dismissal. Defendants' approach extols dismissal over trial.

V. CONCLUSION

For the foregoing reasons, the Court of Appeal's judgment that the trial court erred in dismissing Plaintiff's action should be affirmed.

Respectfully submitted.

DATED: November 27, 2009 LAW OFFICES OF KEVIN M. TRIPI



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Certification of Brief Length

In accordance with the requirements of Rule 8.204(c) of the California Rules of Court, I hereby certify that Appellant's Consolidated Answer Brief on the Merits contains 28,000 words.

DATED: November 27, 2009 LAW OFFICES OF KEVIN M. TRIPI

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2030 Main Street, Suite 1040, Irvine, California 92614.

On November 30, 2009, I served the foregoing document described as APPELLANT'S CONSOLIDATED ANSWER BRIEF ON THE MERITS on the interested parties by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Irvine, California, addressed as follows:

SEE ATTACHED SERVICE LIST.

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

EXECUTED: November 30, 2009

Kevin M. Tripi

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