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IN THE SUPREME COURT OF CALIFORNIA

DEBRA TURNER,

Petitioner,

v.

LAURIE ANNE VICTORIA, *et al*.

Respondents.

After a Decision by the Court of Appeal, Fourth Appellate District, Division One,
Case Nos. D076318, D076337

San Diego County Superior Court
Trial Court Case No. 37-2017-00009873-PR-TR-CTL
The Honorable Julia C. Kelety, Dept. 503
(Appeal No. D076318)

San Diego County Superior Court
Trial Court Case No. 37-2018-00038613-CU-MC-CTL
The Honorable Kenneth J. Medel, Dept. C-66
(Appeal No. D076337)

PETITION FOR REVIEW

SERVICE ON THE OFFICE OF THE ATTORNEY GENERAL CHARITABLE TRUSTS SECTION AS REQUIRED BY PROBATE CODE §§ 17200, 17203, CORPORATIONS CODE §§ 5142, 5223, and 5233 AND CRC 8.29(a)

COOLEY LLP
STEVEN M. STRAUSS, BAR NO. 99153
(SMS@COOLEY.COM)
ERIN C. TRENDA, BAR NO. 277155
(ETRENDA@COOLEY.COM)
4401 Eastgate Mall
San Diego, CA 92121
Telephone: (858) 550-6000
Facsimile: (858) 550-6420

Attorneys for Petitioner DEBRA TURNER

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES PRESENTED 5

II. INTRODUCTION: WHY REVIEW SHOULD BE GRANTED 5

III. RELEVANT PROCEDURAL HISTORY AND STATEMENT OF FACTS 9

A. Statement of the Facts. 9

B. Procedural History. 11

1. Probate Action. 11

2. Civil Action 12

3. Entry of Judgment and Appeal 13

IV. GROUNDS FOR REVIEW 14

A. The Court Should Grant Review to Secure Uniformity of Decision. 14

1. Under the Second District's holding in *Summers*, Turner did not lose her standing to continue the litigation under the director standing statutes. 14

2. The Fourth District rejected the Second District's holding in *Summers* to find that Turner lost her standing to continue the litigation. 22

B. The Court Should Grant Review to Settle Important Questions of Law and Public Policy. 26

1. The director standing statutes are part of a unique statutory framework designed to protect nonprofit public benefit corporations from misconduct. 26

2. The Court should address whether the "continuous ownership" requirement for shareholder derivative standing also deprives a nonprofit public benefit corporation member of standing under section 5710. 30

V. CONCLUSION 35

EXHIBIT A

TABLE OF AUTHORITIES

Page(s)

Cases

Barefoot v. Jennings
(2020) 8 Cal.5th 822 ..... 7, 34

Californians for Disability Rights v. Mervyn's, LLC
(2006) 39 Cal.4th 223 21

Grosset v. Wenaas
(2008) 42 Cal.4th 1100 ..... *passim*

Haro v. Ibarra
(2009) 180 Cal.App.4th 823 33

Holt v. College of Osteopathic Physicians and Surgeons
(1964) 61 Cal.2d 750 ..... *passim*

Summers v. Colette
(2019) 34 Cal.App.5th 361 ..... *passim*

Tenney v. Rosenthal
(NY Ct. App. 1959) 6 N.Y.2d 204 ..... *passim*

Wolf v. CDS Devco
(2010) 185 Cal.App.4th 903 ..... 20, 21, 24

Workman v. Verde Wellness Center, Inc.
(Ariz. Ct. App. 2016) 240 Ariz. 597 ..... 19, 33, 34, 35

Statutes

Cal. Corp. Code
§ 800 ..... 5, 30
§ 834 30
§ 5142 ..... *passim*
§ 5220 27
§ 5233 ..... *passim*
§ 5710 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Cal. Rule of Court
8.500(b)(1) 6, 25

I. STATEMENT OF THE ISSUES PRESENTED

Does a director or officer of a California nonprofit public benefit corporation that brings an action pursuant to Cal. Corp. Code sections 5142, 5233, and/or 5223 lose her standing to continue litigating her claims if she is not nominated or reelected during the litigation? Separately, does Cal. Corp. Code section 800's "continuous ownership" requirement for shareholder derivative standing in the for-profit context equally deprive nonprofit public benefit corporation members of derivative standing under Cal. Corp. Code section 5710?

II. INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

This case is about a director, officer, and member of a nonprofit public benefit corporation that witnessed other fiduciaries breach the charitable trust and act inconsistently with their duties of care and loyalty. That individual, acting responsibly and consistent with their own fiduciary duties, ultimately filed suit under the following special standing statutes in California's Nonprofit Public Benefit Corporation Law: (1) section 5142 standing of a director and officer to remedy breach of charitable trust; (2) section 5233 standing of a director and officer to seek remedies for a self-dealing transaction; (3) standing of a director to seek removal from office of another director; and (4) section 5710 standing for a member to sue derivatively on behalf of a nonprofit public benefit corporation. It is undisputed that Petitioner was a director, officer, and member of the nonprofit corporation at

the time that she brought the action under these statutes. The dispute is over whether she lost her standing to continue litigating the action after not being reelected as a director and officer.

The nonprofit public benefit corporation at issue is the Conrad Prebys Foundation (the "Foundation"), which was established by local San Diego businessman and philanthropist Conrad Prebys. The Petitioner is Debra Turner ("Turner"), who was the life partner of Conrad and a director, officer, and member of the Foundation when she initiated this litigation on May 15, 2017, to address the diversion of $15 million in charitable funds to a non-charitable purpose. After suing her fellow fiduciaries, Turner was retaliated against and not nominated or reelected as an officer or director of the Foundation at the annual election held on November 7, 2017. The Fourth District Court of Appeal affirmed the trial court's finding that as a result of that carefully orchestrated election, Turner lost her standing as a director and officer under Cal. Corp. Code sections 5142, 5233, and 5223 (the "director standing statutes")[1] and her derivative standing as a member under Cal. Corp. Code section 5710.

California Rules of Court, Rule 8.500(b)(1) provides for this Court's review of a Court of Appeal decision "when necessary to secure uniformity

[1] Cal. Corp. Code sections 5142, 5233, and 5223 are referred to collectively as the "director standing statutes," but sections 5142 and 5233 provide the same for officers.

of decision or to settle an important question of law." Both grounds for review exist here.

Review is needed because the Fourth District's determination that Turner lost her standing under the director standing statutes expressly and squarely disagrees with the Second District Court of Appeal on this same issue. In *Summers v. Colette*, the Second District held that "[i]n the absence of contrary legislative direction, ***we decline to read into these statutes a continuous directorship requirement***." (*Summers v. Colette* (2019) 34 Cal.App.5th 361, 374 (*Summers*) (emphasis added).) In finding against Turner, the Fourth District "recognize[d] that our colleagues in the Second District reached a different conclusion" but "disagree[d] with the *Summers* court's interpretation of the statutory language and legislative history as pointing away from a continuous directorship requirement for standing." (Opinion of the Fourth District [Ex. A] at 33-34.) This Court's review is therefore necessary to settle the split of authority between the Second District and the Fourth District, and to ensure uniformity in decisions moving forward.

Review is also warranted to clarify an important question of law and public policy in California by ensuring that a director, officer, and member of a California nonprofit public benefit corporation with well-pleaded allegations of misconduct by her fellow fiduciaries maintains standing under the applicable statutory scheme. (*See, e.g.*, *Barefoot v. Jennings* (2020) 8

Cal.5th 822, 825 (*Jennings*) (review of narrow standing question under Probate code section 17200(a)).) The Legislature enacted the director standing statutes to empower private persons with direct knowledge of misconduct to "remedy a breach of a charitable trust" and curb "self-dealing transaction[s]" by their fellow officers or directors. This legislative purpose would be severely undermined (and even mooted) if the same defendants accused of wrongdoing are permitted to control the legal claims against them by effecting the ouster of the plaintiff director, officer, or member. The Second District in *Summers* confirmed that public policy favors a rule that permits fiduciary directors or officers of a nonprofit corporation to bring litigation to protect the nonprofit corporation and does not strip them of standing if they do not maintain their office over the entire course of the litigation. (*Summers*, 34 Cal.App.5th at 371-73.) Similar policy considerations require the Court's review of the question of whether section 800's "continuous ownership" requirement for shareholder derivative standing in the for-profit context applies to a member's derivative standing in the nonprofit context of section 5710. Granting review to consider these critical questions of standing that threaten the integrity of charitable trusts across California is appropriate.

If allowed to stand, the Fourth District's decision would render the special statutory standing that the California legislature has afforded fiduciaries of nonprofit corporations an ineffective nullity, as any director

defendant accused of wrongdoing could simply wait until the next election to freeze out the whistleblowing fiduciary and obtain dismissal of a properly filed suit. This absurd result is contrary to California's well-established public policy favoring proper supervision of nonprofit corporations and offends the equitable considerations recognized in *Summers* and *Grosset*, alike.

For these reasons, the Court should grant review and reverse the Fourth District. Consistent with the Second District in *Summers*, there is no "continuous directorship" requirement under the director standing statutes at sections 5142, 5233, and 5223. Separately, where (as here) the only members of a nonprofit public benefit corporation are the directors there is no "continuous membership" requirement under section 5170.

III. RELEVANT PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Statement of the Facts.

During his lifetime, Conrad Prebys became a celebrated philanthropist in San Diego—having made over $350 million worth of gifts to many local institutions. (9 AA 2015-16, 2022.) To continue that legacy, Conrad left the majority of his $1 billion estate to charity through the Foundation, which was the remainder beneficiary under his Trust. (*Id*.)

Throughout fall 2016, Trustee Victoria and her attorney asked the Foundation Board to hastily pre-approve a settlement with Conrad's disinherited son, Eric Prebys. (9 AA 2031.) Turner raised corporate

governance concerns regarding a poorly-informed vote and concerns over the Board's adherence to their duties of care and loyalty to the Foundation but the Trustee's counsel dismissively responded that "this is where you decide that there isn't a conflict." (9 AA 2036-37.) The result was a rushed vote by the Board that led to the Trustee's improper diversion of $15 million in charitable assets to a non-charitable purpose.

On May 15, 2017, Turner ultimately filed suit concerning this improper diversion of charitable funds after the rest of the Foundation Board ignored the demand letter and draft petition she delivered to the Board in March 2017. (9 AA 2040-41.) Turner brought claims against Laurie Anne Victoria, in her capacity as both Trustee and a director, as well as the three other directors—Joseph Gronotte, Gregory Rogers, and Anthony Cortes. (3 AA 545-63.)

In response, Victoria (in her dual role as Trustee and director) and the three other directors became openly hostile toward Turner and retaliated by freezing her out of the Foundation. After Turner sued, she became increasingly concerned the other directors would try to remove her from the Foundation. When she raised this concern, Director Rogers indicated the Board was not going to remove her "now." (9 AA 2042-43.)

During the annual Board meeting held on November 7, 2017, the other directors took turns nominating and seconding one another for re-election. No one nominated or re-elected Turner, and she was asked to leave the

meeting. The other directors appeared gleeful over the results of the orchestrated election. (9 AA 2045.) Defendants later argued that Turner could have nominated herself, but Turner did not know this and was never told by Foundation counsel at the meeting that she could nominate herself.[2] (9 AA 2044-45, 2216.)

Any effort by Turner to self-nominate at the meeting would have been futile. This was confirmed when Turner sent a letter to the directors formally nominating herself for reelection to the open board seat. No one responded. (9 AA 2045-46; 2216.) As alleged, Turner believes that the director defendants retaliated against her and were "improperly motivated by their desire to cut off this litigation." (9 AA 2042-46.)

B. Procedural History.

1. Probate Action.

Turner filed the original probate petition on May 15, 2017, in the trust proceedings before the Probate Court pursuant to her undisputed role as a director and an officer of the Foundation under sections 5142(a), 5223(a), and 5233(c), and derivatively as a member on behalf of the Foundation under section 5710(b).

[2] Instead, Turner understood the self-nomination point to be just a proposal for the selection of officers *after* the directors had been re-elected. She also understood self-nomination to be contrary to the best practices for non-profits. (9 AA 2044-45.)

Turner amended her petition on January 5, 2018 to, among other things, address the November 7, 2017 election. (3 AA 678-80.) Turner alleged causes of action against Victoria (as a director and trustee) and the other director defendants for breach of charitable trust, breach of their duties of care and loyalty, self-dealing, and breach of trustee's fiduciary duties, among other causes of action. (3 AA 556-63.) Victoria and the Foundation each filed demurrers asserting that Turner had lost her standing to maintain the action. (3 AA 704-47, 774-95.)

On its own motion, the probate court ordered the causes of action against the directors to be severed from the Probate Action and transferred to the civil department to be determined in a separate civil action. (2 RT 64-70; 4 AA 988-1032.)

2. Civil Action

On August 2, 2018, Turner filed a civil complaint on the four claims against the director defendants (for breach of charitable trust, breach of duty of care, breach of duty of loyalty and self-dealing, and removal) that the Probate Court severed and transferred, which she later amended in a First Amended Complaint ("FAC"). (8 AA 2012.)

At the time the demurrers to the FAC were filed, no California decision had directly addressed whether a director, officer, or member of a nonprofit public benefit corporation maintains if she loses her position as a director, officer, or member after properly filing suit under the director

standing statutes. While the parties were briefing the demurrers, the Second District Court of Appeal answered this question definitively in favor of Turner when it "decline[d] to read into these statutes a continuous directorship requirement." (*Summers*, 34 Cal.App.5th at 374 (holding plaintiff "had standing under sections 5233, 5142, and 5223 at the time she instituted this action, and her subsequent removal as director did not deprive her of standing").)

3. Entry of Judgment and Appeal

Despite *Summers*, the Civil Court sustained defendants' demurrers without leave to amend on grounds that Turner lacked standing to continue the litigation after she did not maintain her position as a director or officer of the Foundation. (10 AA 2458.) The Probate Court sustained the demurrers based solely on the Civil Court's decision. (4 RT 220: 5-8, 11-15; 5 AA 1278.)

Turner's consolidated appeal followed. After the parties completed briefing, the Attorney General filed an amicus brief in support of Turner's standing under the director standing statutes and *Summers*. Notwithstanding *Summers* and the Attorney General's support for Turner's position, the Fourth District affirmed the judgments.

IV. GROUNDS FOR REVIEW

A. The Court Should Grant Review to Secure Uniformity of Decision.

1. Under the Second District's holding in *Summers*, Turner did not lose her standing to continue the litigation under the director standing statutes.

In *Summers*, the Second District decided this issue by declining "to read into these statutes a continuous directorship requirement." (*Summers*, 34 Cal.App.5th at 374.) Under *Summers*, Turner would have standing to continue litigating her claims under the director standing statutes. In finding that Turner lost her standing when she was not reelected for another term, the Fourth District expressly noted its disagreement with and departure from *Summers*. (Ex. A at 33-36.)

In *Summers*, a director of a nonprofit corporation initiated a lawsuit against other directors for, *inter alia*, breach of fiduciary duties and charitable trust under the director standing statutes. (*Summers*, 34 Cal.App.5th at 364.) Subsequently, the defendant directors orchestrated a vote to remove Summers from the board of directors. Summers conceded, and the court agreed, that this removal was a proper exercise of the board's authority. (*Summers*, 34 Cal.App.5th at 365.). However, the court held that, because of the special standing provided to directors of nonprofit corporations, the loss of her position on the Board did not strip Summers of standing to continue the litigation that she properly initiated. The Second District found

merit in the plaintiff-director's contention that "she continues to have standing under the [director standing] statutes that authorized her to bring the action[.]" (*Summers*, 34 Cal.App.5th at 366.)

Summers directly addresses the three director standing statutes at issue in this case: Cal. Corp. Code sections 5142, 5233, and 5223. (*Id.* at 367-68.) Like *Summers*, the parties here "do not dispute that these statutes give a director standing to institute an action such as this one." (*Id.* at 368.) The parties "dispute whether, under these statutes, removing a director who has instituted the action deprives the director of standing to continue to pursue it." (*Id.*) In *Summers*, the ouster was effected by a formal vote to remove the plaintiff defendant. (*Id.* at 364-65.) Here, the ouster was effected through an expiring term and orchestrated freezeout election. (9 AA 2015.) In both cases, the question is the same, "whether these statutes impose a 'continuous directorship' requirement." (*Summers*, 34 Cal.App.5th at 368.) The Second District found that the statutes did ***not*** impose a "continuous directorship" requirement, which is the same position advanced by Turner. (*Id.* at 368.)

In analyzing the statutory language, the Second District found that when "[c]onsidered in isolation, the plain language of the three statutes is inconclusive." (*Summers*, 34 Cal.App.5th at 368.) While "[t]he statutes provide a director 'may bring' the action," the language does not answer the critical question because the statutes "do not say ***whether, having brought the action, the plaintiff must continue to be a director to continue to have***

standing." (*Id.* (emphasis added).) But when this language is considered within the context of the statutory framework in which it was adopted, the Second District found that both the "statutory purpose and public policy" as well as "the statutory language at issue" weighed against a continuous directorship requirement. (*Id.* at 368-72.)

The Second District found that "considerations of statutory purpose and public policy" favored a rule that does not strip directors or officers of a nonprofit corporation of standing if they do not maintain their office over the entire course of the litigation. (*Summers*, 34 Cal.App.5th at 370-71.) In doing so, the Second district examined this Court's decision in *Holt v. College of Osteopathic Physicians and Surgeons* (1964) 61 Cal.2d 750 (*Holt*), which demonstrates "the statutory purpose and public policy served by permitting trustees to sue." (*Summers*, 34 Cal.App.5th at 371).) In *Holt*, this Court addressed how the Attorney General's office may not have sufficient resources or be best positioned to identify and litigate an issue, and thus reasoned that "[a]lthough the Attorney General has primary responsibility for the enforcement of charitable trusts, the need for adequate enforcement is not wholly fulfilled by the authority given to him. . . . The administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." (*Holt*, 61 Cal.2d at 755-56.)

In *Summers*, the Second District recognized that the subsequent codification *Holt* with the enactment of the director standing statutes recognizes the Legislature's understanding that a charitable trust's representatives are "in the best position to learn about breaches of trust and to bring the relevant facts to the court's attention." (*Summers*, 34 Cal.App.5th at 372 (quoting *Holt*, 61 Cal.2d at 756).) The Second District found these "same principles weigh against reading into the statutes at issue here a continuous directorship requirement that would unnecessarily deprive the Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue an action under those statutes." (*Summers*, 34 Cal.App.5th at 371-72.) This is because a plaintiff director "who files an action such as this one will continue to provide the advantages identified in *Holt* even if later removed from office." (*Id*.)

The Second District further found that the absence of a "continuous directorship" requirement does not offend "the purpose of having a standing requirement" which is "to protect a defendant from harassment from other claimants on the same demand." (*Summers*, 34 Cal.App.5th at 372 (internal quotation and citation omitted).) It recognized that "directors authorized to bring an action on behalf of a nonprofit corporation have been charged with managing the corporation's affairs, and those permitted to maintain an action in the absence of a continuous directorship requirement are sufficiently 'few in number.'" (*Summers*, 34 Cal.App.5th at 372.)

Like *Holt* and *Summers*, the Attorney General appreciates that "[p]ersons who stand in a special relationship with the nonprofit corporation, such as its directors and officers, are often in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention." (Amicus Br. at 18.) The Attorney General views the "participation" of such private persons as "essential and complementary to the Attorney General's enforcement work." (Amicus Br. at 18.) The Attorney General also understands that a properly instituted action under the director standing statutes does not suddenly become vexatious or harassing litigation if the plaintiff ceases to be a director or an officer. "Whether they continue to hold their positions or not due to actions by the majority board or for some other reason, the knowledge those former directors and officers have regarding a breach or damage to the corporation is not altered and therefore does [not] make them any less responsible persons to see the litigation to conclusion." (Amicus Br. at 18.)

Other jurisdictions that "have decided against reading a continuous directorship requirement into statutes authorizing directors to bring actions on behalf of corporations" further support a finding of no continuous directorship requirement. (*See Summers*, 34 Cal.App.5th at 372.) Both *Tenney v. Rosenthal* (NY Ct. App. 1959) 6 N.Y.2d 204 (*Tenney*), and *Workman v. Verde Wellness Center, Inc.* (Ariz. Ct. App. 2016) 240 Ariz. 597 (*Workman*), cited policy considerations in refusing to read a continuous

directorship requirement into a statute that was silent on it. The following policy explanation from *Tenney* is critical:

> Strong reasons of policy dictate that, once he ***properly initiates*** an action on behalf of the corporation to vindicate its rights, a director should be ***privileged to see it through to conclusion***. Other ***directors***, themselves charged with fraud, misconduct or neglect, ***should not have the power to terminate the suit by effecting the ouster of the director-plaintiff***. It is no answer to say that, if wrongs were committed, others are available to commence a new and appropriate action.

(*Summers*, 34 Cal.App.5th at 373 (quoting *Tenney*, 6 N.Y.2d at 210) (emphasis added); *see also Workman*, 240 Ariz. at 604-05 (finding "it is reasonable to infer that the board removed the [plaintiff director] in response to her claims, particularly in light of the allegations" and that such circumstances "cannot render the action moot").)

The above considerations all support the determination by the Second District in *Summers* that, "[i]n the absence of contrary legislative direction, we decline to read into these statutes a continuous directorship requirement." (*Summers*, 34 Cal.App.5th at 374.) Having considered the statutory language within the framework of the statutory scheme governing nonprofit public benefit corporations, the Second District found the "may *bring* an action" language in section 5142 and 5233 and the "at the *suit* of" language in section 5223 "suggests there is no continuous directorship requirement." (*Summers*, 34 Cal.App.5th at 368-369.) The Second District contrasted this language with the language in section 5710 (member derivative standing) providing

that "'[n]o action may be instituted *or maintained* in the right of any corporation by any member' unless the plaintiff alleges, among other things he or she 'was a member at the time of the transaction or any part thereof of which plaintiff complains.'" (*Summers*, 34 Cal.App.5th at 369 (emphasis added).) Contrasting this Court's analysis of similar language under section 800 of the GCL in *Grosset v. Wenaas* (2008) 42 Cal.4th 1100 (*Grosset*), the Second District found "the absence of something comparable to the phase 'or maintained' … points away from a continuous directorship requirement in the same way that phrase's presence in section 800" was found to "point to it" in *Grosset*. (*Summers*, 34 Cal.App.5th at 370 (quoting *Grosset*, 42 Cal.4th at 1113).)[3]

As detailed below, the Fourth District departed from the critical holding in *Summers*. In doing so, the Fourth District relied on two cases that the Second District found inapplicable. The first case, *Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903 (*Wolf*), is inapplicable because, as the Second District recognized, it addresses the "narrow"[4] issue of a director's inspection

[3] As the Second District noted, analogous statutes to sections 5142 and 5233 providing that a director or officer "may bring an action" do not exist under the General Corporation Law ("GCL"). (*Summers*, 34 Cal.App.5th at 370 and n.6 (noting the legislative history reflects that "the proposed legislation followed the format and language" of the GCL "except where substantive differences require a different format or language").)

[4] The *Wolf* court was unequivocal that it was only addressing the "narrow" issue of whether a former director had an ongoing "absolute right" to inspect corporate records under section 1602 of the GCL, which provides inspection

rights and thus "offers little assistance in interpreting the statutes at issue here." (*Summers*, 34 Cal.App.5th at 373-74 (citing *Wolf*, 185 Cal.App.4th at 907-08, 915-19).)[5] The second case is *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (*Californians for Disability Rights*), which the Second District understood just stands for the general proposition that "standing must exist at all times until judgment is entered and not just on the date the complaint is filed" but does not answer the question of whether standing continued to exist for the plaintiff-director in *Summers* or for Turner here. (*Summers*, 34 Cal.App.5th at 374 (quoting *Californians for Disability Rights*, 39 Cal.4th at 232-33).)

In sum, the Second District's finding that "Summers had standing under sections 5233, 5142, and 5223 at the time she instituted this action, and her subsequent removal as director did not deprive her of standing," *Summers*, 34 Cal.App.5th at 374, applies equally to Turner here. Whether the "ouster" is accomplished by a removal vote or annual election does not change the analysis. As the New York court reasoned in *Tenney*, "it would hardly be argued that a director's loss of status implies a voluntary

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rights justified by an active director's fiduciary duty to be informed. (*Wolf*, 185 Cal.App.4th at 908.)

[5] *See also Tenney*, 6 N.Y.2d at 209 (rejecting similar comparison because "a director's absolute, unqualified right to inspect books is a personal right and is merely a procedural adjunct of his duty to keep informed of corporate matters" that "terminates and becomes but a qualified one when his duty as director ceases").

abandonment of the corporation's cause of action. If anything, the plaintiff's failure of re-election may be simply another aspect of the unhealthy corporation condition which he is intent upon correcting." (*Tenney*, 6 N.Y.2d at 212.) Consistent with *Summers*, Turner should have standing to continue the litigation she properly brought in May 2017 as a director and officer of the Foundation.

2. The Fourth District rejected the Second District's holding in *Summers* to find that Turner lost her standing to continue the litigation.

In finding Turner "lost her status and standing to justify continued pursuit of the causes of action on behalf of the Foundation," the Fourth District expressly acknowledged that its holding establishes a conflict in authority between the Courts of Appeal: "**We recognize that our colleagues in the Second District reached a different conclusion in *Summers*[.]**" (Ex. A at 33 (emphasis added).)

The Fourth District disregarded *Summers* for at least three reasons.[6] First, the Fourth District stated it "disagree[s] with the *Summers* court's interpretation of the statutory language and legislative history as pointing away from a continuous directorship requirement for standing." (Ex. A at 33-34.) The Fourth District writes that it is "not persuaded by the *Summer's*

[6] The Fourth District also conflicts with the well-reasoned out-of-state authority cited in *Summers*. This includes New York—a jurisdiction that has well-developed corporate law and is home to many nonprofit benefit corporations.

court's analysis of the statutory purpose and public policy." (Ex. A at 35.) Specifically, the Fourth District rejected the Second District's conclusion that "a continuous directorship requirement would unnecessarily deprive the Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue and action under the statutes." (Ex. A at 35-36 (quoting *Summers*, 34 Cal.App.5th at 371-72).) The Fourth District also rejected the Second District's reasoning that the potential for harassing litigation was minimized because "directors authorized to bring an action on behalf of a nonprofit corporation have been charged with managing the corporation's affairs, and those permitted to maintain an action in the absence of a continuous directorship requirement are sufficiently 'few in number.'" (Ex. A at 36 (quoting *Summers*, 34 Cal.App.5th at 372).) The Fourth District criticized the reasoning in *Summers* as "too thin a reed upon which to lean in discarding ordinary standing requirements" and found that it "does not sufficiently protect nonprofit public benefit corporations[.]" (Ex. A at 36.)

Second, the Fourth District attempted to distinguish the situation in *Summers* from Turner's situation on two grounds. The Fourth District believes "the *Summers* court was concerned with equitable considerations surrounding the removal of a director" but not an effective removal through an election. (Ex. A at 34.) The Fourth District believes Turner is positioned differently than the plaintiff director in *Summers* because "Turner was not removed as a director . . . she was simply not reelected at the board's annual

meeting." (Ex. A at 35.) The Fourth District found Turner's allegations of hostility, retaliation, and being frozen out from the Foundation were "speculative contentions or conclusions of law that do not amount to a material factual pleading that her removal was wrongful." (*Id.*) The Fourth District was persuaded by *dicta* in *Wolf* that "[n]ot being renominated is not exactly the same as being removed, and the [director's] term expired." (*Id.*) The Fourth District focused on an eight month period before Turner was not removed (*id.* at n.12) but did not address any of the specific allegations in Turner's complaint, including that the other directors strategically waited to oust her. For example, the alleged facts include that when Turner expressed her fear that the Board would remove her at the next meeting, a director responded "we are not going to remove you … now." (9 AA 2043.) The Fourth District also does not address Turner's allegations on how the election was orchestrated, with each director nominating and seconding one another for reelection before each vote. (9 AA 2044.)

The Fourth District also reasoned the equitable considerations in *Summers* were tied to "the absence of notice to the Attorney General." (Ex. A at 34.) But the Second District's analysis of whether the director standing statutes had a continuous directorship requirement was distinct from the notice issue in *Summers.* (*Summers*, 34 Cal.App.5th at 374-75.) The Fourth District brushed past this point at oral argument and in its decision, where it draws its own distinction, reasoning that "[u]nlike in *Summers* or *Holt*, there

is no concern here that the Attorney General 'may not be in in the position to become aware or wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact[.]'" (Ex. A at 40 (quoting *Summers*, 34 Cal.App.5th at 371 (quoting *Holt*, 61 Cal.2d at 755) (internal quotations omitted)).) The Fourth District appears to have found that there is no policy concern with finding the election results stripped Turner of standing because she "informed the Attorney General of her concerns even before she commenced the probate action" and because "[a]s required by statute, the Attorney General had notice of both the probate and civil actions, has been involved in these cases since the beginning, and is well aware of the issues." (Ex. A at 40.)

The Fourth District's decision in this case directly conflicts with the Second District's decision in *Summers* and well-reasoned out-of-state authority. The Court's review is both appropriate and necessary to secure uniformity of decision. (Cal. Rule of Court 8.500(b)(1).) This Court should grant review and confirm *Summers*'s conclusion that the director standing statutes do not impose a continuous directorship requirement. (*Summers*, 34 Cal.App.5th at 374.)

B. The Court Should Grant Review to Settle Important Questions of Law and Public Policy.

1. The director standing statutes are part of a unique statutory framework designed to protect nonprofit public benefit corporations from misconduct.

The standing issue before the Court has important legal and public policy implications across the State of California. The Legislature viewed the enactment of separate laws to govern California nonprofit public benefit corporations as essential given the difference in corporate form, purpose, and public policy considerations between nonprofits and for-profit business corporations governed by the GCL.[7] The unique statutory framework for California nonprofit public benefit corporations has furthered the promotion of charitable causes, including by helping improve corporate governance and facilitate the protection of charitable assets. Recognizing the potential for mismanagement and abuse of charitable trusts, the Legislature strengthened these protections by articulating a robust framework for both public and private enforcement through the director standing statutes. The Attorney General defends this statutory framework and recognizes the "participation" of individuals "in a position to see and correct breaches of charitable trusts" is "essential and complementary to the Attorney General's enforcement work." (Amicus Br. at 18.)

[7] A copy of this portion of the legislative history is part of the appellate record, as it was submitted by the Attorney General in its Motion for Judicial Notice, dated July 21, 2021.

The question of whether the same director defendants accused of wrongdoing should be permitted to control the legal claims against them—whether through a special removal vote or an annual election—is critical to the enforcement of charitable trusts and the safeguards put in place by the Legislature when it determined that directors and officers of nonprofit public benefit corporations should have standing to sue on behalf of the nonprofit public benefit corporation. If a plaintiff director or officer can lose their standing to continue litigation properly brought under the director standing statutes through any failure of reelection, this would render the statutory framework an ineffective nullity. This is because all directors have terms that are subject to election, while all officers either serve at the pleasure of the board or have set terms subject to election. (*See* Cal. Corp. Code §§ 5220(a) (terms of not longer than four years for directors); 5213(b)&(c) (one year terms for officers, unless set by bylaws not to exceed three years); 9 AA 2123, 2128 (Bylaws §§ 4.4 (director term expiring on date of annual meeting following two years of service), 5.2 (officers chosen annual by Board of Directors)).) Given civil trial court and appellate proceedings take multiple years each, this is an issue that can easily evade judicial review and is contrary to the Legislature's intent to provide robust enforcement mechanisms and remedies for breaches of charitable trust and fiduciary duties in the nonprofit context.

In finding that the Attorney General's presence in this case is a solution to this policy problem, the Fourth District ignores both the purpose of the director standing statutes and the realities of the Attorney General's supervisory and enforcement role for these entities—including the practical limits to the Attorney General's level of engagement in most matters involving proper governance of non-profit public benefit corporations. These limits were recognized by this Court in *Holt*, which discussed not only how the "[t]he Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact," but also that "***the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment***." (*Holt*, 61 Cal.2d at 755 (emphasis added).) The Attorney General acknowledged both in his Amicus Brief and during oral argument that his office cannot actively protect a public benefit corporation's interest in many circumstances because his office supervises some 114,000 registered charitable organizations and "does not have unlimited resources to investigate every complaint." (Amicus Br. at 18-19.)

The Fourth District also appears to have the mistaken view that relator status is an appropriate substitute for the separate statutory standing provided to directors and officers. (Ex. A at 39-40.) It is not. First, the considerations are different. Relator status requires the Attorney General to determine if

claims brought by a director or officer in their role as a fiduciary on behalf of the nonprofit public benefit corporation should now be brought as claims on behalf of the California public. Second, the relator process is time-consuming and burdensome for both the parties and the Attorney General, making it a poor substitute for eligibility determined by the Legislature and codified in the director-officer standing statutes. As the Assistant Attorney General explained during oral argument, determining relator status could require "serious fact development" such as depositions or additional discovery necessary to evaluate if relator status serves the public interest and would require oversight by the Office of the Attorney General if relator status is granted.

Neither the Attorney General nor relator status is a replacement for the director standing statutes.[8] As the New York court recognized in *Tenney*, "[i]t is no answer to say that, if wrongs were committed, others are available to commence a new and appropriate action" because other directors accused of wrongdoing "should not have the power to terminate the suit by effecting the ouster of the director-plaintiff." (*Tenney*, 6 N.Y.2d at 210.) If allowed to stand, the Fourth District's decision would severely undermine (and even moot) the legislative intent by rendering the director standing statutes an

[8] To the extent the Fourth District's decision would require the Attorney General to be more active in all cases—either directly or through granting relator status, then this will require more resources and the use of more taxpayer dollars that would need to be diverted from other public purposes.

ineffective nullity. The Court's review of this issue is critical to effectuate the statutory safeguards put in place by the Legislature and ensure the ongoing protection of charitable trusts across California.

2. The Court should address whether the "continuous ownership" requirement for shareholder derivative standing also deprives a nonprofit public benefit corporation member of standing under section 5710.

The Court should address the issue of whether the "continuous ownership" requirement for shareholder derivative standing under section 800 in the for-profit business corporation context would apply equally to deprive a nonprofit public benefit corporation member of standing under section 5710. Given the different corporate forms, purposes, and public policy considerations, the extension of a continuous stock ownership rule to the nonprofit context should not simply be assumed like it has been in this case. As this Court previously observed in *Holt*, "[t]he differences between private and charitable corporations make the consideration of such an analogy valueless." (*Holt*, 61 Cal.2d at 755 n.4.)[9] Where, as here, the nonprofit public benefit corporation's only members are its directors, the private persons who are permitted to bring an action under section 5710 are

[9] In *Holt*, this Court declined to analogize and apply former California Corporations Code section 834 (which is the predecessor to section 800 governing shareholder derivative suits) in the charitable corporation context. (*Id.* (finding former section 834 "inapplicable, since trustees as fiduciaries have a special interest wholly unlike that of a private corporate shareholder").)

the same people "charged with managing the corporation's affairs," and those who are permitted to maintain the action without continuous membership "are sufficiently 'few in number.'" (*Cf. Summers*, 34 Cal. App.5th at 372 (quoting *Holt*, 61 Cal.2d at 755).)

In affirming the finding that Turner lost her standing to proceed derivatively under section 5710 when she was not reelected as a director, the Fourth District here is the only California appellate court to extend *Grosset*'s "continuous ownership" rule for shareholder derivative standing under section 800 of the GCL to a member in the non-profit context. While the Second District in *Summers* identified the similarity in language in sections 800 and 5710, it found standing under the director standing statutes and did not need to interpret or apply section 5710 in the nonprofit public benefit corporation context. (*See Summers*, 34 Cal.App.5th at 368-70.)

The Fourth District misinterpreted this Court's holding in *Grosset* by automatically applying a "continuous membership" rule to the nonprofit public benefit corporation. (Ex. A at 28-30.) In *Grosset*, this Court found the "instituted or maintained" language in section 800 "does not clearly impose" a continuous ownership requirement. (*Grosset*, 42 Cal.4th at 1113-14.) Instead, the Court found that imposition of a "continuous ownership" requirement for shareholder derivative standing was supported by "other considerations" specific to for-profit corporations such as "minimiz[ing] abuse of the derivative suit" and "basic legal principles pertaining to

corporations and shareholder litigation." (*Id.*; *see also Summers*, 34 Cal.4th at 369 (noting same).) Specifically, this Court in *Grosset* discussed the need to minimize abuse of the derivative suit among a fluid constituency of shareholders and how a shareholder's ownership interest via their stock gives them sufficient financial interest and economic alignment to ensure a shareholder will diligently pursue the litigation. (*See, e.g., Grosset*, 42 Cal.4th at 1109 (finding "status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation"); *id.* at 1114 (citing "purpose to minimize abuse of the derivative suit").)

Grosset's "other considerations" are specific to for-profit corporations and bear no relevance to the nonprofit public benefit corporation context. For an organization like the Foundation, which is structured so its only members are the directors, this means those individuals permitted to maintain an action in the absence of a continuous membership requirement "are 'sufficiently few in number.'" (*Summers*, 34 Cal.App.5th at 372 (quoting *Holt*, 61 Cal.2d at 755).) The Fourth District does not address this point, but instead misplaces its focus on a lack of ongoing membership to find Turner has no "dog in the hunt." (Ex. A at 32.) Here, unlike a shareholder whose only tie to a for-profit business corporation is economic, Turner is a nonprofit public benefit corporation member whose role as a director (and as Conrad's life partner) means that she personally witnessed the very same wrongs that she sought to remedy when she brought the litigation. Turner's interest in

protecting the Foundation did not disappear with the election; she still has a "dog in the hunt."

Finally, even if a "continuous membership" rule does apply for derivative standing under section 5710, then the policy considerations discussed in *Summers* warrant an equitable exception here. In *Grosset*, this Court emphasized that "equitable considerations may warrant an exception to the continuous ownership requirement" and provided the example of a merger in the shareholder context being "used to wrongfully deprive the plaintiff of standing." (*Grosset*, 42 Cal.4th at 1113-14; *see also Haro v. Ibarra* (2009) 180 Cal.App.4th 823, 836 (the Court "was careful to leave open the possibility that equitable considerations might apply if the Appellant was deprived wrongfully of standing").)[10] For the same reasons articulated in the *Tenney* and *Workman* cases cited by *Summers*, it would be inequitable and against public policy to permit the very same defendants accused of wrongdoing to extinguish the derivative claims against them by ousting the member. (*See, e.g., Summers,* 34 Cal.App.5th at 373 (quoting *Tenney*, 6 N.Y.2d at 207-13, and citing *Workman*, 240 Ariz. at 603-05)

[10] The draft Restatement goes even further, and expressly provides that even a *former* director has standing to *commence* a derivative action on behalf of a charity if he or she "is no longer a member for reasons related to that member's attempt to address the harm to the charity." (Restatement of the Law of Charitable Nonprofit Organizations, § 6.02, Tent. Draft No. 2 (March 20, 2017).)

(defendants "should not have the power to terminate the suit by effecting the ouster" of plaintiff).)

Notwithstanding the legal standard on demurrer, where the court assumes the truth of all material facts alleged in a complaint,[11] the Fourth District was overly-dismissive of Petitioner's well-pleaded allegations. As alleged, Turner was retaliated against and treated differently at the election, which was heavily orchestrated with the other four Directors nominated and seconded one another for re-election. (9 AA 2044-45.) Just one year earlier, those same directors had elected Turner to fill Conrad's role as President of the Foundation and Chairman of the Board. (9 AA 2016-17.) As alleged, it was only after Turner objected to the rushed settlement and instituted this litigation that the other directors sought to freeze Turner out of the Foundation. (9 AA 2015, 2017, 2022, 2042-46.) The alleged facts are sufficient to support that the November 7, 2017 vote was in direct retaliation for Turner's refusal to approve the settlement and her initiation of this litigation. (9 AA 2015, 2017, 2022, 2042-46.) The Arizona appellate court in *Workman* reached this same conclusion in similar circumstances, finding it "reasonable to infer that the board removed [a former director] in response to her claims, particularly in light of the allegations of wrongdoing she made against the other directors." (*Workman*, 240 Ariz. at 604-05.)

[11] (*See Jennings*, 8 Cal.5th at 827.)

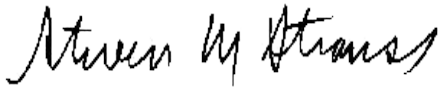
The Court should review these important issues of law and public policy under section 5710 in the context of nonprofit public benefit corporations.

V. CONCLUSION

For all of the foregoing reasons, the petition for review should be granted.

Dated: September 24, 2021

COOLEY LLP



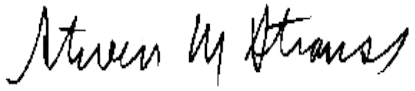
By: Steven M. Strauss

Attorneys for Petitioner
DEBRA TURNER

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I hereby certify that this brief contains 7,120 words, including footnotes, as counted by Microsoft Word, the word processing software used to prepare this brief.

Dated: September 24, 2021



Steven M. Strauss

Exhibit A

Filed 8/17/21

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEBRA TURNER, Plaintiff and Appellant, v. LAURIE ANNE VICTORIA et al., Defendants and Respondents.	D076318, D076337 (Super. Ct. Nos. 37-2017-00009873-PR-TR-CTL; 37-2018-00038613-CU-MC-CTL)

CONSOLIDATED APPEALS from judgments of the Superior Court of San Diego County, Julia C. Kelety and Kenneth J. Medel, Judges. Modified in part, affirmed in part, vacated in part, and remanded with direction.

Cooley, Steven M. Strauss and Erin C. Trenda for Plaintiff and Appellant.

Gibson Dunn & Crutcher, Scott Alan Edelman, Alexander Kosta Mircheff, Megan Marie Cooney, and Jillian Nicole London for Defendant and Respondent Laurie Anne Victoria.

Henderson, Caverly, Pum & Trytten, Kristen E. Caverly and Lisa B. Roper for Defendant and Respondent Joseph Gronotte.

Procopio, Cory, Hargreaves & Savitch, Richard A. Heller, J. Christopher Jaczko, and Sean Michael for Defendant and Respondent Gregory Rogers.

Seltzer Caplan McMahon Vitek, Reginal Vitek and Scott Walter Perlin for Defendant and Respondent Anthony Cortes.

Brownlie Hansen, Robert W. Brownlie; DLA Piper, S. Andrew Pharies for Defendant and Respondent The Conrad Prebys Foundation.

Xavier Becerra, Attorney General, Tania M. Ibanez, Assistant Attorney General, Caroline Hughes and James M. Toma, Deputy Attorneys General for Amicus Curiae on behalf of the State of California.

I

INTRODUCTION

In this appeal, we consider whether a director of a nonprofit public benefit corporation who brings an action on behalf of the nonprofit public benefit corporation can lose standing to pursue its claims if the director is not reelected during the litigation.

Debra Turner, formerly a director and president of the Conrad Prebys Foundation (Foundation), appeals judgments of dismissal in favor of the Foundation and its directors, following orders sustaining demurrers to her probate and civil actions.[1] In those actions, Turner alleged the other Foundation directors breached their fiduciary duties in preapproving a settlement range for Laurie Anne Victoria, who served both as a Foundation

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1 Directors Joseph Gronotte, Anthony Cortes, and Gregory Rogers were dismissed from the probate action, but are parties with respect to the civil action. Cortes and Rogers joined the briefs submitted by the Foundation and Laurie Anne Victoria as well as the answer to the amicus brief submitted by the Attorney General. Gronotte joined Victoria's brief and the answer to the Attorney General's brief.

director and as the trustee of the Conrad Prebys Trust (Trust), to negotiate a settlement of a trust challenge by a disinherited heir. Turner also challenged Victoria's actions as trustee. Several months after commencing her action, Turner's term as a Foundation director and officer expired when she was not reelected to her positions during the annual election process. The civil and probate courts determined that Turner lost standing to maintain her causes of action.

Turner contends she has standing under Corporations Code[2] sections 5142, 5233, 5223, and/or 5710 to pursue the claims on behalf of the Foundation because she was a director and officer when she commenced the action and the statutory scheme for nonprofit benefit corporations does not require continuous directorship status to maintain standing since the claims belong to the corporation. Neither the text nor the legislative history of these statutes suggests an intention to depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation. We conclude the statutory scheme and public policy considerations require a continuous relationship with the public benefit corporation that is special and definite to ensure the litigation is pursued in good faith for the benefit of the corporation. If a plaintiff does not maintain such a relationship, the statutory scheme provides the nonprofit public benefit corporation with protection through the Attorney General, who may pursue any necessary action either directly or by granting an individual relator status.

Because Turner lost standing to pursue her causes of action, we affirm the judgments of dismissal as to Turner acting in her capacity as a former

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2 Further statutory references are to the Corporations Code unless otherwise designated.

director and officer. We remand, however, with directions for the civil and probate courts to grant 60 days leave to amend, limited to the issue of whether a proper plaintiff may be substituted to pursue the existing claims. The Attorney General may consider during that 60-day period whether granting relator status to Turner, or another individual, for these claims is appropriate.

II

BACKGROUND[3]

A. *Factual Background*

1. *Establishment of the Trust and Foundation*

Conrad Prebys was known in San Diego for his successful construction and real estate ventures and for his generous philanthropy. He donated hundreds of millions of dollars to local medical, educational, and arts institutions during his lifetime.

Prebys established the Trust in 1982 and created the Foundation in 2005 as a nonprofit public benefit corporation. The Trust provided that, after making specified distributions to identified beneficiaries, the trustee must distribute the remainder of the estate to the Foundation so it could continue to make grants and distributions for charitable purposes after Prebys's death. The Foundation's articles of incorporation provided that the "property of this corporation is irrevocably dedicated to charitable purposes and no part of the

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3 We draw the factual background from the operative complaint in the civil action and the operative pleading in the probate action. In reviewing a judgment of dismissal on demurrer, "we accept the truth of material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 346.)

net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person."

The operative bylaws of the Foundation state the Foundation's "assets and income shall be held in charitable trust, to be administered and distributed as provided herein for the qualified charitable, religious, scientific, literary or educational purposes of the supported organization."

2. *Turner's Relationship to Prebys and the Foundation*

Turner, who lived with Prebys over the last 16 years of his life and describes herself as his life partner, was a beneficiary of a gift trust and sat on a two-member real estate committee for the Trust. She was also a member of the Foundation's board of directors and served as an officer.

3. *Prebys Creates and Withdraws His Son's Gift Trust*

Prebys created a gift trust for his son in 2007. He allegedly had a falling out with the son in 2014. Prebys amended the gift trust in July 2014 to reduce the son's gift to $20 million, to be held in trust during the son's lifetime with taxes paid from the bequest. After another alleged falling out, Prebys revoked the son's gift trust completely in October 2014.

4. *Prebys Amends the Trust*

Prebys underwent treatment for cancer from 2014 through 2015, but allegedly remained in good mental health. He named Victoria chief executive officer of his company in 2015 and recommended another individual employed by his company to serve on the Foundation's board.

Prebys amended and restated the Trust in February 2016, naming Victoria as his successor trustee for the Trust as well as for the gift trusts. The restated Trust defined amounts to pour over into previously identified gift trusts. The remainder of the Trust estate was to be held as a separate trust pursuant to the terms of the Foundation and applied by the Foundation

"to support performing arts, medical research and treatment, visual arts, and other charitable purposes consistent with the trustor's history of philanthropy during his lifetime, with an emphasis on such philanthropy in the San Diego area." Prebys amended several of the gift trusts and instructed the trustee to pay any estate taxes on the gifts so that all gifts were tax-free.

The 2016 restated Trust noted the son's gift trust was "previously revoked in its entirety." It stated Prebys expressly made no provision for Prebys's son and no distribution would be made to the son's formerly designated gift trust.

5. *Events After Prebys's Death*

When Prebys died in July 2016, Victoria assumed the duties as trustee of the Trust and engaged the attorney who prepared the Trust amendments to represent the Trust. Days after Prebys died, Victoria allegedly began discussing with the attorney how to address a potential challenge to the 2014 and 2016 documents revoking the son's gift trust. They discussed a dollar amount for a potential settlement shortly after the funeral in August 2016.

After Prebys's funeral, the son told Turner he did not want his father's money, but asked if he had been written out of the will. Turner confirmed the son would not receive anything from the estate unless Prebys had changed his mind after the February 2016 amendments.

Thereafter, the son hired an attorney to challenge the trust amendments that disinherited the son. The son alleged the amendments were invalid because Prebys lacked mental competence due to his illness and Turner unduly influenced Prebys.

6. *Foundation Board Meetings in 2016*

In September 2016, at the first board meeting after Prebys's death, the board elected Turner as president of the Foundation and chairperson of the board. The Trust's attorney attended the meeting and discussed the details of establishing the Foundation since he had prepared the Trust documentation.[4] He discussed the issue of a possible trust contest by the son, explaining Prebys reduced the son's gift in 2014 and later revoked it entirely. Victoria, as trustee, wanted to settle the son's claim. The board discussed a dollar amount Victoria could use to negotiate with the son's attorney.

Turner told the other board members that Prebys revoked the son's gift for a reason and documented his intention not to provide a gift to his son in the Trust as well as in the gift trusts. Turner expressed her view that the claims of lack of capacity and undue influence were false and could not be supported by evidence. She alleged the attorney and the other board members did not think the son could establish that Prebys was not competent in 2014 to make his own decisions.

The attorney cautioned the board members that the son could " 'get it all,' " which could deprive the Foundation of its funding. He also warned that if the son could establish incompetence, Prebys's decisions "could be undone like 'peeling the layers of an onion.' "

The other board members expressed a desire to settle rather than fight a lawsuit by the son, which could involve a lengthy trial. Turner commented that Prebys settled "small business-related suits" involving slip-and-fall

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4 The Foundation did not have its own counsel because it was not yet funded.

allegations or water damages, but she said he would never settle personal matters. No settlement amounts were discussed and the issue was tabled without a vote.

After the meeting, Turner told the trust attorney it seemed like a conflict of interests to have Victoria and the other person who was employed by Prebys's company on the board.

At a November 2016 board meeting, Turner asked the other board members to sign an acknowledgement affirming they received, read, understood, and agreed to a copy of a conflict of interest policy and IRS regulations regarding self-dealing. Turner never received signed acknowledgements from the other directors. Turner alleges the other directors became dismissive of Prebys's wishes and said they were going to do things their way now that Prebys was dead.

The son's attorney sent a letter to the trustee's attorney in December 2016 alleging that Prebys lacked capacity to revoke the son's gift trust and that Prebys was the victim of undue influence by Turner. The son alleged Turner limited the son's contact with Prebys and controlled their communication from 2013 to 2016, particularly after Prebys was diagnosed with cancer in 2014. He further alleged Prebys became "increasingly confused" in phone calls with the son between 2014 and 2016. Turner attributed any confusion to Prebys's chemotherapy treatment. The son offered to waive and release any claims in exchange for payment of the gift trust Prebys initially established for him.

Victoria asked Turner to set up a board meeting to discuss the letter from the son's attorney. Victoria wanted to settle the son's claim to avoid the ordeal of depositions and a trial. Turner said the claims were meritless and Prebys would not want to settle.

The board met in December 2016 to discuss a potential settlement with the son. The Trust's attorney attended the meeting and read portions of the letter from the son's attorney to the board. The Trust's attorney encouraged the board to preapprove a settlement amount, stating it could cost over $1 million in legal fees to defend a trust contest by the son. He commented that Prebys was capable of making his own decisions in 2014, the year he disinherited the son. However, the Trust's attorney expressed some concern about the ability to prove Prebys's competence in 2016. He again warned the board that, " 'like an onion the layers of the Trust could be peeled back and reversed by the [c]ourt.' " For example, the 2016 changes made the gifts tax free and a reversal of those changes could result in the gifts being taxed. One board member commented that they did not want to " 'open that can of worms, as some people might think some of us shouldn't even be on the [b]oard.' "

According to Turner, the board members did not investigate the merits of the son's claims and there was no discussion of how the son's claims personally and financially impacted the board members or the Foundation's bylaws regarding conflict of interest.

Turner said three of the board members had conflicts and should not vote. The Trust's attorney allegedly stated, " '[T]his is where you decide that there isn't a conflict.' " The other board members did not respond to the comment and the attorney called for a vote regarding how much to offer the son for settlement.

Victoria and the other board members suggested approving various settlement amounts. In a vote of four to one, the board ultimately approved

the trustee to offer as much as $12 million to settle the son's claims, with the Trust paying any estate tax.[5]

7. *The Trust's Settlement with the Son*

Thereafter, the Trust's attorney negotiated a settlement with the son for $9 million, tax-free, which was paid in January 2017. With taxes, the value of the settlement was approximately $15 million. Turner alleges the settlement diverted $15 million away from the Foundation's charitable purposes.

8. *Turner's Actions to Challenge the Settlement Approval*

In March 2017, Turner delivered a demand letter and a draft petition challenging the board members' agreement to settle with the son as improperly diverting Foundation funds while obtaining personal benefit from the settlement of the son's claims. Turner stated she intended to discuss the matter with the Attorney General to take action against the board for improperly diverting charitable funds.

Turner alleged the board took no steps to consider the demand or to address the harm to the Foundation. The other board members retained defense counsel and inquired about insurance and indemnification from the Foundation. According to Turner, the other board members were dismissive of the demand letter, calling it a " 'distraction.' " The other directors would not speak to her and the meeting was quickly adjourned.

Turner alleged the other directors displayed hostility toward her and she became concerned the other directors would try to remove her from the Foundation. When she raised this concern, some directors assured her they

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[5] Turner alleges Victoria sought preapproval from the board to avoid potential liability as trustee of the Trust if she settled with the son within the authorized range.

would not vote to remove her at the next board meeting. One board member said, " 'we are not going to remove you . . . now.' "

A couple of months later, in May 2017, Turner filed her probate petition. When she was absent from a board meeting a few days thereafter, the other board members retained counsel to represent the Foundation and the Trust.

9. *Board Election*

At a board meeting on November 7, 2017, the other four directors nominated one another for reelection as directors. The board voted to renew their terms, with Turner casting the sole dissenting vote. The board then elected officers, with the other directors nominating and electing one another for positions. None of the other board members nominated Turner for reelection as a director or as an officer. As a result of the election, Turner's term expired and she was asked to leave the meeting. She alleges the other directors appeared gleeful about the election results.

Turner alleged she did not know she could nominate herself. Although the minutes from the meeting reflect that the Foundation's executive director suggested a process of self-nomination, Turner understood the proposal only pertained to the election of officers. She claimed it would have been futile for her to nominate herself for reelection as a director or an officer.

Thereafter, Turner sent a letter to the board of directors formally nominating herself for reelection as a director for the Foundation. She received no response. She further alleged her board seat was not filled or eliminated and remains vacant.

Turner alleged the defendant directors became "openly hostile" toward her after she "refused to approve the diversion of Trust funds to a non-charitable purpose." She alleged the hostility increased after she brought

this action and culminated when they "refused to nominate and reelect [Turner] as a director or officer." She alleged on information and belief that the director defendants were "improperly motivated by their desire to cut off this litigation." Turner claimed the other directors retaliated against her after she brought the action by refusing to reelect her as a director and officer.

B. *Procedural History*

1. *Probate Action*

Turner's probate petition alleged "causes of action" styled as: (1) breach of fiduciary duty of care, (2) breach of fiduciary duty of loyalty and self-dealing, (3) removal of directors, (4) breach of trustee's fiduciary duties, (5) demand for accounting, (6) surcharge, (7) denial of trustee fees, and (8) double damages. Turner alleged the first three causes of action on behalf of the Foundation against the other directors. Turner alleged the remaining causes of action derivatively on behalf of the Foundation against Victoria in her role as trustee of the Trust.

Turner brought the action in her role as a director and president of the Foundation pursuant to sections 5142, subdivision (a)(2) and (3) and 5233, subdivision (c)(2) and (3), and derivatively on behalf of the Foundation as a member under section 5710. She also alleged she was a beneficiary of one of the gift trusts.

Turner amended the probate petition in July 2017 to name the Attorney General as a nominal respondent. The Attorney General entered a general appearance acknowledging the joinder in the action, but indicated he would not participate in conferences or trial unless ordered by the court.

After the November 7, 2017 election, Victoria obtained a stay of discovery pending resolution of the defendants' demurrers, including the

issue of whether Turner had standing since she was no longer a director, officer, or member of the Foundation.

Turner filed a second amended petition, again derivatively on behalf of the Foundation and in her role as director and president of the Foundation, alleging she continued to have standing to assert the causes of action on behalf of the Foundation because she had standing when she filed the petition, notwithstanding the results of the November 2017 election. She alleged the efforts to remove her from the Foundation were in retaliation for her refusal to approve the diversion of Trust funds to a noncharitable purpose and were motivated by the desire to cut off litigation.[6]

The defendant directors and the Foundation again filed demurrers contending, in part, that Turner lacked standing to bring any of the claims. Turner opposed the motions asserting, as she does on appeal, that she has standing because she was a member, director, and officer at the time she filed the action and the other directors should not be able to cut off litigation by refusing to reelect her.

The probate court determined Turner's causes of action against her former fellow board members were "ill-suited to the probate arena" and were "best decided in a civil suit pertaining to the inner-workings of the Foundation's corporate governance." On its own motion, the probate court ordered the first through fourth causes of action severed pursuant to Probate Code section 801 and transferred for decision in a separate civil proceeding

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6 Although Turner again alleged she was a beneficiary of a gift trust from Prebys, she did not assert her causes of action on her own behalf as a trust beneficiary. She alleged she sought only remedies for the benefit of the Foundation.

by way of a new civil complaint, which would relate back to the date of the original petition.

The court determined the fifth through ninth causes of action against the trustee were based on Turner's standing to act derivatively on behalf of the Foundation under section 5710, subdivision (b). The probate court determined the civil court should decide whether the board members' actions were proper and in keeping with their fiduciary duties to the Foundation since the facts upon which Turner relied to pursue a derivative action on behalf of the Foundation were "inextricably intertwined with the propriety of the [b]oard's actions, both in voting to 'pre-approve' the settlement" and the later " 'effort to remove' " Turner from the Foundation. Thus, the probate court stayed the demurrers and corresponding motions to strike as to the remaining causes of action pending a decision regarding Turner's standing to bring a derivative action on behalf of the Foundation in the civil matter. Turner, thereafter, dismissed the directors other than Victoria from the probate matter.

2. *Civil Action and Judgment*

Turner filed a civil complaint realleging the same first four causes of action from the probate petition. She included allegations that she held a fiduciary role on the Trust's two-member real estate committee, which had authority to decide how its holdings are handled, which she alleged impacts the Foundation's funding. She named the Attorney General as a nominal defendant in this action as well. The Attorney General made a general appearance, but indicated the intention not to participate unless ordered by the court. The court sustained the defendants' demurrers to the complaint

concluding Turner had not alleged facts sufficient to establish she maintained standing. The civil court, however, granted leave to amend.

In an amended complaint, Turner realleged the causes of action for breach of charitable trust and breach of fiduciary duties of care against the other four board members in her capacity as a director or officer of the Foundation pursuant to sections 5142, subdivision (a)(2) and (3), and 5233, subdivision (c)(2) and (3) and derivatively on behalf of the Foundation under sections 5142, subdivision (a)(1) and 5710. She alleged the third cause of action against Victoria and another director for breach of duty based on allegations of self-dealing and violating the duty of loyalty. In the fourth cause of action, she sought removal of the other four directors pursuant to sections 5223 and 5710 based on allegations the directors engaged in "dishonest acts and gross abuse of authority or discretion in approving the improper diversion of charitable funds to a noncharitable purpose." Turner prayed for removal of the directors and asked the court to hold them jointly and severally liable to the Foundation for damages. She also sought her attorney fees and costs.

The court sustained the defendants' demurrers to the operative amended complaint without leave to amend concluding Turner, as a former director and member, no longer had standing to bring derivative claims on behalf of the Foundation and, likewise, did not have standing under the director statutes. The court entered a judgment of dismissal of the civil complaint.

3. *Probate Judgment*

The probate court and counsel discussed what to do with the remaining causes of action pending in the probate court after the civil court's ruling, which Turner intended to appeal. The court concluded Turner had not

established the standing she needed to pursue the fifth through ninth causes of action in the probate petition. The court, therefore, sustained the pending demurrers to the remaining causes of action and entered a judgment of dismissal on the petition.

III

DISCUSSION

Turner contends the civil and probate courts erred in sustaining the defendants' demurrers to her claims based on lack of standing because she had standing at the time she filed her action and she did not lose standing when she was not reelected as a board member and officer of the Foundation. We begin with an overview of the general principles and proceed to analyze the statutes and authorities upon which she relies before applying them to the facts alleged in this case.

A. *Standard of Review and General Standing Principles*

In reviewing orders sustaining demurrers without leave to amend, we independently examine the operative complaint "to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162 (*Novartis*).) We " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation reading it as a whole and its parts in their context.' " (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034 quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment. The plaintiff

bears the burden of proving an amendment could cure the defect." (*Novartis*, at p. 162.)

" ' "The question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the defendant." ' " (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 758.) "At its core, standing concerns a specific party's interest in the outcome of a lawsuit." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247 (*Weatherford*); Code Civ. Proc., § 367 ["every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"].) " 'The prerequisites for standing to assert statutorily-based causes of action are determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute.' " (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 916.) We independently review whether the statutory criteria have been met on undisputed facts. (*Ibid.*)

"For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed. '[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.' " (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232–233.) "A plaintiff may lose standing even where an actual controversy originally existed 'but, by the passage of time or a change in circumstances, ceased to exist.' " (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 916–917 (*Wolf*).)

B. *Analysis*

Turner alleges she has standing to maintain her causes of action "both directly under the statutes that permit a director or officer to file an action against a director for misconduct under the California laws governing nonprofit public benefit corporations (§§ 5142, subd. (a)(2) and (3); 5233,

subd. (c)(2) and (3)), and derivatively under the law permitting a member to file an action on behalf of a non-profit public benefit corporation. (§§ 5142, subd. (a)(1); 5710.)" Turner also seeks removal of the defendants as board members pursuant to sections 5223 and 5710.

To consider Turner's claim that these statutes require standing at the time an action is commenced rather than continuous standing, "we must begin by considering the statute's language and structure, bearing in mind that our fundamental task in statutory interpretation is to ascertain and effectuate the law's intended purpose. [Citation.] We examine the ordinary meaning of the statutory language, the text of related provisions, and the overarching structure of the statutory scheme." (*Weatherford*, *supra*, 2 Cal.5th at p. 1246.)

"If, however, the statutory language is ambiguous, 'we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' . . . Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1233.)

1. *Pertinent Statutes*

Section 5142, subdivision (a) provides a means by which a nonprofit public benefit corporation may obtain relief for a breach of a charitable trust stating, "any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust: [¶] (1) The corporation, or a member in the name of the corporation pursuant to [s]ection 5710. [¶] (2) An officer of the corporation. [¶] (3) A director of the corporation. [¶] (4) A person with a reversionary, contractual, or property interest in the assets subject to such charitable trust. [¶] (5) The Attorney

General, or any person granted relator status by the Attorney General." For any action "brought by the persons specified in paragraphs (1) through (4)," the Attorney General shall be given notice and "may intervene." (§ 5142, subd. (a).)

Section 5233 addresses self-dealing transactions, which it defines as "a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest," subject to certain exceptions. (§ 5233, subd. (a).) To recover remedies for a self-dealing transaction on behalf of the corporation, "the Attorney General or, if the Attorney General is joined as an indispensable party, any of the following may bring an action [¶] (1) The corporation, or a member asserting the right in the name of the corporation pursuant to [s]ection 5710. [¶] (2) A director of the corporation. [¶] (3) An officer of the corporation. [¶] (4) Any person granted relator status by the Attorney General." (§ 5233, subd. (c).)

Section 5223, subdivision (a) provides that a superior court "may, at the suit of a director . . . remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty . . . , and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such action." Subdivision (b) states, "The Attorney General may bring an action under subdivision (a), may intervene in such an action brought by any other party and shall be given notice of any such action brought by any other party."

Finally, section 5710 provides for a member derivative action stating, in pertinent part, "No action may be instituted or maintained in the right of any corporation by any member of such corporation unless both of the following conditions exist: [¶] (1) The plaintiff alleges in the complaint that

plaintiff was a member at the time of the transaction or any part thereof which plaintiff complains; and [¶] (2) The plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file." (§ 5710, subd. (b).)

Turner contends the language in sections 5141 and 5233 specifying individuals who "*may bring an action*" (italics added) and the language in section 5223 stating a superior court may remove a director "*at the suit* of a director" (italics added) suggest standing is required only at the time an action is commenced and does not require continuous standing, as is required for derivative actions under section 5710, which uses the language "*instituted and maintained*." (Italics added.) We are not persuaded.

The plain language of these statutes "is inconclusive" when considered alone and does not help us determine whether an individual who was qualified to commence an action must continue to have standing throughout the litigation. (*Summers v. Colette* (2019) 34 Cal.App.5th 361, 368.) Therefore, we look to the legislative history.

2. *Legislative History*

These statutes were enacted in 1978 as part of a comprehensive revision of the law governing nonprofit corporations to modernize and set forth in one division of the Corporations Code the law applicable to nonprofit corporations. "The project was undertaken to modernize the Nonprofit Corporation Law and to facilitate the operation of nonprofit corporations while maintaining and expanding upon this state's traditional protection of

the rights of members, creditors and the public." (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, p. 9002.) The Special Committee on the Revision of the Nonprofit Corporation Law, appointed by the Business Law Section of the State Bar, included "attorneys who participated in drafting the GCL and attorneys who represented a wide variety of nonprofit entities." Additionally, representatives from the Secretary of State's office, the Department of Corporations, and the Charitable Trust Division of the Attorney General's office "provided advice and liaison to the Committee." (*Id.* at p. 9003.) The effective date of the legislation was postponed until January 1, 1980 to allow comment and suggestions from entities affected by the new law. The Legislature enacted primarily "cleanup" amendments to the statutory scheme in 1979. (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, pp. 9002–9003; 4 Sen.J. (1979–1980 Reg. Sess.) pp. 7005–7006.); Stats. 1978, ch. 567, § 5, pp. 1750, 1755, 1762, 1764–1766, 1787; Stats. 1979, ch. 724, pp. 2226, 2235, 2242–2245; see also Assem. Select Com. on Revision of the Nonprofit Corp. Code, Summary of Assem. Bill Nos. 2180 and 2181 (1977–1978 Reg. Sess.) July 27, 1978, p. 1.)[7]

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[7] The Assembly Select Committee on Revision of the Nonprofit Corporations Code prepared a report "to aid the Legislature in voting on AB 495 and AB 1632 and the courts and members of the bar of this state in comprehending the new Nonprofit Corporation Law ("New Law") enacted in 1978 by AB 2180 and amended in 1979 by AB 495 and AB 1632." This report was printed in the Assembly Journal by unanimous consent and in the Senate Journal by motion. (5 Assem. J. (1979–1980 Reg. Sess.) p. 9002; 4 Sen. J. (1979–1980 Reg. Sess.) p. 7005.) We grant the Attorney General's request to take judicial notice of this report along with a cover letter from Speaker Pro Tempore of the California Assembly John Knox to Governor

The drafters explained that they followed the format and language of the general corporation law (GCL) and "employ[ed] the GCL language whenever the same substantive results are intended. The use of different language would needlessly invite erroneous speculation by lawyers or judges that the change in language has a substantive purpose. . . . Keeping the language the same also allows those using the New Law to benefit from judicial interpretations of the GCL." (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, p. 9004; 4 Sen.J. (1979–1980 Reg. Sess.) p. 7007; see also Assem. Select Com. on Revision of the Nonprofit Corp. Code, Summary of Assem. Bill Nos. 2180 and 2181 (1977–1978 Reg. Sess.) July 27, 1978, p. 2.)

In earlier committee comments, the drafters acknowledged the natural inclination to " 'improve' upon the work of others" particularly when one sees "blemishes or ambiguities that were invisible to the original draftsmen." However, for the most part, they "adhered steadfastly" to the intention to follow the form of the GCL. (Assem. Com. on Judiciary, Bill Analysis Work Sheet of Assem. Bill No. 2180 with Comments on Proposed Nonprofit and Nonstock Corp Law by Assem. Select Com. on Revision of the Nonprofit Corp. Code, p. 3.)

Accordingly, section 5223 is similar to the language of section 304 involving an action to remove a director "at the suit of" certain shareholders (those "holding at least 10 percent of the number of outstanding shares of any class") for "fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation."

Edmund G. Brown, Jr. dated August 29, 1978 enclosing the July 27, 1978 report for purposes of signing.

Section 5710, subdivision (b), follows the language of section 800 which states, "[n]o action may be instituted or maintained" in the right of the corporation by a member "unless both of the following conditions exist:" (1) the plaintiff was a shareholder "at the time of the transaction or any part thereof of which plaintiff complains" and (2) the plaintiff alleges "with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file."

Sections 5142 and 5233 were new provisions that did not have a direct correlation to the GCL. (Marsh, Finkle and Bishop, Marsh's Cal. Corp. Law, (Aspen Pub. 2021), App. B Committee Reports, B.1.A., Assem. Select Com., Rep. on Revision of the Nonprofit Corp. Code, Aug. 27, 1979, Cross-reference Tables, Intro and Chart for Part II.) However, section 5142 was derived from former Corporations Code section 9505 (as added Stats 1947 ch. 1038) and former Civil Code section 605c (as added Stats 1931, ch. 871, § 1.) (Derivation Notes, Deering's Ann. Corp. Code (2021 ed.) foll. § 5142.) These former statutes provided that the Attorney General, who was charged with supervision of nonprofit corporations holding property subject to any public or charitable trust, "shall institute" in the name of the state "proceedings necessary to correct" noncompliance or departure from the terms of the trust or the general purposes for which it was formed. (Stats 1947, ch. 1038, pp. 2414–2415; Stats. 1931, ch. 871, p. 1852.)

Section 5142 follows the general formulation of the former statutes from which it was derived. However, it expands the statutory authority to

"bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust" to include not only the Attorney General, but also specified corporate representatives.[8]

Section 5233 was the subject of much discussion and resulted from proposals by the State Bar Committee, including the Attorney General's representative, to define self-dealing transactions and to allow the corporation to validate some transactions that would otherwise qualify as self-dealing. This allowed nonprofit public benefit corporations "to take advantage of opportunities made available to them by their directors while at the same time protecting them from insider abuses." (Assem. Select Com. on Revision of the Nonprofit Corp. Code, Report on Revision of the Nonprofit Corp. Code 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, pp. 9009–9010; 4 Sen.J. (1979–1980 Reg. Sess.) p. 7013.)[9] There is no indication, however, that the drafters' discussions involved the question of whether an individual

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8 Section 5142 is in the section of the law dealing with the formation and corporate powers of public benefit corporations. (Assem. Select Com. on Revision of the Nonprofit Corp. Code, Report on Revision of the Nonprofit Corp. Code 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, p. 9007; 4 Sen.J. (1979–1980 Reg. Sess.) p. 7011.)

9 Former section 5233, added by the 1978 legislation, was repealed and replaced in 1979 by Assembly Bill No. 495. The relevant portions of the statute involving who may bring an action for self-dealing are identical to the current statute. (See Stats. 1978, ch. 567, pp. 1764–1766, and Stats. 1979, ch. 724, §§ 25–26, pp. 2242–2243.) Section 5233 was later amended in 1980, in part, to shorten the period within which to commence an action for self-dealing from 10 years to 3 years after the transaction occurred, except for the Attorney General, who continued to have 10 years after the transaction occurred to commence an action. (3 Stats 1980 (1979–1980 Reg. Sess.), ch. 1155, § 4; Legis. Counsel's Dig., Assem. Bill No. 3343 (1979–1980 Reg. Sess), 4 Stats 1980, Summary Dig., p. 375; see also Deering's Ann. Corp. Code (2021 ed.) History & Notes foll. § 5233.)

who brings an action to correct or to remedy self-dealing transactions may continue an action if the individual loses status as a qualified individual under the statute.

Based on our examination of the legislative history, nothing suggests the Legislature intended to depart from the generally applicable standing principles for actions involving nonprofit public benefit corporations. Although courts may infer the Legislature intended a different meaning if materially different language is used in statutory provisions addressing the same or related subjects (see *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 463), we cannot draw such an inference here. The legislative history for this statutory scheme indicates only a clear intention to hew as closely to the law used for general corporations as possible–despite any ambiguities or inconsistencies in the language of the GCL statues–while providing for the unique circumstances of internal governance of nonprofit public benefit corporations.

3. *Judicial Interpretations*

We look, then, to judicial interpretations of similar provisions in GCL to interpret the statutes before us because there are few authorities directly addressing the provisions regarding nonprofit public benefit corporations. (Rep. of the Assem. Select Com. on Revision of the Nonprofit Corp. Code, 5 Assem. J. (1979–1980 Reg. Sess.) Aug. 27, 1979, p. 9004; 4 Sen.J. (1979–1980 Reg. Sess.) p. 7007; see also *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 716 ["When the Legislature has expressly declared its intent, we must accept the declaration."].)

We begin, however, with *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750 (*Holt*) in which the Supreme Court concluded that minority directors or trustees of a charitable corporation could maintain

an action against majority trustees to enjoin a threatened breach of trust. (*Id.* at p. 755.) The Supreme Court stated that although the Attorney General had "primary responsibility for the enforcement of charitable trusts" under former section 9505, "the need for adequate enforcement [was] not wholly fulfilled by the authority given" to that office. (*Ibid.*)

The Supreme Court determined that "responsible individuals" could sue on behalf of the charitable corporation. (*Holt*, *supra*, 61 Cal.2d at p. 755.) " 'The charity's own representative has at least as much interest in preserving the charitable funds as does the Attorney General who represents the general public. The cotrustee is also in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention.' [Citation.] Moreover, permitting suits by trustees does not usurp the responsibility of the Attorney General, since he would be a necessary party to such litigation and would represent the public interest." (*Id.* at p. 756.) In reaching this conclusion, the Supreme Court relied on the special interest the trustees had as fiduciaries to the charitable corporation commenting that the trustees "are the ones solely responsible for administering the trust assets" and "they are fiduciaries in performing their trust duties." (*Ibid.*) The court noted the majority view of other jurisdictions was that "a trustee or other person having a special interest" may enforce a charitable trust in addition to the Attorney General. But " 'the only person who can object to the disposition of the trust property is one having some definite interest in the property—he must be a trustee, or a *cestui*, or have some reversionary interest in the trust property.' " (*Id.* at p. 753.)[10]

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10 Turner and the Attorney General rely on the Supreme Court's comment in footnote 4 of *Holt* for the general proposition that differences in private and charitable corporations make consideration of interpretations of statutes

Relying on *Holt*, we concluded in *San Diego Etc. Boy Scouts of America v. City of Escondido* (1971) 14 Cal.App.3d 189, 195 (*Boy Scouts*), that youth organizations had standing to enforce the charitable trust on behalf of the youth beneficiaries when a property owner intended to use the property for a purpose other than that for which it was designated by the charitable trust. (*Id.* at pp. 191, 195–196.) We concluded that although former section 9505 placed the duty to supervise charitable trusts upon the Attorney General, "the right of the Attorney General to sue to enforce a charitable trust is not exclusive: other responsible individuals may be permitted to sue on behalf of the charity." (*Id.* at p. 195.)

Thereafter, as we have seen, after careful consideration and after receiving input from stakeholders, including a representative of the Attorney General, the Legislature enacted section 5142, codifying and defining the categories of individuals who have standing to seek a remedy for breach of a charitable trust on behalf of a nonprofit public benefit corporation in addition to the Attorney General: an officer of the corporation, a director of the corporation, the corporation or a member of the corporation (under § 5710), or

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regarding general corporations "valueless." (*Holt*, *supra*, 61 Cal.2d at p. 762, fn. 4.) The Supreme Court did not go that far. In that footnote, the Supreme Court rejected the defendant's reference to former Corporation's Code section 834 (from which current Corp. Code, § 800 is derived), which provided safeguards such as posting an undertaking for suits by private shareholders. The court noted such safeguards were not necessary because trustees are fiduciaries with a special interest in the corporation that is different from private shareholders. The Supreme Court specifically stated it did not reach the question about whether minority directors of a private corporation could bring an action on behalf of the corporation. In that context, the court said "the differences between private and charitable corporations make the consideration of such an analogy valueless." (*Ibid.*) In any event, the *Holt* decision predated the enactment of the nonprofit corporation law by more than a decade.

a "person with a reversionary, contractual, or property interest in the assets subject to such charitable trust." (§ 5142, subd. (a)(1)–(4).) "Other than the Attorney General, only certain parties who have a special and definite interest in a charitable trust, such as a trustee, have standing to institute legal action to enforce or protect the assets of the trust." (*Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161–162 (*Hardman*) citing § 5142.)

Turning to the question of whether a continuous relationship is necessary, we look to *Grosset v. Wenaas* (2008) 42 Cal.4th 1100 where the Supreme Court held that California law "generally requires a plaintiff in a shareholder's derivative suit to maintain continuous stock ownership throughout the pendency of the litigation." (*Id*. at p. 1119.) The plaintiff in that case lost standing to continue a derivative action when he was required to sell his stock as part of a merger. (*Id*. at p. 1104.) The court observed the authority to manage the business and affairs of a corporation, including commencing, defending, and controlling actions on behalf of the corporation, is vested in the board of directors. (*Id*. at p. 1108 citing *A. Paladini, Inc. v. Superior Court of San Francisco* (1933) 218 Cal. 114, 121; see also § 300, subd. (a) ["the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board"].)

Shareholders are permitted under section 800 to bring a derivative suit to enforce the corporation's rights and redress injuries if the board fails to do so. (*Grosset*, *supra*, 42 Cal.4th at pp. 1108, 1110.) The action is derivative because the " ' "gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among the individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets." ' " (*Id*. at p. 1108.)

Only the corporation obtains recovery from a successful derivative suit. (*Ibid.*)

The *Grosset* court examined section 800's language stating that no derivative action on behalf of a corporation may be "instituted or maintained" unless "the plaintiff was a shareholder, of record or beneficially . . . at the time of the transaction or any part thereof of which plaintiff complains" or "devolved upon plaintiff by operation of law from a holder who was a holder at the time of the transaction . . . ." (*Grosset*, *supra*, 42 Cal.4th at p. 1110.) The court concluded that nothing in either the text or the legislative history of the statute indicated "that the Legislature rejected a continuous ownership requirement, or that construing the statute to include such a requirement would be contrary to legislative intent." (*Id.* at p. 1113.)

The *Grosset* court commented that the "instituted or maintained" language "seems to point to a continuous ownership requirement," but this language "does not clearly impose it." (*Grosset*, *supra*, 42 Cal.4th at pp. 1113–1114.) However, the court concluded that "other considerations ultimately support" a continuous ownership requirement. Continuous ownership not only furthers the statutory purpose of minimizing abuse of derivative suits, "but the basic legal principles pertaining to corporations and shareholder litigation all but compel it." (*Id.* at p. 1114.)

"Because a derivative claim does not belong to the stockholder asserting it, standing to maintain such a claim is justified only by the stockholder relationship and the indirect benefits made possible thereby, which furnish the stockholder with an interest and incentive to seek redress for injury to the corporation. [Citations.] Once this relationship ceases to exist, the derivative plaintiff lacks standing because he or she 'no longer has a financial interest in any recovery pursued for the benefit of the

corporation.' " (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) In other words, "allowing a plaintiff to retain standing despite the loss of stock ownership would produce the 'anomalous result that a plaintiff with absolutely no "dog in the hunt" is permitted to pursue a right of action that belongs solely to the corporation.' " (*Ibid*.) The court noted "the vast majority of other jurisdictions that have considered the issue require continuous stock ownership for standing to maintain a derivative lawsuit." (*Ibid*.) Consistent with these courts, the Supreme Court held section 800, subdivision (b) "is properly construed as containing a continuous ownership requirement." (*Id*. at p. 1115.)

The *Grosset* court rejected an argument that involuntary loss of stock should not result in lack of standing. The court stated, " '[p]laintiffs who lose their shares involuntarily have no greater interest in the continued well-being of a corporation than plaintiffs who willingly sell their shares.' " (*Grosset*, *supra*, 42 Cal.4th at pp. 1115–1116.) The Supreme Court commented in dicta that equitable considerations might warrant an exception to a continuous ownership requirement if a merger was fraudulent or used to "wrongfully deprive" a plaintiff of standing, but those issues were not before it. (*Id*. at pp. 1118–1119.)

In *Wolf*, we determined a director who was not reelected to serve on the board of directors lost standing to assert a statutory right to inspect corporate documents. (*Wolf*, *supra*, 185 Cal.App.4th at p. 919.) We rejected an argument that a director's inspection rights continue if he or she was in office when the inspection demand was made and when a lawsuit was filed. "When [the director] lost his seat on the board, he lost standing to assert recognized inspection rights, since they are intended to promote the appropriate exercise of a director's fiduciary duties." (*Id*. at p. 921.)

Wolf cited another decision of our court, *Tritek Telecom, Inc. v. Superior Court* (2009) 169 Cal.App.4th 1385, in which we "discussed the scope of directors' inspection rights, in terms of their intended function of promoting the directors' proper exercise of fiduciary duties to the corporation and shareholders." (*Wolf*, *supra*, 185 Cal.App.4th at p. 916 citing *Tritek*, at pp. 1390–1391 & § 309, subd. (a).) We held that a current director of a corporation "could lose the 'absolute' right to inspect corporate documents" subject to an attorney-client privilege when the director filed a shareholder action that was adverse to the corporation. (*Wolf*, at pp. 918–919 citing *Tritek*, at pp. 1390–1391.) The director's inspection rights were limited "because the director's loyalties [were] divided and documents obtained by a director in his or her capacity as a director could be used to advance the director's personal interest in obtaining damages against the corporation." (*Tritek*, at p. 1391.)

4. *Application*

Using similar prohibitory language as section 800, subdivision (b), section 5710, subdivision (b) states, "no action may be instituted or maintained in the right of any corporation by any member of such corporation" unless certain criteria are met, including the fact that plaintiff "was a member at the time of the transaction or any part thereof of which the plaintiff complains." As suggested by the Legislature, we apply the Supreme Court's interpretation of section 800, subdivision (b) in *Grosset* and similarly conclude section 5710, subdivision (b) requires continuous membership in the nonprofit public benefit corporation to bring a derivative action. As with general corporations, the derivative claim belongs to the nonprofit public benefit corporation.

To determine who constitutes a "member" for purposes of section 5710, subdivision (b), we look to the bylaws of the nonprofit public benefit corporation. In this case, section 3.1 of the Foundation's bylaws provide for only one class of voting members consisting of the individuals who comprise the board of directors. Turner's membership in the Foundation expired when she was not reelected and her term as a director expired. Since she no longer maintains an interest in the Foundation as a member she no longer has a " ' "dog in the hunt" . . . to pursue a right of action that belongs solely to the [nonprofit public benefit] corporation.' " (*Grosset*, *supra*, 42 Cal.4th at p. 1114.)

Likewise, we conclude Turner cannot maintain her causes of action under sections 5142, 5233, or 5223 based on her former position as a director and officer. Other than the Attorney General (or someone granted relator status by the Attorney General), each category of individuals specified in sections 5142 and 5233 is tethered to the corporation as a member, a fiduciary, or someone who holds a definite interest in the assets that are the subject of the charitable trust. Section 5223 allows removal of a director only "at the suit of a director" for "fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty" arising under the statutory scheme. Each of these statutes are derivative in the sense that the gravamen of an action brought by an authorized individual seeks to obtain remedies on behalf of the corporation. (*Grosset*, *supra*, 42 Cal.4th at p. 1108.)

Just as a corporation manages its business and affairs through a board of directors (*Grosset*, *supra*, 42 Cal.4th at p. 1108; § 300, subd. (a)), a nonprofit public benefit corporation also acts through its directors. All "activities and affairs" of a nonprofit public benefit corporation are "exercised

by or under the direction of the board." (§ 5210.) In exercising this power, the directors must "perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (§ 5231, subd. (a).) If a director so performs his or her fiduciary duties, and subject to section 5233, there is "no liability based upon any alleged failure to discharge the person's obligations as a director, including, . . . , any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated." (*Id.* at subd. (c).) Therefore, the powers given to directors and officers under sections 5142, 5233, and 5223 promote the exercise of their fiduciary duties to the nonprofit public benefit corporation and require them to act in the best interest of the nonprofit.

As in *Wolf*, when Turner was not reelected as an officer or director, she no longer had fiduciary obligations to the Foundation and she lost her status and standing to justify continued pursuit of the causes of action on behalf of the Foundation. (*Wolf*, *supra*, 185 Cal.App.4th at p. 919.) Again, she no longer has a " ' "dog in the hunt" ' " to pursue remedies on behalf of the Foundation. (*Grosset*, *supra*, 42 Cal.4th at p. 1114.)[11]

We recognize that our colleagues in the Second District reached a different conclusion in *Summers v. Colette* (2019) 34 Cal.App.5th 361, 364

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11 Because we conclude Turner is not qualified to pursue an action on behalf of the Foundation under section 5142, we need not reach Turner's argument that such an action could be brought against Victoria as trustee, in addition to her role as a director.

and determined a director of a nonprofit public benefit corporation who brought an action alleging self-dealing and misconduct by another director did not lose standing after the board removed her from her position as a director. The *Summers* court also concluded the trial court erred in that case by not granting leave to amend to add the Attorney General as an indispensable party after the plaintiff failed to give proper notice. (*Ibid*.)

We disagree with the *Summers* court's interpretation of the statutory language and legislative history as pointing away from a continuous directorship requirement for standing, for the reasons we have explained. (*Summers*, *supra*, 34 Cal.App.5th at pp. 369–370.) However, we note the *Summers* court was concerned with equitable considerations surrounding the removal of a director and the absence of notice to the Attorney General. These considerations are not before us.

The plaintiff in *Summers* was one of four directors for a nonprofit public benefit corporation. Summers filed an action against the corporation and another director " 'as a director on behalf of' " the corporation for self-dealing and misconduct by the other director. She alleged the other director treated the public benefit corporation " 'as her own personal fiefdom' " and engaged in acts of self-dealing and breaches of fiduciary duty. After Summers confronted the other director about her claims, the other director orchestrated a vote to remove Summers from the board. (*Summers*, *supra*, 34 Cal.App.5th at p. 364, including fns. 1 & 2.) However, the vote was not valid because it did not meet the requirements of the bylaws for a majority vote for involuntary removal. The trial court granted a temporary restraining order enjoining the corporation from conducting board meetings without notice to plaintiff. The board subsequently voted to remove Summers from the board at a properly noticed meeting in which she participated. (*Id*. at p. 365.)

Unlike the *Summers* plaintiff, Turner was not removed as a director under the Foundation's bylaws. She was simply not reelected at the board's annual meeting.

Turner's allegations that the other directors appeared hostile to her, tried to freeze her out, and did not nominate her because she initiated this litigation, are speculative contentions or conclusions of law that do not amount to a material factual pleading that her removal was wrongful. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [we treat a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law"].) "[N]ot being renominated is not exactly the same as being removed, and [the director's] term expired. [A former director's] allegations that [she] was removed for the sole purpose of avoidance of corporate . . . obligations amount only to contentions or conclusions of law that do not withstand demurrer." (*Wolfe*, *supra*, 185 Cal.App.4th at p. 921.)[12]

We are also not persuaded by the *Summer*'s court's analysis of the statutory purpose and public policy. The *Summer*'s court concluded that "a continuous directorship requirement would unnecessarily deprive the

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12 According to the operative pleadings, Turner first objected to the notion of settlement with Prebys's son in September 2016, at the same meeting when she was elected as president of the board. She voted against approving any settlement amount in December 2016. In March 2017, months after a settlement was reached with the son, Turner delivered a demand letter and draft petition challenging the board members' agreement to settle as an improper diversion of Foundation funds. The board took no action against Turner. Even after Turner filed her probate petition in May 2017, the board took no action against her. It was not until the annual board meeting in November 2017, eight months after the board first received a draft petition and more than a year after she first objected to settlement, that Turner was not renominated or elected to serve as an officer or director.

Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue an action under the statutes" (*Summers*, *supra*, 34 Cal.App.5th at pp. 371–372) and minimize the potential for harassing litigation saying, "directors authorized to bring an action on behalf of a nonprofit corporation have been charged with managing the corporation's affairs, and those permitted to maintain and action in the absence of a continuous directorship requirement are sufficiently ' "few in number." ' " (*Id*. at p. 372.) This analysis is too thin a reed upon which to lean in discarding ordinary standing requirements and does not sufficiently protect nonprofit public benefit corporations for reasons we next discuss.

5. *Policy Considerations*

We are mindful of the important contributions nonprofit organizations make to nearly every aspect of American life "whether they are provided by religious institutions, schools and colleges, human and social resource agencies, cultural and arts organizations, medical and scientific research facilities, or humanitarian organizations. In addition to the specific contributions, the sector serves as a counterbalance to government and to the private realm, supplementing their public and private activities, filling in the gaps in services that neither meet, while using its unique position to innovate in delivering services and providing facilities for the general good." (Freemont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation (2004) (hereafter Governing Nonprofit Organizations) p. 1; Blasko, *Standing to Sue in the Charitable Sector* (1993) 28 U.S.F. L.Rev. 37 (hereafter *Standing to Sue*) ["Charities have a profound and positive role in American society"].)

Because the nonprofit sector "is a vital component of our democratic society" it must be "allowed the greatest degree of freedom to operate,

consistent with the need to assure the public of its integrity." (Governing Nonprofit Organizations, at p. 2.) "Philanthropy in the United States has been claimed . . . to be 'our freest enterprise' " and the dominant policy of the states and federal government since colonial times has been to afford freedom of action to the managers and directors of charitable funds, who act on behalf of the charitable entity as fiduciaries. (*Id.* at p. 53.) "The problem faced by the courts in deciding the grounds on which to permit an interested party to bring suit to enforce a charity is, of course, the need to strike the difficult balance between the desire to assure that abuses will be corrected and the desire to permit fiduciaries to function without unwarranted abuse and harassment." (*Id.* at p. 333.)

Since the beneficiaries of charities and nonprofit public benefit corporations are the public at large, the attorney general has historically been "the protector, supervisor, and enforcer" of these organizations. (Bogert's, The Law of Trusts and Trustees (2021) Power to Enforce–Rights on Failure or Breach, § 411. The attorney general as the protector, supervisor, and enforcer of charitable trusts, Governing Nonprofit Organizations, at pp. 54, 301.) The attorney general may pursue cases for breach of duty "as representative of the sovereign, rooted in the common law power of *parens patriae*. It has been traditionally recognized that the suit may be either on the [a]ttorney [g]eneral's own initiative, or on the relation of (ex relatione) an interested citizen who has brought the alleged breach to the attention of the [a]ttorney [g]eneral and demanded action." (Bogert's, § 411, pp. 11-12.) Enforcement primarily by an attorney general addresses pragmatic concerns that "charities would be embroiled in 'vexatious' litigation, constantly harassed by suits brought by parties with no stake in the charity. Trustees who administer a public charity should not be called upon to answer to

private and therefore presumably disinterested, parties. . . . The concern that the corpus of the charity might be dissipated in litigation also has encouraged standing limitations, and for the public good courts try to protect charitable resources so that charitable dollars can be spent on the charity's philanthropic purpose." (*Standing to Sue*, pp. 41–42.)

California law is consistent and gives the Attorney General "primary responsibility for supervising charitable trusts . . . and for protection of assets held by charitable trusts and public benefit corporations." (Gov. Code, § 12598, subd. (a); *Holt*, *supra*, 61 Cal.2d at p. 754 ["the Attorney General has been empowered to oversee charities as the representative of the public"].)

We recognize, however, that there are practical limitations on the resources of the Attorney General to provide investigative oversight of the nearly 114,000 registered charitable organization and additional unregistered organizations holding charitable assets in California. Staffing and funding limitations may prevent the Attorney General from prosecuting all of the complaints it receives. (*Standing to Sue*, at p. 48.) Additionally, political concerns may discourage "investigation of charges against respectable trustees and corporate officers." (*Ibid*.)

The California statutory scheme addresses these practical concerns by allowing litigation on behalf of a public benefit corporation by a defined class of individuals in addition to the Attorney General. The statutes also provide a mechanism for continued protection of the public benefit corporation if someone who was once within the defined class of individuals entitled to litigate on its behalf loses his or her status with the corporation and, thereby, standing.

A public benefit corporation, such as the Foundation, may continue to seek relief for claims of misconduct against its directors through the Attorney

General, or through an individual to whom the Attorney General grants relator status under sections 5142, subdivision (a)(5) and 5233, subdivision (c)(4), even if a qualified individual who initiated suit on behalf of the corporation loses standing during the litigation.[13]

" ' "A relator is a party in interest who is permitted to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official. . . ." ' " (*Arman v. Bank of America, N.T. & S.A.* (1999) 74 Cal.App.4th 697, 705, fn. 12; see Cal. Code Regs., tit. 11, §§ 1–2 (Lexis Advance through Register 2021, No.28, July 9, 2021).) If the Attorney General deems it appropriate to grant relator status to an individual, such as a former director, to litigate the matter on behalf of the public benefit corporation, the relator is responsible for all costs and expenses incurred in the prosecution of the matter. (Cal. Code Regs., tit. 11, § 6.) This is consistent with the common law where relators were liable for costs to protect charities and the state from vexatious suits. (Bogert's, § 411, p. 13.) This cost-shifting mechanism addresses the limited public resources of the Attorney General and operates as a pragmatic check on an individual pursuing his or her personal interests over those of the public benefit corporation.

Moreover, the Attorney General is charged with oversight of the relator proceedings, which serves as an additional check against any retaliatory or harassing litigation tactics by a person who no longer holds a distinct and special relationship with the corporation. (Cal. Code Regs., tit. 11, § 8 ["The Attorney General may at all times, at any and every stage of the said proceeding, withdraw, discontinue or dismiss the [relator's status], as to him

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13 The Attorney General may also seek removal under section 5223, subdivision (b) of any director who breached their duties.

may seem fit and proper; or may, at his option, assume the management of said proceeding at any stage thereof.") "In principle, the use of a relator allows the attorney general to bring suit in absentia–to draw upon private resources for the conduct of the suit, but simultaneously retain ultimate control of the proceeding." (*Standing to Sue*, at p. 49.) California's relator statute and regulations expand "the availability of relator actions . . . , which may encourage 'public spirited citizens' to supplement the attorney general's efforts while still protecting the charity from frivolous suits." (*Id*. at p. 50.)

The Attorney General filed an amicus brief in support of Turner's position on appeal, relying primarily on *Summers*, but without acknowledging the different factual posture presented here. The Attorney General cites practical limitations on the Attorney General's enforcement powers such as lack of resources to investigate every complaint and the ability to become aware of wrongful conduct or be sufficiently familiar with the situation to appreciate its impact. The Attorney General states there is no meaningful distinction between a director who sues on behalf of a nonprofit public benefit corporation and one who sues but is not reelected in terms of their ability to represent the nonprofit public benefit corporation. We are not persuaded by the Attorney General's appellate position.

Unlike in *Summers* or *Holt*, there is no concern here that the Attorney General " 'may not be in the position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact . . . .' " (*Summers*, *supra*, 34 Cal.App.5th 371 quoting *Holt*, *supra*, 61 Cal.2d at p. 755.) Turner informed the Attorney General of her concerns even before she commenced the probate action. As required by statute, the Attorney General had notice of both the probate and civil actions, has been involved in these cases since the beginning, and is well aware of the issues.

After the ruling by the civil court, the probate court inquired about the Attorney General's intention with respect to this matter. The deputy Attorney General stated they were "aware of the allegations being made here, and it is completely on our radar. We have not filed anything. If we are to file something, it would likely . . . be our own petition and complaint." The court asked if the Attorney General would come into the case if Turner was not able to proceed, commenting that the Attorney General "would perhaps be in a position to vindicate the interests of whatever charities lost out of the $15 million . . . ." The deputy Attorney General stated, "If my office does determine that a petition or complaint is necessary, we would absolutely file that." To date, however, the Attorney General has not filed a separate petition or granted Turner relator status.

Where, as here, an individual with statutory standing initiates an action on behalf of a nonprofit public benefit corporation and provides the Attorney General with adequate notice of the matter, we see no public policy concerns with imposing ordinary standing principles if that person loses standing during the litigation. The Attorney General, or someone to whom the Attorney General grants relator status, may step into an existing action or initiate a separate action, if warranted.[14] The Attorney General should not be able to avoid its ongoing obligations to supervise charitable organizations simply because a director begins a lawsuit.

Under our interpretation, the statutory scheme adequately protects the nonprofit public benefit corporation and its beneficiaries from gamesmanship or improper attempts by the accused directors to terminate litigation brought under the statutory scheme. It gives the Attorney General primary

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[14] The Attorney General has 10 years to commence an action from the date of its accrual. (Gov. Code, § 12596, subd. (b).)

responsibility for oversight where it has historically rested, but also allows the Attorney General to grant relator status, if appropriate and in the public interest, to an individual who may continue litigating on behalf of the public benefit corporation. The rules requiring oversight of a relator and requiring the relator to bear the costs, serve as a check against vexatious litigation. This minimizes the risk that a nonprofit public benefit corporation and its directors could become embroiled in expensive retaliatory or harassing litigation by a disgruntled individual who no longer has a "dog in the hunt." (See *Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.* (2003) 111 Cal.App.4th 912, 921 [a purpose of the standing requirement is "to protect a defendant from harassment"].) On the other hand, allowing perpetual standing to an individual who no longer stands in a definite and special relationship with the nonprofit public benefit corporation, such as a director or officer who is constrained by fiduciary duties, would not protect the corporation from suits continued in bad faith or for harassment. A person who is no longer tethered to the charitable organization by such a relationship or acting under the supervision of the Attorney General could divert the board and the organization's resources from the organization's charitable purpose by pursuing litigation for personal interests rather than the best interest of the corporation. (Governing Nonprofit Organizations, at p. 449 [broadening standing rules "will encourage frivolous suits that will divert fiduciaries and deplete charitable funds in the defense of lawsuits" and "encourage disaffected persons . . . or disgruntled members of the public, to use the courts to attempt to force trustees and directors to take desired courses of action."].)

We in no way imply that Turner is a disgruntled or disaffected person who continued this litigation in bad faith after she lost her position as a

director and officer. However, not all nonprofit public benefit corporations are as generously endowed as this one and a significant and potentially devastating risk exists that a person who no longer stands in a definite or special relationship to the charity could engage in harassing litigation tactics to such an extent that it would cripple the organization's ability to fulfill its charitable purpose.

C. *Special Interest Standing*

Finally, Turner contends she has special interest standing to proceed against the trustee based on her role on the Trust's real estate committee. In her operative civil complaint, Turner alleged she "holds a fiduciary role on the Trust's two-member Real Estate Committee" and on this committee she "has authority to decide how the real estate assets comprising the bulk of the residual trust estate are handled, and thus how the Foundation is funded."[15]

At the final hearing before the probate court, Turner's counsel raised the issue of whether Turner's role as a member of the Trust's real estate committee provided her with standing. The court commented that a separate

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15 This allegation is not included in the operative probate petition. However, the restated trust declaration was lodged with a confidential trust coversheet and includes the provisions regarding Turner's appointment to the real estate committee. According to the trust declaration, "The trustee may not sell any real estate assets without the approval of the Real Estate Committee. In addition, the Real Estate Committee shall advise the trustee about the management of real property and related assets." Other than approving the sale of real estate assets, the committee's "role shall be only advisory. The trustee shall still have the fiduciary duty of a trustee under the terms of this instrument and under California law, and the Real Estate Committee shall not be liable to any person for their advice or lack of advice about any trust matter. Correspondingly, the trustee shall not be liable to any person for decisions made by the Real Estate Committee concerning any sale or non-sale of real estate assets."

petition seeking redress could be presented regarding the real estate committee and trust administration. Turner's counsel did not disagree, but asserted that Turner's role on the real estate committee gave her "special interest" standing to proceed with her claims on behalf of the Foundation. Turner concedes she did not fully develop this argument before the probate court.

We do not believe she has developed this argument on appeal either and we are not persuaded she has any special interest to pursue this matter, as currently pled. Turner relies upon the Restatement Third of Trusts, section 94(2), which states, "A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust." She also cites Restatement Third of Trusts, section 94(2), comment g(2), stating the terms of a charitable trust may confer upon individuals other than the beneficiaries the power to enforce a trust or the power to control or advise the trustee and such powers may give the person holding those powers special interest standing to enforce the trust. Finally, Turner cites *Crocker-Citizens National Bank v. Younger* (1971) 4 Cal.3d 202, which involved a trust advisory committee to designate charitable institutions to receive distributions at intervals stated by the trust. (*Id*. at pp. 206–207.) In that case, the court commented that "rules pertaining to the rights and duties of trustees generally would be broadly applicable to trust advisors or other persons holding trust powers, such as the members of the committee herein. 'Trust advisers with powers of direction must be considered fiduciaries.' " (*Id*. at p. 211.) However, it also stated that "trustees are bound by the terms of the trust and possess only that authority conferred upon them by the trust."

(*Ibid.*) The *Crocker-Citizen's National Bank* court ultimately concluded that a committee member's appointment to a trust committee was void as an unlawful deviation from the terms of the trust. (*Id.* at p. 213.)

This smattering of authorities is not helpful. Whether these authorities potentially support an argument that Turner has an advisory role or fiduciary duty to *the Trust* that would enable her to raise concerns with respect to the administration of the trust, is not an issue before us.

The issue before us is whether Turner has a special and definite interest *in the Foundation* to pursue a derivative claim on its behalf. (*Hardman*, *supra*, 195 Cal.App.3d at pp. 161–162.) Turner's role on the Trust's real estate committee simply does not fall within the statutorily defined categories of individuals with a special or definite connection *to the Foundation* who may pursue an action on its behalf under sections 5142, 5233, 5223, or 5710.

The statutes themselves codify and define the categories individuals who have a sufficiently special interest in a nonprofit public benefit corporation to allow them to litigate an action on behalf of the corporation: an officer of the corporation, a director of the corporation, the corporation itself or a member of the corporation, or a person with a reversionary, contractual, or property interest in the assets subject to such charitable trust. (§§ 5142, subd. (a)(1)–(4), 5223, subd. (a), 5233, subd. (c)(1)–4); 5710, subd. (b)(1).)

Bogert's The Law of Trusts and Trustees, section 414, an authority Turner cites for the special interest doctrine, comments that "courts have permitted private individuals, whose positions with regard to the charitable trust were more or less fixed, to sue for its enforcement." The supporting note cites our decision in *Boy Scouts*, saying "plaintiff had standing to bring

the action on behalf of Boy Scouts who were beneficiaries of the trust." (*Id*. at pp. 51–52, citing *Boy Scouts*, *supra*, 14 Cal.App.3d at pp. 195–196.) In *Boy Scouts*, we relied on *Holt*, which permitted minority trustees of a charitable corporation to maintain an action against majority trustees to enjoin a threatened breach of trust. (*Holt*, *supra*, 61 Cal.2d at pp. 756–757.) In both instances, the plaintiffs had a definite interest directly connected to the charitable organization. These authorities also predate the enactment of the statutes pertaining to nonprofit public benefit corporations in California, which, as we have discussed, expanded and defined the scope of individuals who can pursue derivative actions on behalf of nonprofit public benefit corporations, in addition to the Attorney General. A commentator who surveyed authorities from other states noted courts allow standing "to enforce a charity" by a beneficiary, a fiduciary, a trustee, or a director of the charitable corporation. (See Governing Nonprofit Organizations, *supra*, p. 334.) This is consistent with California's statutory scheme.

Turner has not alleged her role on the Trust's real estate committee makes her a fiduciary of *the Foundation* or a beneficiary of its assets. She also does not explain how she could amend her pleadings to allege that her advisory role on the real estate committee gives her any corporate or fiduciary powers *with the Foundation* or any other special connection *to the Foundation's assets* that would allow her to litigate a derivative action on its behalf.[16] Even if the Trust's real estate committee makes financial decisions

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16 " ' "The burden of proving such reasonable possibility is squarely on the plaintiff." ' " (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.) "To satisfy this burden, ' "a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading' " ' by clearly stating not only the legal basis for the amendment,

regarding the Trust's real estate that ultimately result in moneys to fund the Foundation, as currently pled, any connection between Turner's role on the Trust's real estate committee and the Foundation is too attenuated to give Turner special interest standing to continue this action on behalf of *the Foundation*.

DISPOSITON

The judgments are modified to indicate that the dismissals are entered against Turner in her capacity as a former director and officer of the Foundation and, as modified, are affirmed. However, the portions of the judgments denying leave to amend are vacated. The matter is remanded with directions for the probate and civil courts to enter new orders sustaining the demurrers, but granting 60 days leave to amend, limited to the issue of whether a proper plaintiff may be substituted to continue this action consistent with the holdings of this decision. Respondents shall recover their costs on appeal.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

08/17/2021

KEVIN J. LANE, CLERK

By _____ Deputy Clerk

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but also the factual allegations to sufficiently state a cause of action." (*Ibid.*; accord, *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

PROOF OF SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in the County of San Diego, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of 18 and not a party to the within action. My business address is 4401 Eastgate Mall, San Diego, California 92121. On the date set forth below I served the documents described below on the following part(ies) in this action in the manner described below:

PETITION FOR REVIEW

☑ (BY ELECTRONIC SERVICE – CCP § 1010.6; CRC 2060(c)) By the filing of the aforementioned document(s) with the clerk of this court, through the designated E-File Service Provider, TrueFiling. TrueFiling will send email notification of the filing to the parties and their counsel of record who are registered with the court's E-File Service Provider at email address(es) provided to the court.

Clerk
Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101
eservice@capcentral.org

Court of Appeal Case Nos. D076318, D076337

Carolyn Hughes
Sandra Barrientos
Deputy Attorney General
Charitable Trusts Section
California Department of Justice
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Carolyn.Hughes@doj.ca.gov
Sandra.Barrientos@doj.ca.gov
SacAWTTrueFiling@doj.ca.gov

Attorneys for Attorney General, State of California Charitable Trusts

Scott A. Edelman, Esq.
Gibson Dunn & Crutcher LLP
2029 Century Park East, Suite 4000
Los Angeles, CA 90067
sedelman@gibsondunn.com

Attorneys for Respondent, Laurie Ann Victoria

Alexander K. Mircheff, Esq. Megan M. Cooney, Esq. Jillian N. London, Esq. Gibson Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 amircheff@gibsondunn.com mcooney@gibsondunn.com jlondon@gibsondunn.com	Attorneys for Respondent, Laurie Ann Victoria
Robert W. Brownlie, Esq. Brownlie Hansen LLP 10920 Via Frontera, Suite 550 San Diego, CA 92127 robert.brownlie@brownliehansen.com	Litigation Counsel for Respondent, The Conrad Prebys Foundation
S. Andrew Pharies DLA Piper LLP 4365 Executive Drive, Suite 1100 San Diego, CA 92121 Andrew.pharies@dlapiper.com	Litigation Counsel for Respondent, The Conrad Prebys Foundation
Kristen E. Caverly, Esq. Lisa Roper, Esq. Henderson Caverly Pum & Trytten LLP 12750 High Bluff Dr., Suite 300 San Diego, CA 92130 kcaverly@hcesq.com lroper@hcesq.com	Attorneys for Respondent Joseph Gronotte
J. Christopher Jaczko, Esq. Procopio, Cory, Hargreaves & Savitch LLP 12544 High Bluff Dr., Suite 400 San Diego, CA 92130 chris.jaczko@procopio.com	Attorneys for Respondent Gregory Rogers
Sean M. Sullivan Procopio, Cory, Hargreaves & Savitch LLP 525 B Street, Suite 2200 San Diego, CA 92101 sean.sullivan@procopio.com	Attorneys for Respondent Gregory Rogers

Reginald Vitek, Esq. Scott W. Perlin, Esq. Seltzer Caplan McMahon Vitek 750 B Street, Suite 2100 San Diego, CA 92101-8177 vitek@scmv.com perlin@scmv.com	Attorneys for Respondent Anthony Cortes

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Brenda Danziger

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **TEMP-R172Y027**
Lower Court Case Number:

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Jamie D. Robertson	jdrobertson@cooley.com	e-Serve	9/24/2021 7:55:33 PM
Carolyn Hughes	Carolyn.Hughes@doj.ca.gov	e-Serve	9/24/2021 7:55:33 PM
Sandra Barrientos 163808	Sandra.Barrientos@doj.ca.gov	e-Serve	9/24/2021 7:55:33 PM
Scott A. Edelman 116927	sedelman@gibsondunn.com	e-Serve	9/24/2021 7:55:33 PM
Alexander K. Mircheff 245074	amircheff@gibsondunn.com	e-Serve	9/24/2021 7:55:33 PM
Megan M. Cooney 295174	mcooney@gibsondunn.com	e-Serve	9/24/2021 7:55:33 PM
Jillian N. London 319924	jlondon@gibsondunn.com	e-Serve	9/24/2021 7:55:33 PM
Robert W. Brownlie 138793	robert.brownlie@brownliehansen.com	e-Serve	9/24/2021 7:55:33 PM
S. Andrew Pharies	Andrew.pharies@dlapiper.com	e-Serve	9/24/2021 7:55:33 PM
Kristen E. Caverly	kcaverly@hcesq.com	e-Serve	9/24/2021 7:55:33 PM

175070			
Lisa Roper 282152	lroper@hcesq.com	e-Serve	9/24/2021 7:55:33 PM
J. Christopher Jaczko 149317	chris.jaczko@procopio.com	e-Serve	9/24/2021 7:55:33 PM
Sean M. Sullivan 254372	sean.sullivan@procopio.com	e-Serve	9/24/2021 7:55:33 PM
Reginald Vitek	vitek@scmv.com	e-Serve	9/24/2021 7:55:33 PM
Scott W. Perlin 311169	perlin@scmv.com	e-Serve	9/24/2021 7:55:33 PM
Erin C. Trenda 277155	etrenda@cooley.com	e-Serve	9/24/2021 7:55:33 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

9/24/2021

Date

/s/Steven Strauss

Signature

Strauss, Steven (099153)

Last Name, First Name (PNum)

Cooley LLP

Law Firm