S199887/S199889 (consolidated)

IN THE

CALIFORNIA SUPREME COURT

DANIELLE BOURHIS, ET AL.,

Plaintiffs and Appellants,

vs.

JOHN LORD, ET AL.,

Defendants and Respondents.

AFTER DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIV. TWO; A132136 AND A133177
ON APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY
CASE NO. CIV 060796
HON. JAMES R. RITCHIE, JUDGE

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

TEXT

INTRODUCTION

A. Issues presented.

1. When a notice of appeal is filed by a suspended corporation, does the corporation's subsequent payment of taxes and revivor validate the notice of appeal and bar subsequent dismissal?[1]

2. If this Court changes existing law to rule that a suspended corporation's notice of appeal is not validated retroactively by the corporation's later payment of taxes and revivor, should that change in law apply prospectively only?

B. Summary of reasons to affirm the order below.

The Court of Appeal denied respondents' motion to dismiss because the back taxes owed by appellant Brown Eyed Girl, Inc. (BEG) had been paid and BEG was revived and in good standing at the time of the Court of Appeal's order. Because the goal of Revenue & Taxation Code statutes—to pressure BEG to pay its taxes—had been achieved, there was no need to imposed on BEG the additional penalty of the dismissal that respondents sought.

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[1] Respondents' version of the "Issue Presented" is inaccurate and contrary to law. Respondents' "Issue Presented" refers to an "*invalid* appeal." OB, p. 1 (emphasis added). Not so. BEG's notices of appeal were timely, and because a notice of appeal need not state that the corporate appellant is in good standing, BEG's temporary incapacity did not render the notices of appeal *in*valid. Hence, the issue here is whether the valid notice of appeal filed during BEG's temporary suspension requires dismissal of the appeal, even though BEG has paid its taxes and obtained revivor, thereby fulfilling the tax statutes' goals and eliminating any need to penalize BEG.

BEG filed three timely notices of appeal, but the issue is the same as to all three. Hence, for simplicity we use the singular: "notice of appeal."

Nevertheless, respondents ask this Court to reverse that order and to impose on a corporation now in good standing the harsh penalty of denying appellate review of an adverse judgment. Such a denial of appellate review would exonerate respondents from potential liability for their tortious failure to forewarn BEG that premises owned and leased by respondents to BEG were likely to become flooded by an adjacent creek during predictable, periodic heavy rains. As a result of respondents' concealment, BEG's business and inventory were ruined.

1. Precedent and policy compel affirmance of the order denying dismissal.

Respondents' asserted basis for dismissing BEG's appeal is an "apparent inconsistency" between the judicial treatment of complaints compared to other procedural steps (including a notice of appeal) taken by a corporation which is temporarily suspended when the steps are taken but which later pays its taxes and is reinstated. Respondents ask this Court to resolve this "apparent inconsistency" by ruling that notices of appeal and complaints be treated alike—banning retroactive validation for both and dismissing BEG's appeal.

But this proposed solution contravenes nearly 100 years of tax policy and virtually unanimous precedent. Current tax law policy allows courts to do *no more than* "pressure" delinquent corporations to pay their taxes, using the threat of dismissing the corporation's suit or appeal if back taxes are not paid.

This Court has *twice* applied this policy to retroactively validate a notice of appeal filed by a corporation that was suspended at the time of filing but since paid its taxes and so was reinstated before the ruling. *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369; *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351. These precedents were faithfully applied by the court below in denying respondents' motion to dismiss.

In short, under this long-standing policy, once the taxes are paid and the corporation is revived, there is no need to impose on these corporations any further penalty. See Part I.A.2, below.

2. If this Court finds an inconsistency, that inconsistency should be resolved, not by dismissing this appeal, but by retroactively validating timely complaints.

If, despite the foregoing, this Court finds an intolerable inconsistency in allowing retroactive validation of notices of appeal but not of complaints, then the proper resolution of this inconsistency is *not* to *in*validate a prior notice of appeal, *but to validate a prior complaint.* The statute of limitations, like other acts during litigation that are retroactively validated as "procedural," has also been regularly described by this Court as "procedural." For courts to ban retroactive validation of complaints by characterizing a complaint filed by a temporarily-suspended corporation as creating a "substantive" defense elevates semantics above policy. Indeed, California courts have often validated a complaint filed by a then-suspended corporation.See Part II.B, below.

And no policy goal of the statute of limitations is served by invalidating, for lack of capacity, a complaint whose timely filing protected the defendant from a stale claim and showed plaintiff's diligence in pursuing the claim.

Finally, to dismiss a case because the statute has expired after the corporate plaintiff filed a timely complaint would improperly reward the defendant who delayed objecting to the corporation's suspended status until the statute of limitations has expired. See Part II.D, below.

3. Respondents' three arguments fail to show that the order denying dismissal should be reversed.

Respondents' three arguments in support of reversal are either irrelevant or plainly wrong, and so fail to show that the order denying dismissal of this appeal should be reversed.

Respondents' first argument—that procedural steps taken by a suspended corporation that is never revived are "a nullity" (OB, pp. 6-9)—is irrelevant. Here, after BEG was suspended, it paid its taxes and obtained revivor. Yet respondents' first argument takes no account of BEG's revivor. Accordingly, the "nullity" that respondents cite regarding corporations that *never pay their back taxes* has no relevance to the issue here—whether a notice of appeal filed during corporate suspension is "retroactively validated by revival of corporate status" after a suspended corporation *pays its back taxes*. (OB, p. 1.)

Respondents' additional arguments—that notices of appeal as well as complaints should not be retroactively validated (OB, pp. 9-13), and that this Court should clarify *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, and *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369 (OB at pp. 14-17)—are simply wrong. *Peacock* and *Rooney* are clear to any reader who would study them diligently. Hence, contrary to respondents' claim, they need no clarification.

As will be explained, the retroactive validation of notices of appeal is compelled by virtually a century of law and policy stated by this Court and intermediate appellate courts.

4. If this Court changes current law to reverse the order below, this Court's ruling should apply only prospectively.

Finally, if, despite the foregoing, this Court agrees with respondents to change current law to rule that, even after a suspended corporation pays its taxes and is revived, the notice of appeal filed during the suspension is invalid, such a ruling should be applied prospectively and not to BEG, for the reasons stated by this Court in *Claxton v. Waters* (2004) 34 Cal.4th 367, *Smith v. Rae–Venter Law Group* (2002) 29 Cal.4th 345, and *Woods v. Young* (1991) 53 Cal.3d 315. See Part III, below.

FACTUAL AND PROCEDURAL BACKGROUND.

BEG leased from respondents, the Lords, retail space in Ross, California, opening their clothing store on November 10, 2005. 6 RT 470:19-20.

On December 31, 2005, one of the plaintiffs, Kristen Joyce, "received a phone call from [defendant] Kate [Lord]," who said "there might be a little bit of water in [her] store" and that Joyce "should probably go over and check it out." 6 RT 472:7-12. When Joyce arrived at the store, "there [were] little baby shoes floating around in the store," "[e]verything was muddy," it "smelled," "everything was wet," the "furniture was destroyed," and "[t]here was sewage." 6 RT 472:16-24.

Respondents, who had owned the building since 1968, admitted knowing that the leased property, adjacent to the main creek draining the Ross Valley, flooded every four years on average. 8 RT 846:13-16. The respondents' civil engineer admitted that water penetrated the building on average every three years. 8 RT 987:12-16.

Plaintiffs' testimony was that the Lords never told them "anything about the flood characteristics of the building" and that they never had "any conversations about the flooding history of Ross" or "of the Lords' space prior to that time." 9 RT 1136:7-11, 10 RT 1288:28-1289:4. Plaintiff Bourhis testified that the Lords never disclosed "any flooding characteristics of [the] building" and if they had, she would not have signed the lease. 9 RT 1133:20-1134:5.

Moreover, respondents admitted there was no "discussion about flood gates" or "emergency procedures." 12 RT 1744:3-7. Respondents never told plaintiffs that they "should elevate [their] inventory within the space," or that they "should install floodgates," "Visqueen inside the walls," or "have sandbags available." 7 RT 639:8-25 (Dorman). Respondents never "suggest[ed] that [plaintiffs] needed to do certain things to protect [themselves] or [their] investment." 9 RT 1136:12-18. And plaintiffs never had "any conversation about any flood prevention activities" before the flood. 10 RT 1289:8-11.

The judge ruled that defendants had no "affirmative duty" to warn plaintiffs "that there has been flooding sometime in the past" and that plaintiff therefore could not elicit testimony about defendants' knowledge of past flooding "because it's not relevant to the issues that are still at hand in the case." 2 RT 78:18-79:5.

Midway through plaintiffs' counsel's examination of Mr. Lord, the judge ruled it was "probably appropriate to tell the jury" "[r]ight away" "that there is no duty to warn or no duty to disclose the floodings." 8 RT 906:22-907:1, 909:24-25. The judge instructed: "I'll advise you at this point that, in this case, there is no question over whether the defendants, the landlords in this case, had any duty to warn or disclose the flooding circumstances to their tenants, the plaintiffs in this case." 8 RT 912:4-9.

Moreover, over plaintiff's objection, the judge eliminated from CACI 1003 the language "or give adequate warnings of the condition." 13 RT 1985:6-8. The judge ruled that because the "question of the warning of the flood condition has been ruled on in the case," there is "no obligation for the landlord to give notice of the prior flooding history of the premises." 13 RT 1981:17-22.

Accordingly, the jury, not being instructed on respondents' duty to warn of the flood hazard, returned a verdict for respondents. 16 RT 2190:24-2193:3.

From the defense judgment, plaintiffs, including BEG, appealed. Pending appeal, respondents moved to dismiss the appeal as to the corporation on the ground that the corporation was not in good standing due to nonpayment of taxes, so that the notice of appeal was assertedly a nullity.

While respondents' motion was pending, BEG paid its taxes and was revived, and submitted to the Court of Appeal evidence from the Secretary of State and the Franchise Tax Board showing payment of taxes and revivor. See Appellants' Opposition to Motion to Strike Notice of Appeal and Dismiss Appeal, filed in the Court of Appeal on December 16, 2011. This opposition attached exhibits showing the corporation's payment of taxes and good standing with the Secretary of State. Respondents do not deny BEG's revivor.

The Court of Appeal, based on the evidence of revival, denied respondents' motion to dismiss on December 29, 2011, stating:

> Respondents' motion to strike the notice of appeal and dismiss the appeal of Brown Eyed Girl, Inc. in *Bourhis, et al. v. Lord, et al.* (A132136) is denied. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359; *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 373-374; see *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 725, fn. 2.)

This Court then granted respondents' Petition for Review.

DISCUSSION

I.

BEG's revivor required the notice of appeal to be validated and the motion to dismiss to be denied.

Respondents ask this Court to penalize BEG for its temporary suspension by dismissing this appeal—a penalty that will do nothing to fulfill statutory tax policies because BEG's taxes have already been paid and BEG is now in good standing but which will give respondents the undeserved windfall of avoiding appellate review of a judgment that erroneously insulated respondents from liability for their failure to disclose a serious flood hazard that was known to respondents but was unknown to plaintiffs before plaintiffs leased respondents' premises.

As shown below, dismissal of this appeal would be contrary to two of this Court's decisions directly on point, decisions that properly reflect the trend of statutory and decisional law over the past 100 years. This Court should adhere to current precedent and current tax policy and deny respondents the undeserved windfall they seek.

A. Statutes and case law compelled the denial of respondents' motion to dismiss.

1. Under former law, corporations with unpaid taxes were harshly penalized by involuntary dissolution.

Respondents' quest to dismiss this appeal—in effect penalizing BEG because it was temporarily suspended—smacks of the harshness of a former era.

In this former era, corporations with unpaid taxes were regarded as "dead" and were treated harshly by involuntary dissolution. As this court has recognized, under former law nonpayment of corporate taxes caused "corporate charters or powers [to be] forfeited" under the "former California statute (Act of 1905; Stats. 1905, p. 493)

with respect to domestic corporations (see *Rossi v. Caire* (1921) 186 Cal. 544, 549; *Graceland v. Peebler*, 50 Cal.App.2d 545, 547-548; *Southern Land Co. v. McKenna* (1929) 100 Cal.App. 152, 159 . . . ." *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 371.

The harshness of former law was well-summarized in Justice Mosk's dissent in *Peacock Hill Association*:

> Under early California statutes, upon failure to pay taxes the powers of a delinquent corporation were forfeited, the corporation was dissolved, and it came under the control of trustees, with the result that the corporation itself could not sue or be sued, and a summons served upon it or a judgment rendered against it was void. . . . "The penalty imposed by the act for non-payment of the license tax prescribed was *exceedingly severe* and the consequence doubtless *often disastrous*. . . . [T]he corporation having failed to pay within the specified time thereafter, *the corporation simply ceased to exist,* . . . without any existing provision of law for rehabilitation as a corporation. It was not a case simply of suspended animation, as under present license tax law, but one of absolute death. . . .

Id. at p. 375 (citing *Rossi v. Caire* (1921) 186 Cal. 544, 549).

The harshness of former law's catastrophic penalty—dissolution—for delinquent corporations, *regardless of revivor*, was noted by this Court in *Ransome-Crummey Co. v. Superior Court in and for Santa Clara County* (1922) 188 Cal. 393.

> Before the enactment of these statutes, the penalty imposed upon a corporation for a failure to pay its license and franchise taxes was a forfeiture of its charter (Stats. 1905, p. 493, and amendments thereto; Stats. 1911, p. 530; Stats. 1915, p. 422), which resulted in a dissolution of the corporation. (*Lewis v. Miller & Lux*, 156 Cal. 101.) After such a

forfeiture the corporation was governed by the rules relating to dissolved corporations, and all actions prosecuted by or against such a corporation abated, except in those cases where an action against the corporation survived by the terms of section 10a of the act of 1905, as amended in 1907. (*Brandon v. Umpqua L. & T. Co.*, 166 Cal. 322.

Id. at 396.

Further, under former law, corporate revival could not retroactively validate acts taken by the corporation during its temporary suspension. As this Court said in 1922:

> Furthermore, we are of the opinion that the subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by the statute. The suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty, and it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely if it were held that by subsequent payment of the delinquent taxes all the benefits of the attempted acts denied to the corporation could be secured.

Id. at 398.

Respondents' request to deny retroactive validation of the notice of appeal and to dismiss the appeal, despite BEG's revivor, is a retrograde return to the harshness of prior law, and so should be rejected. Under current law, the order denying dismissal correct recognized the retroactive validation of the notice of appeal, as shown below.

2. Current law does not penalize corporations after they are revived. The "purpose" of current law is solely to "pressure" corporations to pay their taxes. After that payment, prior acts are validated because no need exists to impose further penalty.

a. Case law recognizes the sole goal of getting delinquent corporations to pay their taxes and avoiding penalties on revived corporations.

In recent decades, courts have recognized that the core purpose of the Revenue & Taxation Code is not to dissolve delinquent corporations but to "pressure" corporations to collect back taxes—nothing more. After the taxes are paid, there is no point in "imposing additional penalties."

The shift from the harshness of former law to the tolerant attitude of current law—allowing retroactive validation of prior acts taken during suspension—was well-summarized in *Damato v. Slevin* (1989) 214 Cal.App. 668:

> California originally adopted a harsh attitude toward delinquent corporate taxpayers: "the penalty imposed upon a corporation for a failure to pay its license and franchise taxes was a forfeiture of its charter [citations], which resulted in a dissolution of the corporation." (*Ransome–Crummey Co. v. Superior Court* (1922) 188 Cal. 393, 396.) With time, the Legislature's hostility gradually relaxed. Following this lead, courts no longer treated suspended corporations as pariahs. . . . [*C*]*ourts have given the curative effect of revivor an expansive construction. Indeed, the present judicial attitude is positively benign.* "In a number of situations the revival of corporate powers by the payment of delinquent taxes has been held to validate otherwise invalid prior action.... [A]s to matters occurring prior to judgment the revival of corporate powers has the effect of validating the earlier acts and

permitting the corporation to proceed with the action." [Citations.] Revivor may even be demonstrated during the pendency of an appeal. [Citations.] Revivor and validation are akin to the "relation back" of amended pleadings. [Citation.]

Id. at pp. 672-673 (fn. omitted).

The retroactive validation allowed under current law was recognizes by this Court in *Peacock Hill*:

> In a number of situations the revival of corporate powers by the payment of delinquent taxes has been held to validate otherwise invalid prior action. (*Traub Co. v. Coffee Break Service, Inc.*, 66 Cal.2d 368, 370; *Diverco Constructors, Inc. v. Wilstein*, 4 Cal.App.3d 6, 12; *A.E. Cook Co. v. K S Racing Enterprises, Inc.*, 274 Cal.App.2d 499, 500; *Duncan v. Sunset Agricultural Minerals*, 273 Cal.App.2d 489, 493.) In all of the above cited cases it was held that *the purpose of section 23301 of the Revenue and Taxation Code is to put pressure on the delinquent corporation to pay its taxes, and that purpose is satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities.* This reasoning is in accord with our language in *Boyle v. Lakeview Creamery Co.*, 9 Cal.2d 16, declaring the legislative policy of Revenue and Taxation Code provisions imposing sanctions for failure to pay taxes to be 'clearly to prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern, in order that some pressure will be brought to bear to force the payment of taxes.' (At p. 19 [68 P.2d 968].) *There is little purpose in imposing additional penalties after the taxes have been paid.*

Peacock Hill Assoc. v. Peacock Lagoon Construction Co. (1972) 8 Cal.3d 369, 371 (emphasis added) (corporation suspended after judgment for nonpayment of franchise

taxes could pursue appeal after it paid the delinquent tax, interest and penalties and received its certificate of revivor].

Moreover, as this Court has said, "a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of taxes 'is a *plea in abatement which is not favored in law, is to be strictly construed* and must be supported by facts warranting the abatement' at the time of the plea." (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 370).

b. The Revenue & Taxation Code allows retroactive validation of procedural acts where temporary suspension did not create a defense or right.

BEG's revivor by payment of its back taxes was authorized by section 23305, which provides that a suspended corporation may be "relieved" of the suspension by payment of back taxes and penalties and "the issuance by the Franchise Tax Board of a certificate of revivor."

The only limitation on "relief" from suspension is that "*reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture . . . .*" Section 23305a.

As explained below, BEG's notice of appeal was timely and thus valid, establishing in respondents no "defense or right," for several reasons.

First, respondents were entitled to assert a "plea in abatement," but a "plea in abatement" does not render the notice of appeal invalid, is disfavored, and defeated here by BEG's payment of taxes and revivor before the Court of Appeal rendered its ruling.

Second, the notice of appeal was a "procedural" act that this Court and others have for decades ruled must be retroactively validated after the corporation pays its taxes and is reinstated.

Third, under the California Constitution, Art. VI, section 13, BEG has a constitutional right to have the adverse judgment reviewed on appeal and reversed for a "miscarriage of justice." Respondents' claim that the notice of appeal cannot be retroactively validated by a revived corporation that is in all respects in full compliance with the law must be rejected as violative of BEG's constitutional right to appellate review.

3. This Court *twice* retroactively validated notices of appeal.

a. *Peacock Hill Association.*

In *Peacock Hill Assoc. v. Peacock Lagoon Construction Co.* (1972) 8 Cal.3d 369, the defendant corporation was suspended before trial, lost the judgment, and then appealed. *Id.* at p. 374. On appeal, the plaintiff sought to have the suspended corporation's appeal dismissed. The defendant corporation responded by paying its taxes and obtaining revivor. *Id.* at pp. 371, 374.

This Court denied the motion to dismiss, stating the rationale that "the revival of corporate powers has the effect of validating the earlier acts and permitting the corporation to proceed with the action," and "[w]e are satisfied that the same rule should ordinarily apply with respect to matters occurring subsequent to judgment." *Id.* at p. 373.

Contrary to respondents' claim, this ruling needs no "clarification."

b. *Rooney*

In *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, this Court relied on *Peacock Hills Assn.* to validate retroactively a notice of appeal filed while the corporation was suspended. The corporation had been suspended during trial, and the suspension continued through appeal until 20 days after the suspension was mentioned in the "plaintiff's brief" (presumably the Respondent's Brief). *Id.* at 359.

This Court rejected plaintiffs' motion to dismiss the defendant corporation's appeal, stating:

> The revival of corporate powers validated the procedural steps taken on behalf of the corporation while it was under suspension and permitted it to proceed with the appeal. [citing *Peacock Hills Assn.*]

Rooney, supra, 10 Cal.3d at 359.

Contrary to respondents' claim, this ruling needs no "clarification."

4. Appellate courts retroactively validate all procedural steps.

Appellate courts have placed no limits on their power to retroactively validate a corporation's procedural steps taken before the suspended corporation paid its taxes and was reinstated. Specifically, corporate revivor has been held to retroactively validates the following actions taken during litigation:

• Obtaining an attachment (*A.E. Cook Co. V. K S Racing Enterprises, Inc.* (1969) 274 Cal.App.2d 499, 500-501).

• Applying for and obtaining a use permit (*Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1492.

• Making and opposing motions and engaging in discovery (*Diverco Constructors, Inc. v. Wilstein* (1970) 4 Cal.App.3d 6, 12).

• Opposing a default judgment (*Schwartz v. Magyar House, Inc.* (1959) 168 Cal.App.2d 182, 189-190.) *Schwartz* ruled that taking of a default judgment against a suspended corporate defendant disabled from defending is not a "'right'" within the meaning of Revenue & Taxation Code section 23305a that accrued to the plaintiff and could be prejudiced by subsequent reinstatement. (*Id.* at p. 190.)

5. Differing treatment of complaints and notices of appeal is justified by the "substantive/procedural" distinction.

This Court and others often cite the "substantive/procedural" distinction to justify the difference in refusing retroactive validation to complaints despite revivor while retroactively validating procedural steps because of revivor.

a. Supreme court.,

This Court in *Traub* recognized that where the complaint was filed by a suspended corporation, the case raised a "statute of limitations problem." *Traub, supra,* at p. 371 (citing *Cleveland v. Gore Bros., Inc.* (1936) 14 Cal.App.2d 681).

b. Appellate courts.

Appellate courts often rely on the "substantive/procedural" distinction to explain the disparate treatment given to complaints as compared to all other procedural steps.

Most recently, in *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, an appellate court affirmed a judgment of dismissal, refusing to retroactively validate a complaint filed by a suspended corporation, even though the corporation had later paid its taxes and obtained revivor. The court characterized the defense created by the failure to obtain revivor within the statute of limitations as "substantive":

> "The failure timely to file the litigation within the statute of limitations has been held (in the context of corporate suspension) to be a *substantive* defense that is not prejudiced by subsequent corporate revivor (*Benton, supra*, 226 Cal.App.3d at pp. 1490-1491)."

Id. at 1494.

Benton v. Napa (1991) 226 Cal.App.3d 1485, explained the difference between procedural actions (which are retroactively validated) and "substantive

defenses, such as the statute of limitations, are not revived." *Id.* at p. 1491. *Benton* stated:

> The cases have created *a distinction between procedural and substantive acts.* The revival of corporate powers *validates any procedural step* taken on behalf of the corporation while it was under suspension. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 359,[appeal]; see *Urich Oil Co. v. Crown Discount Dept. Stores* (1973) 34 Cal.App.3d 743, 746 [appeal]; see also *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371,; *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, 72.) *Procedural acts in the prosecution or defense of a lawsuit are validated retroactively by corporate revival.* Most litigation activity has been characterized as procedural for purposes of corporate revival.

Id. at p. 1490.

By contrast, substantive defenses that have accrued bar retroactive validation, as *Benton* explained:

> However, *substantive defenses* accruing during corporate suspension may not be applied to the benefit of the now-revived corporation. (*Welco Construction, Inc. v. Modulux, Inc., supra,* 47 Cal.App.3d at p. 73.) For example, *the statute of limitations is regarded as a substantive defense, not a procedural right.* (*Ibid.*) Revival cannot be given a retroactive effect so as to permit the filing of an action at a time of incapacity to toll the running of the statute of limitations. In other words, if an action is commenced during the period of suspension and the corporate powers are revived after the limitations period expires, the revival does not toll the running of the limitations period. (See *Hall v. Citizens Nat. Tr. & Sav. Bank* (1942) 53 Cal.App.2d 625, 630–631, 128 P.2d 545.) *In such a case, the plea is not one in*

abatement, but a plea of the statute of limitations—a substantive defense to the action on the merits. (Ibid.; see *Welco Construction, Inc. v. Modulux, Inc., supra,* 47 Cal.App.3d at p. 73, 120 Cal.Rptr. 572.)

Benton, supra, at p. 1491.

Several other decisions hold (or state) that a complaint filed by a temporarily suspended corporation may not, after the corporation's payment of taxes and revivor, be retroactively validated. (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300; *Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1512–1513; *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724–725; *Welco Construction, Inc. v. Modulux, Inc.*, (1975) 47 Cal.App.3d 69 (the statute of limitations provides a "substantive" (not "procedural") defense, and so bars retroactive validation where revivor occurred *after* the limitations period expired); *Cleveland v. Gore Bros.* (1936) 14 Cal.App.2d 681 (where plaintiff's assignor was suspended when the complaint was filed, the subsequent revival did not retroactively validate the complaint).

B. The constitutional right to appeal and the policy of preserving the right to appeal support the order below.

1. The corporation has a constitutional right to appellate review and reversal for prejudicial error.

The California Constitution guarantees to every litigant who suffers an adverse judgment to have that judgment reviewed and reversed if the judgment resulted from prejudicial error. Cal. Const., Art. VI, § 13:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the

opinion that the error complained of has resulted in a miscarriage of justice.

Respondents ask this Court to abrogate this constitutional right to appellate review even though the notice of appeal was procedurally correct and BEG is now in good standing. Respondents offer no policy reason to justify such severe erosion of this constitutional right of appeal.

2. The order below promotes the policy of preserving the right to appeal (e.g., by liberally construing the notice of appeal).

In addition, courts follow a policy of validating an appellant's efforts to initiate an appeal.

For example, appellate courts may treat a nonappealable preliminary order as appealable, e.g., *People ex rel Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 658, or may amend the record itself to include an appealable judgment, e.g., *Molien v. Kaiser Found. Hosp.* (1980) 27 Cal.3d 916, 920.

The Rules of Court also manifest a liberal attitude toward preserving appeals. First, the rules allow for validation of premature notices of appeal filed before entry of judgment and even before judgment is rendered. Rule 8.104(e).

Also, with respect to deficiencies in the content of the notice of appeal, the notice "must be liberally construed" in favor of its sufficiency. Rule 8.100(a)(2). *Luz v. Lopes* (1960) 55 Cal.2d 54, 59. The "law aspires to respect substance over formalism and nomenclature." *Walker v. Los Angeles County Metro. Transp. Auth.* (2005) 35 Cal.4th 15, 18.

In sum, the foregoing authorities and policies support the order below and refute respondents' technical arguments against the validation of BEG's notice of appeal.

II.

If this Court finds unacceptable inconsistency between the treatment of complaints and notices of appeal, the solution is to retroactively validate complaints, which will promote tax policy without violating statutes of limitation.

If this Court perceives an inconsistency between the retroactive validation of notices of appeal but not of complaints, then the proper resolution of this inconsistency is *not* what respondents propose—banning retroactive validation of notices of appeal—but rather retroactively validating complaints. Such a step would promote the tax law goal of collecting back taxes and would not violate statutes of limitations goals—protecting defendants from stale claims and ensuring that plaintiffs file their claims diligently.

A. Complaints filed during suspension are valid—corporate capacity is not an element of the corporation's claim, and incapacity does not defeat jurisdiction.

Retroactive validation of the complaint filed by a temporarily suspended corporation is the proper solution to any perceived "inconsistency" because the suspension affects only the corporation's capacity to sue—not the court's jurisdiction—and the corporation's lack of capacity may be corrected after the complaint is filed. Hence, the filing of a complaint during a corporation's suspension creates no "defense or right" that would bar retroactive validation under section 23305a.

For example, in *Color–Vue Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, the court ruled that the plaintiff corporation, suspended before trial (and when the complaint was filed) must be allowed to obtain a continuance of the trial for the

payment of taxes and revivor. The court's rationale refutes the respondents' claim that a complaint filed while the corporation was suspended must be dismissed after the statute of limitations has run.

Specifically, *Color-Vue* defined the suspended corporation's disability as a lack of capacity and explained this lack of capacity did not automatically invalidate the complaint because a valid complaint need not allege the corporation's capacity, which is *not* an element of a cause of action: "Unless required by a governing statute, a plaintiff's capacity to sue *is not an element of a cause of action.*" *Color-Vue, supra,* 44 Cal.App.4th at p. 1605; accord, *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 994, fn. 4.

Accordingly, as this Court has ruled, a complaint by a suspended corporation must be challenged by a plea in abatement if the complaint does not show on its face the corporation's lack of capacity: "If lack of capacity does not appear on the face of the complaint, it cannot be raised by demurrer, but is a special plea in abatement." *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 994, n. 4. A "'plea in abatement . . . is not favored in law [and] is to be strictly construed . . . .'" (*Traub, supra,* 66 Cal.2d at p. 370.)

B. This Court and others retroactively validate complaints filed during a corporation's temporary suspension.

The retroactive validation of complaints has been endorsed by this Court and several appellate courts.

In *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, this Court stated as an accepted principle that "the suspended status of corporate powers at the time of filing of action by a corporation does not affect the jurisdiction of the court to proceed. . . ." *Id.* at p. 371. This statement rested on three appellate decisions that allowed a corporation that was suspended when it filed its complaint to obtain revivor and thereafter to continued to prosecute the action.

First, this Court approved *Maryland Cas. Co. v. Superior Court* (1928) 91 Cal.App. 356, where the corporate plaintiff was suspended when the complaint was filed but was reinstated before trial. This Court concluded that the corporation could "go forward with full vigor when reinstated." *Id.* at p. 362.

Second, this Court approved *Hall v. Citizens Nat. Tr. & Sav. Bank* (1942) 53 Cal.App.2d 625, where the corporate plaintiff was suspended when the complaint was filed, held that "commencement of the action during the period of suspension is not a nullity and a revival of the corporate powers prior to the interposition of the plea (in abatement) is sufficient." *Id.* at p. 630.

Third, this Court approved *Pacific Atlantic Wine, Inc. v. Puccini* (1952) 111 Cal.App.2d 957, where the corporate plaintiff was suspended for 10 years, until just before trial when the corporation paid its back taxes and obtained revivor. *Id.* at p. 967. The appellate court cited *Hall* as refuting the defendant's "contention that plaintiff's revivor [before trial] wa ineffectual to enable it to proceed in this action. . . ." *Ibid.*

Of these three decisions, this Court said in *Traub* that "the corporate plaintiff had been suspended before it filed its lawsuit, but after defendant had brought the suspension to the attention of the trial court the corporation secured reinstatement prior to trial. In each case it was held that *revival of the corporate powers before trial was sufficient to permit the corporation to maintain the action.*" *Id.* at p. 370 (emphasis added).

Based on these decisions, this Court in *Traub* concluded:

> [T]he suspended status of corporate powers at the time of filing of [an] action by a corporation does not affect the jurisdiction of the court to proceed . . . .

Traub, supra, 66 Cal.2d 371.

Similarly, in *La France Enterprises v. Van Der Linden* (1977) 70 Cal.App.3d 375, the corporation was suspended when the corporation's complaint was filed.

Later in the litigation, the corporation was again suspended. After trial the trial court announced its proposed decision for the corporation. The corporation was then revived. Thereafter, the trial court entered judgment *against* the corporation on the sole ground that the corporation was not entitled to prosecute the action "as of the date of trial." *Id.* at 379.

La France reversed and ordered judgment for the corporation, relying on this Court's statements in *Peacock*:

> "(A)s to matters occurring prior to judgment the revival of corporate powers has the effect of validating the earlier acts and permitting the corporation to proceed with the action." (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.,* 8 Cal.3d 369, at 373) . . . . "(T)he purpose of section 23301 of the Revenue and Taxation Code is to put pressure on the delinquent corporation to pay its taxes, and that purpose is satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities. . . . There is little purpose in imposing additional penalties after the taxes have been paid." (*Peacock, supra,* 8 Cal.3d at 371.)

La France, supra, 70 Cal.App.3d at 380.[2]

Finally, in *A. E. Cook Co. v. K S Racing Enterprises, Inc.* (1969) 274 Cal.App.2d 499, a corporation that was suspended when its complaint was filed and when it levied an attachment was still allowed to proceed with the action and the attachment. The court analogized revivor of the complaint and attachment to an amendment that "relates back," and held that filing a complaint while the corporation is suspended does not create a "right to dismissal" that may not be abrogated by revivor:

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[2] *La France* did not consider the "substantive" defense rule that other courts have applied to bar revival of a complaint filed by a temporarily suspended corporation.

On revivor of its corporate powers *a corporation may continue an action commenced during the period of suspension* and not previously dismissed, even though the opposing party pleaded the suspension prior to the revivor. (*Traub Co. v. Coffee Break Service, Inc.,* 66 Cal.2d 368; *Hall v. Citizens Nat. Trust & Sav. Bank,* 53 Cal.App.2d 625, 630-632; *Maryland Cas. Co. v. Superior Court,* 91 Cal.App. 356, 361-364.) These cases state that a challenge to the complaint on the ground that the corporation's powers have been suspended is a disfavored plea in abatement which must be supported by facts warranting the abatement at the time of the plea. Even at the time of the hearing, the court may grant a continuance in order to allow the delinquent corporation to secure a revivor. The plea in abatement does not vest a right to dismissal which cannot be abrogated by a subsequent revivor of corporate powers. (*Schwartz v. Magyar House, Inc.,* 168 Cal.App.2d 182, 190.)

The same logic which sustains actions commenced prior to revivor of corporate powers sustains the validity of provisional remedies ancillary to such actions. If a corporation may shore up its entire cause of action by reviving its corporate powers and thereby validate its complaint, it seems appropriate to permit it to do the same thing on behalf of a provisional remedy wholly dependent on the main cause of action, provided, of course, that in the meantime substantive defenses have not accrued nor third party rights intervened. (*Hall v. Citizens Nat. Trust & Sav. Bank,* 53 Cal.App.2d 625, 631.) The effect of such revivor and validation is comparable to that of an amendment to an irregularly issued attachment, which amendment by statute may relate back to the time of issue and cure defects and omissions in the original attachment. (Code Civ. Proc., § 558; *Peninsula etc. Co. v.*

County of Santa Cruz, 34 Cal.2d 626, 631.) The purpose of the Revenue and Taxation Code is to put pressure on the delinquent corporation to pay its taxes, and that purpose is normally satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities. (Code Civ. Proc., § 558; Corp. Code, § 5701; *Schwartz v. Magyar House, Inc., supra,* p. 188.)

Id. at pp. 500-501.

In sum, the asserted "inconsistency" is virtually nonexistent because courts already allow retroactive validation of complaints.

C. Retroactive validation of complaints is supported by this Court's decisions describing statutes of limitations as "procedural."

Contrary to decisions describing the statute of limitations defense as "substantive," many authorities and this Court's decisions characterize the statute of limitations as procedural rather than substantive. Hence, no obstacle exists to retroactive validation of complaints because the corporation's temporary suspension when the complaint was filed was merely a procedural matter that created no "defense or right" under section 23305a.

"[T]he general statutes of limitations are ordinarily considered to be *procedural* rather than substantive . . . ." Note, Developments in the Law: Statutes of Limitations, 63 Harvard L. Rev. 1177, 1180 (1950) (emphasis added). "A statute of limitations *is procedural*; it affects the remedy only, not the substantive right or obligation." B. Witkin, 3 Cal.Proc. (5th ed. 2008), § 432, p. 549. In exceptional circumstances, some time limits may be "treated as conditions on the substantive right, i.e., they cause the right that previously arose and on which an action could have been maintained, to expire." Witkin, supra, § 441, p. 561. But only in such exceptional circumstances "must" the plaintiff "allege facts showing that the right has not expired." Witkin, *supra*, p. 562. Illustrative of these exceptional circumstances

include rights that ripen simply with the passage of time (e.g., adverse possession; escheat). Witkin, *supra*, § 442, p. 562. Such cases do not resemble BEG's right to sue in tort a landlord that concealed material facts concerning the property and its condition.

This Court commonly describes statutes of limitations as "procedural."

For example, this Court characterized the 10-year statute of limitations in Code Civ. Proc. Section 337.15 as an "ordinary, *procedural* statute of limitations" (*Regents of University of California v. Hartford Acc. & Indem. Co.* (1978) 21 Cal.3d 624, 641 (emphasis added).) Further, this Court in *Regents rejected* the argument that the limitation period in "section 337.15 is not an ordinary *procedural* statute of limitation, but [is] a *substantive* limit upon the plaintiff's cause of action," noting that section 337.15 is codified along with other statutes of limitations "in that portion of the Code of Civil Procedure which sets out *procedural limitations* on the commencement of common law actions." *Id.* at 640.

Other decisions by this Court describing the statute of limitations as "procedural" include:

• *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 348 (describing the "statute of limitations" defense as "a procedural defense.")

• In *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1240, this Court distinguished "the *substantive nature of the claims requirements* from *the procedural nature of statutes of limitations* . . . ." (Emphasis added.)

• *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114-115: "The Court of Appeal correctly noted that for certain *procedural purposes, such as statutes of limitations,* an indemnity claim is an independent action. (See, e.g., *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 506.)" (Emphasis added.)

• *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 273 (describing the "statute of limitations" as a "*procedural* deadline[].")(emphasis added).

• *Young v. Haines* (1986) 41 Cal.3d 883, 892, citing with approval the characterization of the six-year statute of limitations in Civil Code section 29 "as a *procedural* statute of limitations . . . ." (Citing *Myers v. Stevenson* (1954) 125 Cal.App.2d 399, 407)

• *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751: "Termination of an action by a statute of limitations defense must be deemed a technical or *procedural as distinguished from a substantive termination.* Like other *procedural defenses* I. e., lack of personal jurisdiction or failure to comply with the statute of frauds the limitations defense is waived unless timely raised. *Its procedural nature* is further demonstrated by operation of the principal of revival by acknowledgment whereby a debt, though timely barred, may be revived through a new promise or written acknowledgment by the debtor."

• *Wilson v. Beville* (1957) 47 Cal.2d 852, 860, described a city charter requirement that claims be filed within six months as "stringent statutes of limitations *procedural* restrictions."

• *Biewend v. Biewend* (1941) 17 Cal.2d 108, 114, described the statute of limitations a "a *procedural* matter governed by the law of the forum . . . ."

• *Carpentier v. Brenham* (1870) 40 Cal. 221, 236 (the "Statute of Limitations" is not a "substantive" defense).

As shown, this Court commonly regards the statutes of limitations as procedural. Hence, any inconsistency between the treatment of complaints and notices of appeal when filed by suspended corporations should be resolved in favor of retroactively validating prior complaints, as to which the statute of limitations allows a "procedural" objection rather than a "substantive" defense or right.

D. Retroactive validation of complaints would remove an illicit motive for defendants to delay asserting the corporation's suspension until after the statute of limitations has run.

> Regarding the plea of a corporation's incapacity, this Court has said:
>
> [A] plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of its taxes "is a plea in abatement which *is not favored in law,* is to be strictly construed . . . .

Traub Co., supra, 66 Cal.2d at p. 370 (emphasis added).

If the objection for lack of capacity is not favored, then the question arises whether defendants, who seek a tactical advantage by asserting corporate incapacity, should be allowed to delay their motion to dismiss until after the statute of limitations has expired, thereby gaining the ultimate tactical advantage of dismissal if, as respondents argue, the complaint may not be retroactively validated despite the corporation's revivor.

The unfairness of this situation is patent because under respondents' view, the incapacity could be cured during the limitations period *if* the defendant promptly raises the objection before the statute expires, but the incapacity cannot be cured if the defendant waits strategically until the limitations period has expired.

The law ought not to reward the defendant who delays in bringing an objection that could be cured if the objection were filed as soon as the grounds for the objection are known or reasonably knowable.

As this Court has said: "A trial is not a game . . . ." *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 836, fn. 2.

To eliminate the gamesmanship discussed above, this Court should resolve any inconsistency in the treatment of complaints and notices of appeal by announcing that henceforth complaints may be retroactively validated also.

III.

If the order below is erroneous, this Court's ruling should apply prospectively.

At all times, BEG and the judges presiding over this case in the trial court and the Court of Appeal have accepted the law regarding retroactive validation of notices of appeal as this Court clearly stated that law in *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369 and *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, allowing retroactive validation of a notice of appeal filed by a corporation that was suspended when the notice was filed but since paid its taxes and was reinstated before the ruling. These precedents were faithfully applied by the court below in denying respondents' motion to dismiss.

Accordingly, if this Court changes the law to the *opposite* of what this Court ruled in *Peacock Hill* and *Rooney,* then this Court should limit the application of this 180-degree change in the law to future cases, but not apply that new rule to this case.

The factors that limit the application of this Court's reversal of precedent to prospective application only have been explained in three of this Court's decisions, and those factors apply here.

> Most recently, this Court stated in *Claxton v. Waters* (2004) 34 Cal.4th 367:
>
> "Although as a general rule judicial decisions are to be given retroactive effect [citation], there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied. [Citations.] '[C]onsiderations of fairness and public policy' may require that a decision be given only prospective application. [Citations.] Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. [Citations.]"

Id. at pp. 378-379.

This Court in limiting its new ruling to future cases only recited factors present here—reliance, a change in law that will radically alter the effects of past conduct, and the minimal impact of prospective application.

> We conclude that our holding should apply only prospectively. The rule we are changing is one that parties in this and other cases may have relied on in settling claims. In particular, employers may have refrained from proposing and executing separate documents expressly releasing claims outside the workers' compensation system because they were confident they could prove by extrinsic evidence a mutual intent to release such claims. Our holding barring the admission of extrinsic evidence for this purpose has a substantive effect because it may, in individual cases, effectively alter the legal consequences of executing the standard compromise and release form. Although barring the use of extrinsic evidence will preserve judicial resources, denying retroactive application will not unduly impact the administration of justice because it will merely permit a gradual and orderly transition. Accordingly, we conclude that considerations of fairness and public policy require prospective application. . . .

Id. at 378-379.

Other decisions by this Court to the same effect are *Smith v. Rae–Venter Law Group* (2002) 29 Cal.4th 345, 372, and *Woods v. Young* (1991) 53 Cal.3d 315, 330.

Under these decisions, this Court, if it rules for respondents, should apply its ruling prospectively only.

CONCLUSION

The order denying respondents' motion to dismiss this appeal was correct. BEG's revival compelled retroactive validation of the notice of appeal because BEG had paid its taxes, so there was no need to inflict on BEG the further penalty of dismissing this appeal, and there is certainly no need to reward respondents by relieving respondents of appellate scrutiny, inasmuch as respondents are merely bystanders of the laws that encourage the payment of corporate taxes while minimizing needless penalties on reinstated corporations.

Further, contrary to respondents' claim, the order below creates no inconsistency as to the treatment of complaints—either because of the "substance v. procedure" distinction, or because the inconsistency should be abolished inasmuch as complaints should be (and are) retroactively validated after a corporation's payment of taxes and revivor.

Finally, if this Court finds error in the order below, this Court's ruling would constitute a radical change in law that should apply only prospectively.

Dated: May 14, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief, excluding tables, consists of 8,520 words.

By:_____
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PROOF OF SERVICE BY MAIL
(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is 220 16th Avenue, San Francisco, CA 94118. On this date I served the interested parties in this action the within document: ANSWER BRIEF ON THE MERITS by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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Executed at San Francisco, California on May 14, 2012.

Dona R. McCullough