LIU, J.

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In the

SUPREME COURT OF CALIFORNIA

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

A132136

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

PETITION FOR REVIEW

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Table of Contents

Page(s)

Tables of Authorities

Page(s)

Cases

Rules

Statutes

I. ISSUE PRESENTED

Does an invalid appeal filed by a "suspended" corporation get retroactively validated by revival of corporate status after the appeal period has expired?

Plaintiff and Appellant below, BROWN EYED GIRL, INC., a California corporation ("Appellant" or "BEG"), filed its notice of appeal during the time its corporate status was "Suspended" by the Secretary of State for failure to pay taxes and file tax returns. After the time for appealing had expired, and after Defendants and Respondents below had moved to dismiss the appeal, Appellant revived its corporate status. The Court of Appeal denied the motion. (See Order bound at end of this Petition). By its citation to two Supreme Court cases it implicitly ruled that the revival validated the prior filing of the notice of appeal, even though in the interim the Judgment had become final by reason of the lack of a proper notice of appeal during the appeal period, and rights of res judicata had vested in Respondents. However, it also cited another Court of Appeal decision questioning the inconsistency between these cases and another Supreme Court case holding that revival did not extend statutes of limitations and leaving "the resolution of this apparent inconsistency to the Supreme Court." That apparent inconsistency between Supreme Court decisions is the issue presented in this matter.

II. STATEMENT OF THE CASE

Appellant BEG is a California Corporation. Judgment was entered against it (and other Appellants not involved herein) on April 5, 2011, and was served on April 6, 2011. Notice of Appeal from this Judgment by all

Appellants was filed on May 26, 2011. That appeal is the subject of this appellate action.

After the Judgment was entered, the trial court entered two Orders awarding costs and attorneys' fees to Respondents. These Orders were both entered and served on August 20, 2011. On September 13, 2011, Appellants filed a Notice of Appeal from those two orders.[1]

At the times Appellant BEG filed both Notices of Appeal, the Secretary of State's records reflected that its corporate status had been "Suspended" since June 1, 2009. Respondents below, JOHN LORD, KATE LORD, and Q-TIP TRUST OF THE LORD JUNE 30, 1988 TRUST (collectively the "Respondents"), moved to dismiss each of the appeals on the ground that BEG lacked the capacity to appeal and the appeal period had expired. According to Appellant BEG, effective December 8, 2011, after the appeal periods had expired, and after the motions were filed, BEG revived its corporate status. On December 29, 2011, the Court of Appeal denied each of the motions, citing *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, and *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, without any discussion of these cases.

The Court of Appeal also added "see *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 725, fn.2." That footnote pointed out the inconsistency between *Rooney's* holding that filing a notice of appeal was a "procedural" step and a prior Supreme Court decision stating that the statute of limitations was substantive.

[1] That appeal in the Court of Appeal is No. A133177, and is the subject of a like Petition for Review.

> Apparently, the Supreme Court in *Rooney* considered the filing of a notice of appeal a "procedural" step which could be retroactively validated by revivor whereas the Supreme Court in *Traub* did not include in its holding those cases where the statute of limitations was raised as a defense. We question why the timely filing of a notice of appeal, which is jurisdictional and cannot be waived, is a procedural act unaffected by a corporation's suspension, while the statute of limitations, which is not jurisdictional and can be waived, is a substantive defense fatal to a suspended corporation's cause of action. However, *we leave the resolution of this apparent inconsistency to the Supreme Court.*

(*ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 725, fn.2 (emphasis added)).

By its citation to this footnote, the Court of Appeal below similarly left it to this Court to resolve this apparent inconsistency.

The Court of Appeal orders are reviewable. (Rule 8.500, California Rules of Court, and Advisory Committee Comment on Subdivision (a)(1)). The orders became final thirty (30) days after filing. (Rule 8.264, and Advisory Committee Comment to Rule 8.500, Subdivision (e)). This timely Petition for Review follows. (Rule 8.500(e), California Rules of Court).

III. BACKGROUND FACTS

Appellant sued its landlord, Respondent Q-TIP TRUST OF THE LORD JUNE 30, 1988 TRUST, and the other Respondents for property damage caused by the flooding of a creek that was not on Respondent's property. Respondents JOHN LORD and KATE LORD were granted non-suits, and the jury rendered a 12-0 verdict for Respondent Q-TIP TRUST CF THE LORD JUNE 30, 1988 TRUST. Judgment on the operative complaint for all Respondents and against all Appellants was entered on

April 5, 2011, and served on April 6, 2011. Notice of Appeal from that Judgment was filed by Appellants on May 26, 2011, and is the subject of Court of Appeal No. A132136.

After the Judgment was entered, the trial court entered two Orders awarding costs and attorneys' fees to Respondents. These Orders were both entered and served on August 20, 2011. Notice of Appeal from those orders was filed on September 13, 2011, and is the subject of Court of Appeal No. 133177.

Shortly prior to trial Respondents became aware that BEG's corporate status was "Suspended" for failure to pay corporate taxes for 2007, 2008, and 2009. (See Respondents' Motion to Strike Notice of Appeal and Dismiss Appeal of BEG, filed in the Court of Appeal [hereinafter "Motion to Dismiss"]. Attached as Exhibit 2 to that Motion to Dismiss is Defendants' *Motion In Limine* No. 6 to preclude Brown-Eyed Girl, Inc. from Offering any Evidence at Trial, which was filed in the trial court. See Exhibit A to Exhibit 2, and Exhibit B to Exhibit 2 at pages 75:11-19). BEG had also failed to file income tax returns for those years. (See Exhibit B to Exhibit 2 at page 25:21-24). The default was intentional, as BEG felt there was no rush to file the returns and to pay the State of California the money that was owed because BEG perceived that it was not subject to any penalty for not doing so. (See Exhibit B to Exhibit 2 at pages 25:25-26:6). At the same time it sought to enjoy the benefits and protections of the California court system, funded by other tax payers. Respondents moved the trial court *in limine* to preclude BEG from offering evidence at trial. (Exhibit 2 to Motion to Dismiss).

The trial court allowed BEG an opportunity to cure its default (Exhibit 3 to the Motion to Dismiss), and a few days later, on October 12,

2010, BEG represented to the trial court that it had taken the actions necessary to do so, subject to "bureaucratic steps". (Exhibit 4 to Motion to Dismiss). On that basis it was allowed to proceed to trial.

After the Notices of Appeal were filed, Respondents learned that in fact the "Suspended" status had not been lifted for the trial or for the time thereafter when BEG filed its Notices of Appeal. The Certificate of Status obtained from the Secretary of State listed the status as "FTB Suspended" from June 1, 2009, which means "The domestic entity's powers, rights and privileges were suspended in California by the California Franchise Tax Board for failure to meet franchise tax requirements (e.g., failure to file a return, pay taxes, etc.)." (Exhibit 1 to Motion to Dismiss). Under California law, BEG was not authorized to file or to pursue the appeals.

Appellant opposed the Motions to Dismiss arguing that its corporate status was revived on December 8, 2011, which was after the appeal periods had expired and after the motions had been made. Nonetheless, the Court of Appeal denied the motions.

IV. ARGUMENT

A. The Supreme Court Should Grant Review To Secure Uniformity of Decision And To Settle An Important Question Of Law

As the Court of Appeal noted in *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 725, fn.2, there is an apparent inconsistency in the Supreme Court cases as to the effect given a revival of corporate powers. The background of this issue is as follows:

Revenue & Taxation Code § 23301 was enacted to deprive recalcitrant tax payers like BEG from holding onto their money while they enjoy state services paid by others. It provides:

> Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer may be suspended, and the exercise of corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited, if any of the following conditions occur::
>
> (a) If any tax, penalty, or interest, or any portion thereof, that is due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, either at the time the return is required to be filed or on or before the 15th day of the ninth month following the close of the taxable year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the taxable year.
>
> (b) If any tax, penalty, or interest, or any portion thereof, due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, upon notice and demand from the Franchise Tax Board, is not paid on or before 6 p.m. on the last day of the 11th month following the due date of the tax.
>
> (c) If any liability, or any portion thereof, which is due and payable under Article 7 (commencing with Section 19131) of Chapter 4 of Part 10.2, is not paid on or before 6 p.m. on the last day of the 11th month following the date that the tax liability is due and payable.

(See also, Revenue & Taxation Code §§23301.5 and 23302).

The purpose of this section is to encourage the payment of taxes. (*Cadle Company v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal. App. 4th 504, 512). Cases uniformly hold that pursuant to this section a "Suspended" domestic corporation cannot prosecute or defend actions in court. (*Domato v. Slevin* (1989) 214 Cal.App.3d 668, 672; *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 244-45).

In addition, the fact of a corporation's suspension can be raised at any time, even right before trial or after appeal. (*Ocean Park etc. Co. v. Pacific Auto P. Co.* (1940) 37 Cal. App. 2d 158; *Reed v. Norman* (1957) 48 Cal. 2d 338, 343; *Cadle Company v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal. App. 4th 504, 511-12).

Here, Appellant was fully aware of the issue and the consequences because Respondents raised the matter before trial. The trial court gave Appellant an opportunity to cure the default, and Appellant represented it had been cured. On that basis Appellant was allowed to proceed with trial. Thus, Appellant was on actual notice of the need to maintain BEG's status in good standing. It failed to do so.

The cases hold that a suspended corporation cannot appeal from an adverse judgment, and if it does its appeal should be dismissed. In *Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, the Supreme Court dismissed an appeal of a suspended corporation, saying:

> The statute expressly deprives the corporation of all 'corporate powers, rights and privileges,' subject to one exception, which is specifically set forth, the right to amend the articles to change the name. As the court declared in *Ransome-Crummey Co. v. Superior Court, supra,* 188 Cal. 393, 397, 205 P. 446, 448: 'During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes.' The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision.

(*Id.* at 20).

This ruling was followed, and the appeal dismissed, in *Ocean Park Bath House & Amusement Company v. Pacific Auto Park Co.* (1940) 37 Cal. App. 2d 158; and *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 245 ("Taking an appeal from an adverse judgment of the superior court is one of the privileges which the law denies to a domestic corporation suspended under section 23301"); and the principal was repeated in *Reed v. Norman* (1957) 48 Cal. 2d 338, 343.

This rule was again reaffirmed in *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368. While holding that a suspension after a complaint was filed but before rendition of judgment did not render the judgment subject to collateral attack once it became final, the Supreme Court distinguished the facts before it from those in a number of other cases.

> Our holding with respect to the final judgment here attacked is to be distinguished from cases holding that 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. [Citing *Boyle, Ocean Park,* and *Reed*].

(*Id.* at 371).

Also important, *Traub* noted that acts by a suspended corporation can create jurisdictional issues:

> *Ransome-Crummey Co. v. Superior Court* (1922) 188 Cal. 393, 397—399, 205 P. 446, dealt with the special jurisdictional problems incident to a motion for new trial, and the court was careful to point out that although the corporation's motion was a nullity because the notice thereof had been given at a time its corporate powers were suspended, the holding to that effect was without prejudice to further proceedings had after reinstatement of the corporation.

(*Id.* at 372).

In *Ransome,* the Supreme Court held that a suspended corporation could not give notice of intent to move for a new trial which was "necessary to confer jurisdiction on the court to entertain the subsequent proceedings. Such a notice may not be waived, and is not waived, by the voluntary appearance of the adverse party." (*Ransome-Crummey Co. v. Superior Court in and for Santa Clara County* (1922) 188 Cal. 393, 398). "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." *Id.*

This latter holding as to the effect of corporate revival has been tempered over time, and more modern cases hold that while procedural acts may be validated by revival of corporate powers, substantive defenses that accrued during the period of suspension cannot be defeated by corporate revival.

> A corporation whose powers have been suspended may apply for a certificate of revivor upon payment of all applicable taxes, interest and penalties. (Rev. & Tax. Code, § 23305.) However "such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture." (Rev. & Tax. Code, § 23305a.) Thus, where a substantive defense accrues during corporate suspension, a corporate revival will not prejudice that defense.

(*ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724).

In *ABA Recovery Services*, plaintiff corporation filed an action while it was suspended, the statute of limitations period then expired, after which plaintiff revived its status. The court held that the statute of limitations is a substantive defense which accrued by its running during the period of the plaintiff corporation's suspension and thus that defense could not be prejudiced by revival of the suspended corporation. (*Id.* at 724. Accord: *Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1513 n.2; *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, 73-74.).

This rule was again reaffirmed very recently in *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (Nov. 22, 2011) 200 Cal. App.

4th 1470. There a suspended non-profit corporation filed an action while it was suspended and attempting to comply with revival requirements. It was revived effective two days after a 90 day statute of limitations period expired. A demurrer for lack of legal capacity to sue and on the statute of limitations was sustained. The Court of Appeal affirmed. It held a suspended corporation "lacks standing to sue and statutes of limitations are not tolled." (*Id.* at 1486). "The suit is ineffective because of the suspension, so the statute continues to run." (*Id.* at 1487). "'If the statute runs out prior to revival of a corporation's powers, the corporation's actions will be time barred even if the complaint would otherwise have been timely.'" (*Id.*). Substantial compliance with the revival requirements could not be allowed to defeat the statutes of limitations applicable to the land use matters there involved which were made purposefully short to achieve certainty and finality.

The same rule should apply to the filing of an appeal while suspended. Like the statute of limitations, the running of the period for filing an appeal bars the appeal. In fact, it is jurisdictional. Appellate courts have no jurisdiction to entertain appellate review or writ review from an appealable judgment or order from which a timely appeal was not taken. (*Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119; Code of Civil Procedure §906; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 ("'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.'" (emphasis in original)); *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 952 (appealable judgment not reviewable by writ after expiration of appeal period)). A reviewing court may not

relieve a party from default in failing to file a timely notice of appeal. (Rule 8.60(d), California Rules of Court).

Further, a valid appeal can only be taken by one with standing, and this requirement, too, is 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, "shorn of all rights", has no standing to file a notice of appeal. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado, supra,* 200 Cal.App.4th at 1486; *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724).

Moreover, the failure to file a timely appeal renders the judgment final and binding. (*Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119). The issues decided in an appealable judgment from which no timely appeal is taken are *res judicata,* creating rights and defenses for the prevailing party. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393 ("If an order is appealable, however, and no timely appeal is taken therefrom, the issues determined by the order are res judicata.")). Suspended corporations cannot have the right no other party has to hold the finality of a judgment in limbo, and effectively extend its time to appeal, until it decides to revive its powers. Nor can it have the power to "definalize" a judgment.

Thus, BEG's invalid attempt at filing the notice of appeal cannot be cured by reviving the corporate status after the appeal period has run. As in *Ransome,* the purported notice of appeal was a nullity. The ineffective notice deprived the Court of Appeal of jurisdiction to consider BEG's appeal. BEG lacked standing to file the notice, which also removed jurisdiction. And once the period for filing a valid notice expired, the judgment became final and binding, which, like the expiration of the statute of limitations, created rights and defenses for Respondents. In

accordance with Revenue & Taxation Code § 23305a, "reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture." Reinstatement cannot take away the rights and defenses Respondents accrued by reason of the lack of a timely and proper appeal.

The Supreme Court should grant review to settle the law that notices of appeal cannot be retroactively validated once the appeal period has expired.

B. The Supreme Court Should Grant Review To Clarify *Peacock* And *Rooney*

The Supreme Court cases cited by the Court of Appeal did not actually hold that revival after the appeal period validated a prior ineffective notice of appeal. "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). In any event, if that is their import, they should be clarified or changed.

In *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, a motion to dismiss an appeal was denied where the suspended corporation demonstrated it had been revived. The opinion does not state whether the notice of appeal was filed during the suspension, or whether the revival was during the time for filing an appeal. Had it been the *Peacock* Court's intent to establish a rule that revival of corporate status after an appeal period has run retroactively validates an invalid notice of appeal, and to negate the *res judicata* effect of the final judgment, certainly it would have made a point of presenting those facts. The Court only holds that the rule allowing revival to validate procedural actions

occurring prior to judgment should also be applied to procedural actions occurring after judgment, but again noted the exception for the matter in *Ransome* involving "special jurisdictional problems." (*Id.* at 373-74).

Such a problem exists here since the time period for appeals and the standing requirements for appeals are jurisdictional. Jurisdictional defaults cannot be retroactively cured by reinstatement. Further, the acknowledged rule prior to judgment is that statutes of limitations which expire during suspension are ***not*** revived. Similarly, the appeal period after judgment which expires during suspension must also ***not*** be revived.

In *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, as well, the Court does not set out facts which show its intent to rule on the specific situation presented here. There, a motion to dismiss the appeal was denied. However, the chronology of events in the case is not clear, and the Court's entire discussion of the issue is as follow:

> Third, they [respondents on appeal] urged that on June 15, 1971, which was prior to entry of judgment, the corporate powers of defendant Vermont Investment Corporation were suspended under section 23302 of the Revenue and Taxation Code. The corporate powers were revived on June 20, 1972, 20 days after the suspension had been called to defendants' attention by the filing of plaintiffs' brief. 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. (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369 [105 Cal.Rptr. 29, 503 P.2d 285].)

(*Id.* at 359).

The sole cite to *Peacock* suggests the Court was only affirming the general principle that revival of corporate powers can validate procedural

steps taken on appeal during the period of suspension. It does not appear that either party presented the Court with the issue of whether that revival of corporate status after an appeal period had run would retroactively validate an invalid notice of appeal and negate the *res judicata* effect of the final judgment. The Court certainly does not address or overtly decide that issue.

Moreover, the absence of discussion in either of these cases of the proviso in Revenue & Taxation Code § 23305a that "such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture," further suggests the Court did not intend to interpret it. In fact, *Peacock* relies heavily on the logic of *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, which acknowledged the cases holding that a suspended corporation "lacks the right or capacity . . . to appeal from an adverse decision," and also acknowledged a case holding that a statute of limitations which expired during the suspension was not retroactively tolled by reinstatement. (*Traub*, 66 Cal.2d at 371, 372). *Peacock* also cited with approval a case which relied on *Traub* and acknowledged the statutory proviso by stating: "provided, of course, that in the meantime substantive defenses have not accrued nor third party rights intervened." (*Peacock*, 8 Cal.3d at 372-73). Thus, Respondents respectfully submit that the *Peacock* Court could not have intended to eviscerate the statutory proviso.

Rooney and *Peacock* are discussed in *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69. The court noted the distinction between allowing corporate revival to validate procedural steps taken during the corporation's incapacity, and allowing revival to retroactively defeat substantive defenses that have arisen during the incapacity. The

filing of a complaint during incapacity could be validated on revival, but the revival could not be given retroactive effect so as to toll the running of the statute of limitations during the incapacity. The statute of limitations was a substantive defense, not a plea in abatement.

The same is true with the expiration of the appeal period. Revival of corporate status might validate the filing of a notice of appeal (a procedural step) if the appeal period is still running, but it cannot retroactively toll the running of the appeal period (a substantive matter). The running of the appeal period is a jurisdictional matter which creates rights and defenses for Respondents that cannot be retroactively taken away.

Appellant BEG could not cure its default this time. Its Notices of Appeal were invalid and should be stricken. Any new Notice of Appeal would not be timely. The failure to file a timely notice of appeal is jurisdictional.

V. CONCLUSION

The issue raised herein satisfies the requirements for review under Rule 8.500(b)(1) and (2) of the California Rules of Court—"to secure uniformity of decision," "to settle an important question of law," and "[w]hen the Court of Appeal lacked jurisdiction." This issue involves important jurisdictional considerations. As recognized by two Courts of Appeal, there is a need for reconciliation of seemingly inconsistent

Supreme Court decisions. Accordingly, Respondents respectfully request that this Court grant review.

Dated: February 3, 2012 BRYDON HUGO & PARKER

By: _____

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CERTIFICATION OF WORD COUNT

I certify that this document contains 4838 words according to the Microsoft Word word count feature.

Jeffrey Kaufman

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DANIELLE BOURHIS et al.,

Plaintiffs and Appellants,

v.

JOHN LORD et al.,

Defendants and Respondents.

A132136

(Marin County
Super. Ct. No. CIV060796)

BY THE COURT:

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.)

Appellant's opening brief and appendix shall be file 30 days from the date of this order.

DEC 29 2011

Date: _____

Kline, P.J.

_____Kline, P.J.

Bourhis, Danielle
Marin County Superior Court Case No. CV-060796
First Appellate District, Division Two, Case No. A132136

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:

PETITION FOR REVIEW

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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.

o By placing the document(s) listed above in a sealed envelope designated for Federal Express overnight delivery and depositing same with fees thereupon prepaid, in a facility regularly maintained by Federal Express, addressed as set forth above.

o By causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth above.

I declare under penalty of perjury that the above is true and correct. Executed on February 3, 2012, at San Francisco, California.

Mabelene Valeros