IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND DISTRICT – DIVISION ONE

MISCHELYNN SCARLATELLI,

Petitioner,

v.

MARK W. SCARLATELLI,

Respondent.

MARK SCARLATELLI, et al.,

Plaintiff-Appellant,

vs.

ARMIE T. ISOM & SHIRLEY ISOM, TRUSTEES FOR THE ARMIE TROY ISOM AND SHIRLEY ISOM REVOCABLE TRUST, u/d/t Dated December 28, 2004; et al.

Defendant-Respondent.

Court of Appeal No. B327768

Superior Court of California
Los Angeles County
No. KD077685
Hon. Scott Nord,
Commissioner

RESPONDENT'S BRIEF

Jerry R. Dagrella, Bar No. 219948
DAGRELLA LAW FIRM, PLC
11801 Pierce St., Suite 200
Riverside, California 92505
Phone: (714) 292-8249
Email: dagrella@lawyer.com
Attorney for Defendant-Respondent Mischelynn Scarlatelli, successor trustee of the Army Troy Isom and Shirley Isom Family Living Trust

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Defendant-Respondent Mischelynn Scarlatelli, successor trustee of the Army Troy Isom and Shirley Isom Family Living Trust in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: November 7, 2023 By: /s/ Jerry R. Dagrella

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I. INTRODUCTION

Beginning in 2012, Mark Scarlatelli ("Mark") filed multiple civil lawsuits against Troy and Shirley Isom, individually and in their capacities as trustees of the Isom Trust ("Isom Trust").[1] These civil lawsuits were joined into family court and referred to as the "Joinder Action." Eleven years later, Mark moved the court to "lift" a non-existent stay and set the Joinder Action for trial. He claimed the Joinder Action had been stayed "indefinitely" and that he had the right to come into court anytime of his choosing—be it 10, 20 or 50 years later—to "lift" the stay and request a trial. The court ruled that no such stay existed. A year later, Mark again asked the court to lift the same non-existent stay and set the Joinder Action for trial. The court declined to set it for trial, and made clear in a written order that there had been no stay in effect and that the Joinder Action was barred by the 5-year statute. Fast forward another year and another motion—titled a "Renewed" motion—Mark demanded that the court reverse its prior rulings and set the Joinder Action for trial. The court denied the renewed motion. Mark appealed. This appeal fails for three reasons:

1. A ruling denying a "renewed" motion is <u>not</u> an appealable order;
2. The court was correct in finding the Joinder Action barred by the 5-year statute; and,
3. The Joinder Action was barred for reasons beyond the 5-year statute.

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[1] In family court, Mark is "Respondent/Plaintiff". On Appeal, the Isom Trust is "Respondent/Defendant." To avoid confusion, this brief simply refers to the parties as "Mark" and "Isom Trust." Mischelynn is not a party to this appeal except in her capacity as successor trustee of Isom Trust. The Isoms died on Dec. 26, 2014, at which time Isom Trust became irrevocable and Mischelynn substituted in as successor trustee. (1 AA 165.)

II. STATEMENT OF FACTS

A. The Joinder Action

Mark filed lawsuits on Apr. 25, 2012 and Oct. 3, 2012 against then-trustees of the Isom Trust, Troy and Shirley Isom. (Volume 4, Appellant's Appendix ("4 AA") 856 & 885.) Those lawsuits sought to enforce an alleged oral contract to transfer ownership of real property. (*Id.*; 2 AA 301.) Mark voluntarily dismissed those lawsuits weeks before trial and re-filed them as three separate civil cases on June 6, 2013. (4 AA 891, 901 & 909; 2 AA 288 [lines 18–20]; 2 AA 303–304.) Later, the three "re-filed" civil cases were joined into family court and combined into a single pleading on May 7, 2014 ("Joinder Action"). (4 AA 780.) To avoid a statute of limitations bar, Mark has maintained—in statements to the court and in his court pleadings—that the Joinder Action was simply a "transfer" of claims from the civil court into the family court by way of a separate pleading with an original filing date of June 6, 2013:

> "Mr. Wade [Mark's attorney]: Your Honor what happened in the last case was there was a stipulation that it be transferred into this Family Law court." (1 AA 029 [RT 16:8–10]; see also 1 AA 017 [RT 4:24–27].)

> "The next question is when the statute of limitations was ended. That is, when was litigation commenced as required by law. In this case, the Plaintiff initiated the filing of complaints seeking the same relief sought in the Joinder Complaint against the Isom Trust through the filing of three separate complaints in LASC on June 6, 2013. These suits, designated Gamut 2, Bella 2 and the Individual Suit, were 'transferred' to Family Court pursuant to a stipulation between the parties

> which serves, alternatively, to impute the statute of limitations from those actions to the Joinder Suit…." (4 AA 998 [p. 19, ll. 6–13].)

On July 13, 2015, Judge Iwasaki severed the Joinder Action from the family court trial and directed counsel to go to Dept. 1 for civil trial assignment. (1 AA 010; 1 AA 048 [RT 35:13–17].) To ensure that that the parties wouldn't be compelled to appear in two trials at once, the court later issued a minute order indicating that the Joinder Action would be stayed pending completion of the family court trial. (1 AA 010.) Judge Iwasaki remarked "I didn't want two cases going on exactly the same time." (2 AA 393 [RT 11:6–8].) Thus, "[t]he language in the minute order simply reflects that the civil portion [Joinder Action] could go forward as soon as the family law trial was done." (2 AA 386 [RT 4:22–24].)

On Dec. 21, 2015, final judgment was entered in the family court, at which point, the stay of the Joinder Action was automatically lifted. (1 AA 065; 2 AA 392 [RT 10:15–20].) The stay lasted at most 161 days. Mark was expected to try the Joinder Action at that time in the civil court. Judge Iwasaki made this abundantly clear: "Certainly, at that point – I think the proper way of viewing the minute order was simply that, look I'm not trying two cases here. I'm trying the family law case. You have a civil case [Joinder Action]. Go to the civil court. Litigate that case in 2015." (2 AA 389 [RT 7:13–17].) However, Mark made no effort to proceed to trial on the Joinder Action.

On Feb. 16, 2016, Mark filed a Notice of Appeal of the family court judgment. The appeals court reversed a portion of the judgment entered by Judge Iwasaki. (1 AA 099.) On Mar. 2, 2018, a Remittitur was issued by the Court of Appeal. (1 AA 098.) **Mark did absolutely nothing in the case for <u>three years</u> following the Remittitur.**

On Sep. 30, 2021, Mark asked Judge Iwasaki in a Request for Order to amend the family court judgment and lift a purported stay so that the Joinder Action could be calendared for trial. (1 AA 109.) Mark argued that the "Joinder Action" remained stayed indefinitely—*for all infinity*—at least until Judge Iwasaki amended the judgment on his own accord and lifted the purported stay. (Appellant's Opening Brief ("AOB"), p. 32, lines 1–3.) Isom Trust argued that no stay existed and that the action was barred for a multiplicity of reasons, including the 5-year statute. (2 AA 339–344.) Mark refuted the argument that the action was barred by the 5-year statute, claiming, incredibly, that "time stood still" at least until the court amended the family court judgment on its own. (2 AA 291–292.) Judge Iwasaki rejected Mark's arguments, stating in a written Order:

> "Nothing in that language precluded Mark from proceeding with his civil action upon entry of the dissolution Judgment in December 2015. Certainly, nothing precluded the civil action from moving forward after the Court of Appeal's decision was final in 2018. Mark concedes he never sought clarification — in the Civil Department or the Family Law Department — of whether any stay was in place that barred his suit against the Isom trust from going forward. Mark argues that until the Court issues an amended Judgment in conformance with the Court of Appeal's ruling, his civil action has been stayed. Yet Mark has had the ability, since at least 2018, to submit to this Court a Judgment in conformance with the appellate mandate." (2 AA 401.)

Judge Iwasaki explicitly ruled that **no stay existed**:

> "The Court concludes there is no stay in effect precluding Mark from pursuing his action against the Isom Trust. This Family Law court never ordered, did

> not intend to order, and doubts it had any authority to order, the Civil Law Department from hearing cases involving overlapping parties once the dissolution Judgment was entered on December 21, 2015." (2 AA 401.)

Notice of Entry of Order was served on Sep. 30, 2021. (2 AA 402.) Mark did not file an appeal against Judge Iwasaki's ruling.

B. The May 5, 2022-Order Finding Joinder Action Barred By The 5-Year Statute

Mark eventually filed another Request for Order—heard on May 5, 2022 (nearly one year later) before Commissioner Nord—in which he asked the court to transfer the Joinder Action to Dept. 1 for trial assignment. (2 AA 431–444.) Again, Isom Trust argued that the Joinder Action was barred by the 5-year statute. Isom Trust's Opposition emphasized that "The issue of the mandatory five-year time limit had been raised by the Isom Trust in response to Mark's previous RFO, and is now raised again." (2 AA 445–449.) Following extensive briefing and oral argument, the court explicitly held that the action was barred by the 5-year statute. Commissioner Nord made clear to Mark that if he disagreed with the ruling, he should file an appeal, and Mark threatened to do just that:

> "The Court: You may disagree with me. I understand that, but the **Court is going to find as a matter of law that** there is no case pending or case to be transferred, as **the five year statute expired** at least two years ago, and therefore, the Court is not going to transfer any matter to Department 1 [for] any further proceedings. Counsel you've made your record, I understand that, and if you wish to appeal this, you can. But based upon my ruling and reading of the Transcripts---"

> "Mr. Wade [Mark's attorney]: I definitely will, your Honor."

(2 AA 476 [RT 23:1–11] (Emphasis added).)

The Court repeated its findings in a written Order that same day:

> "The Court finds that there is no matter to be transferred to Department 1. **The Court also finds that the case has passed the (5) year statute and has expired**, and that no stay is currently in place on this matter."

(2 AA 480; 4 AA 1014–1016; Emphasis added.)

Notice of Entry of the Order finding the Joinder Action barred by the 5-year statute was served on May 19, 2022. (4 AA 1011–1017.) Mark did not file an appeal of this Order.

C. The Jan. 20, 2023-Order Denying "Renewed" Motion

Mark sought to "revive" the dormant action by filing a "Renewed" motion that was heard on Jan. 13, 2023, *nearly a year later*. (2 AA 486–511.) This was now 11 years since the original civil action was filed and 5 years since the Remittitur was issued in 2018. In a rambling 26-page brief, Mark criticized the prior rulings of Judge Iwasaki and Commissioner Nord and demanded that the court "reconsider" those past rulings. (*Ibid*.) Mark invited the court to "dismiss" his action if the court found that the 5-year statute had run (3 AA 725)—a ruling the court had already made previously (2 AA 480; 4 AA 1014–1016). In its written Order filed Jan. 20, 2023, the Court repeated its prior ruling that the action was barred by the 5-year statute, and per Mark's request, the court indicated that the action had been "dismissed". (3 AA 725.)

The Court also denied Mark's motion on the separate and independent ground that it was defective because it exceeded the page limitation under California Rules of Court, rule 5.90 & 3.1113. (*Ibid*.) On Apr. 1, 2023, Mark filed a Notice of Appeal of the court's denial of his "Renewed" motion. (3 AA 727.)

III. STANDARD OF REVIEW

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) In reviewing the lower court's dismissal of an action for failure to prosecute, the burden is on Mark to show a "clear" or "manifest" abuse of discretion. (*Freedman v. Pac. Gas & Elec. Co.* (1987) 196 Cal.App.3d 696, 704.) Under the abuse of discretion standard, "[t]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Gaines v. Fid. Nat'l Title Ins. Co.* (2016) 62 Cal.4th 1081, 1100.)

IV. LEGAL ARGUMENT

A. The Court Has No Jurisdiction To Consider This Appeal

1. Mark Failed To Appeal The May 5, 2022-Order Finding Joinder Action Barred By 5-Year Statute

Mark did not appeal the May 5, 2022-Order adjudicating the case barred by the 5-year statute. The deadline to appeal that Order has expired. The deadline to appeal is jurisdictional—once

reached, a court of appeal has no power to consider an appeal of the Order. (*In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1216.) Moreover, California follows the one-shot rule—if an appealable order is not timely appealed, the right to challenge the order or the issues resolved therein is forfeited. (*Reyes v. Kruger* (2020) 55 Cal.App.5th 58, 67.)

This appeal is a surreptitious attempt to belatedly appeal the May 5, 2022-Order adjudicating the case barred by the 5-year statute. That Order constituted a final judgment from which Mark had a right of appeal. "[A]n order's legal effect, rather than its form, determines its appealability, and this Order clearly adjudicated the merits of the case." (*Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755.) The court's Order denying a trial in the action was effectively the "death knell" for the case, and having disposed of all issues, it was functionally equivalent to a final judgment. (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 698 [The substance and effect of the judgment - not its label - determine whether it is "final"].) By holding the case barred by the 5-year statute and denying a request to set it on the trial calendar, the Order amounted to a "final determination of the rights of the parties in [the] action." (2 AA 480; 4 AA 1014–1016; *Otay River Contructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 801.)

2. The Jan. 20, 2023-Order Denying Mark's "Renewed" Motion Is Not Appealable

This Court has "jurisdiction over a direct appeal only when there is an appealable order or an appealable judgment." (*Otay River Contructors v. San Diego Expressway*, *supra*, 158 Cal.App.4th at p. 801.) Mark's appeal is from an order denying a renewed motion pursuant to section 1008, subdivision (b). (3 AA

725.) "[A]n order denying a renewed motion pursuant to section 1008, subdivision (b) is not appealable." (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 152.) Appellate courts do not have discretion to entertain a non-appealable order and must dismiss appeals thereon. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.)

The court in *Tate* explained that orders on renewed motions are not appealable for the same reason why orders on motions for reconsideration under section 1008, subdivision (a) are not appealable: in both types of orders, a rule of nonappealability would "eliminate the possibilities that 1) a nonappealable order or judgment would be made appealable, 2) a party would have two appeals from the same decision, and 3) a party would obtain an unwarranted extension of time to appeal." (*Tate v. Wilburn*, *supra*, 184 Cal.App.4th at p. 160.) *Tate* found renewed motions especially problematic because, unlike the time-proscribed reconsideration motion, a renewed motion "may be brought any time," which exacerbates the problem of a party obtaining an "unwarranted extension of the time to appeal." (*Ibid.*; *see also Global Protein Prods., Inc. v. Le* (2019) 42 Cal.App.5th 352, 364.)

The point here is that in either case, a party has moved for relief previously, been denied it, has returned to court seeking the same relief, and been denied again. The nonappealability rule is in place to prevent a party from returning to court again and again, asking for the same relief, being denied, and appealing. "Section 904.1 of the Code of Civil Procedure does not authorize appeals from such orders, and to hold otherwise would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal." (*Powell v. Cnty. of Orange* (2011) 197 Cal.App.4th 1573, 1577.)

The instant fact pattern exemplifies this logic: the trial court denied Mark's first Request for Order on Sep. 30, 2021. (2 AA 399.)

Mark's second Request for Order was denied on May 5, 2022. (2 AA 479.) Mark's third filing for the same relief, aptly titled, "Renewed Request for Order," was denied on Jan. 20, 2023. (3 AA 721.) Mark purports to appeal the denial of the "Renewed" Request for Order. This cycle of filing repeat motions ad infinitum has the effect of draining a party's resources through endless delay. Permitting appeals of orders denying renewed motions would empower opportunistic parties like Mark to tie up an action indefinitely, taking as many shots as he wants. "Section 1008's purpose is to conserve judicial resources by constraining litigants who would endlessly bring the same motions over and over, or move for reconsideration of every adverse order and then appeal the denial of the motion to reconsider." (*Chango Coffee, Inc. v. Applied Underwriters, Inc* (2017) 11 Cal.App.5th 1247, 1253.)

Realizing he could not appeal from a "renewed motion," Mark sought to reframe his request as one seeking dismissal under the 5-year statute, hoping to somehow differentiate it from the previous motion, despite calling it a "Renewed Request for Order." The court's Order, the content of which was negotiated and signed by Mark's counsel, makes clear that it was Mark who made the formal dismissal request: "Respondent [Mark Scarlatelli] requests that the court issue a formal order dismissing the action if the court finds the action falls outside the five-year statute for bringing cases to trial. The court orders the action dismissed under the five-year statute per C.C.P. § 583.310." (3 AA 725.)

Mark specifically invited the court to "dismiss" the action in hopes to differentiate the Order from the previous one and restart the appeal clock. However, the Court had already found the case barred by the 5-year statute in denying the previous Request for Order on May 5, 2022. (2 AA 480.) As explained above, the May 5, 2022 Order denying a trial in the action was effectively the "death

knell" for the case, and having disposed of all issues, it was functionally equivalent to a final judgment. (*Estate of Miramontes-Najera*, *supra*, 118 Cal.App.4th at p. 755 ["an order's legal effect, rather than its form, determines its appealability."]; *Griset v. Fair Political Practices Comm'n*, *supra*, 25 Cal.4th at p. 698 [The substance and effect of the judgment - not its label - determine whether it is "final"].) Mark did not file an appeal of the court's May 5, 2022-Order adjudicating the action barred by the 5-year statute. Having missed that appeal deadline, Mark procured, on Jan. 20, 2023, a non-appealable order in which he asked for "dismissal" of an action that had already been fully adjudicated. Mark cannot convert the non-appealable Jan. 20, 2023-Order into an appealable one by recasting his Renewed motion as a motion to dismiss *his own case* under the 5-year statute.

B. The Trial Court Did Not Abuse Its Discretion In Finding The Joinder Action Barred By The 5-Year Statute

"An action shall be brought to trial within five years after the action is commenced against the defendant." (Code Civ. Proc., § 583.310.) Dismissal is mandatory if an action has not been brought to trial within that five year period. (§ 583.360, subd. (b) ["The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."]; *Gaines v. Fid. Nat'l Title Ins. Co.*, *supra*, 62 Cal.4th at p. 1105 ["the five-year rule is mandatory and dismissal for noncompliance is required"].) As explained below, **the Joinder Action was 9 years, 7 ½ months old.** After deducting the time within which the action was stayed or pending appeal, the matter was still well past the 5-year statutory bar.

1. Joinder Action Was 3,508 Days Old

The Joinder Action is based on civil cases filed on June 6, 2013. (4 AA 780, 891, 901 & 909; 1 AA 029 [RT 16:8–10]; 1 AA 017 [RT 4:24–27].) Mark has continually maintained—in statements to the court and in his court pleadings—that the Joinder Action was initiated on June 6, 2013. (1 AA 029 [RT 16:8–10]; 1 AA 017 [RT 4:24–27]; 4 AA 998 [p. 19, ll. 6–13].) Mark appeals from an Order following a hearing on Jan. 13, 2023 in which the court denied his request to send the Joinder Action to Dept. 1 for trial assignment due to the 5-year statutory bar. (3 AA 725.) The time between filing (June 6, 2013) and the hearing that resulted in the Order that is the subject of this appeal (Jan. 13, 2023) is 3,508 days. This is equivalent to 9 years, 7 ½ months.

The action is so far beyond the 5-year statute that it doesn't matter whether the court uses the June 3, 2013-filing date or the May 7, 2014-date in which it was joined into family court. However, Mark cannot have it both ways. If he now insists on using the later date in his failed effort to close the 5-year gap, then he must accept the consequences of a statute of limitations bar, which has the same effect—complete dismissal.

2. The 5-Year Statute Was Tolled For Only 906 Days

a. Automatic Stay During Appeal (745 Days)

The trial court was divested of jurisdiction for a brief period pending an appeal, from Feb. 16, 2016 (Notice of Appeal) to Mar. 2, 2018 (Remittitur). (1 AA 098.) That appeal lasted 745 days.

It is well settled law that the automatic stay on appeal is terminated upon issuance of the remittitur. (*Bryan v. Bank of Am.*

(2001) 86 Cal.App.4th 185, 190 ["[w]hen a remittitur issues, the jurisdiction of the appellate court ceases and that of the trial court attaches."].) Nonetheless, Mark argued that the Mar. 2, 2018-remittitur did not terminate the stay. He contends that the stay remained in place indefinitely until the court entered an amended judgment on its own accord. (AOB, p. 32.) There is no legal authority cited for this bold proposition. If such were the case, an action could plausibly be stayed *for all infinity*—a plaintiff could abandon his case and return in 50 years asking for the amended judgment and a trial setting. In his Sep. 30, 2021-Order, Judge Iwosaki rejected Mark's argument and found no stay existed. (2 AA 401.) On May 5, 2022, Commissioner Nord also issued an Order rejecting Mark's argument, finding no stay existed. (2 AA 480.) Mark did not file an appeal against either of these Orders.

b. Stay Of Prosecution (161 Days)

Judge Iwasaki made clear in his Sep. 30, 2021-Order that the action was stayed, at the very most, from July 13, 2015 to Dec. 21, 2015. (2 AA 401.) That stay lasted 161 days.

Mark argues on appeal that a stay existed due to Mischelynn's bankruptcy from May 14, 2014 to Mar. 25, 2015. First, Mark cites no evidence in the record to support a single factual allegation about the purported bankruptcy stay, and for this reason alone, it should be rejected. (AOB, pp. 29–31.) (*Liberty Nat'l Enters., L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846.) Second, the facts are simply incorrect about Mischelynn's bankruptcy. A review of the bankruptcy on PACER indicates that the filing occurred on May 14, 2014, the discharge was granted on Dec. 22, 2014, and, by law, the stay terminated upon discharge. (11 U.S.C.

§ 362(c)(2)(C).) This is three months shorter than the Mar. 25, 2015 date claimed by Mark. Where facts mentioned by a party on appeal are skewed or mislead, the court may deem all of that party's evidentiary arguments waived. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96–97.) Third, the argument that Mischelynn's bankruptcy imposed a stay of the Joinder Action is completely without merit and appears to be a purposeful attempt to confuse the issues. A bankruptcy only stays "actions against the debtor." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 365 fn. 2.) The Isoms did not die until *after* Mischelynn's bankruptcy discharge (1 AA 165); as such, they were still alive and acting trustees of the Isom Trust during the time of Mischelynn's bankruptcy. Therefore, the Joinder Action against the Isoms and the Isom Trust was not affected by Mischelynn's bankruptcy. Pointedly, Mischelynn was **not** the successor trustee of the Isom Trust during the period of her personal bankruptcy.

Mark also argues that there was a reimposition of a stay upon the reopening of Mischelynn's bankruptcy from May 2, 2019 to Dec. 12, 2019. First, once again, Mark cites no evidence in the record to support a single factual allegation, and for this reason alone, the argument must be rejected. (AOB, pp. 35–36.) (*Liberty Nat'l Enters., L.P. v. Chicago Title Ins. Co.*, *supra*, 194 Cal.App.4th at p. 846.) Second, the only relevant evidence on this point found in the record are declarations of Mark's counsel (not cited in Appellant's Opening Brief) that say the case was reopened while Mark's counsel negotiated with the bankruptcy trustees about his retention as creditor's counsel to pursue Mark's alleged claims against the Isom Trust.[2] (2 AA 296, 515–516.) These statements

[2] Having filed for bankruptcy, Mark has lost all interest in his civil claims. Yet, he is so steadfast in his quest to harass his ex-wife that he sought permission of the bankruptcy court to continue litigating stale claims against the Isom Trust, under the guise of

say nothing that would support a stay of the Joinder Action against the Isom Trust. There is no legal authority cited to support the claim of a stay of the Joinder Action against the Isom Trust during this administrative reopening of Mischelynn's bankruptcy. "[U]nless a party's brief contains a legal argument with citation of authorities on the point made, the court may treat it as waived and pass on it without consideration." (*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1413.) In fact, the authority says the exact opposite of what Mark is arguing: the Ninth Circuit's Bankruptcy Appellate Panel explicitly held that the reopening of a bankruptcy case does **not** revive the automatic stay. (*In re Menk* (9th Cir. BAP 1999) 241 B.R. 896, 913–914.)

3. Dismissal Is Mandatory

As calculated above, the Joinder Action was 3,508 days old. If the time the action was pending appeal (745 days) and stayed by the trial court (161 days) are deducted, then the Joinder Action is 2,602 days old. That is equivalent to 7 years and 1 ½ months – well past the 5-year statutory maximum.

A plaintiff has the duty at every stage of the proceedings to use due diligence to expedite his case to a final determination." (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 589.) This duty includes

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helping his creditors. This is a continuation of Mark's harassment for 11 years. Mark has been sanctioned under Code Civ. Proc., § 128.7 three times (one reversed on appeal) and admonished by multiple judges about his harassment. In a 21-page opinion, Judge Bruguera evaluated Mark's prior lawsuits and found abundant evidence that he filed them without probable cause and with malice (1 AA 217-230). The appeals court noted that witnesses in the Isom Trust litigation testified that "Mark's multiple lawsuits were significant stressors for Troy, taking a huge toll on his finances and emotions." (Isom v Scarlatelli (Cal. Ct. App. 2019, No. E067988) 2019 Lexis 2356)

the obligation to apprise the court of the need to set the case for trial within the five-year statute. (*Id.* at p. 590.) In *Tew v. Tew* (1958) 160 Cal.App.2d 141, the plaintiff similarly waited 7 years to file a motion to set the case for trial. There, the court dismissed the action *sua sponte*, finding it had a mandatory duty to do so:

> *"[P]laintiff's motion to set the cause for trial was not filed until approximately seven years after the action was instituted*... While it is true, as plaintiff contends, no notice was given by defendant of his intention to move to dismiss, nevertheless it is also true that independent of statutory provisions, the trial court had inherent power to dismiss the action in a case where it had not been diligently prosecuted. [Citations omitted.] Furthermore, the record shows without contradiction that plaintiff's counsel appeared at and participated in the hearing of the motion and raised no question of lack of notice. Nor was any request made for a continuance in order to make the factual showing as is now contended by plaintiff... Finally it may be said that absent any showing on the part of plaintiff to bring the case within the statutory exemption, *her failure to bring the cause to trial within the five-year period placed a* ***mandatory duty*** *upon the court to dismiss*." (Emphasis added.)

The 5-year statute serves to "prevent prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses" and "to protect defendants from the annoyance of having unmeritorious claims against them unresolved for unreasonable periods of time." (*Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 375.) A defendant is not required to demonstrate prejudice to obtain a mandatory dismissal for the plaintiff's failure to timely prosecute the action. (*Fid. Nat'l Home Warranty Co. Cases* (2020) 46 Cal.App.5th 812, 857–858.) Even so, the prejudice to Isom Trust here is manifest. Here, over the course

of 11 years, both Troy and Shirley Isom have died, their estates administered and their assets liquidated (which makes the title claim moot). (2 AA 365–369.) Mischelynn, the successor trustee and ex-wife of Mark, has endured the expense, stress, and uncertainty of having this lawsuit hang over her head and over that of her parents (predecessor trustees) for over a decade since the original filing of the civil actions in 2012. The dismissal statutes were designed to prevent just that: "The policy of the dismissal statutes is… to protect defendants from being subjected to the annoyance of unmeritorious actions that remain undecided for indefinite periods of time." (*Davis v. Allstate Ins. Co.* (1989) 217 Cal.App.3d 1229, 1232.) Mark has inflicted this "annoyance" (an understatement in this context) on his ex-wife and in-laws for nearly 11 years, all while failing to bring his case to trial within the required time period. It is too much to ask that Isom Trust continue to defend this action where Mark failed to comply with his duty to diligently prosecute it. Dismissal is mandatory.

C. There Was No Prejudicial Error Because The Joinder Action Was Barred For Reasons Other Than The 5-Year Statute

Appellate courts will reverse a trial court's order only for "prejudicial" error. (*See* Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Thus, it is Mark's burden not only to show an abuse of discretion, but to show that dismissal under the 5-year statute was prejudicial error.

"If a suit would have failed or been dismissed even in the absence of an asserted error, the error is plainly not prejudicial to the appellant and thus reversal is not warranted." (*Tanguilig v. Neiman Marcus Grp., Inc.* (2018) 22 Cal.App.5th 313, 334 [declining to reverse a potentially erroneous order sustaining

demurrer because complaint would have been dismissed regardless for another reason].) Thus, prejudicial error cannot be shown where a claim fails as a matter of law.

This rule prevents reversal because Mark's action fails as a matter of law. Had the trial court disregarded the 5-year statute and ruled on the other legal doctrines raised by Isom Trust, the result would have been the same: the action would have still been dismissed.

First, the Joinder Action (and its predecessor civil actions) was filed against Troy and Shirley Isom as individuals and in their capacities as trustees of the Isom Trust. (4 AA 780–781.) The Isoms died on Dec. 26, 2014. (1 AA 165.) Mark was a trial witness in favor of adversaries who challenged the validity of the Isom Trust. (*Isom v. Scarlatelli* (Cal. Ct. App. 2019, No. E067988) 2019 Lexis 2356.) Yet, he failed to file a creditor's claim allowing him to maintain his civil suits against the Isoms' estates.

Pursuant to Probate Code section 9370 and 19004, any action pending against the Isoms or the Isom Trust at the time of death cannot be continued unless a timely creditor claim was first filed against the Isoms' estate. The maximum time-period to file a creditor claim is one year. (Code Civ. Proc., § 366.2; *Stoltenberg v. Newman* (2009) 179 Cal.App.4th 287, 292–297; *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 254–257 [***lack of strict compliance with creditor claim procedure bars claim against trust***]; *Kapila v. Belotti (In re Pearlman)* (Bankr. M.D. Fla. 2012, No. 6:07-bk-00761-KSJ) 2012 Lexis 2858 [creditor with an action pending against trustee must "*re-file* the claim against the defendant's probate estate."].)

Mark admits that he failed to file a creditor's claim within one year of the Isoms' deaths; and he acknowledges that this error on his part is the reason a related case was dismissed by another

judge**.** (2 AA 353 [Wade Decl, ¶ 7c ["at trial before Judge Oki on March 7, 2016, this case was dismissed with prejudice based upon non-compliance for failure to file a claim against the Isom Trust within one year."].)

The purpose of the probate rules are to preclude stale claims from delaying the orderly administration of trust proceedings and to provide certainty to the beneficiaries of a trust so that they will not be required later to disgorge their inheritance. (*Stoltenberg v. Newman*, *supra*, 179 Cal.App.4th at p. 292 ["strong public policies of expeditious estate administration and security of title for distributes."].) By the time Mark requested trial in the Joinder Action, the trust had been administered, all assets were distributed and an Order for Final Discharge was issued by the probate court, rendering any claim Mark had to the Trust assets moot. (2 AA 348 [¶ 3] & 365–369.) As such, regardless of the 5-year statute, Mark was procedurally barred from further litigating claims against the deceased Isoms, or the successor trustee of the Isom Trust due to his failure to file a creditor claim.

Second, the Joinder Action alleges derivative claims on behalf of Gamut Construction Company, Inc. and Bella Piazza, LLC. (4 AA 782 [¶¶ 5 & 7].) Both entities have been suspended by the Franchise Tax Board. (AA 372–373.) A suspended entity lacks capacity to prosecute any lawsuit and any lawyer who prosecutes same is guilty of a criminal misdemeanor and subject to sanctions. (Rev. & Tax. Code, § 19719; *Palm Valley v. Design MTC* (2000) 85 Cal.App.4th 553, 560.) A shareholder cannot maintain a derivative action on behalf of a suspended corporation either. (*Cohen v. Davis Creek Lumber Co.* (1957) 151 Cal.App.2d 420, 427.) Mark requested trial assignment of stale claims belonging to suspended entities so that he could engage in the criminal act of prosecuting such claims. The court could never grant such a request.

Third, on March 7, 2016, Mark proceeded to trial in Case No. KC066075. (1 AA 171–172 [¶¶ 8 & 10.].) His case was dismissed with prejudice. (*Id.*; 1 AA 239.) In a sworn declaration, Mark's attorney admits his failure to file a creditor's claim is the reason that case was dismissed: "at trial before Judge Oki on March 7, 2016, this case was dismissed with prejudice based upon non-compliance for failure to file a claim against the Isom Trust within one year." (2 AA 353 [Wade Decl, ¶ 7c.].) "[A] dismissal with prejudice… bars any future action on the same subject matter." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793.) The appellate court already held that Mark's multiple lawsuits are all related: "the two Gamut Suits and the two Bella Suits each arose out of the same alleged transaction—the transfer of the 328 Saddlehorn Property to Bella in exchange for Gamut's construction of a residence on the property." (*Scarlatelli v. Gamut Constr. Co.* (Cal. Ct. App. 2015, B252435) 2015 Lexis 426.) The "law of the case" doctrine binds parties to the appellate court's resolution of issues in the same case. (*Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1341.) The judgment in Case No. KC066075 bars re-litigation of claims related to the Saddlehorn properties, including alternative pleas for relief predicated on the same set of facts. (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 401 ["If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged."].) Thus, irrespective of the 5-year statute, the court would have had to dismiss the Joinder Action due to collateral estoppel.

V. CONCLUSION

It has been 11 years since inception of the original civil actions. This 11-year saga has gone on far too long and imposed needless expenditures of time and expense on Isom Trust and the courts. Isom Trust respectfully requests that this Court finally end this saga, affirm the trial court's order and award Isom Trust its costs.

Respectfully submitted,

Dated: November 7, 2023

By: /s/ Jerry R. Dagrella

Attorney for Defendant-Respondent
Mischelynn Scarlatelli, successor trustee of the Army Troy Isom and Shirley Isom Family Living Trust

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **6,063** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.204(c), 8.360(b), 8.412(a) or by Order of this Court.

Dated: November 7, 2023 By: /s/ Jerry R. Dagrella

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 11801 Pierce Street, Suite 200, Riverside, CA 92505. I served document(s) described as Respondent's Brief as follows:

By email

On November 7, 2023, I served by email (from dagrella@lawyer.com), and no error was reported, a copy of the document(s) identified above as follows:

Stephen Robert Wade
srw@srwadelaw.com
(for Mark Scarlatelli)

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

Dated: November 7, 2023 By: /s/ Jerry R. Dagrella