

No. A118969  
(Alameda County Super. Ct. No. RG 05-248721)

**IN THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE**

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GLOBAL REACH INVESTMENT CORPORATION,  
*Plaintiff and Appellant,*

v.

BURLINGAME INVESTMENT CORPORATION,  
*Defendant and Respondent.*

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Appeal From Order Of The Superior Court  
For The County Of Alameda  
(Hon. Winifred Y. Smith, Presiding)

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**MOTION TO DISMISS APPEAL; DECLARATION OF  
AMY E. MARGOLIN**

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AMY E. MARGOLIN (No. 168192)  
ROBERT D. HALLMAN (No. 239949)  
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## INTRODUCTION

This appeal is untimely because plaintiff failed to appeal within sixty days of notice of entry of the trial court's signed, written order dismissing this lawsuit.

As explained below, the trial court involuntarily dismissed this lawsuit on June 13, 2007. Under settled law, the dismissal was immediately appealable. After Respondent Burlingame Investment Corporation ("BIC") served notice of entry of the dismissal order, plaintiff waited seventy-one days to file its notice of appeal. Under Rule 8.104, that was eleven days too late. Accordingly, the Court lacks jurisdiction over this appeal and it must be dismissed.

## FACTUAL STATEMENT<sup>1</sup>

The plaintiff and appellant, Global Reach Investment Corporation ("Global Reach"), is a Panamanian corporation. Declaration of Amy E. Margolin ("Margolin Decl.") Ex. A ¶2. It filed this action on December 29, 2005, claiming to be the assignee of a number of promissory notes issued many years ago by BIC to certain of its Hong Kong investors, and to be the holder of general powers of attorney as to the same notes and one additional note. *See id.* Exs. A, B.

On January 10, 2007, BIC moved under Code of Civil Procedure Section 1030 to require Global Reach to file an undertaking in the amount of BIC's incurred and expected attorneys' fees and costs. *Id.* Exs. C, D. Section 1030 provides for such an undertaking if (a) the plaintiff is not a California resident, (b) the defendant, were it to prevail, would be entitled to recover its fees, and (c) there is a reasonable possibility that the defendant will prevail. *See* CODE CIV. PROC. §1030.

On April 12, 2007, the trial court granted the motion and required Global Reach to post an undertaking in the amount of

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<sup>1</sup>This appeal is proceeding by appendix and the opening brief has not yet been filed; accordingly, no written record has yet been filed.

\$1,000,000 within thirty days or suffer dismissal. Margolin Decl. Ex. E.

Rather than post the required bond, Global Reach attempted to avoid the trial court's order by assigning its claims to a hastily formed shell domestic subsidiary. *See id.* Exs. N, O.

BIC subsequently moved for dismissal of the action on the ground that Global Reach had failed to post the required bond. *Id.* Exs. F, G.

On June 13, 2007, the trial court entered a signed, written order granting the motion to dismiss and stating that “[t]his action is hereby dismissed.” *Id.* ¶¶8-9 & Exs. H, I.

On June 14, 2007, Defendants served written notice of entry of this order by mail, accompanied by a proof of service. *Id.* Exs. J, K. On June 27, 2007, the trial court entered a document captioned “Judgment of Dismissal.” *Id.* Ex. L.

On August 24, 2007—less than sixty days after the June 27 “Judgment” was entered but seventy-one days after notice of entry of the dismissal order was served—Plaintiff filed a notice of appeal. *Id.* Ex. M. Plaintiff identified only the June 27, 2007 Judgment in the notice of appeal. *See id.*

## ARGUMENT

The finality of a judgment depends on its substance, not its label. *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 698-99 (1967).

One type of appealable judgments is an involuntary dismissal order: as the Supreme Court has held, an order that is “tantamount to a dismissal of the action . . . is in legal effect a final judgment from which an appeal lies . . . .” *Id.* at 699.

This includes minute orders of involuntary dismissal—which are appealable judgments so long as they are in writing and signed by the trial court. *Kahn v. Lasorda's Dugout, Inc.*, 109 Cal. App. 4th 1118, 1120 n.1 (2003); *accord Law Offices of Dixon R. Howell v. Valley*, 129 Cal. App. 4th 1076, 1085 (2005); *Muller v. Tanner*, 2 Cal. App. 3d 438, 440 (1969) (signed minute order dismissing sham

action filed by vexatious litigant is “treated as a judgment of dismissal and as appealable”); *see also Cano v. Glover*, 143 Cal. App. 4th 326, 328 n.1 (2006) (involuntary dismissal without prejudice); *Topa Ins. Co. v. Fireman’s Fund Ins. Cos.*, 39 Cal. App. 4th 1331, 1336 (1995) (same); *see also* CODE CIV. PROC. §581d.

When an involuntary dismissal order satisfies the requirements of a final judgment, it makes no difference whether a subsequent “judgment” of involuntary dismissal is entered. The appealable judgment is *the dismissal order* itself; if the notice of appeal is not timely in relation to *it*, then the appeal must be dismissed. *See, e.g., S. Pac. R.R. Co. v. Willett*, 216 Cal. 387, 390 (1932) (dismissing appeal as untimely that was filed more than sixty days after entry of dismissal order, but within sixty days of subsequent “judgment” of dismissal); *Glaze v. Visalia Improvement Ass’n*, 176 Cal. App. 2d 288, 290-91 (1959) (similar).

In this case, the trial court entered an order on June 13, 2007 dismissing this case. Margolin Decl. ¶¶8-9 & Exs. H, I. Under the foregoing authorities, that order was immediately appealable.

Even assuming, *arguendo*, that the notice of appeal could be liberally construed to be from the June 13 order of dismissal, it came too late. The time to appeal runs from, *inter alia*, “60 days after the party filing the notice of appeal serves or is served with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, accompanied by proof of service.” CAL. R. CT. 8.104(a)(2). Here, BIC served written notice of entry of the June 13 dismissal order on June 14, 2007. *See* Margolin Decl. Exs. J, K. Therefore, Plaintiff’s sixty-day deadline to appeal expired on August 13.<sup>2</sup> Yet it did not file any notice of appeal until August 24. *Id.* Ex. M. That was eleven days too late.

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<sup>2</sup>Notice of entry was served by mail, but the familiar five-day extension for mail service that applies to many state court deadlines expressly does *not* apply to notices of appeal. *See* CODE CIV. PROC. §1013(a). Even if it applied, however, the notice of appeal would still be untimely.

The failure timely to appeal is a jurisdictional defect that cannot be excused or remedied.

**CONCLUSION**

The appeal must be dismissed.

DATED: January 16, 2008.

Respectfully,

HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
A Professional Corporation

By \_\_\_\_\_  
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**REQUEST FOR LEAVE TO FILE REPLY IN SUPPORT  
OF MOTION TO DISMISS APPEAL; [PROPOSED]  
REPLY IN SUPPORT OF MOTION TO DISMISS  
APPEAL**

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**REQUEST FOR LEAVE TO FILE REPLY IN  
SUPPORT OF MOTION TO DISMISS APPEAL**

On January 16, 2007, Respondent Burlingame Investment Corporation (“BIC”) filed a motion to dismiss this appeal as untimely. Thereafter, Appellant served and filed an opposition, which the undersigned received on the afternoon of Friday, February 1, 2008.

BIC respectfully requests leave to file a reply memorandum responding to Appellant’s arguments. The proposed reply is attached to this pleading.

February 4, 2008.

Respectfully,

HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
A Professional Corporation

By \_\_\_\_\_  
AMY E. MARGOLIN

*Attorneys for Defendant and  
Respondent Burlingame Investment  
Corporation*

**[PROPOSED] REPLY IN SUPPORT OF  
MOTION TO DISMISS APPEAL**

BIC's motion to dismiss this appeal is anything but "frivolous." Opposition ("Opp.") 1. Appellant Global Reach Investment Corporation ("Global Reach") does not dispute that if the June 13, 2007 order dismissing this lawsuit was appealable, then this appeal is untimely and must be dismissed. As next explained, it was.

Global Reach argues, *first*, that the June 13, 2007 dismissal was not appealable because subsection (g) of Section 1030 states that "[a]n order granting . . . a motion . . . under this section is not appealable." Opp. 1. But Global Reach has not quoted that provision in full. It states only that

[a]n order granting or denying a motion *for an undertaking* under this section is not appealable. (CODE CIV. PROC. §1030(g) (emphasis added))

This provision does not apply to an order dismissing an action under subdivision (d), after a foreign plaintiff has failed to post a required undertaking. The reason BIC did not cite this provision (Opp. 1) is because, by its express terms, it is so obviously inapplicable.

Still, Global Reach maintains that "since the order granting the right to an undertaking is not directly appealable *and must wait for a judgment*, it would be absurd to have a different rule for the dismissal pursuant to the same section." Opp. 2 (emphasis added). This begs the question, however, which is whether the June 13 dismissal *is* the final judgment (and therefore, whether the trial court's initial requirement of a bond could have been reviewed on appeal from the dismissal had Global Reach timely appealed it). Nothing in the text of Section 1030 requires the entry of a "judgment" following the dismissal of a foreign plaintiff's lawsuit under subdivision (d) who refuses to post a court-ordered security. That in fact would be unnecessary. A final judgment, after all, is one that leaves "no issue . . . for future consideration except the fact of compliance or noncompliance" (*Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 698 (2001) (citation omitted))—which is true of an order dismissing a plaintiff's lawsuit who refuses to post security. Thus,

had Global Reach timely appealed the June 13 dismissal, then the trial court's earlier ruling requiring it to post a bond would have been reviewable on appeal. *See, e.g., Singh v. Lipworth*, 132 Cal. App. 4th 40, 43 (2005) (reviewing order requiring vexatious litigant to post bond on appeal from order of dismissal after litigant failed to post bond).

Next, Global Reach argues that the trial court's ruling "is no different than an order granting a demurrer or for summary judgment." Opp. 1. But it was. Global Reach ignores the language of the June 13, 2007 order—which did not just grant BIC's motion to dismiss the lawsuit when Global Reach refused to post bond, but *also dismissed it*. Declaration of Amy E. Margolin ("Margolin Decl.") Ex. H ("This action is hereby DISMISSED"). When demurrers are disposed of in this fashion, the order *is* a final, appealable judgment. *See, e.g., Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 699 (1967) (order that "not only sustains the demurrer" but also transfers case to municipal court "is tantamount to a dismissal of the action as to all members of the class" and is appealable); *see also Hudis v. Crawford*, 125 Cal. App. 4th 1586, 1590 n.4 (2005). By contrast, summary judgment is not analogous because the procedure does not involve a dismissal. The summary judgment statute both requires the entry of judgment and states that the judgment is appealable. *See* CODE CIV. PROC. §437c(k) ("the final judgment shall . . . award judgment as established by the summary proceeding herein provided for"); *id.* §437c(m)(1) ("A summary judgment entered under this section is an appealable judgment as in other cases"). Section 1030 does neither.

Next, Global Reach argues that the June 13, 2007 dismissal was not appealable because it was not on a ground listed in Section 581 of the Code of Civil Procedure. *See* Opp. 2. This too is incorrect. As just shown, the dismissal left no issue for future determination; that is the telltale characteristic of a final judgment.

The finality of the June 13 dismissal is only bolstered by Section 581d of the Code of Civil Procedure which, in relevant part, states as follows:

*All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes . . . . (CODE CIV. PROC. §581d (emphasis added))*

In suggesting that Section 581d does not apply by its literal terms, Global Reach relies only on case law arising under predecessor statutes. *See Egan v. McCray*, 220 Cal. 546, 547 (1934); *Integral Land Corp. v. Anderson*, 62 Cal. App. 2d 770, 772 (1944); *Ross v. O'Brien*, 1 Cal. App. 2d 496, 499 (1934). Global Reach's cases also were decided long before the Legislature, in 1993, amended Section 581 to state that "[t]he provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant." CODE CIV. PROC. §581(m) (added by Stats. 1993, ch. 456, §9). Through its express recognition of a court's additional dismissal powers, and its placement in proximity to Section 581d, this amendment leaves no doubt that Section 581d encompasses all types of dismissals, no matter the basis.<sup>1</sup>

BIC's motion to dismiss this appeal cites four modern cases in which Section 581d was held to apply to an order of dismissal on a ground not enumerated in Section 581, yet Global Reach does not address any of those authorities. For example, *Muller v. Tanner*, 2

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<sup>1</sup>Section 581d was enacted in 1947 and was subsequently amended five times, most recently in 1998. *See* CODE CIV. PROC. §581d Historical and Statutory Notes (West 2008). Global Reach has not cited the Supreme Court's observation in 1957 that Section 581d is restricted to the types of dismissals covered by former section 581. *See Lavine v. Jessup*, 48 Cal. 2d 611, 615-16 (1957). Presumably, that is because it agrees the Court's statement was dicta. It also predates the Legislature's 1993 amendment of Section 581 discussed in the text, as well as the Legislature's more recent amendments to Section 581d, by which the Legislature presumptively acquiesced in a more expansive interpretation of Section 581d. *See* note 2, *infra*.

Cal. App. 3d 438 (1969), held that an order dismissing a vexatious litigant’s “sham” action that had been filed to evade a court order requiring the plaintiff to post security in another action, was to be “treated as a judgment of dismissal and as appealable” under Section 581d. *Id.* at 440. The dismissal there was pursuant to the trial court’s inherent powers to prevent the abuse of the court’s process. *Id.* at 443-44. There is no relevant distinction between that dismissal and this one—both were made to effectuate the purpose of a court-ordered security. *See also Law Offices of Dixon R. Howell v. Valley*, 129 Cal. App. 4th 1076, 1085 (2005) (order granting motion to dismiss action due to law firm’s failure to give plaintiff notice of statutory arbitration rights properly appealed under, *inter alia*, Section 581d); *Kahn v. Lasorda’s Dugout, Inc.*, 109 Cal. App. 4th 1118, 1120 n.1 (2003) (minute order dismissing action following default prove-up hearing treated as “an appealable judgment” under Section 581d); *Topa Ins. Co. v. Fireman’s Fund Ins. Cos.*, 39 Cal. App. 4th 1331, 1336 (1995) (order dismissing action under good faith settlement statute appealable under, *inter alia*, Section 581d).<sup>2</sup>

Finally, Global Reach argues that BIC, by submitting a form of judgment to the Superior Court, “acknowledge[ed] that a judgment is required to complete a dismissal of the matter.” Opp. 2. But the fact

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<sup>2</sup>Other modern courts, too, have permitted appeals from orders of dismissal on grounds not listed in Section 581 (*see, e.g., Church of Scientology of California v. Armstrong*, 232 Cal. App. 3d 1060, 1064 (1991) (order dismissing cross-action pursuant to settlement))—including in situations strikingly similar to this case. *See, e.g., Singh*, 132 Cal. App. 4th at 43 (appeal from order dismissing action following vexatious litigant’s failure to post required bond); *Sheta v. Graham*, 156 Cal. App. 2d 77, 78-80 (1957) (order of dismissal due to foreign corporation’s forfeiture of right to do business in-state held appealable and appeal dismissed as untimely, even though notice of appeal was timely as to later-filed judgment). The Legislature is presumed to have been aware of and acquiesced in cases such as *Muller* (1969), *Church of Scientology* (1991), and *Topa* (1995) when it amended Section 581d in 1977 and again in 1998, and when it added subdivision (m) to Section 581 in 1993. *See In re Gladys R.*, 1 Cal. 3d 855, 868-69 (1970).

that BIC took belt and suspenders steps to cross every possible “t” and dot every possible “i” is a reflection only of careful lawyering, not a concession. In any event, appellate jurisdiction is not a function of the parties’ views. *See Harrington-Wisely v. State*, 156 Cal. App. 4th 1488, 1494 n.6 (2007). It either exists or it does not, and that is the question for this Court to decide.

As Global Reach’s authority confirms, what matters is not what form any order or judgment may take, but its legal effect. *Howe v. Key Sys. Transit Co.*, 198 Cal. 525 (1926). Here, the June 13, 2007 dismissal was as final as any formal judgment could possibly be. Once the trial court dismissed Global Reach’s lawsuit on June 13, there was nothing further left to do. The dismissal was final. It should have been timely appealed.

### **CONCLUSION**

This appeal must be dismissed.

February 4, 2008.

Respectfully,

HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
A Professional Corporation

By \_\_\_\_\_  
AMY E. MARGOLIN

*Attorneys for Defendant and  
Respondent Burlingame Investment  
Corporation*

## PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the documents are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business.

On February 4, 2008, I served the following document(s) described as **REQUEST FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL; [PROPOSED] REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL** on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, Seventh Floor, San Francisco, California, to be served by mail addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on February 4, 2008.

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Elizabeth Carmichael