IN THE SUPREME COURT OF CALIFORNIA

MILTON HOWARD GAINES, Plaintiff and Appellant, v. FIDELITY NATIONAL TITLE INSURANCE COMPANY, et al., Defendants and Respondents.	CASE NO. S215990 2nd District Court of Appeal Case No. B244961 Los Angeles Superior Court Case No. BC361768

On Appeal from the Judgment of the
Court of Appeal, Second District, Division 8
Case No. B244961

Superior Court, Los Angeles County
Case No. BC361768
The Honorable Rolf M. Treu, Judge

SUPPLEMENTAL LETTER BRIEF OF RESPONDENTS LEHMAN BROTHERS HOLDINGS INC. AND AURORA LOAN SERVICES LLC

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FIRST AMENDED CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

S215990 – *Gaines v. Tornberg, et al.*

This form is being submitted on behalf of respondents Lehman Brothers Holdings Inc. and Aurora Loan Services.

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
Aurora Loan Services LLC	[x]	[ ]	Respondent
Lehman Brothers Holdings Inc.	[x]	[ ]	Respondent
Great Ajax Operating Partnership, LP	[ ]	[x]	Financial
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

The undersigned certifies that the above listed persons or entities have either (1) an ownership interest at 10 percent or more in the part if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(3)(2).

Submitted by:

Dated: August 28, 2015

GARCIA LEGAL, A PROFESSIONAL CORPORATION

BY: _____

Steven Ray Garcia, Attorney for Respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC

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I.

QUESTIONS PRESENTED

By an order dated July 29, 2015, this Court requested that the parties submit supplemental letter briefs on the following questions:

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 Code (sic) of Civil Procedure, section 583.340, subdivision (b)?

II.

SUMMARY OF CONCLUSIONS

Because the trial court's order striking the trial date did not "freeze" the trial court's ability to set the case for trial or the ability of the parties to carry on other proceedings in the action, it did not constitute a stay of trial of the action under Code of Civil Procedure § 583.340(b). The distinction between a continuance of trial under and a stay of trial for the purposes of section 583.340(b) is that the former is part of the normal litigation process for which the party has been given the five-year period by the Legislature, while with the latter, the time during which the stay is in effect is precluded from the five-year period because the parties are barred from obtaining a trial date during its effective term, which is dependent upon some event beyond the control of the parties or the court.

III.

THE AGREED UPON ORDER STRIKING THE TRIAL DATE DID NOT CONSTITUTE A STAY OF TRIAL OF THE ACTION

The Court's first question asks whether the trial court's April 3, 2008 order striking then current trial date constituted a stay of trial of the action under Code of Civil Procedure § 583.340(b). Aurora and Lehman have concluded the answer is that it did not. To reach this conclusion, we begin by looking at the language in the statute since it is the

Court's purpose to determine the legislature's intent focusing on the plain words of the statute with their usual and ordinary meaning that govern in the first instance. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724; *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.) Section 583.340(b) provides:

> 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.

In *Bruns, supra*, this Court explained, "Only when the 'prosecution'or 'the trial'of the 'action' is stayed does the running of the five-year period halt under 583.340(b)." (51 Cal.4th at 725.) Then, this Court concluded, "When the statute is read as a whole, it becomes apparent that subdivision (b) contemplates a bright-line, nondiscretionary rule that excludes from the time in which a plaintiff must bring a case to trial only that time during which all proceedings in an action are stayed." (51 Cal.4th at 726.) As the court in *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1797, fn. 4—a case in which the parties stipulated that the trial of the action would be stayed pending completion of contractual arbitration—noted:

> The stay exception was an offshoot of the catchall impossible/impracticable/futile doctrine developed in common law before the enactment of section 583.340 in 1984. (See, e.g., *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 212-213.) "In determining whether the prescribed five-year period has expired, time during which it is impossible or impracticable to proceed to trial is excluded. [Citations.] While the stay order is in effect, it will be impossible or impracticable to proceed to trial.

Therefore, the five-year period cannot expire because a stay is ordered." (Ibid.) The stay exception was then separately codified (§ 583.340, subd. (b)) from the catchall exception (§ 583.340, subd. (c)). (6 Witkin, op. cit. *supra*, Proceedings Without Trial, § 138, p. 443.)

In *Bruns*, this Court noted that the Law Revision Commission's comment to section 583.340(b) cited only *Marcus v. Superior Court, supra*, for the proposition that subdivision (b) codifies existing law, concluding "the fact that the Law Revision Commission cited only that case to support its statement that subdivision (b) codified existing case law suggests that the subdivision applies only to complete stays." (51 Cal.4th at 729.) Applying the same rationale—that subdivision (b)'s "stayed or enjoined" language applies only when the trial is completely stayed—not only is grammatically consistent but also is consistent with this Court's interpretations of the law prior to the enactment of subdivision (b). (See, e.g., *Brunzell Construction Co. v. Wagner* (1970) 2 Cal.3d 545 [periods during which trial of the action was stayed by an injunction against proceeding issued by a Nevada court and by an appeal in California made it impossible or impracticable to go to trial against parties to claims not stayed.].)

Striking the trial date and setting a new trial setting conference did not constitute a stay of trial of the action here, however. It is helpful to recall the circumstances under which the trial court order striking the trial date came into existence. Plaintiff[1] had sold her home to Tornberg, who obtained new financing on it to save it from being lost to foreclosure by the loan plaintiff and her husband had received from Countrywide. By the time Aurora Loan Services, LLC (Aurora) was named, Tornberg's new loan was in

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[1] Respondents will continue their practice of referring to Fannie Marie Gaines as "plaintiff" and Milton Gaines as "appellant." (See Answering Brief of Respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC on the Merits, p. 5, fn. 6.)

default, and the holder of the loan, Lehman Brothers Holdings Inc. (Lehman), was threatening foreclosure through its servicing agent, Aurora. Plaintiff had named Aurora but not Lehman as a defendant in the case, and Aurora's general counsel approached plaintiff's counsel seeking an opportunity to discuss settlement before litigating. Due to the so-called Fast Track Rules implemented following the Trial Court Delay Reduction Act[2], however, the parties did not have sufficient time to arrange a global mediation before Aurora's response to the complaint would be due. (Gov't Code, § 68616(b); 2 AA 254: 12-17; 257:25-27; 259:15-25; and 260:19-24.) What is more, Countrywide wanted to be sure that by agreeing to go to mediation, it did not lose its right to file a motion for summary judgment, which could only be accomplished by moving the trial date. (2 AA 254: 24-255:2.) As such, the partial stay of proceedings was agreed to by the parties and implemented by the trial court through the order striking the trial date. (2 AA 278-279.) Nevertheless, as the trial court found, and the Court of Appeal concurred, the agreed-upon order striking the trial date did not constitute a stay under section 583.340(b).

"The terms 'stay' and 'strike' are not legally synonymous. (*People v. Calhoun* (1983) 141 Cal.App.3d 117, 124.) A stay is a temporary suspension of a procedure in a case until the happening of a defined contingency." (*People v. Santana* (1986) 182 Cal.App.3d 185, 190, fn. omitted.) A stay "freezes" the trial court proceedings at a particular point. (*Bruns v. E-Commerce Exchange, Inc., supra,* 51 Cal.4th at 724.) By contrast, striking is the unconditional deletion of the legal efficacy of the stricken event, allegation, or facts for the purposes of the proceeding. (*Id.*) In no way here did the trial court's order striking the trial date "freeze" the proceedings or the resetting of the trial date at that point. Instead, the parties were ordered to respond to currently outstanding written discovery (2 AA 279: 5-7) and to mediate the dispute. Thus, by striking the trial date, the trial court merely eliminated the initial effect of setting the trial date so as to

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[2] Government Code, § 68600, et seq.

extend the time to conduct discovery (Code Civ. Proc., § 2024.020), potentially to file motions for summary judgment (Code Civ. Proc., § 437c(a)), and to mediate the case, as agreed to by the parties and reflected in the trial court's order. What is more, the trial court also set a new trial setting conference and post mediation status conference on July 16, 2008. (2 AA 279:16-17.) But, because a great deal of activity toward the prosecution of the action was contemplated in the interim, including setting a new trial date, the trial court's action striking the trial date did not constitute a stay either of the prosecution of the case or of the trial but rather was more like a continuance, and this is a significant distinction that will be discussed in the next section.

IV.

THE DISTINCTION BETWEEN A STAY AND A CONTINUANCE SHOWS THAT THE ORDER STRIKING THE TRIAL DATE WAS NOT A STAY UNDER SECTION 583.340(b)

As noted above, this Court noted that a stay "freezes" the trial proceedings at a particular point. (*Bruns, supra*, 51 Cal.4th at 724.) The Court then discussed the only other case to discuss the meaning of the term "stay" under section 583.340(b), *Holland v. Dave Altman's R.V. Center* (1990) 222 Cal.App.3d 477, quoting the case as follows:

> "[T]he term ["stay"] 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, 190, 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 [, *supra*, at] page 1267 defines the term as 'a suspension of the case or some designated proceedings within it.' " (*Holland, supra*, 222

> Cal.App.3d at p. 482, 271 Cal.Rptr. 706.) Relying on *Holland*, plaintiff argues that a "stay" under subdivision (b) 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." But *Holland* does not support this position. *Holland* gave examples of time periods during which the case could not be brought to trial. They included the "absence of trial court jurisdiction to try [the case]" and "a court order barring the trial (by a stay or injunction)." (*Id.* at p. 482, 271 Cal.Rptr. 706.) *Holland* did not address whether the "prosecution" of the action was stayed within the meaning of section 583.340 when only a designated proceeding in a case, other than a trial, was stayed or suspended "until the happening of a defined contingency." (*People v. Santana, supra*, 182 Cal.App.3d at p. 190, 227 Cal.Rptr. 51.)

Bruns, supra, 51 Cal.4th at 724-725.

This Court then concluded that either total prosecution of the action or trial must be halted by the "stay" in order for section 583.340(b)'s exception to apply. As noted above, however, striking the trial date and setting a new trial setting conference at the request of the parties so that they can complete pending discovery and mediate the case is not a "stay" of trial of the action under section 583.340(b). There was no defined contingency of unknown duration that kept the trial court from resetting the trial such as a stay pending appeal (*Holland v. Dave Altman's R.V. Center, supra*, 222 Cal.App.3d at 482), a pending bankruptcy of a defendant (11 U.S.C.A. § 362), or any other court order precluding trial from being set. (*Brunzell Construction Co. v. Wagner, supra* [injunctions and appeals prevented trial from being set].) Thus, this circumstance was more like a continuance of the trial.

Trial continuance periods are "ordinary incidents of proceedings like disposition of demurrer, amendment of pleadings in the normal time of waiting for a place on the court's calendar or securing a jury trial"; they are included in the five-year calculation and do not extend the five-year mandatory dismissal period. (*O'Donnell v. City & County of San Francisco* (1956) 147 Cal.App.2d 63, 65-66; *Continental Pac. Lines v. Superior Court* (1956) 142 Cal.App.2d 744, 750 [the time necessary for service of process, settlement of the pleadings *and the time when the parties are waiting for a trial date* are ordinary proceedings not to be excluded from the computation of the five-year period]; *Youngblood v. Terra* (1970) 10 Cal.App.3d 533, 536-537 [the period during which the trial court ordered the case off the court's trial calendar due to plaintiff's illness was not excludable from the five-year period, particularly since the plaintiff had ample time to seek a trial date]; *De Santiago v. D and G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 376 [periods of continuance while the parties mediate are not excluded from five-year period where there is a possibility the case could have been brought to trial before the expiration of the five-year mark].)

It thus appears that for purposes of section 583.340(b), the distinction between a stay of trial and a continuance of trial is a similar bright line test to that set out by this Court in *Bruns*. Where a continuance is concerned, the parties are free to move the case to trial—whether through normal trial setting procedures (e.g., Rule 3.729, Cal. Rules of Court), a motion to advance, specially set or reset the trial (e.g., Rule 3.1335, Cal. Rules of Court) or a motion for preferential setting (Code Civ. Proc., § 36)—while carrying on with other procedural aspects of the case. On the other hand, when trial of the action is stayed under section 583.340(b), the trial court may not set the case for trial until the contingency giving rise to the stay has occurred so as to lift the stay, such as the lifting of a bankruptcy stay regarding a defendant (11 U.S.C.A. § 362; *Au-Yang v. Barton* (1999) 21 Cal.4th 958, 961; *Webster v. Superior Court* (1988) 46 Cal.3d 338, 349), the issuance

of the remittitur on appeal (Rules 8.272, 8.490(d), 8.499(d), Cal. Rules of Court; *Holland v. Dave Altman's R.V. Center, supra*), or the dissolution of a stay issued by another trial court. (*Brunzell Construction Co. v. Wagner, supra.*) It has been uniformly held that continuances do not toll the running of the five-year period but stays that prevent trial from occurring do. There is no reason to interpret what occurred in this case differently. The trial court's order striking the trial date and setting a new trial setting conference did not stay trial of this case under section 583.340(b).

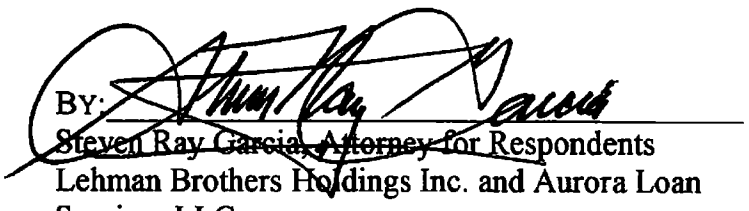
V.

CONCLUSION

The trial court's order striking the trial date did not "freeze" all proceedings in this action or prevent this case from being set for trial. Instead, like most continuances, it was an ordinary part of the procedure in the case, one designed to give the parties the opportunity they desired to mediate the case. (*De Santiago v. D and G Plumbing, Inc., supra,* 155 Cal.App.4th 365; cf., Code Civ. Proc., § 1775.7.) It did not preclude other actions toward prosecuting the case, including discovery or mediation. As such, it was not a "stay" of the trial of the action under Code of Civil Procedure § 583.340(b). In order to be a stay, it would have had to preclude the trial from being set at all, and it did not. Therefore, the order was not a stay, and the time following when the order was issued should not be deducted from the five-year period. The judgment of the Court of Appeal should be affirmed.

Dated: August 27, 2015

GARCIA LEGAL, A PROFESSIONAL CORPORATION



BY: _____
Steven Ray Garcia, Attorney for Respondents
Lehman Brothers Holdings Inc. and Aurora Loan Services LLC

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1), CAL. RULES OF COURT

I, Steven Ray Garcia, counsel for respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC, certify that the foregoing brief is prepared and proportionally spaced Times New Roman 13 point type and based on the word count of the word processing system used to prepare the brief, exclusive of tables, is 2,572 words long.

Dated: August 27, 2015

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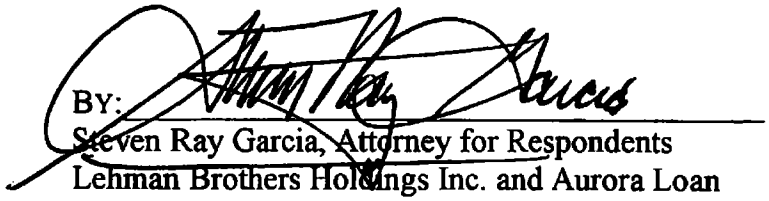

BY:
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Gaines v. Tornberg

California Supreme Court Case Number SC215990

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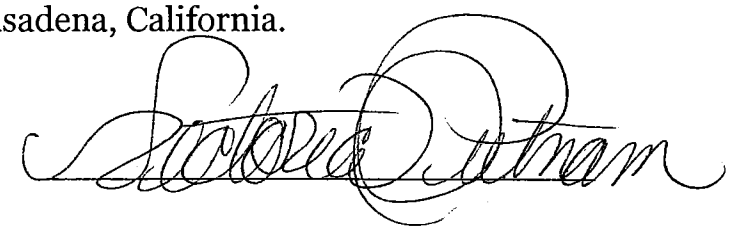

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