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August 27, 2015

VIA PERSONAL DELIVERY
Attn: Clerk of the Court
California Supreme Court
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

Re: Fannie Marie Gaines v. Fidelity National Title Insurance Co., et al. (S215990)

Dear Chief Justice Cantil-Sakauye,

The following brief is submitted on behalf of Respondents, Fidelity National Title Insurance Co. and Bobby Jo Rybicki ("Fidelity") on the following two issues:

1. Did the trial court's April 3, 2008 order "striking the current Trial Date of September 22, 2008" (CT 279) constitute a stay of the "trial of the action" under Code of Civil Procedure, section 583.340, subdivision (b)?

2. What factors distinguish between a stay of trial and a continuance of trial for purposes [of] Code of Civil Procedure, section 583.340, subdivision (b)?

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1. **An Interpretation of Subdivision (b) with Respect to *Stays of Trial* that Would Allow the Order in this Case to Toll the Five Year Statute Would be Inconsistent with This Court's Reasoning in *Bruns* Strictly Interpreting Subdivision (b) With Respect to Stays of Proceedings within the Action**

The very purpose of the five year statute was to create a uniform set of unambiguous rules regulating dismissals for lack of prosecution that do not change with the ebb and flow of every policy shift in California. (*Bruns,* at 728; citing to *Revised Recommendation Relating to Dismissal for Lack of Prosecution* (June 1983) *17 Cal. Law Revision Com. Rep.* (1983) *p. 2*)

As stated by this Court in *Bruns,* citing to *Coalition of Concerned Communities, Inc. v. City of Los Angeles,* 34 Cal.4th 733, 737 (2004), *"If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history and public policy."* This Court's citation to *Coalition of Concerned Communities, Inc.,* was based upon its determination that the five year statute did not definitively answer the question of whether partial stays, *of proceedings within the action,* would qualify for tolling under the five year statute under subdivision (b).

The five year statute similarly does not definitively answer what type of *stay of trial* would qualify for tolling under the five year statute. Although in *Bruns,* this Court ultimately did not look at the word stay in the context of a stay of trial, there was an express acknowledgement that the word "stay" is ambiguous generally as to both prosecution of the action, and stay of the trial. (*Bruns,* at 725) As this Court pointed out in *Bruns,* a "stay" freezes a court's 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. (*Bruns,* at 724; Citing to *Black's Law Dict.,* p. 1267 (5th ed. 1979))

Because of this, this Court should look to the statute's purpose, the legislative history and public policy in determining whether the order in question **(CT, 279)** would qualify as a stay of the trial under subdivision (b) of Section 583.340.

i. This Court's Reasoning in *Bruns,* Which Narrowly Interprets Subsection (b) With Respect to Stays of the Prosecution of the Action in Light of Subsection (c), is Equally Applicable to Stays of the Trial Under Subsection (b)

On its face, Section 583.340(b) does not expressly explain any legally relevant distinction between a stay *of a proceeding* and the stay *of a trial.* For that reason, the strict treatment and interpretation this Court gave to subdivision (b) in *Bruns* with respect to stays *of the proceedings* is the only interpretation that makes logical sense with respect to an interpretation of stays *of the trial* under the same subdivision.

Admittedly, in *Bruns,* this Court dealt with the stay of the proceedings in its analysis and not stays of the trial. However, there is no reason that the lengthy analysis this Court gave in *Bruns* with respect to partial and complete stays would not apply equally with respect to this specific issue. There is certainly nothing in the plan language of the statute, legislative history or policy underlying the five year statute that would support a different analysis.

As this Court has already stated in *Bruns,* subsection (b) cannot be read in isolation, and because of this, the other subdivisions must be taken into account to attribute the most common sense meaning to the subdivision being interpreted. This Court determined that the mere existence of subdivision (c) of Section 583.340 warrants a strict interpretation of subdivision (b), because subdivision (c) of Section 583.340 already allows for tolling for *partial* stays of *prosecution of the action,* where those time periods meet the requirements of being impossible, impracticable, and/or futile." (*Bruns,* at 726)

Admittedly, this Court was addressing stays of the *prosecution of the action* under subdivision (b) and not stays of the trial. However, the general logic of this Court was that the mere existence of subsection (c) generally supported a narrower, bright line, interpretation of subsection (b) as a whole. Therefore, if there was some kind of legitimate delay resulting from a stay that was only partial, plaintiff was still protected by subdivision (c) if the delay met the requirements of subdivision (c). Similarly, there is no reason *not to* apply the same logic in this case: if some kind of trial continuance does not meet the strict requirements of subdivision (b), plaintiff is still protected by the more flexible subdivision (c). As this Court stated:

> *"When the statute is read as a whole, it becomes apparent that subdivision (b) contemplates a bright-line, nondiscretionary rule...[s]ubdivision (c) gives the trial courts discretion to exclude additional periods, including periods when partial stays were in place, when the court concludes that brining the action to trial was 'impossible, impracticable, or futile.' Obviously, if a complete stay is in effect, bringing the action to trial is impossible. It makes sense for the Legislature to state a bright-line rule in this situation. The effect of a partial stay can vary from stay to stay and case to case. A partial stay might, or might not, make it 'impossible, impracticable, or futile' to bring the action to trial."* (*Id.* At 726) [Emphasis added]

Also, at page 729 of *Bruns,* this Court stated:

> *"Plaintiff argues that the general policy in favor of trial on the merits...supports a broad interpretation of section 583.340(b). But our interpretation of subdivision (b) is consistent with this policy. This is because subdivision (b) is not the only exclusion from the five-year period. When it enacted subdivision (b) of section 583.340, the Legislature also enacted the more flexible subdivision (c) of the provision, which permits trial on the merits when appropriate in situations not governed by subdivision (b)."* (*Id.* At 729) [Emphasis added]

Again, while this Court was specifically addressing the portion of subdivision (b) that deals with stays of the *prosecution of the action*, there is no logical reason why the portion of subdivision (b) dealing with stays of the trial would, or should, warrant an interpretation that allows for a *non-bright-line, non-discretionary* rule, when subdivision (c) is clearly a catch-all provision that would operate as a back-up for any legitimate tolling claims that do not meet the bright line intent of the Legislature for the entirety of subdivision (b).

This Court reasoned that the very existence of subdivision (c) warrants a more restrictive, narrow interpretation of subdivision (b). Indeed, subdivision (c) would be redundant if subdivision (b) were interpreted in a manner that does not attribute strict, definitive meaning to its

terms. The five year statute already has built-in protections for justifiable delay that do not fit the strict requirements of subdivisions (a) or (b). Subsection (c) of Section 583.340 is broad enough to encompass the reality of broader constraints on civil litigation in California *where tolling is justified,* and can properly take into account shifting budgetary, or other, constraints.

Therefore, before the actual order is analyzed, it is important to establish that subdivision (b) should be interpreted strictly and in light of subdivision (c).

2. The Authority of the Parties to Enter into Agreements to Continue Trial Dates Along with the Parties' Relative Ability to Facilitate Resolution of the Case During the Purported "Stay" *Should* be the Relevant Factors to be Considered in Determining Whether an Order Qualifies for Tolling Under Subdivision (b) as a *Stay of Trial* or Whether the Order was Merely a Continuance

i. To Allow the Order "Striking the Current Trial Date..." in this Case to Toll the Five Year Statute as a Qualified "Stay of the Trial" would Undermine the Purpose of the Five Year Statute and *Could* Apply to *Any* Order in Which a Trial Court Vacates a Trial Date and Sets a New Trial Setting Conference

Because of the existence of subdivision (c) of Section 583.340, subdivisions (a) and (b) should be interpreted in a way that only allows for tolling for time periods that are completely out of the control of the plaintiff, and where the plaintiff cannot act. Simply put, a holding that would place the order in this case within the ambit of the tolling provision of Section 583.340(b), as a stay of the trial, would have broad and far-reaching consequences that would undermine the policy of the five year statute.

In this case, although the order may have technically been suspending certain procedures, *the order only does so at the express request of the parties because it will **assist** with the resolution of the case*. **(CT, 252)** The record is clear in this case that the parties requested the order because of their perceived belief that resolving the case would have, in actuality, been *more difficult* than without an order.

To allow an order that the parties perceive as necessary, ***and even superior***, in facilitating the resolution of their case to toll the five year statute under any tolling provision (whether it be (a), (b), or (c)) would directly contradict the intent and policy of the five year statute.

The order itself indicates the following factors that would militate *against* interpreting the order as a stay of trial that would qualify for tolling under subdivision (b):

- All the parties expressly sought the order and the order would not have been in effect *but for* the parties' agreement to obtain the order;

- The parties believed that the order would conserve judicial resources and ***expedite the resolution of the case***;

- The newly served defendants, Aurora and United, along with the Appellant, believed that the case would be resolved more efficiently without the constraints of discovery and/or Fast Track rules;

- The parties agreed that the striking of the trial date was to ***preserve the defendants' procedural rights in the event the case does not settle.*** **(CT, 252)**

In light of the existence of subdivision (c) as the more "flexible" tolling subdivision of Section 583.340, to allow the order in this case to be qualified for tolling under subdivision (b) in light of the above factors would indisputably be interpreting subdivision (b) in a manner the Legislature never intended.

There is a strong case to be made that in light of the Legislative history of the five year statute and this Court's strict interpretation of subdivision (b) regarding stays of *proceedings of the action* in light of the Legislative history, the Legislature never intended for tolling under subdivisions (a), (b), or (c) to be placed strictly within the power of the litigants. This is especially true for subdivisions (a) and (b).

California Appellate Courts have held uniformly that the general underlying policy of the five year statute is the prevention of ***avoidable*** delay in the prosecution of actions. (*Sierra Nevada Memorial-Miners Hospital,*

Inc. v. Superior Court, 217 Cal.App.3d 464, 472 (1990)) Even if the order in this case could be interpreted as something causing a delay (and Fidelity would argue that the record clearly establishes that the terms of the order created the exact opposite of a delay), it is beyond dispute that it was avoidable. As mentioned in Fidelity's Answering Merits Brief, the Trial Court in this case was merely acquiescing to the desire of the litigants in its execution of the order. The language within the order was written by none other than the Appellant, and there is nothing in the record that indicates that the parties could not have simply requested that the Court vacate the order and set the trial date.

For these reasons, Fidelity would respectfully request that this Court attribute the same strict interpretation of subdivision (b) of Section 583.340 with respect to *stays of the trial* that it does for *stays of the proceedings* in *Bruns,* and conclude that the order **(CT, 279)** be interpreted as simply a strategic and desired continuance requested by the parties to facilitate the resolution of the suit.

Respectfully Submitted,
FIDELITY NATIONAL LAW GROUP

Kevin R. Broersma,
Attorney for Fidelity National Title Ins. Co., and
Bobby Jo Rybicki

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 915 Wilshire Boulevard, Suite 2100, Los Angeles, CA 90017.

On August 27, 2015, I served the foregoing document(s) described as:
LETTER BRIEF
on the interested parties in this action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

__X__ **(BY OVERNIGHT DELIVERY)** I delivered to an authorized driver authorized by Overnite Express to receive documents, in an envelope or package designated by Overnite Express with delivery fees paid or provided for, addressed to the person on who it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; or at that party's place of residence.

_____ **(BY MAIL)** I deposited such envelope in an internal collection basket. The envelope was mailed with postage thereon fully prepaid from Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if a postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__X__ **(BY ELECTRONIC SERVICE)** Pursuant to California Supreme Court's electronic notification address. Pursuant to Rule 8.212(c)(2), Respondents have submitted an electronic copy of the Letter Brief, which satisfies the service requirement of the California Supreme Court.

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

Executed on August 27, 2015, at Los Angeles, California.

Arbi Abrami

SERVICE LIST

Fannie Marie Gaines v. Joshua Tornberg, et al.

California Supreme Court Case No. S215990
Second Appellate Court of Appeal Case No. B244961
Los Angeles Superior Court Case No. BC 361768

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