S199887/S199889 (Consolidated)

In the

SUPREME COURT OF CALIFORNIA

After Decision By The Court Of Appeal
First Appellate District, Division Two

A132136 and A133177 (Consolidated)

Superior Court of the County of Marin CIV 060796
Hon. James R. Ritchie

DANIELLE BOURHIS et al.

Plaintiffs and Appellants

v.

JOHN LORD, et al.

Defendants and Respondents

PETITIONERS' REPLY BRIEF ON THE MERITS

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JOHN LORD, KATE LORD, AND Q-TIP TRUST OF THE LORD JUNE 30, 1989 TRUST

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Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Appellant Brown Eyed Girl, Inc. ("BEG") filed invalid notices of appeal and asks this Court to retroactively stay the period for filing appeal notices so the revival of its corporate status can validate those notices. Appeal periods are jurisdictional and cannot be extended. Standing to appeal is also jurisdictional, and Appellant's suspension deprived it of such standing. Appellant cites no authority or reason why its volitional conduct which led to suspension should entitle it to litigate without standing and to extend otherwise fixed appeal periods, rights not enjoyed by parties who pay their taxes.

Appellant has no constitutional right to appeal. That right is wholly statutory and can be restricted or abolished by the Legislature. Here the right has been conditioned upon being in good standing. Appellant failed to meet this condition.

Unable to distinguish the decades of analogous authority holding that suspension does not toll statutes of limitations, Appellant asks this Court to overrule all that authority. Yet, it supplies no sound basis for doing so. Those cases are well reasoned and give effect to the Revenue & Taxation Code §23305a proviso that reinstatement cannot prejudice any action, defense or right that accrued by reason of the suspension. Like the statute of limitations, the period for appeal is not tolled by suspension, and if reinstatement does not occur prior to the expiration of the period, the appeal must be dismissed.

Appellant is not being punished for being suspended. It is being held to the consequences of failing to file a valid notice of appeal during

the period for doing so, the same consequences that every other litigant must face.

The Court should clarify *Peacock* and *Rooney*. Those cases were erroneously interpreted in this matter to allow the Court of Appeal to retain jurisdiction of Appellant's purported appeal when it had none. This Court should hold that a notice of appeal filed while suspended is invalid and the failure to reinstate corporate status prior to the running of the appeal period deprives the appellate court of jurisdiction. The holding should be applied to this case, not prospectively as Appellant requests. None of the requirements for prospective application are met here, and, in any event, cannot confer jurisdiction where none otherwise exists.

II. FACTUAL BACKGROUND

The merits of the action are not before the Court and really are not relevant to the issue under review. However, Appellant has presented the Court with a rather selective statement of the facts. So Respondents provide this statement in response.

This dispute arises out of the flooding in Southern Marin on New Year's Eve 2005. Flooding occurred with only a few hours of notice during heavy rains, identified variously as a 50 or 100 year storm, with runoff discharge that has only been exceeded once in the period of historical records. (8 RT 1000:5-1001:4; 11 RT 1557:4-18). Indeed, the quantity of rain on December 31 itself occurs only once every 100 years. (8 RT 1002:14-1003:3). Neither the government nor anybody else predicted this amount of rainfall. (8 RT 1003:4-21; 1032:18-1033:2). The flooding left 10 counties in California as federally declared disaster areas. (11 RT 1557:19-25). As regards Ross, the Corte Madera Creek overflowed its banks and flooded

the surrounding area. (11 RT 1522:23-1523:3). The amount of water flowing past the subject building *every second* was equated to the amount of water in an Olympic sized swimming pool. (8 RT 1007:8-16). There is no claim that Respondents caused or exacerbated this flooding.

Among the properties flooded were those at 3 and 5 Ross Common, Ross, California, owned by Respondent Trust. Respondent John Lord is the trustee of the Trust. (8 RT 842:12-15, 843:15-20). These premises were leased to Appellant. (Exh. 2).

Appellant's assertion that it was not told about the prior flooding history of the premises is disputed by the evidence. John Lord told Appellants about a prior flood, and pictures of prior floods in Ross were in the Lord's office, the grocery store across the street, and in the post office across the parking lot, all places visited by Appellants. (Exh. R; 8 RT 957:11-959:16; 962:20-963:5; 10 RT 1262:12-21, 1264:17-24, 1265:20-25; 12 RT 1653:5-1654:20, 1658:1-6). The Corte Madera Creek itself was in plain view running behind the buildings in Ross, including 3 and 5 Ross Commons, in a large cement viaduct built by the Army Corp of Engineers.[1] (11 RT 1536:7-10). The Creek, which is 30 to 50 feet wide, has water in it year around. (10 RT 1382:13-24). Respondents had no right or ability to control the condition of the Creek. Flood control in Ross was one of the topics on the agenda of the Town of Ross Council Meeting that Appellants attended in order to get a permit for their store. (Exh. CC, Item 11; 10 RT 1260:19-1261:15). Of course, Appellants deny the conversation with John Lord took place, deny seeing the pictures, deny seeing the Creek, deny seeing any water, and deny hearing the discussion at the town meeting.

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[1] A history of the construction of the Corte Madera Creek Flood Control Project is at 11 RT 1523:21-1528:3.

The Lease specifically advised Appellants that the "Landlord does not carry earthquake or flood insurance and Tenant should obtain such earthquake and flood insurance as Tenant deems appropriate to protect its . . . improvements, fixtures, equipment and inventory. (Exh. 2, p. 12, ¶13A). The Lease also exculpated Landlord from any liability for damage from "adverse weather, water intrusion, or flood," and Tenant waived all such claims. (Exh. 2, p.11, ¶12A). Tenant also acknowledged in the Lease that there were no warranties of fitness or suitability of the Premises for the conduct of Tenant's business, and "Tenant has made Tenant's own independent investigation to determine the fitness and suitability of the Premises for Tenant's use." (Exh. 2, p.8, ¶6G). Appellants actually did inspect the premises. (5 RT 386:21-387:5, 388:1-9). The Lease was reviewed and negotiated by Appellants. (5 RT 393:24-394:10; 10 RT 1252:16-22).

The actual flooding history of the leased premises was that in the 40 years prior to 2005 it had flooded in 1982 and once before that. (8 RT 842:13-15, 955:14-956:3). Appellant asserts that the premises flood every 3-4 years. (Answer Brief at 6). That is not what the evidence shows and is simply not true. (8 RT 846:20 ["It did not flood every four years."]).[2] To be sure, the Corte Madera Creek had overflowed its banks at various points periodically over the years, causing some water in the streets in Ross or upstream, but with no consequence to the leased premises. (8 RT 847:12-15, 955:1-13; 9 RT 1036:8-17).[3] According to Appellants' expert, the cause

[2] Appellant cites to testimony from Respondent's expert, Charles Perry. As Mr. Perry explained, the opinion he rendered at his deposition was based on a mis-reading of Mr. Lord's deposition. Mr. Lord had testified there had been some flooding in Ross every four or so years, and Mr. Perry misread this to mean flooding of the subject building. (8 RT 987:3-11; 9 RT 1034:19-1036:5). Even Appellants' expert had no knowledge of any flooding between 1982 and 2005. (11 RT 1565:3-7).

[3] In hydraulic terms, a flood is any flow which exceeds the creek banks. (10 RT 1384:15-21).

of flooding is constriction upstream from the subject premises, not behind them. (11 RT 1545:7-1546:1). In the 2005 flood, there was no sewage in the flood waters. (9 RT 1037:3-1038:17). In this action, Appellants along with some 80 other plaintiffs, sued numerous upstream property owners and public entities for causing or contributing to the flood. (5 RT 399:2-10; 6 RT 490:2-14; 10 RT 1280:12-1281:14).

The propensity for the Corte Madera Creek to overflow its banks is well known in the Ross community. (11 RT 1534:23-1535:5 [Appellant's expert]). There was a lot of publicity surrounding the 1982 flood and the subsequent progress made and not made for flood control was common knowledge in Ross Valley. (11 RT 1535:23-1537:1). It was general knowledge the town is in a flood zone. (8 RT 844:19-22).

In motions concerning the pleadings and in a Motion in Limine prior to trial, the trial court ruled at least four times that there was no duty of the Landlord to advise Appellants of the prior flooding history of the property. (See, e.g., 2 RT 68:11-70:21). Nonetheless, Appellants' trial counsel continued to press the point. He asked every plaintiffs' witness whether they were warned and asked Mr. Lord questions about his knowledge and warnings he gave of prior flooding. As a consequence, early in the proceedings the trial court gave the jury a preliminary instruction that the duty to warn of prior flooding circumstances was not an issue in the case. (See discussion 8 RT 903:15- 911:11). Plaintiffs' counsel approved of giving the instruction and its content. (8 RT 904:9-15, 910:1-911:1).

Ultimately, complete and proper instructions were given to the jury, and after considering all the evidence, including testimony on warnings

actually given to Appellants and the many exhibits, it returned a 12-0 defense verdict.

III. BEG'S NOTICE OF APPEAL WAS INVALID

BEG begins its opposition by contesting that the notices of appeal it filed while suspended were invalid. This position is illogical and wrong. If its notices of appeal were valid then why did Appellant need to "validate" them by reinstatement? If those notices were valid, then suspension has no effect.

BEG's suspension under Revenue & Taxation Code §23301 meant that its "powers, rights and privileges were suspended." (Exhibit 1 to Motion to Dismiss). It had no power, no right, or no privilege to file a notice of appeal.

The caselaw is unanimous that the acts of a suspended corporation are invalid. Even the cases Appellant relies on recognize that suspension renders the acts invalid. (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371 [revival of corporate powers by the payment of delinquent taxes can "validate *otherwise invalid* prior action" (Emphasis added)]; *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 371 ["a suspended corporation not shown to have been reinstated *lacks the right or capacity to defend an action or to appeal* from an adverse decision" (Emphasis added)]. "What has come down to the present day is the general rule that 'the corporation may not prosecute or defend an action, nor appeal from an adverse judgment in an action while its corporate rights are suspended for failure to pay taxes.'" (*Damato v. Slevin* (1989) 214 Cal.App.3d 668, 672, citing *Reed v. Norman* (1957) 48 Cal.2d 338, 343).

Indeed, the acts of filing the notices of appeal were illegal and could carry with them penalties of up to $1,000 in fines and one year of imprisonment for each act. (Rev. & Tax. Code §19719.) Valid acts do not result in imprisonment.

Thus, the notices of appeal filed by BEG were invalid when filed and throughout the time period for filing such notices. BEG did not have the power, right or privilege to file them or perform any other act in litigation. The issue is whether BEG's subsequent revival validates these previously invalid acts. As demonstrated in the Opening Brief on the Merits and in this brief below, it cannot and should not.

IV. AN INVALID NOTICE OF APPEAL CANNOT BE VALIDATED AFTER THE APPEAL PERIOD HAS EXPIRED

Appellant does not address the unique aspects of a notice of appeal. The appeal period is jurisdictional. "California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited." (*In re Baycol Cases I and II.* (2011) 51 Cal.4th 751, 761 n.8). A ruling must be "timely appealed or the right to challenge its particulars be forever lost." (*Id.*). "Compliance with the time for filing a notice of appeal is mandatory and jurisdictional. [Citation omitted.] If a notice of appeal is not timely, the appellate court must dismiss the appeal. (Cal. Rules of Court, rule 2(e).)"[4] (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582). Appellate jurisdiction "can never be created by consent, waiver or estoppel." (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47).

The time period for filing a notice of appeal cannot be extended, and an appellate court cannot relieve a party from its default. (Rules 8.104(b)

[4] This requirement is now in Rule 8.104(b), California Rules of Court.

and 8.60(d), California Rules of Court). Appellant's request to validate its otherwise invalid notices of appeal violates both of these Rules.

Moreover, the standing requirement to appeal is also jurisdictional and cannot be waived. (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947); *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295). A suspended corporation, with no power, right or privilege to act, does not have standing to appeal. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1486; *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724).

Appellant should not be accorded any greater rights to appeal after filing an invalid notice of appeal than are afforded to litigants who pay their taxes but file invalid notices of appeal. In *Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119, appellant failed to file a timely notice of appeal from an appealable interlocutory order. Therefore, that order became final and binding and court dismissed the invalid appeal from that order following the subsequent judgment. (See also Code of Civil Procedure § 906). In *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46, notice of appeal from the judgment did not validly appeal from the post-judgment order awarding attorneys' fees. Thus, the appellate court had no jurisdiction to review that award. Invalid appeals from non-appealable orders are also routinely dismissed. (See *Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 41-42).

Appellant filed invalid notices of appeal. They were invalid as of the time the period to appeal expired. No liberal construction of the notices could validate them. Therefore, the appellate court was without jurisdiction to do anything but dismiss BEG's appeals.

V. APPELLANT HAS NO CONSTITUTIONAL RIGHT TO APPEAL

Appellant claims it has a constitutional right to appeal. (Ans. Brief at 19-20). Not so. While appellate courts derive their jurisdiction from the California Constitution (Art. VI, §11), "the right of appeal is entirely statutory and . . . there is no constitutional right of appeal." (*Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 668; accord *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 ["The right to appeal is wholly statutory."]; *Skaff v. Small Claims Court for Los Angeles Judicial Dist. of Los Angeles County* (1968) 68 Cal.2d 76, 78 ["a party possesses no right of appeal except as provided by statute"]). Generally, Code of Civil Procedure §§904 and 904.1 are the enabling statutes.

"The Legislature has complete control over the right to appeal and may restrict, alter or even abolish that right." (*Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1152). Here, the Legislature has conditioned the right of corporations to appeal on their filing their tax returns, paying their taxes, and remaining in good standing. Appellant did not satisfy these conditions, and cannot complain its constitutional rights have been violated.

VI. THIS COURT SHOULD NOT OVERTURN DECADES OF CASE LAW TO BENEFIT THIS SERIAL TAX DELINQUENT

Appellant has offered no logical basis for distinguishing between the treatment of a statute of limitations that expires during suspension and the treatment of an appeal period that expires during suspension. At first Appellant suggests the substantive/procedural dichotomy could justify different treatment (Answer Brief at 17-19), but offers no explanation for how the jurisdictional, non-waivable consequences of the expiration of an appeal period can be less substantive than the non-jurisdictional, waivable

consequences of the expiration of a statute of limitations. Unable to articulate a valid distinction, Appellant falls back to argue that both should be treated as procedural and retroactively curable. (Answer Brief at 21-28).

Appellant urges the Court to overturn unanimous precedent holding that a suspended corporation's complaint must be dismissed if revival does not occur until after the statute of limitations has run. For decades cases have followed and/or approved of this rule. (*County of El Dorado* (2011) 200 Cal. App. 4th 1470; *Cleveland v. Gore Bros., Inc.* (1936) 14 Cal.App.2d 681; *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, 73; *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724; *Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1513 n.2; *Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1491; *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 402-03; *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal. App. 4th 1470.) And the rule has been recognized by this Court. (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 372).

All the analogous precedent is against Appellant for a good reason – corporate delinquency is within the power of the corporation to avoid, and the self-inflicted wound which results from suspension does not entitle the corporation to benefits not afforded to other litigants. No other litigant can stay the statute of limitations, or take some action after the statute expires to retroactively revive its claims. Yet, those are the benefits Appellant seeks for corporations that try to slide by without paying their taxes. Such delinquency is not inadvertent. All corporations must be given ample notice before they can be suspended. (Rev. & Tax. Code §21020). Particularly here, Appellant tried to slide by twice; once during trial and now on appeal. No policy of leniency in the enforcement of the corporate

suspension statute justifies giving the suspended corporation more rights for having been suspended then it would have had otherwise.

Appellant's arguments are not supported by law and inaccurately state the holdings of the cases. Appellant argues that corporate capacity is not an element of the cause of action and incapacity does not defeat the court's jurisdiction. (Answer Brief at 21-22). Appellant misstates the facts of *Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, on which it relies. Contrary to Appellant's representation, the corporation was not suspended at the time it filed its complaint. (Answer Brief at 21-22). The complaint was filed on May 24, 1992, and the corporation was suspended on December 1, 1992. (*Id.* at 1602.) Thus, the case is inapposite.

Moreover, a suspended corporation, with no power, right or privilege to act, does not have standing to sue. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado, supra,* 200 Cal.App.4th at 1486 ["while the corporation's powers are suspended, it lacks standing to sue and statutes of limitations are not tolled."]. Accord: *ABA Recovery Services, Inc. v. Konold, supra,* 198 Cal.App.3d at 724.) As this Court stated in *Traub*: "[A] suspended corporation not shown to have been reinstated lacks the right *or* capacity to defend an action or to appeal from an adverse decision." (66 Cal.2d at 371 [emphasis added]). A corporation lacking the "right or capacity" to sue or appeal has no standing to do so.

Further, as to appeals, an appellant's lack of standing does deprive the court of jurisdiction. (*Sabi v. Sterling, supra,* 183 Cal.App.4th at 947); *Marsh v. Mountain Zephyr, Inc., supra,* 43 Cal.App.4th at 295).

None of the other cases Appellant cites involved a statute of limitations which expired while the corporation was suspended. (Answer Brief at 22-26). In *Maryland Casualty Co. v. Superior Court* (1928) 91

Cal.App. 356, the reinstatement occurred one year before trial, and the motion to dismiss was made during trial. (*Id.* at 357-58.) Thus, at the time the motion was made, plaintiff had already been reinstated. Moreover, there is no indication that the statute of limitations had run by the time the reinstatement occurred. The case was a contract action, and likely had a lengthy statute of limitations period. Additionally, the court noted that the only defense created by the original suspension was the plea based on the suspension, which suggests that the statute of limitations was not a defense. (*Id.* at 363).

In *Hall v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1942) 53 Cal.App.2d 625, 630, the action was commenced November 4, 1940, and the corporate powers were revived November 22, 1940. That the statute of limitations had not run is made clear by the court's distinguishing of *Cleveland v. Gore Bros., Inc., supra,* 14 Cal.App.2d 681, on just that basis, saying:

> After the running of the statute and the filing of the answer the corporate powers were revived. The court held that the revival could not be given a retroactive effect so as to permit the filing of the action at a time of incapacity to toll the running of the statute of limitations; it was the intervening fact of the expiration of the statute of limitations that controlled the decision. In truth the plea was not one in abatement but a defense to the action on the merits.

(53 Cal.App.2d at 630-31.)

The same point is true here. The motion to dismiss was based not only on the fact of suspension when the invalid notices of appeal were filed, but also on the intervening fact of the expiration of the appeal periods without valid notices of appeal on file.

In *Pacific Atlantic Wine v. Duccini* (1952) 111 Cal.App.2d 957, there is no discussion of the statute of limitations. The fact that the court says the defendants' contention "is fully answered by the decision in *Hall*" (*id.* at 967), shows that the expiration of the statute of limitations was not a factor.

In *La France Enterprises v. Van Der Linden* (1977) 70 Cal.App.3d 375, the plaintiff corporation was revived after filing its complaint and then later was suspended and reinstated again. The statute of limitations had not run as of the time of the first reinstatement. This is made clear by the trial court's statement that if plaintiff had to file a new action, the statute of limitations would be a defense. (*Id.* at 379). It obviously was not a defense in the current action.

Finally, in *A. E. Cook Co. v. K S Racing Enterprises* (1969) 274 Cal.App.2d 499, 500, the complaint was filed on October 20, 1967, and plaintiff revived its powers on December 1, 1967. It does not appear the statute of limitations expired in the 41 days prior to revival. The court's citation to *Hall* supports that conclusion. Significantly, the court also stated the caveat to allowing revival to validate prior invalid actions, to wit: "provided, of course, that in the meantime substantive defenses have not accrued nor third party rights intervened." The court then cited to the discussion in *Hall* distinguishing the situation where there is "the intervening fact of the expiration of the statute of limitations". (*Id.* at 501.)

In summary, not one of the cases relied upon by Appellant validated a complaint filed during a corporation's suspension when corporate revival occurred after the statute of limitations expired. Appellant's assertion that "courts already allow retroactive validation of complaints" (Answer Brief at 26) cannot withstand analysis. The decades of case authority mandating dismissal of complaints filed during corporate

suspension when corporate reinstatement occurs after expiration of the statute of limitations is unanimous. There is no reason to overturn it, and it directly supports Respondents' position here.

Appellant's characterization of the statute of limitations defense as procedural similarly misses the point. (Answer Brief at 26-28). In some contexts the statute of limitations is referred to as a procedural defense, to distinguish it from a defense on the merits. However, the expiration of the statute of limitations creates a complete defense to the action for the defendant, every bit as substantive as any defense on the merits. Procedural or not, the expiration of the statute of limitations creates a "defense or right that has accrued by reason of the original suspension" within the meaning of Revenue & Taxation Code §23305a, and this defense or right cannot be prejudiced by reinstatement of the corporation. The statute does not distinguish "procedural" from "substantive" defenses or rights. The expiration of the statute of limitations defeats the plaintiff's claim, just as the expiration of the appeal period defeats any right to appeal. In both cases it is not simply the fact of suspension that is being asserted, it is the defense or right that accrued by reason of the suspension.

VII. THE POSSIBILITY OF DELAY IN RAISING CORPORATE SUSPENSION IS NO JUSTIFICATION FOR NOT ENFORCING ITS CONSEQUENCES

According to Appellant, the mere possibility that a defendant could strategically delay raising the issue of corporate suspension should mean the consequences of suspension should not be enforced. (Answer Brief at 29). Appellant does not suggest that there was any delay here, and there is nothing in the record which would support such a suggestion. In this case, once the appeal period expired, there was nothing any party could do to

reinstate Appellant's appeal rights. Appellate jurisdiction cannot be based on consent, waiver, or estoppel. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker, supra,* 220 Cal.App.3d at 47).

Moreover, in most cases involving suspension the court has discretion to give the suspended party time to get reinstated or to deny a motion based on suspension when there has been an unreasonable delay. (*Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 511-12). Thus, adequate protection against unreasonable delays exists without stripping suspension of all consequences.

It is also important to remember that suspension does not occur without a party's knowledge and can be avoided simply by paying the taxes due. A party must be accountable for its actions and decisions, and should not be able to rely on others to protect its interests. Appellant was not blindsided by the suspension issue. Appellant initially went into suspended status knowingly, thinking there were no consequences. (See Motion to Strike Notice of Appeal and Dismiss Appeal of BEG, filed in the Court of Appeal). The suspension issue was raised at trial, and Appellant was given time to get reinstated, which it told the trial court it had done. It could no longer claim ignorance of the consequences, and it was on notice of the importance of remaining in good standing. It has nobody else to blame for the consequences of its failure to protect its own interests.

VIII. APPELLANT IS NOT BEING PUNISHED FOR ITS SUSPENSION

Appellant cites authority for the purpose of Revenue & Taxation Code §23301 being to put pressure on delinquent corporations to pay their taxes, and consequently once taxes are paid there is little purpose in

imposing additional penalties. The Revenue & Taxation Code provisions expressly recognize, however, that paying the taxes and reviving the corporation is not necessarily a cure-all. The suspension can create actions, defenses and rights, and when it does so revival cannot prejudice them. (Rev. & Tax. Code §23305a). In such situations, there are no additional penalties being imposed on the revived corporation. Rather, there are consequences from its suspension which it is being required to face, and the rights of others which accrued by reason of the suspension are being protected.

The result Respondents seek does not alter the lenient treatment often given to suspensions once cured. In many cases the suspension does not create any actions, defenses or rights in others. In such cases a motion based on the suspension can be treated as a plea in abatement. However, when the motion is based not only on the fact of suspension, but also on the action, defense or right which accrued by reason of the suspension, then the motion is not a plea in abatement. As stated in *Hall v. Citizens Nat. Trust & Savings Bank of Los Angeles, supra,* 53 Cal.App.2d at 631: "In truth the plea was not one in abatement but a defense to the action on the merits."

The truth here is that Appellant seeks not only to validate prior invalid actions, but also to stay the running of appeal periods. It seeks rights not enjoyed by other litigants.

IX. *PEACOCK* AND *ROONEY* SHOULD BE CLARIFIED

While Appellant claims that *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, and *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.*

(1972) 8 Cal.3d 369, do not need clarification, it does not answer any of the issues raised by the Opening Brief concerning these cases. Appellant interprets these cases to retroactively validate invalid notices of appeal after the appeal period has expired; yet neither opinion directly discusses the issue, neither sets out the facts which create the issue, neither raises Revenue & Taxation Code §23305a, neither addresses how the res judicata effect of the judgment becoming final can be retroactively negated, and neither discusses the jurisdictional nature of appeal notices. The most logical explanation is that no party raised any of these issues and the Court did not consider them. As stated in the Opening Brief on the Merits, "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; *Vasquez v. State* (2008) 45 Cal.4th 243, 254). The Court should take this opportunity to clarify them.

X. THE RULING IN THIS MATTER SHOULD APPLY TO THIS MATTER

Without question, the general rule is that a judicial decision is applied to the case in which the decision is made. Appellant offers no justification for not applying the ruling in this matter to this matter. (See Answer Brief at 30-31).

Cases which have applied their rulings only to future cases are the exception and base their decision on several factors. (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378-79). First, there has to be a clear, settled rule which is being changed. That is not so here. *Peacock* and *Rooney* are, for the reasons discussed above, not clear or settled. No published Court of Appeal case has ruled on the issue raised here. If anything is clear and settled, it is that suspension does not toll statutes of limitations, and

complaints filed by suspended corporations must be dismissed if corporate reinstatement occurs after the statute of limitations has expired. The one Court of Appeal case that raises the apparent inconsistency of treatment between expiration of the statute of limitations and expiration of the period for filing an appeal, leaves it for resolution by this Court. (*ABA Recovery Services, Inc. v. Konold, supra,* 198 Cal.App.3d at 725, fn.2). There has been no clear rule on which Appellant or any other party could rely.

Second, there has to be actual reliance on the "former rule". To show such reliance Appellant must concede it filed the notices of appeal when it knew it was suspended and purposefully let the appeal periods lapse without seeking reinstatement because it was aware of *Peacock* and *Rooney*.

Third, even if Appellant did rely, such reliance was not reasonable. The issue was not so clearly decided, and the consequences of being wrong are significant. It would not be reasonable to take the risk when it could have been easily avoided.

Fourth, applying the rule retroactively will have no adverse effect on the administration of justice, and will advance the purposes for the rule. Indeed, the issue is jurisdictional. The decision should be applied in this case and all other pending cases and future cases. If the court does not have jurisdiction, the cases ought not to be proceeding. A decision which so holds will encourage corporate parties to make sure they have paid their taxes and are in good standing.

The cases cited by Appellant in support of prospective application involved completely different facts which are not analogous to the facts here. *Claxton v. Waters* (2004) 34 Cal.4th 367, involved changes to the rule, clearly established and relied on, allowing extrinsic evidence to interpret

workers' compensation releases. Changing the rule for releases already written based on the former rule would unfairly impact them.

Smith v. Rae-Venter Law Group (2002) 29 Cal.4th 345, 372-73, involved a "clear break" in the former law regarding fee shifting which had been "uniformly applied" and relied on by the party in the case.

Woods v. Young (1991) 53 Cal.3d 315, 330, involved the change of a rule on which seven prior Court of Appeal cases had reached a "unanimous conclusion" that "established a settled rule upon which plaintiff could reasonably rely in determining when to file her action."

There is no such clear, "uniform" or "unanimously" followed "former rule" here, and no widespread and palpable reliance on it. Nor did any of these cases involve a jurisdictional issue, as this case does. There is no basis for not applying the decision in this matter to this matter.

XI. CONCLUSION

Appellant has provided no sound basis for retroactively reviving its appeals and negating the *res judicata* effects of the final judgment and orders. Affording such rights of revival to delinquent corporations that are suspended would give them rights not enjoyed by tax paying litigants.

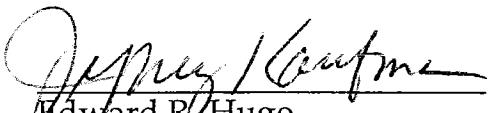
The result Respondents seek is fully consistent with decades of analogous law and is mandated by the proviso in Revenue & Taxation Code §23305a.

Respondents respectfully submit that this Court should reverse the

orders of the Court of Appeal, and order it to grant the motions to dismiss Appellant's appeals.

Dated: June 26, 2012

BRYDON HUGO & PARKER

By: 

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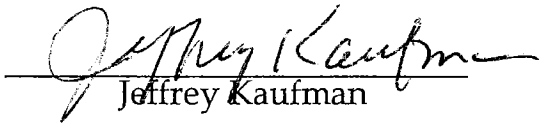
CERTIFICATION OF WORD COUNT

I certify that this document contains 5560 words, including footnotes, according to the Microsoft Word word count feature.



Jeffrey Kaufman

Bourhis, Danielle
Marin County Superior Court Case No. CV-060796; COA Case Nos. A132136/A133177
Consolidated Supreme Court Case Nos. S199887 & S199889

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My electronic notification address is service@bhplaw.com and my business address is 135 Main Street, 20th Floor, San Francisco, California 94105. On the date below, I served the following:

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X By placing the document(s) listed above in a sealed envelope and placing the envelope for collection and mailing on the date below following the firm's ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal service on the same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the above is true and correct. Executed on June 29, 2012, at San Francisco, California.

Mabelene Valeros