CASE NO. S215990

SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FANNIE MARIE GAINES,
Plaintiff/Petitioner

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, et. al.
Defendants/Respondents.

Appeal from the Superior Court of Los Angeles (BC361768)
Hon. Rolf M. Treu

After Decision by the Court of Appeal for the Second District
Division Eight (B244961)

FIDELITY NATIONAL TITLE INSURANCE COMPANY AND BOBBIE JO RYBICKI'S ANSWERING MERITS BRIEF

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Defendants/Respondents, Fidelity National Title Insurance Company and Bobby Jo Rybicki (hereafter collectively referred to as "Fidelity") hereby submit this Answering Merits Brief ("AMB") in response to Plaintiff/Petitioner, Fannie Marie Gaines' ("Petitioner") Opening Merits Brief ("OMB").

I. INTRODUCTION

California's five year statute, codified as *California Code of Civil Procedure* ("CCP"), Section 583.310 *et. seq.*, requires that, *"[a]n action shall be brought to trial within five years after the action is commenced against the defendant."* The policy underlying the five year statute has been stated in this Court, and California Courts of Appeal, time and time again: the prevention of ***avoidable*** delay in the prosecution of actions. Section 583.340 provides that certain periods of time shall be excluded from the computation (or tolled) under the five year statute where, in relevant part, prosecution or trial of the action was stayed or enjoined, or where bringing the action to trial, for any other reasons, was impossible, impracticable, or futile. (CCP §583.340(b) & (c), respectively)

In the entire jurisprudence of the five year statute, neither this Court, nor the California Court of Appeal, whether under subdivision (b) or (c) of Section 583.340, has ever allowed for tolling of the five year statute for a stay or circumstance that was requested by, and fully within the control of, the plaintiff. With this appeal, the Petitioner asks this Court, for the first

time in its jurisprudence, to toll the five year statute for a stay that resulted from the Petitioner's express request to stay prosecution of the action to facilitate the Petitioner's express desire to mediate, and globally settle all claims against all parties.

Fidelity submits that no stay, which ordered the parties to participate in mediation, and allowed for the completion of outstanding discovery, which resulted from a plaintiff's express desire and request, has *ever* qualified as a complete stay within the scope of subdivision (b) of Section 583.340. Fidelity further submits that no circumstance of impracticability that was requested by, and fundamentally within the control of, plaintiff, has ever qualified as a circumstance of impracticability causing an inability to meet the five year deadline under subdivision (c) of Section 583.340.

To the extent tolling would be allowed under such circumstances, whether under subdivision (b) or (c) of Section 583.340, it would fundamentally undermine the purpose and policy underling the five year statute. Fidelity respectfully requests that this Court not expand the scope of existing law to include such situations.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. FACTS UNDERLYING THE LITIGATION

The Petitioner and her husband applied for a loan in approximately May of 2006, after their previous loan had already gone into default. After a denial from Countrywide, defendant AJ Roop, who worked for

Countrywide, informed Petitioner that her boyfriend, Josh Tornberg ("Tornberg"), might be able to assist her in finding financing. Tornberg, Johnson and Ray Management agreed to assist Petitioner in finding refinancing for her and her husband, but were ultimately unsuccessful due to the fact that Petitioner and her husband did not have sufficient income to obtain a loan. Tornberg agreed to purchase the Property from Petitioner for $950,000.00 and was going to lease it back to Petitioner so that Ms. Gaines could stay in the Property. As part of the escrow instructions, the seller was to pay for repairs to bring the Property up to code. According to Petitioner, it would have cost approximately $100,000.00 to bring the Property up to code. The final HUD1 and amendments include an allocation of $90,000.00 to Ray Management for the repairs to the Property, which Petitioner and her husband agreed to.[1] **(1AA, 1-57)**

Upon closing, Petitioner and her husband received $280,555.82 in cash proceeds, along with $2,500.00 in earnest money that was released

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[1] Justice Rubin, in his dissent, although acknowledging that these were merely allegations, seemed to put weight into the claim that Fidelity misappropriated $90,000.00 of the Petitioner's money. While such facts are not relevant to this appeal, Fidelity would respond: (1) Fidelity's escrow agent, Rybicki, who was completely disinterested in the allocation of the $90,000.00, was going to testify that Petitioner orally instructed her to allocate that money to Ray Management through closing; (2) Petitioner acknowledged that the money was going to be used for repairs. By mention of these facts, Fidelity is not seeking adjudication on the merits, but is merely attempting to show that these facts were disputed with compelling evidence and testimony.

prior to closing. $4,221.65 was used to pay off real estate taxes on the Property in 2005/2006. Most importantly, however, Petitioner's existing mortgage, which was then in default, was paid off with $567,995.96 from the sale proceeds. After Petitioner and her husband signed the warranty deed transferring title to the Property to Tornberg, Petitioner changed her mind, and refused to allow any of the defendants on the Property to begin repairs.[2] Petitioner sued Fidelity and the escrow agent, Bobby Jo Rybicki, for negligence, breach of fiduciary duty, and assisting financial elder abuse, resulting primarily from the allege transfer of the $90,000.00 in escrow to Ray Management. **(1AA, 58-148)**

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[2] With due respect to the decedent Petitioner, the portrayal of her as a victim is highly inaccurate. With one pre-planned call to her attorney (evidence in the case suggests she planned her attorney's involvement before the transaction closed), Petitioner simultaneously, (1) avoided an inevitable foreclosure in which she *was going* to lose the property; (2) secured her living in the property for going on eight years now without making a single mortgage or tax payment; (3) got the previously defaulted Countrywide loan paid off in full; (4) removed herself from any tax liability, as the property was no longer in her name (although she got to live there because of the pending lawsuit concerning title); and (5) removed herself from any liability on the new trust deeds, for which she received hundreds of thousands of dollars in cash. Tornberg defaulted on the loan he obtained for Petitioner because Petitioner locked him out of the Property and refused to allow the repairs to get done, thereby precluding Petitioner and Tornberg's arrangement. Fidelity is in no way trying to portray Tornberg as the epitome of upstanding moral character; it is simply trying to show that the portrayal of Petitioner as a victim is simply wrong.

B. PROCEDURAL FACTS UNDERLYING THE CURRENT APPEAL

Petitioner filed suit on November 13, 2006, naming both Fidelity and Rybicki in the original complaint. **(1AA, 1-57)** After approximately one year of litigation, the Petitioner went to court on an ex-parte basis to submit the case to voluntary mediation for 120 days with the consent of the defendants. **(2AA, 278-281)** The purpose of the Petitioner-initiated mediation and voluntary stay, according to the Petitioner, was to "settle all claims against all parties." **(3AA, 533)** The resulting order allowed for the completion of outstanding discovery and ordered good faith participation in the mediation itself. **(3AA, 543-544)**

In November of 2008, the parties attended a status conference, and the Trial Court set a trial setting conference for December 11, 2008, and a trial for August 24, 2009. **(2AA, 303-304)** The case continued to be litigated until approximately August of 2009 when it was apparently discovered that one of the defendants, Aurora, did not hold the underlying beneficial interest in the note and deed of trust with regard to Petitioner's quiet title claim. **(3AA, 9)** It was claimed that Lehman was the beneficial interest holder, and that Lehman needed to be a party to the suit. Lehman, however, was currently undergoing bankruptcy. Trial was originally scheduled for August 24, 2009, but was vacated in order for Petitioner to obtain relief from the bankruptcy stay and add Lehman as the real party in

interest to the litigation as a defendant.

When, after five months passed and Petitioner had still not brought a motion for relief from stay in Lehman's bankruptcy matter, trial was again continued to January 28, 2010 so the Petitioner could obtain relief from the Lehman bankruptcy stay, and add it into the case as a defendant. From that date forward, the trial date was continued several more times because Petitioner continuously failed to bring a motion for relief from stay in the Lehman bankruptcy matter. Status conferences regarding Petitioner ongoing failure to obtain relief in the Lehman bankruptcy occurred on November 4, 2009, January 28, 2010, August 20, 2010, November 1, 2010, December 13, 2010, February 25, 2011, and June 20, 2011. **(3AA, 646-662)** Finally, the Trial Court set an Order to Show Cause re Dismissal for Failure to obtain relief from stay on October 26, 2011, whereat Petitioner informed the Court that Lehman's bankruptcy counsel had stipulated to its involvement in the case. The Trial Court then continued the status conference again to allow Petitioner to name Lehman, and a trial date of August 6, 2012 was eventually set. Petitioner did not bring a motion to set the trial date before the five year statute, nor did she attempt to bifurcate the case against the parties against whom she was only seeking damages. **(AAA, 1015-1018)**

Fidelity and Rybicki, filed a motion to dismiss the case under CCP §583.310, based upon the Petitioner's failure to bring the case to trial

within five years of the filing date. **(1AA, 158-191)** The motion was heard on July 25, 2013, and was granted. **(2AA, 429-431)** The case was dismissed in its entirety, and the Petitioner filed a motion for reconsideration, which was ultimately denied. **(4AA, 725-731)** Petitioner filed the instant appeal on December 12, 2013, and the Majority of the Court of Appeal (Justice Bigelow and Grimes) affirmed the Trial Court's order with respect to all the defendants, except Lehman. With respect to the dismissal of Lehman, the Court of Appeal reversed the Trial Court's order of dismissal and remanded the case. (*Gaines v. Fidelity National Title Ins. Co.*, 222 Cal.App.4th 25 (2013))

III. LEGAL DISCUSSION AND ARGUMENT

A. GENERAL INTRODUCTION

This Honorable Court indicated in its order that this case presents the following issues: *Was this action properly dismissed for the failure to bring it to trial within five years or should the period during which the action was stayed for purposes of mediation have been excluded under Code of Civil Procedure section 583.340, subdivision (b) or (c)?*

For the purposes of this AMB, Fidelity will herein respond specifically to the Court's issue statement, and to the extent arguments in Petitioner's brief overlap with that issue statement, Fidelity will respond to Petitioner's specific arguments. However, the Petitioner fundamentally ignored this Court's order on the issues presented in the OMB, instead

choosing to combine all arguments made at the Trial Court level with the arguments made throughout the appeal. To the extent the Court finds other issues in the OMB compelling, Fidelity would respectfully request it be allowed to brief those separately.[3]

The first part of this AMB will focus on subdivision (b) of Section 583.340. Under subdivision (b), the stay imposed in this case cannot be a complete stay because the stay contemplated, and even encouraged, the facilitation of *prosecution* of the action through mediation and the allowance for the completion of outstanding discovery. Furthermore, the trial in this case was not stayed; it was merely vacated by the express request of Petitioner and a new trial setting conference was scheduled. **(3AA, 532-534; 543-546)** There is nothing in the record to support the proposition that the trial was stayed, or that the Petitioner could not have simply requested that the mediation stay be lifted at any time to resume normal litigation. The parties choose to mediate the case as a *form* of resolution, or *prosecution,* and the stay facilitated that form of resolution: mediation.

Under subdivision (c), the mediation and resulting stay do not

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[3] Although this Court narrowed the issues presented to the mediation and resulting stay under subdivisions (b) and (c) of Section 583.340, Petitioner inappropriately revives several irrelevant arguments, and even raises a new substantive claim for the first time in this Court (that Petitioner has a Home Equity Sales Act claim. **(OMB, 46)**).

qualify as a circumstance of impracticability at the outset. The voluntary nature of the stay, and the fact that it could have been withdrawn at any time undermines the argument that the stay qualified as a circumstance of impracticability at the outset. Furthermore, even if the stay is considered a legitimate circumstance of impracticability, the Petitioner has failed to show causation and diligence. To the contrary, the Petitioner admits not only was the case ready for trial in August of 2009, but also that the mediation was successful in facilitating the settlement with one defendant, and had laid the groundwork for another.

Finally, the Petitioner fails to cite to any diligence, other than an irrelevant docket report in her Request for Judicial Notice ("RJN"), which, as any six-year-old case would yield, shows many hearings and many documents being filed.[4] As the Court of Appeal found in *Gaines,* the Petitioner fails to account for a 16 month gap in the beginning of the case, and the record is clear that the Petitioner did nothing from August of 2009 until October of 2011 to bring the case to trial or otherwise attempt to meet

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[4] The Petitioner's RJN is irrelevant. The fact that a docket report for a six-year-old case has a long history is hardly controversial or noteworthy. It certainly does not *prove* diligence. Just for example, every unproductive hearing that the parties attended from August of 2009, until the Petitioner ultimately was able to add Lehman into the case is listed on the docket report. The numerous hearings may appear to show diligence and a highly active case. However, when one looks at the transcripts of these hearings, it belies such claims. The Trial Court, after admonishing Petitioner numerous times, was forced to continue these hearings over and over again. **(2AA, 162-222)**

the five year deadline.

The fact that there are hearings and docket entries in the docket report (attached as Exhibit A to Petitioner's RJN) does not show diligence ***to meet the five year deadline***, nor does it show an inability to meet the five year deadline because of an overly active case. In fact, as argued, *infra,* the docket report actually shows a lack of diligence. For these reasons, the Trial Court's ruling should be upheld and the Court of Appeal's affirmance of that ruling should similarly be upheld.

B. THE FIVE YEAR STATUTE SHOULD NOT BE TOLLED UNDER SUBDIVISION (b) OF SECTION 583.340-THE STAY IN THIS CASE WAS PARTIAL BECAUSE IT WAS REQUESTED BY PETITIONER AND CLEARLY CONTEMPLATED AND FACILITATED "PROSECUTION" UNDER *BRUNS.*

The word "stay" must be looked at in the context of each individual case, according to *Bruns v. E-Commerce Exchange, Inc.*, 51 Cal.4th 717 (2011). Section 583.340(b) only applies to *complete* stays that are used to stop the *prosecution* of the action altogether where the court is divested of jurisdiction or there is a specific order that the *trial* be stayed. (*Bruns* at. 730)

In this case, the trial was not stayed; it was vacated and a new trial setting conference was set after a defined period of time, *which was voluntarily agreed to by the parties*. **(3AA, 532-541, 543-545)** The order and stay in this case resulted solely from the Petitioner's desire to settle all

claims with all parties, and through a bargaining with Aurora, to cease foreclosure efforts. (3AA, 536)

1. The Stay Resulting From the Order in this Case Established Only a *Partial Stay* – The Allowance for the Completion of Outstanding Discovery and Requisite Good Faith Participation in Mediation *is not* a Stay "*Encompassing the Entire Proceeding*" That is "*Used to Stop the Prosecution of the Action Altogether*"

a. Subdivision (b) of Section 583.340 Only Applies to Complete Stays

The Court below (including the dissenting Justice Rubin) held that the submission of the case to mediation and resulting stay *did not* toll the five year statute under subdivision (b) because the resulting stay was *partial.* (*Gaines v. Fidelity National Title Company,* 165 Cal.Rptr.3d 544, 554 (2013)) Subdivision (b) of Section 583.340 only allows for tolling of the five year statute where there is either a stay of *prosecution* or a stay of the *trial.* In *Bruns,* this Court was faced with addressing, in relevant part, the following two issues: (1) did subdivision (b) apply to partial stays, and (2) if not, what distinguished a partial stay from a complete stay.

As this Court said in *Bruns, "a partial stay might, or might not, make it 'impossible, impracticable, or futile' to bring the action to trial."* (*Bruns, supra,* at 726) Hence, and in further support of subdivision (b)'s application only to complete stays, the mere existence of subdivision (c)

supports the Legislature's intent to that effect. Specifically rejecting the plaintiff's argument in *Bruns* that the Court should adopt a position that subdivision (b) encompasses individual steps or proceedings in prosecution, this Court said:

> *"To embrace plaintiff's position that section 583.340 (b) encompasses individual steps or proceedings in a prosecution, we would have to engraft onto subdivision (b) an exception that the Legislature explicitly included in section 583.240 but did not include in section 583.340 CCP §583.340 (b). We decline to rewrite the statute to exclude from the mandatory time in which an action must be brought to trial the time during which individual proceedings are stayed.* (*Bruns, supra,* at 727) [Emphasis added]

This Court went to great lengths to analyze the five year statute in its own context, and within the context of other similarly enacted statutes, which expressly distinguished between the *stay of an action* and the *stay of a proceeding within an action.* In short, this Court found that the Legislature, had it intended, knew to distinguish between stays of the action, and stays of proceedings within the action. The absence of language in subdivision (b) making such a distinction, according to this Court, is indicative of the Legislature's intent for subdivision (b) to apply only to *complete stays of the action,* and not *stays of proceedings within the action.* In other words, a stay only qualifies for tolling under subdivision (b) of Section 583.340 when that stay, ***"encompasses all proceedings in the action."*** (*Id.* at. 726)

b. Where the Scope of the Stay Includes Possible "Prosecution," the Stay is Partial, and No Tolling Will Take Place Under Subdivision (b) of Section 583.340

This Court exhaustively and comprehensively addressed the distinction between a partial stay and a complete stay in *Bruns, supra,* and concluded that a stay could not be complete if any form of *prosecution* was, or could be, conducted within the scope of the stay. For a determination of whether a stay was partial or complete, the term *prosecution* needed to be defined. Simply put, from *Bruns,* one can take the following rule: where the scope of any given stay encompasses prosecution, it is partial and no tolling is allowed under subdivision (b); on the other hand, where the stay completely precludes prosecution, the stay is complete, and tolling can take place under subdivision (b). (*Bruns, supra,* at 725)

After reviewing the common and general notions of the word prosecution, this Court looked at the word in a legal context, and concluded:

> *"In a legal context, 'prosecution' has been defined, '[a]s applied to actions or suits generally, [as] the following up or carrying on of an action or suit already commenced until the result be attained..." "* (*Id.* at 725; citing to, *32 Cyclopedia of Law & Procedure* (1909) p. 727) [Emphasis added]

This Court went on:

> *"In its broadest sense the term would embrace all proceedings ... for the protection or enforcement of a right or*

> *the punishment of a wrong, whether of a public or private character."* (*Bruns* at 725, citing to *32 Cyclopedia, supra,* at 728, fn. 5; *Ray Wong v. Earle C. Anthony, Inc.*, 199 Cal. 15, 18, (1926) *"The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination"* (*Id.*) [Emphasis added]

In light of the above analysis in *Bruns,* the stay resulting from the order in this case *cannot* be a complete stay for purposes of tolling the five year statute under subdivision (b) of Section 583.340. This is the case because the order, which was drafted by Petitioner and merely signed by the acquiescent Trial Court, contemplated several actions within litigation that are considered prosecution, thereby precluding the characterization of the stay as *complete.* Those continuing prosecutorial actions included completion of pending discovery and good faith participation in a mediation of the disputes raised, in an effort to resolve the dispute.

Thus, the order and stay in this case resulted specifically from the Petitioner's expressed desire to bargain with counsel for Aurora regarding foreclosure issues, and to *"conduct...a global mediation...in an effort to conserve attorney's fees and judicial resources and to...* ***resolve all claims between all parties.*** (3AA, 533). These arguments are discussed more thoroughly below.

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i. The Definition of Prosecution Expressed in *Wong* and Adopted by this Court that it is *'Sufficiently Comprehensive to Include Every Step in an Action from Its Commencement to its Final Determination'* Includes both the Express and Implied Actions Contemplated Within the Scope of the Stay Order in This Case

In *Ray Wong v. Earle C. Anthony, Inc.*, 199 Cal. 15, 18 (1926), the Court held that *"The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination."* Taking that analysis a step further, and with more specificity, in *Melancon v. Superior Court in and For Los Angeles County*, 42 Cal.2d 698, 707-708 (1954), this Court held that depositions constitute a step in the 'prosecution' of the action and therefore would not be able to proceed under the stay provision of *California Corporations Code*, Section 834.

Although the Court in *Melancon* decided whether a deposition concerned prosecution within the context of the *Corporations Code*, Fidelity believes that analysis is applicable in this case. This Court adopted the reasoning in *Melancon* and cited to it in coming to a determination of the meaning of prosecution in *Bruns*. In short, if a deposition is *prosecution*, thereby being forbidden during a stay, then similar forms of discovery, including the allowance for the completion of outstanding discovery, must also be *prosecution*.

The purpose of discovery in general is to assist a party in the preparation of their case for trial, and educating the parties of their respective positions through the mutual accumulation of evidence. (*Boston v. Penny Lane Centers,* 170 Cal.App.4th 936, 950 (2009))

The order in this case imposing a stay for 120 days cannot be considered an order imposing a complete stay. The order here clearly contemplates not only the completion of outstanding discovery **(3AA, 544)**, but also the good faith participation of the parties in the mediation itself. Indeed, those two seemingly minor allowances involve the possible following forms of prosecution: (1) motions to compel; (2) the meet and confer process under The Discovery Act; (3) further or supplemental responses to discovery; and (4) court intervention and/or orders and sanctions. Each of these steps involves prosecution of the action within the scope of *Wong* and *Melancon,* as adopted by *Bruns.*[5]

Therefore, the allowance for the completion of outstanding discovery alone places the stay resulting from the order in this case firmly

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[5] It is possible that a hypothetical case with the same order could yield highly contentious litigation under such an order. For example, if there were numerous parties, all of whom owed discovery at the time of the order's making, but decided not to produce the discovery, or decided to produce insufficient responses. Potentially, the trial court could be hearing numerous motions to compel and could be ordering supplemental production and sanctions. It is difficult to comprehend a stay that allows for such a scenario to take place (and such a scenario is more than a mere remote possibility) to qualify as a complete stay for tolling purposes under Section 583.340(b).

outside the scope of the kind of stay envisioned by the California Legislature in subdivision (b) of Section 583.340.[6]

ii. Because the Order in this Case Specifically Allowed for The Global Mediation of All Claims Against All the Parties, and the Order Resulted from Petitioner's Desire to Effectuate Resolution of the Case, the Stay Resulting from the Order Was Not Complete

The California Legislature has expressly declared:

> "*...mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity for them to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.*" (*Wimsatt v. Superior Court,* 152 Cal.App.4th 137, 150 (2007); citing to, *Code of Civ. Proc.*, §1775, subd. (c)) [Emphasis added]

Even if the order in this case completely precluded *any* discovery, including outstanding discovery, the stay resulting from the order would still not qualify under subdivision (b) of Section 583.340 as complete

[6] At oral argument in the Court of Appeal, Justice Rubin inquired if, in fact, any discovery had been due and owing during the pendency of the stay. To the extent Justice Rubin would make a legally relevant distinction based upon what an order *allows* and what *actually happened* during the order's existence, Fidelity responds follows: In determining whether any particular order imposes a complete or partial stay, it stands to reason that the only relevant factor is what the order *allows;* not what *actually occurred.* To draw any other distinction would not only be difficult to impose, but would undermine the policy of the five year statute. Since the policy of the five year statute is prevention of *avoidable* delay, the relevant factor in determining whether a stay is partial or complete *must be* whether the plaintiff *could* have acted; not whether plaintiff *did,* in fact, act.

because the order specifically called for mediation between all the parties in good faith. **(3 AA, 544)**

In fact, one can easily make the argument that the stay order *facilitated* the prosecution of this case *because* it precluded the parties from propounding any new discovery pending the mediation.[7] The Petitioner here entered into negotiations with Aurora's counsel to enter into a stay and mediation for 120 days, in exchange for Aurora's promise to cease foreclosure efforts while the parties mediate their dispute. **(3AA, 530)** To be sure, the Petitioner made a voluntary and strategic decision on a manner in which to resolve this case. The Petitioner should not be awarded by the tolling of the five year statute simply because of Petitioner's decision to facilitate reaching one of her litigation goals through mediation.

There is no evidence in the record (or, as the court in *Gaines* held, even an argument from the Petitioner) that the mediation and stay did

[7] Trial courts typically stay discovery pending mediation specifically to assist with the mediation by keeping the focus of the litigation on the mediation. The allowance of potentially burdensome and harassing discovery during this time would only benefit parties with financial means. Furthermore, it is nearly always the case that discovery has been done, or is being completed, by the time of mediation; such was the case here. The record in this case supports that position that mediation is a facilitator of prosecution because the Petitioner was clearly ready for mediation and specifically requested the stay on discovery. **(3AA, 533)** Furthermore, the Petitioner indicates in the OMB that she settled with United Mortgage, and later, Countrywide, as a result of the mediation, and was ready for trial in August of 2009. Indeed, Petitioner's argument of diligence is a double-edged sword, as it portrays the mediation as a facilitator of settlement of certain issues for which she sought relief.

anything other than help the Petitioner in litigating the case. There is no evidence or argument that the Petitioner was precluded from propounding imperative discovery during that time, or that a vital motion needed to be filed, or that any other act needed to be accomplished, but could not be because of the stay. In light of this, the Court should not assume a hindrance that does not exist and is not supported by the record.[8]

2. Petitioner's Claim That the Statute Should be Tolled for 217 Days is Simply Wrong – The Stay was a Finite 120 Day Period Pursuant to the Express Language of the Order

Petitioner continuously argues that the 120 day stay listed in the Trial Court's order should be 217 days because Judge Lee had left the bench by the time of their next scheduling conference, which was scheduled pursuant to the order for July of 2008. **(3AA, 543-544)** However, this is wrong. Even if this Court were to consider the stay complete for tolling purposes, it was expressly set for 120 days pursuant to the order. **(3AA, 544)**

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[8] Fidelity is aware that this argument *may* be more appropriate in its defense to subdivision (c), as the only concern under subdivision (b) is whether there was a qualified stay; not whether the stay caused any hindrance for the plaintiff. However, to the extent this Court will be broadening the horizons of the five year statute to create a holding and/or rule specifically for mediations, Fidelity would argue that the fact that mediations, and stays resulting therefrom, are specifically designed to facilitate prosecution and the resolution of the litigation, should weigh into the Court's reasoning, even under subdivision (b). Indeed, often resolutions at mediation result in some form of judgment, which is the ultimate end of prosecution.

Petitioner claims that the next judge to be assigned to the case, Judge Heeseman, "lifted" the stay at a November 6, 2008 status conference, at which Judge Heeseman also set a trial date of August 29, 2009. **(OMB, 15; 2AA, 302-306)** To support the proposition that Judge Heeseman was required to "lift the stay," Petitioner cites to **2AA, 302-306**. However, that portion of the record is merely the Petitioner's self-serving statement in her own notice of ruling.

There is nothing in the record to evidence the proposition that Judge Heeseman was required to "lift the stay." Indeed, even if Judge Heeseman did say the words that the, *"stay was lifted,"* because he was under a misapprehension that a stay was in place, that ruling would be superfluous. The only evidence of any stay, supported by a judge-executed order in the record, is the order listing the finite 120 day stay signed by Judge Lee. **(3AA, 543-544)** Furthermore, Judge Lee did not tie the length of the stay to the next status conference.

3. The Stay Was Voluntary - The California Legislature Never Intended for Subdivision (b) to Apply to Voluntary Stays Within the Action – The Rule Applicable to Arbitrations Under *Code of Civil Procedure* Section 1141.17 Should Assist the Court in Ruling on Mediations

California Code of Civil Procedure Section 1141.17 provides the following:

> (a) *Submission of an action to arbitration pursuant to this chapter shall not suspend the running of the time periods specified in*

Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2, except as provided in this section.

(b) *If an action is or remains submitted to arbitration pursuant to this chapter more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under Section 1141.20 shall not be included in computing the five-year period specified in Section 583.310.*

According to Section 1141.17, the general rule is that arbitration under that chapter does not toll the five year statute, *unless* the case is or remains submitted to arbitration within six months preceding the five year deadline. In that case, the amount of time beginning four years and six months after the plaintiff filed the action, and ending at a time where the plaintiff requests a trial de novo is not included in computing the five year period.

In *Moran v. Superior Court,* 35 Cal.3d 229 (1983), this Court held that the five year statute *is not* tolled by voluntary submission of the case *by the parties*, or the plaintiff, to arbitration, even under subdivision (b) of Section 1141.17. The only time periods for submission to arbitration or mediation that will be tolled from the five year statute are those that are *mandatorily* submitted to arbitration. (*Moran, supra,* fn. 5; *Dodd v. Ford,* 153 Cal.App.3d 426, 429 (1984))

Although there does not appear to be any specific legislative history regarding Section 1141.17, as it is only one provision within a larger

chapter dealing with judicial arbitration, the implied policy is clear: involvement in dispute resolution, far from acting as a hindrance to the prosecution of the case, acts as a facilitator of the prosecution of the case. If dispute resolution in the form of arbitration were a fundamental hindrance to the prosecution of the case, the California Legislature would not have enacted a separate provision under the chapter specifically excluding arbitration from tolling under the five year statute.

Fidelity is not naive to the fact that arbitration, unlike mediation, bears some semblance to trial, and therefore, the policy underlying Section 1141.17 may be, admittedly, stronger in the case of arbitration. However, that does not make the natural, common sense extension of the underlying purpose of Section 1141.17 to mediations incomprehensible.

To be sure, mediation and arbitration share many of the same characteristics that undoubtedly inspired the express exclusion of arbitration from tolling under the five year statute: (1) both facilitate resolution of the underlying case through bargaining, based upon the relative strengths and weaknesses of the parties involved; (2) both are typically not productive, and thus, not conducted until the parties have completed all, or most, of the discovery set to be propounded in the case;[9]

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[9] Parties will generally not engage in any form of dispute resolution unless and until discovery has been conducted. This supports the proposition that both mediation and arbitration, notwithstanding stays imposed during these proceedings, facilitate prosecution and do not hinder it.

(3) both involve the use of previously served discovery and evidence in the facilitation of the particular form of dispute resolution.

The difference between arbitration and mediation are not differences that make the common sense application of the policy behind Section 1141.17 wholly inapplicable to mediations. Indeed, the general common theme in arbitration and mediation is that in both, the parties are actively involved in facilitating the resolution of the case. In other words, both clearly fit the definition of prosecution adopted in *Bruns*.

C. THE VOLUNTARY MEDIATION OF THE PARTIES AND RESULTING STAY *SHOULD NOT* TOLL THE FIVE YEAR STATUTE UNDER SUB. (c) OF SECTION 583.340

The most thorough explanation of subdivision (c) of Section 583.340 comes from *Tamburina v. Combined Ins. Co.*, 147 Cal.App.4th 323 (2007). The Court of Appeal in that case specifically divided the analysis under subdivision (c) into three distinct categories, requiring the plaintiff to show: (1) a circumstance of impracticability; (2) a causal connection between *that* circumstance and the inability to meet the five year deadline; and (3) diligence. (*Id.* at 328) Under the facts here, the Petitioner cannot meet *any* of the three criteria.

Tamburina is an insightful case because the Court there contrasted their decision to find causation under subdivision (c), with its refusal to do so in *Sierra Nevada Memorial-Miners Hospital, Inc. v, Superior Court*, 217

Cal.App.3d 464, 473 (1990). In that case, the Court of Appeal, looking at subdivision (c) of Section 583.340, concluded that certain time periods, including the serious illness of trial counsel, could not toll the statute unless, either (1) the illness took place at the end of the five year period, and it precluded the trial counsel from acting, or (2) the illness of trial counsel is of such an unusually long length that it would deprive counsel of the ability to prepare for trial. (*Id.* at 474)

In *Sierra,* the Court of Appeal refused to toll the statute based upon the serious illness of plaintiff's counsel, as well as a surgery that counsel had undergone close to the end of the five year period. The Court held:

> *"However, there is no basis in plaintiffs' evidence for an inference that but for this period of incapability Rummonds would have discovered the impending deadline and taken some action regarding it."* (*Id.* at 474) [Emphasis added]

The Court then went on to hold that it would also not toll the statute for a 77 day period of sickness of plaintiffs' counsel:

> *"Even viewing the pertinent time period as the two years during which Rummond's firm handled the case, there were 77 days of illness in a 723 day span. This is not a sufficient period alone to warrant an inference that an appreciable delay in the prosecution of plaintiffs' case occurred because of that incapacity. There was no other evidence that plaintiffs' case was retarded in its development for trial and would otherwise have been suitably prepared for trial but was not trial ready because of Rummond's incapacitation. Moreover, the basis for a finding of delay in prosecution attributable to Rummond's illnesses was also undercut by the consideration that Rummonds was not a sole practitioner and had consigned the pretrial work in the case to [another attorney]."* (*Id.* at 474) [Emphasis added]

In *Tamburina,* conversely, the Court held that the illness there was of sufficiently long duration and involved medical opinion that plaintiff's counsel could not attend a trial, to establish not only a circumstance of impracticability, but also that the circumstance *caused* the inability to meet the five year deadline. The delay of 424 days was sufficiently long to deprive the plaintiff of a sufficiently long period of time during the five year period. The Court of Appeal only reversed the Trial Court on the issue of causation, and remanded the case for an analysis of diligence in light of the Court of Appeal's findings. (*Id.* at 337)

The Court in *Tamburina* went even further to give guidance on the causation requirement of subdivision (c), and that merely listing times in which it would be *literally* impossible to bring the case to trial will be insufficient:

> *"...in the course of five years, it is reasonable to expect that counsel will be away from his or her practice at various times due to illness, vacation and the like. Under the five-year statutory deadline, these periods do not constitute circumstances of impracticability that must be excluded in computing the deadline. To read the scheme otherwise would render it utterly indeterminate, subjective, and unadministerable, and thus absurd. And as we explain..., the plaintiff must show a causal connection between the alleged circumstance of impracticability and the failure to move the case to trial."* (*Tamburina, supra,* at 329) [Emphasis added]

As was further supported in *Tamburina,* through a citation to *New West Fed. Savings & Loan Assn. v. Superior Court,* (223 Cal.App.3d, 1145,

1155-1156 (1990), while the *Sierra* case *did* discuss causation principals, those principals were only discussed in light of whether the claimed disability caused a circumstance of impracticability/impossibility; *not*, as is required, whether the circumstance itself *caused* the inability to meet the five year deadline.

That deficiency, which is specifically discussed in *Tamburina* and *New West Fed. Savings &Loan Assn.*, is *exactly* the same deficiency that exists in Petitioner's arguments on appeal. Petitioner *only* lists causation in the context of showing that the particular circumstance in question, is, in fact, a circumstance of impracticability that would qualify under subdivision (c). There is *never* any discussion, whatsoever, of causation, with references to the record, as it relates to Petitioner's inability to meet the five year deadline.

Furthermore, as a preliminary matter, Petitioner fails to establish that the stay resulting from the order was qualified as a circumstance of impracticability at the outset. Before Fidelity analyzes why the Petitioner cannot show proper causation under (c), Fidelity will first argue that, because the stay resulting from the Trial Court's order was requested by the Petitioner's express desire to settle the case, and because the Petitioner could have removed the stay at any time, the stay was not a qualified circumstance of impracticability.

1. Petitioner's Argument that it was Impossible, if not Impracticable, to Bring the Case to Trial *<u>During</u>* the Stay Misses the Point – What Matters, Under Subdivision (c), is Whether the Stay *<u>Caused</u>* the Petitioner's Inability to Meet the Five Year Deadline, Which Expired Years Later

The Petitioner's first argument proceeds under a misapprehension of the case law on subdivision (c) of Section 583.340. The Petitioner argues that because it was purportedly impossible for the case to be brought to trial from July 16, 2008, until November 6, 2008, because of the party-requested mediation and resulting stay, that the five year statute should be tolled for that period of time. There are two glaring problems with Petitioner's argument: (1) because the submission of the case to mediation and the resulting stay was voluntarily requested by the parties, including Petitioner, it is simply not true that it was *impossible,* or even, *impracticable* to bring the case to trial during that time; and (2) the fact that the case could not be brought to trial during the pendency of the stay does not, in and of itself, toll the five year statute under subdivision (c) without a further analysis of causation and diligence.

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a. The Petitioner *Did Not* Establish a Proper Circumstance - The Voluntary Submission of the Case to Mediation and Stay Requested by the Petitioner Should Not Qualify As a Circumstance of Impracticability - It is Not True that the Case Could Not be Brought to Trial During the Stay – The Parties Could have Requested the Trial Court Terminate the Stay at Any Time

Courts of Appeal in California, and this Court, have consistently held that the fact that it may literally be impossible for the case to be brought to trial during certain times in the pendency of any given case, is not alone determinative of whether circumstance qualifies as such under subdivision (c) of the five year statute. The Court of Appeal has held that:

> *"[T]ime consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of the "impossible, impracticable, or futile" exceptions to the five-year dismissal statute."* (*Jordan v. Superstar Sandcars*, 182 Cal.App.4th 1416 (2010); *Bruns v. E-Commerce Exchange, Inc.*, 51 Cal.4th 717, 731 (2011) [Emphasis added]

The voluntary act of the parties, including a plaintiff, should not qualify as a circumstance of impracticability because it is a circumstance primarily within the control of the plaintiff. The Petitioner requested the stay **(3AA, 543-546)**, and that order was a direct consequence of Petitioner's express desire for global settlement. **(3AA, 533)** In the entire jurisprudence of subdivision (c), one struggles to find a single case in

which a California court has allowed a circumstance that is primarily under the control of the plaintiff to qualify as a circumstance of impracticability.[10]

To be sure, there is no doubt that had the parties come to a determination that a mediation would not be fruitful, the trial court would have lifted the stay with the same amount of effort that was required to enter it in the first place. In fact, this happens all the time in litigation. Parties decide to mediate, the trial court enters a stay pending mediation, and the parties decide shortly thereafter that they do not want to waste their client's money on a mediation they know will be fruitless. It is difficult, if not impossible, to envision a scenario in which a trial court would not lift the stay in light of the expressed futility of counsel. The Petitioner was in control of the mediation and stay at all stages of its enactment and fulfillment. Therefore, the stay should not even reach the question of causation and diligence because the stay is not a legitimate *circumstance of impracticability/impossibility/futility* at the outset.

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[10] For example, *Bennett v. Bennett Cement Contractors, Inc.*, 125 Cal.App.3d 673 (1981) [*tolling allowed for six court-initiated trial continuances on the ground that no court was available*] – the circumstance in *Bennett* was not avoidable – the plaintiff there could not have met the deadline because the trial court continued the trial dates, and there was ultimately no trial court available. Clearly, such a circumstance was not within the plaintiff's control, and was thus unavoidable.

b. The Petitioner *Did Not* Demonstrate Causation - Even if the Stay is a Legitimate Circumstance of Impracticability, Under Sub. (c) of Section 583.340, Petitioner Must Show a Causal Relationship Between the Circumstance of Impracticability and the Inability to Meet the Five Year Deadline

Causation under subdivision (c) cannot be argued in the abstract, but instead, must be argued with reference to the stated circumstance of impracticability. To the extent the Petitioner argues diligence (and she attempts to do so by simply listing every common hurdle that any litigant runs up against in any litigation), she does so without any reference to a circumstance of impracticability and/or causation. The Court below made special note of this in *Gaines*. The Court below in *Gaines* found:

> "*...even if the plaintiff had satisfied the causal connection requirement, the trial court justifiably concluded she [Petitioner] failed to demonstrate she was reasonably diligent in prosecuting the case. Reasonable diligence is required at all states of the proceeding.*" (*Gaines*, at 39, citing to *Tamburina, supra*, at 336) [Emphasis added]

The Court went on:

> "*...even in plaintiff's own timeline, there are multiple lengthy periods for which plaintiff has proffered **<u>no argument or evidence</u>** to show she was diligently prosecuting the case during that time.*" (*Gaines*, at 39-40)[11] [Emphasis added]

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[11] As the Court below stated in its opinion, the record on appeal was devoid of *any* evidence of diligence in the first 16 months of the case, and as Fidelity has maintained throughout this appeal, from August of 2009 until October of 2011, the parties did *nothing* but wait for the Petitioner to kick into gear to get relief from stay to add Lehman as a defendant, which she *only* did after the Trial Court threatened to dismiss the entire case through an order to show cause re: dismissal.

Normally, after defining the standard by which the appeal is judged, the parties engage in analysis, applying the facts of their case to the standard. However, for this particular section of the AMB, Fidelity is at a loss. In the face of Petitioner's complete lack of argument regarding causation, especially with regard to the mediation, Petitioner has taken *no* position that Fidelity could refute.[12] Far from an argument that the stay *caused* Petitioner's failure to meet the five year deadline, the Petitioner makes light of how productive the parties were during the stay in an effort to show diligence.

As already alluded to, under subdivision (c), the fact that the Petitioner could not *literally* bring the case to trial during the pendency of the mediation (even if true) is not determinative. At best, under *Tamburina,* the mediation merely presents a legitimate *circumstance of impracticability*. The Petitioner must still demonstrate causation and diligence.

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[12] Fidelity is not trying to assert that Petitioner, in the OMB, does not give a list of hurdles, which, Petitioner implies, caused the failure to meet the five year deadline. However, there is no comprehensible argument, or even attempt at an argument, that the Petitioner's failure to meet the five year deadline *resulted from the mediation and stay*. To the contrary, several times in the OMB, Petitioner, in arguing diligence, alludes to how productive the parties were *during* the stay.

The Petitioner and, with due respect to the dissent in *Gaines*, Justice Rubin, continuously attempted to list circumstances to justify tolling without reference to causation.[13]

There is no reason, though, for this Court to blindly accept Petitioner's disingenuous assertions without any evidence in the record of causation. Furthermore, the Petitioner makes a glaring admission at page 16 of the merits brief:

> *"Prior to the August 29, 2009 trial date, plaintiff successfully opposed defendant Countrywide's motion for summary judgment on July 17, 2009. The parties prepared for trial, submitted Final Status Conference Documents, and appeared for final status conferences on August 20, 2009 and August 24, 2009 at which time they announced [sic] ready for the trial scheduled for August 29, 2009."* **(2AA 236-243; POB, 16)**

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[13] Just for example, both the Petitioner and the dissent in *Gaines* mentioned the fact that the complaint was amended four times in this case. However, not only does the Petitioner fail to argue that the number of amendments *caused* an inability to meet the five year deadline, but cases like *Jordan v. Superstar Sandcars* (182 Cal.App.4th 1416 (2010)), specifically reject the argument that the amendment of pleadings support tolling under the impossibility/impracticability standard. Fidelity is not taking the position that an appellant could *never* argue that the numerous times that a complaint was amended *could* be a circumstance of impracticability causing an inability to meet the deadline. However, the Petitioner made no such showing. Although Lehman was a new party, Lehman did not enlarge the issues in any way, because the prosecution of Lehman was redundant with the prosecution of Aurora. Furthermore, the Petitioner should not be rewarded because she blundered in suing the loan servicer instead of the beneficiary of the underlying trust deed. A simple title search yields relevant information related to trust deeds and property.

It is difficult to even manufacture a possible causation argument under subdivision (c) when the Petitioner has admitted that the stay resulted in productive settlement discussions, which ultimately resulted in settlements with two defendants. Furthermore, the fact that Petitioner admits that there was an announcement that the parties were ready for trial in August of 2009 absolutely precludes *any* form of causation argument to the extent the mediation is the circumstance of impracticability.[14]

c. Petitioner *Was Not* Diligent and Under *Bruns*, Diligence Alone is not Enough to Preclude Involuntary Dismissal Under the Five Year Statute

For purposes of determining whether the plaintiff exercised reasonable diligence in prosecuting its case, in determining whether the "impossible, impracticable, or futile" exception to the five-year dismissal statute applies, reasonable diligence places on a plaintiff the affirmative duty to make every reasonable effort to bring a case to trial within five years, even during the last month of its statutory life. (*Jordan, supra,* at 1420-1421; *Hill v. Bingham,* 181 Cal.App.3d 1, 10 (1986)) "Under the statute tolling the five-year period to bring an action to trial, a plaintiff's

[14] That is not to say that Petitioner cannot argue that *other* subsequent events caused an inability to meet the five year deadline. However, this brief only addresses what the Court requested; arguments regarding subdivisions (b) and (c) of Section 583.340 as they pertain to the mediation in 2008. There is simply no way of arguing that the mediation and stay for a four month period in 2008 *caused* an inability to meet the five year deadline, *and* admit a readiness for trial in August of 2009. These two claims are inherently irreconcilable.

reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility." (*Bruns, supra*, at 731)

Aside from the 16 month gap for which Petitioner provides no record of diligence (*Gaines, supra,* at 39-40), there is the enormous gap of time for which the parties did nothing but wait for the Petitioner to add Lehman as a defendant to the case by filing a simple motion for relief from stay. The Trial Court continued seven status conferences over the course of this huge gap of time on the same exact same issue. Just as a sample of the nature of the hearings, on November 18, 2010, for example, the Trial Court held a status conference where the following statements were placed on the record:

> The Court: *"Okay, have a seat. So, what's our situation?"*
>
> Plaintiff's Counsel: *"I think we're ready to set it for trial, your Honor."*
>
> Steven Garcia: *"Your Honor, this is Steve Garcia. My client is Aurora Loan Services. The last time we were before the Court we had the same issue come up as happened time and again, that is, Lehman Bros. holds the interest in the deed of trust that Mr. Wyatt is seeking to attack in this case. Lehman Bros. continues to be in bankruptcy in the Southern District of New York, and there's been no relief of stay applied for by Mr. Wyatt."*
>
> The Court: *"How come you haven't applied for*

a release [sic] *of stay?"*

> Plaintiff's Counsel: *"Well, Lehman Bros. is not a party in this action, your Honor."* **(1AA, 203-206)**

The Parties went on to discuss the issue of Lehman's standing and interest in the case, and the Court went on:

> The Court: *"We've spent six months in limbo on this point and I can't believe that we're downstream now and we're still having this kind of discussion."*
>
> Mr. Garcia: *"Your Honor, we've spent more than six months, I think we've spent almost a year on that point [the Court's recommendation to obtain relief from stay occurred on August 24, 2009, which was well over a year before this hearing]. And in terms of having proof, I don't know what more Mr. Wyatt needs. We submitted a declaration from a representative of Aurora who indicated exactly what I told the Court."* **(1AA, 206)**

The Court again went on to express its frustration with Plaintiff later in the hearing:

> The Court: *"Look, we've had, you know, six or seven get-togethers about Lehman Bros. this and all this kind of stuff. I'm getting frustrated about this. Okay? I want you to fish or cut bait. And I might be frustrated at the plaintiff's side for how come you don't sue Lehman Bros. Okay? They're admitting that they own the property."* **(1AA, 174)**

Mr. Garcia later indicated that he had been telling Plaintiff's counsel exactly how to solve the problem:

> Mr. Garcia: *"I was about to say, your Honor, the solution is for Mr. Wyatt to do what we've been telling him for a year to do, which is, to go to New York, file your motion for relief from the stay, get your relief from stay and then bring Lehman Bros. into the action."* **(1AA, 175)**

The following dialog took place at a status conference on February 25, 2011:

> The Court: *"Okay. So we're all together again. Has the New York situation been worked out?"*[15]
>
> Plaintiff's Counsel: *"Not yet, your Honor. We've got authorization from the client to retain New York counsel to file a petition, and we just have yet to make those arrangements. But we expect to do so soon...."*
>
> The Court: *"I guess I'm a little surprised to hear you say you just got permission."* **(1AA, 185-186)**

The above only represents four status conferences out of seven on the same subject.[16] From August of 2009 until the time when the Appellant finally obtained relief from stay, the Trial Court continued seven status conferences on the exact same topic of Lehman's addition to the case.

i. Although Admittedly Not Determinative, Petitioner *Could Have* Attempted to Sever the Claims Against the Non-Lehman Parties

The general burden of bringing the case to trail within five years, as well as the burden of calendaring all relevant dates related to that deadline,

[15] The 'New York' situation refers to the adding of Lehman Brothers as a real party in interest defendant, which was first brought up in August of 2009.

[16] This is simply a result of the fact that Fidelity could not obtain the transcripts to the other hearings because they were destroyed (another testament to policy underlying the five year statute, and statutes of limitation generally.).

lies with plaintiff alone. (*Massey v. Bank of America Nat. Trust*, 56 Cal.App.3d 29, 33 (1976)) Under subdivision (c) of Section 583.340, the burden is also on the plaintiff to show a circumstance of impracticability, causal relationship between the circumstance and the inability to meet the five year deadline, and diligence. (*Tamburina, supra*, at 323)

Under current case law, under subdivision (c) of Section 583.340, the plaintiff also has a burden to sever claims against one defendant where it is impossible to go to trial against another, and that impossibility would cause a failure to meet the five year deadline with respect to all defendants. (*Brunzell Constr. Co. v. Wagner*, 2 Cal.3d 545, 553 (1970)) While Fidelity fully acknowledges that this Court's holding in *Brunzell* made clear that the ability to sever is not determinative, and is merely a factor in the analysis of impossibility/impracticability. (*Id.* at 553) In the instance of determining whether severability was a valid option, militating against impossibility/impracticability, this Court looked at the following factors in *Brunzell*, which were not exhaustive: expense, complexity, and quantity of the evidentiary duplication that severance would entail, as well as the potential problems that inconsistent judicial determinations would produce, and the degree of hardship or prejudice to the defendants occasioned by the delay.

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In this case, when one looks at the cumulative case against Petitioner's claims under subdivision (c), and the factors supporting severing the case against Fidelity, it would be hard to believe that if a case exists justifying severability, it is not this case.[17] To the extent the Petitioner is asserting the claim that the voluntary stay resulting from the mediation in 2008 *caused* the inability to bring the case to trial within the five year deadline, it is difficult, if not impossible, to comprehend how that could be the case, considering she admits in the OMB that the case was ready for trial in August of 2009, and only hindered by the issue of the disclosure that Lehman was the actual real party in interest, and Aurora was not. This hindrance, which should be attributed as Petitioner's blunder, does not relate to the mediation stay issue, nor should it be applicable to Fidelity.

The record is absolutely clear that after that August of 2009 date, the Petitioner sat on her hands for two years, and the Trial Court engaged in seven continued status conferences regarding the same subject: Petitioner's inability to obtain relief from stay in the Lehman bankruptcy and add it as a defendant in the case.

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[17] Clearly, this Court in *Brunzell* could have, and would have, foreclosed the possibility of requiring severability if it felt such a requirement unfair to plaintiffs in all respects. But this Court specifically held that severability is not just a factor, but an *important, threshold* factor in determining the legitimacy of a plaintiff's claims under Section 583.340(c). (*Brunzell, supra,* at 553)

Fidelity's argument that a motion to sever against it should have been brought is only relevant if the Court accepts Petitioner's claim that going to trial against Lehman within the five year deadline was effectively impossible/impracticable. Assuming the hypothetical merit of that argument, severability was a feasible option here for the following reasons, all in conformance with the factors listed in *Brunzell.*

First, the Petitioner did not need to sever Fidelity only; she could have severed against Fidelity and *every other defendant that was not Lehman.* Because the claim against Lehman involved substantially a claim for the return of the underlying property, including set aside, cancellation, and quiet title, the case against Lehman involved substantially equitable claims. **(1AA, 58-102)**

Second, the claims against Fidelity and the remaining defendants (all of whom defaulted and had no interest in participating in the case) were damage claims. Petitioner's operative complaint named Fidelity only in the negligence and elder abuse causes of action (a breach of fiduciary duty claim was dismissed on demurrer.). **(1AA, 86-91)**

In light of those differing issues, there was no risk of inconsistent judgments, nor was there substantial risk of duplicative efforts on the part of the Petitioner to prove the case. Fidelity is in no way trying to argue that the two potential cases would not involve overlap on *some* of the damage

claims, but the cases involve wholly separate witnesses and evidence and the inevitable overlap is not enough to justify the prejudicial delay to the defendants.

Because of this, even if this Court were to determine that it was, in fact, impossible or impracticable for Petitioner to add Lehman into the case and meet the five year deadline, it was still incumbent upon the Petitioner to make a motion to sever. Therefore, Petitioner should have made the motion to sever; had it been denied, the Petitioner could come to this Court with a much better diligence argument under Section 583.340(c).

D. PETITIONER'S REQUEST FOR JUDICIAL NOTICE IS IRRELEVANT AND IMPROPER

Rather than file an opposition or objection to Petitioner's RJN,[18] Fidelity will instead address the content of the RJN. Indeed, arguably the RJN supports Fidelity's position as much or more than it does Petitioner's. Petitioner's RJN asserts the idea that quantity is greater than quality. To be sure, a case docket *could* contain nothing but entries for the filing of the complaint, the defendant's answer, and trial, and could, in reality, be one of the most diligently prosecuted matters in the history of litigation.

[18] To be sure, Petitioner makes no showing of why the RJN (the Trial Court docket sheet) was not part of the record below under CRC §8.252(a)(3). Certainly, to the extent the Petitioner believes it shows diligence, such a purported showing was relevant in the Court of Appeal.

It is conversely the case that numerous entries in the docket report, far from showing diligence, to the contrary, show the Petitioner's lack of diligence.

For example, there are ten status conferences on page 20 of 22 of Exhibit A to Petitioner's RJN, all of which are continued. These status conferences alone take up nearly an entire page of the docket report, and the Petitioner was the sole reason for the numerous continuances. **(1AA, 194-224)**

Upon closer examination of Petitioner's RJN, the following entries also are shown, none of which show any kind of diligence on the part of Petitioner:

- Case management statements filed by all the parties at various times;
- Proofs of service and summonses;
- Notices related to hearings and matters held;
- Attorney substitutions and associations of counsel;
- The several motions of the various defendants in the case, including demurrers, summary judgment motions, motions in limine, and motions to be relieved as counsel; and
- All orders of the Trial Court.

Without a doubt, the Petitioner would claim that the above entries show how active the case was and that because of that activity, Petitioner *must* have been diligent.

Again, Petitioner argues diligence too abstractly. Petitioner seems to be under the impression that one successfully argues diligence simply by citing every action that has been taken in a case. However, under subdivision (c) of Section 583.340,[19] diligence should be examined in light of the purported circumstance of impracticability after causation is established. Also, diligence should be argued with reference to *meeting the five year deadline.*

As already argued, *supra*, Petitioner fails to establish a circumstance, or causation for that circumstance and the inability to meet the five year deadline. However, even assuming a circumstance and causation, the Petitioner's RJN does nothing more than show that parties were filing documents with the Trial Court, and numerous appearance were held *because of* Petitioner's inaction;. Even if the docket can be considered abnormally lengthy, which is doubtful considering the fact that this case languished in the Trial Court for six years, just as many of those entries exist *because of* Petitioners failure to be diligent.

Interestingly missing from the docket report is a motion to sever or a denial of that motion. The underlying implication of the Petitioner's RJN is that the Petitioner was simply not ready for trial because of seemingly

[19] Fidelity assumes that Petitioner's RJN is only seemingly relevant to a claim under subdivision (c), as it has no relevance whatsoever to subdivision (b).

endless activity. However, one must remember that Petitioner *was* ready for trial as early as August of 2009 by her own admission; the only thing stopping Petitioner from trying the case after that date was the issue with Lehman.[20] There was nothing out of the Petitioner's control after the 120 day stay was lifted that precluded the Petitioner from getting the case to trial within the five year deadline.

The bottom line is that the Petitioner did not know about the five year deadline, and did not much care about it. The five year deadline passed, not because Petitioner was furiously and diligently working to meet it and failed due to circumstances out of her control, but because the Petitioner simply did not know about the five year deadline, and desired Lehman's discharge in the bankruptcy court so as to avoid the cost of hiring a New York attorney. Far from contradicting the above argument, Petitioner's RJN supports it, and, if anything, should only be seen as evidencing Petitioner's lack of diligence in prosecuting this case.

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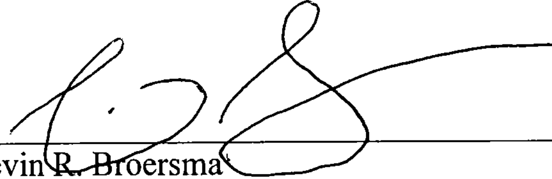
[20] And to be clear, Fidelity does not concede that the Lehman bankruptcy qualifies under either subdivision (b) *or* (c) of Section 583.340. However, those issues were briefed separately below, and this Court did not ask for briefing on the Lehman issue.

IV. CONCLUSION

Based upon the foregoing, the Fidelity would respectfully request that the holding of the Court of Appeal be affirmed.

Date: June 18, 2014

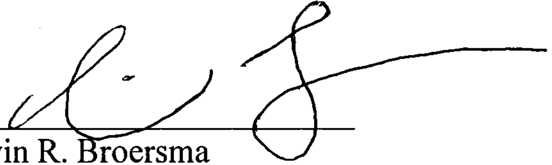
FIDELITY NATIONAL LAW GROUP



Kevin R. Broersma
Attorney for Defendants/Respondents,
FIDELITY NATIONAL TITLE
INSURANCE COMPANY AND
BOBBIE JO RYBICKI

CERTIFICATE OF COMPLIANCE

I, Kevin R. Broersma, appellate counsel for Respondents, certify that the foregoing brief is prepared in proportionally spaced Times New Roman 13 point type and, based on the word count of the word processing system to prepare the brief, exclusive of tables the brief is 10,191words long.



Kevin R. Broersma
Counsel for Fidelity National
Title Insurance Company and
Bobbie 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 June 17, 2014, I served the foregoing document(s) described as:
FIDELITY NATIONAL TITLE INSURANCE COMPANY AND BOBBIE JO RYBICKI'S ANSWERING MERITS 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

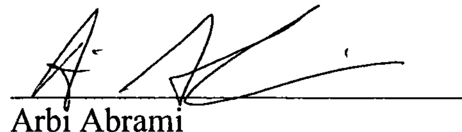
_X_ **(BY OVERNIGHT DELIVERY)** I delivered to an authorized driver authorized by Overnite Express to receive documents, in an envelope or package designated by Overnite Express with delivery fees paid or provided for, addressed to the person on who it is to be served, at the office address as last given 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 Answering Merits 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 June 17, 2014, 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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