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Supreme Court of California
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Case No. S271054

In the

Supreme Court

of the

State 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 CASE NO. 37-2017-00009873-PR-TR-CTL
THE HONORABLE JULIA C. KELETY, DEPT. 503 (APPEAL NO. D076318)

SAN DIEGO COUNTY SUPERIOR COURT • TRIAL CASE NO. 37-2018-00038613-CU-MC-CTL
THE HONORABLE KENNETH J. MEDEL, DEPT. C-66 (APPEAL NO. D076337)

SERVICE ON THE ATTORNEY GENERAL REQUIRED BY PROB. CODE §§ 17200, 17203, CORPS. CODE §§ 5142, 5223 AND 5233, AND RULE OF COURT 8.29(a)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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I. ISSUE PRESENTED

Does an individual who served as an officer, director, and member of a nonprofit public benefit corporation at the time she filed a case on behalf of such a corporation retain standing to pursue the case on behalf of the corporation after the expiration of her term as an officer and director (and, hence, member) of the corporation?

II. INTRODUCTION

Appellant Debra Turner[1] seeks to upend the law of standing. Appellant argues that if she can establish standing to sue on behalf of Respondent The Conrad Prebys Foundation[2] at the start of the case, standing is removed as an issue and she can continue to pursue her alleged claims even after her relationship with the Foundation has ended. The court below rejected this argument as contradicting the statutes defining standing to sue on behalf of nonprofit public benefit corporations and the decisions of this Court that have consistently held that standing to sue is jurisdictional and must be maintained at all times.

The court below thoroughly considered the language and history of the statutes authorizing standing to sue on behalf of nonprofit public benefit corporations, and the law of standing in general. It held Appellant's standing to sue on behalf of the Foundation ended when her association with the Foundation as an officer, director, and member ended. That decision is consistent with the legislature's identification of certain responsible individuals who are statutorily authorized to sue on behalf of nonprofit public benefit corporations. The statutory authorization of responsible individuals reflects policy decisions that balance the need to allow responsible individuals to sue on behalf of nonprofit public benefit corporations with the need to protect such corporations and the volunteers who serve them from abusive litigation, a balance that should be preserved. The Foundation, therefore, asks the Court to affirm that decision.

This case involves an attempt by Debra Turner, a former director, officer, and member of the Foundation, to use claims alleged on the

[1] Hereafter, "Turner" or "Appellant."

[2] Hereafter, the "Foundation."

Foundation's behalf to expel members of the Foundation's Board of Directors,[3] to hold them liable for breach of fiduciary duty, and to bring an action for breach of trust against Laurie Anne Victoria,[4] the trustee of the Conrad Prebys Trust.[5] The claim against the Trustee alleges that she breached her duty to the Foundation, beneficiary of the Trust, by settling litigation threatened by Eric Prebys,[6] the only child of Conrad Prebys,[7] who alleged that his disinheritance from the Trust was, in part, a result of undue influence by Appellant. The claim against the members of the Board alleges that they breached their fiduciary duty to the Foundation by voting in favor of a non-binding, advisory resolution relating to the settlement.

Derivative case standing is limited to prevent third parties from abusing the power to litigate alleged corporate claims to accomplish personal objectives. This case serves as an example of the need to maintain those strict limitations. Unmoored from the constraints of a fiduciary duty, Appellant is attempting to usurp the powers of the Board in order to gain control of the Foundation and to rehabilitate a reputation tarnished by the settlement. The way to prevent Appellant, as well as other similarly situated people, from using nonprofit public benefit corporations to accomplish personal objectives is to ensure that their actions are constrained by a fiduciary duty, an interest in the corporation, or supervision by the Attorney General. Existing law provides such protection.

---

[3] Hereafter, the "Board."

[4] Hereafter, Victoria. When Victoria is referenced in her capacity as trustee of the Trust, she will be referred to as the "Trustee."

[5] Hereafter, the "Trust."

[6] Hereafter, "E. Prebys."

[7] Hereafter, "Decedent" or "Mr. Prebys."

Here, soon after the death of Mr. Prebys, his only child threatened to contest his disinheritance. The grounds asserted by E. Prebys included undue influence by Appellant, who was Mr. Prebys' "life partner" at the time of his death. The Trustee negotiated a settlement of the threatened contest.

The Trustee was the only person authorized by the Trust's terms to determine whether the Trust should litigate or settle the threatened contest. Before agreeing to settle with E. Prebys, the Trustee asked for an advisory vote from the Board of the Foundation, which was the Trust's sole remainder beneficiary, on whether and for what amount the threatened contest should be settled.

At that time, Appellant, Victoria, and three other individuals served on the Foundations' volunteer Board. Appellant was then the Board Chair and President of the Foundation. Over the course of three months, two Board meetings, and discussions outside of the meetings, Appellant argued vociferously that the Trustee should not settle with E. Prebys, taking the position that not one cent from the great wealth amassed by Mr. Prebys during his lifetime should go to settle claims alleging wrongdoing by Appellant.

In addition to Appellant's arguments, the Board considered the potential impact on the Foundation if the Trust litigated with E. Prebys. Those considerations included the time, costs, and distraction of litigation; the merits of the alleged claims; whether the Board members were conflicted regarding the vote; and the delay in the Foundation receiving funding from the Trust, which was then estimated to exceed $1 billion. In the end, and despite her bully pulpit as Board Chair and Foundation President, Appellant was unable to persuade her fellow Board members to

adopt her point of view. The five-person Board voted four-to-one on a resolution recommending a settlement within a particular range. This left it up to the Trustee to decide whether to settle and for what amount.

Unsatisfied with this result, Appellant retained counsel and demanded, among other things, that all the other Board members resign or face a lawsuit that she would bring on the Foundation's behalf. While it was within Appellant's power, as a director, Board Chair and President, to ask the Board and the Foundation to consider her demands, she did nothing.

Two months later Appellant sued, attempting to allege causes of action on the Foundation's behalf. The causes of action were under four statutes in the Corporations Code, allowing an officer, director, or member of a nonprofit public benefit corporation to seek relief on the corporation's behalf.

After filing her case, but unrelated thereto, the terms of all the Foundation's Board members and officers expired. The Foundation held a meeting, chaired by Appellant, to receive nominations and to vote on the Board seats. No one, not even Appellant, nominated Appellant to continue on the Board. No one, not even Appellant, cast a vote in favor of reelecting Appellant as a director or officer of the Foundation. Consequently, Appellant's association with the Foundation ended and she was no longer a director, officer, or member of the Foundation.

Standing is jurisdictional. Generally, standing to sue is only allowed for the real party in interest. However, the legislature, by statute, may allow third parties to assert claims for the real party in interest. Importantly, pleading facts establishing standing at the start of a case is not enough, it must be maintained throughout the case. If standing is lost, the case should be dismissed.

The legislature authorized certain responsible individuals to litigate claims on behalf of nonprofit public benefit corporations in Corporations Code sections 5142, 5233, 5223, and 5710. These persons (in addition to the corporation itself) are limited to some or all of the following, depending on the specific statute: (1) directors; (2) officers; (3) members; (4) individuals with a reversionary, contractual, or property interest in the assets subject to such charitable trust; (5) the Attorney General; and (6) any person granted relator status by the Attorney General.

Each of these responsible individuals has an identifiable relationship to the corporation which serves to protect it from suits filed or continued in bad faith, for harassment, or against the best interests of the corporation. Officers and directors have fiduciary duties to the corporation. A member or person with a revisionary, contractual, or property interest in the assets has an inherent interest to protect the corporation's assets. The Attorney General, by statute, has "primary responsibility for supervising charitable trusts ... and for protection of assets held by charitable trusts and public benefit corporations." A person granted relator status by the Attorney General is subject to the Attorney General's oversight and bears the cost of the litigation.

Contrastingly, the legislature excluded *former* director, officer, or member from the statutory lists of responsible individuals. A former director, officer, or member is untethered by fiduciary duties or any other identifiable relationship with the corporation that could serve as a check against vexatious litigation. This omission is consistent with the statutory framework. The common thread among the persons to whom the legislature gave standing to pursue litigation for nonprofit public benefit corporations is a definite relationship to the corporation that serves as a check against

vexatious litigation. A former director, officer, or member lacks any such relationship and is not bound to do what is in the best interests of the corporation.

Under the statutory scheme, the loss of director, officer, or member status is not a death knell to litigation initiated by such person when she had standing to sue on behalf of the charitable corporation in that capacity. Under the statutes, such former director, officer, or member can ask the Attorney General for relator status. If, upon review of the lawsuit, the Attorney General determines the lawsuit should continue — i.e., that it is in the public interest — the Attorney General can appoint the former director, officer, or member as a relator, and she can continue the litigation in that capacity under the supervision of the Attorney General. Alternatively, the Attorney General can intervene in the litigation to pursue the claims.

As explained below, the holding of the court below — that a director, officer, or member loses standing to continue litigation in such capacity (as opposed to as a relator) when she no longer is a director, officer, or member but can continue if she is granted relator status by the Attorney General — is consistent with the language of the statutes, the jurisdictional requirement under California law that a plaintiff maintain standing throughout the entire litigation, the legislative history of the statutes, judicial interpretation of similar provisions in the General Corporations Law, and public policy. It strikes the right balance of benefiting and protecting nonprofit public benefit corporations by allowing responsible individuals to sue on their behalf while bound by their fiduciary duty to litigate the case in the best interests of the corporation. And, in the event such an individual severs her relationship with the corporation, she can seek relator status and remain subject to the Attorney General's

oversight to prevent the continuation of litigation which is not in the best interests of the corporation.

Here, after multiple rounds of pleadings and demurrers, both the General Civil Division and the Probate Division of the Superior Court agreed with the Foundation and the other demurring defendants, sustaining the demurrers without leave to amend, dismissed the case, and entered judgment against Appellant.[8]

On appeal to the Fourth Appellate District, Division 1, the Court of Appeal affirmed the trial court's holding that Appellant lost standing to continue this action on the Foundation's behalf when Appellant's term as an officer and director (and thus member) of the Foundation expired. The court below modified the judgment "to indicate that the dismissals are entered against [Appellant] in her capacity as a former director and officer of the Foundation," and, as modified, affirmed the judgments. The court vacated the portions of the judgment denying leave to amend.

Consistent with the statutory scheme pursuant to which the Attorney General or a person granted relator status by the Attorney General can litigate a claim on the Foundation's behalf, the court below ordered the remand of the matter "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." That is, the court provides the Attorney General with an opportunity to intervene or, alternatively, for the Appellant to seek relator status to continue the

[8] In the analysis starting at Section IV., below, this brief will refer to the Superior Court, rather than General Civil Division and the Probate Division because the same analysis applies to the decisions made by both divisions of the court.

litigation. Any of the other persons enumerated in Corporations Code sections 5142, 5233, 5223, and 5710 as having standing to litigate a claim on behalf of a charitable corporation could also seek to intervene. Thus, the decision of the court below is consistent with the applicable statutes and the balance struck by the legislature in enacting them.

Indeed, this case exemplifies the need for the safeguards inhibiting the use of derivative claims to settle personal grievances. Appellant concedes she is motivated by her own personal interests, which are not necessarily aligned with the Foundation's interests. In her Opening Brief, Appellant describes her continued interest in the litigation as follows: Appellant "(1) witnessed and objected to the breach at issue; (2) remains potentially personally liable under federal and California law for any gross misconduct at the Foundation occurring during her directorship (liability that persists well after her tenure has elapsed); and (3) faces substantial reputational, emotional, and other harms arising from the same." Each of these issues are personal to Appellant, especially the reputational, emotional, and other unspecified harms to Appellant arising from the settlement of E. Preby's claim that Appellant exercised undue influence over Mr. Prebys in the decision to disinherit his only child. None of these motivations are driven by the best interests of the Foundation.

In using the Foundation to settle her personal grievances, Appellant could easily drag the Foundation (and the other directors) through endless litigation in an effort to redeem her own reputational or emotional harm she maintains she has endured from the settlement, when such continued litigation is not in the Foundation's best interests. Protecting nonprofit public benefit corporations from personal-interest driven litigation is why the relevant statutes grant only the Attorney General and a limited number

of responsible individuals with a special relationship to the nonprofit public benefit corporation standing to litigate on its behalf, and why the well-established California law that standing must be maintained throughout litigation should not be discarded in this context. But insofar as the Appellant's claims have merit, the Court of Appeal's order allows the Attorney General or an individual with relator status to continue it.

The Court of Appeal's decision should be affirmed.

III. STATEMENT OF THE CASE

A. Factual Overview.

The First Amended Complaint ("FAC") is the pleading that is the focus of this appeal. Consequently, the material facts alleged therein will be discussed below.

In December 1982, Mr. Prebys created the Trust. (9 AA 2022-23.) Initially, Decedent served as trustee of the Trust. (9 AA 2017.) The Trust named Victoria as its successor trustee. (9 AA 2018-19.)

Decedent also created a series of gift trusts, each of which were to be funded at Decedent's death with a pecuniary distribution from the Trust. (9 AA 2018.) One of those gift trusts was created for the benefit of Decedent's only child, E. Prebys. (*Id.*) Through a series of amendments in 2014, Decedent reduced the amount of the pecuniary distribution to E. Prebys' gift trust. (9 AA 2026-27.) In late 2014, Decedent revoked E. Prebys' gift trust in its entirety. (9 AA 2026.)

The Foundation is a California nonprofit public benefit corporation. (9 AA 2016.) The Foundation is the Trust's sole remainder beneficiary. (9 AA 2017-18.) The Foundation's specific purpose "is to make distributions and grants to one or more nonprofit organizations . . . to be used by such distributees exclusively for public, religious, charitable, scientific, literary,

or educational purposes, or to make distributions or grants for charitable purposes consistent with the foregoing." (9 AA 2137 [Exhibit 5 to FAC].) The Foundation's voting members are the members of the Board. (9 AA 2016; 9 AA 2122 [Exhibit 4 to FAC].)

At the time the FAC was filed, the members of the Board were Victoria, Joseph Gronotte ("Gronotte"), Gregory Rogers ("Rogers"), and Anthony Cortes ("Cortes"). (9 AA 2016.) Appellant served as the Foundation's President, Board Chair, and as a director until the expiration of her term on November 7, 2017. Appellant no longer holds any of these positions. (9 AA 2016-17.)

Decedent died in July 2016. (9 AA 2016.)

In August 2016, Victoria, in her capacity as trustee of the Trust, became aware that E. Prebys might contest his disinheritance. (9 AA 2030.) In December 2016, E. Prebys' attorney sent a letter to the Trustee that threatened litigation contesting the disinheritance of E. Prebys on the grounds of lack of competency and undue influence exerted by Appellant on Decedent. (9 AA 2030; 9 AA 2175-78 [Exhibit 7 to the FAC].)

In the letter, E. Prebys' counsel wrote that Appellant "exercised influencing actions or tactics," including "isolation from others." (9 AA 2177.) The letter claimed,

> From 2013 to 2016, [Appellant] controlled Conrad's means of communication. Conrad could not use computers, text message, or phone calls to communicate without [Appellant's] control. Thus, it is clear [Appellant] isolated and controlled Conrad's basic communications with his son and others.

(*Id.*) The letter alleged, "[Appellant's] actions resulted in inequitable control over Conrad's estate. … [Appellant's] control over Conrad resulted in an inequitable result to Conrad's intended estate distribution." (*Id.*) Only

Appellant, and no one else, was accused of exerting undue influence and control over Decedent.

At a September 2016 meeting and then a December 16, 2016, meeting of the Foundation's Board, Victoria, along with Attorney James Lauth ("Lauth"), who, among other positions, was Decedent's estate planning lawyer, raised with the Board the potential litigation by E. Prebys against the Trust, as well as the possibility that Victoria, in her capacity as Trustee, might try to settle with E. Prebys. (9 AA 2030-37.) The Trustee was the only person authorized to enter into a settlement on the Trust's behalf. (9 AA 2091 [Exhibit 1 to FAC].)

In those meetings and in conversations outside the meetings, the Board members, including Appellant, discussed the merits of E. Prebys' claims, the time that would be consumed by a "lengthy trial," the cost of litigation, the potential that such litigation may delay the receipt of funding from the Trust, and whether the directors were conflicted regarding the vote. (9 AA 2030-38.) Throughout, Appellant argued vociferously against recommending settlement at any amount. (*Id.*) Although the Foundation lacked the authority to settle claims on behalf of the Trust, the Foundation's Board, in an advisory vote, indicated that a settlement by the Trustee of up to $12 million plus taxes would be appropriate. (9 AA 2037.) The advisory vote was passed four-to-one with Appellant dissenting. (9 AA 2038.)

Appellant alleges that on March 1, 2017, she "made a proper demand on the Board pursuant to section 5710 of the Corporations Code." (9 AA 2040; 9 AA 2180-81 [Exhibit 8 to the FAC].) The alleged demand was prepared by counsel. (9 AA 2180-81.) At this time, Appellant was still President and Board Chair of the Foundation. (9 AA 2016, 2040.) Appellant, thus, had the authority to cause the Foundation to investigate the

allegations in her demand and to ask the Board to vote on her demand. Despite having counsel, who presumably could advise her on such matters, Appellant did nothing. Instead, she simply filed her original case on May 15, 2017. (9 AA 2016, 2040-41.)

B. Relevant Procedural History.

On May 15, 2017, Appellant filed a petition in the Probate Division, asserting claims on behalf of the Foundation under Corporations Code sections 5142(a), 5223(a), 5233(c), and 5710(b). (1 AA 16-55.) At that time, Appellant was a director of the Foundation and also its President. (1 AA 18.)

On January 5, 2108, Appellant filed a second amended petition ("SAP"), again alleging claims on behalf of the Foundation under the same statutes. (3 AA 16-568.) Before filing the SAP, Appellant's term as an officer and director expired. (3 AA 522, 543-44.) At a November 7, 2017 meeting at which Board nominations and elections took place, Appellant was neither nominated nor elected to serve another term. (*Id.*)

The Foundation and the other respondents named in the SAP demurred. The Foundation's demurrer was limited to the issue of Appellant's standing to proceed with claims on its behalf. (3 AA 774-76.) After the demurrer was fully briefed and argued, the Probate Division issued an order severing the First through Fourth Causes of Action alleged in the SAP and transferring them to the General Civil Division to be presented in a newly filed complaint. (3 AA 1006-14.) The severed and transferred causes of action attempted to allege causes of action on the Foundation's behalf under Corporations Code sections 5142, 5223, 5233, and 5710. (3 AA 546, 547, 549, 555.) The Probate Division then stayed the

remainder of the case before it pending the resolution of the transferred and severed causes of action. (3 AA 1006-14.)

On August 2, 2018, Appellant filed a complaint in the General Civil Division re-alleging the transferred and severed causes of action. (7 AA 1441-83.) Appellant alleged that she "was a director, officer and a member of the Foundation at the time of the acts of which Plaintiff complains and at the time she initiated the Probate Action on May 15, 2017." (7 AA 1444.) Appellant did not allege that she was a director, officer, or a member of the Foundation when she filed this complaint.

The Foundation and the other defendants demurred. Again, the Foundation's demurrer was limited to the issue of Appellant's standing to proceed with claims on its behalf. (8 AA 1803-05.) After the demurrers were fully briefed and oral argument, the court sustained them with leave to amend. (8 AA 2007-09.)

On February 14, 2019, Appellant filed a first amended complaint ("FAC"). (9 AA 2012-58.) The Foundation and the other defendants demurred. The Foundation's demurrer was again limited to Appellant's standing to sue on its behalf. (9 AA 2229-31.)

After the matter was fully briefed and a lengthy oral argument, the General Civil Division sustained the demurrers without leave to amend. (10 AA 2458-63.) Before the briefing on the demurrers was completed and the subsequent oral argument, the Second District Court of Appeal issued its decision in *Summers v. Colette* (2019) 34 Cal.App.5th 361 (*Summers*), which the trial court declined to follow.

The case was then returned to the Probate Division, where the court sustained, without leave to amend, the demurrers to the remaining causes of action in the SAP. (5 AA 1278-79.)

Turner's consolidated appeal followed. The Attorney General filed an amicus brief supporting Turner's standing to continue the litigation, relying on *Summers*. The Fourth District affirmed the judgments. *Turner v. Victoria* (2021) 67 Cal.App.5th 1099, 1135 (*Turner*). The Fourth District distinguished *Summers*, noting that *Summers* "was concerned with equitable considerations surrounding the removal of a director and the absence of notice to the Attorney General" which were not before the Fourth District in this case, 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[.]" (*Turner*, *supra*, 67 Cal.App.5th at p. 1129.)

On November 10, 2021, this Court granted review.

IV. STANDING IS JURISDICTIONAL AND AN IMPORTANT ISSUE IN DERIVATIVE ACTIONS

"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.) "'*To have standing, a party must be beneficially interested in the controversy* ….'" (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 599, emphasis in original and quoting *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314–15.) Thus, a plaintiff "must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.'" (*Ibid.*) "[I]f the plaintiff has a cause of action in his own right, and he pursues it in his own name, [standing] poses no obstacle to the maintenance of the action." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 991; *see also* Code Civ. Proc., § 367 ("Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."))

A. Appellant is Not the Real Party in Interest.

"A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law." (*Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.* (2003) 111 Cal.App.4th 912, 920–21.) Appellant admits that through this action, she seeks to enforce rights belonging to the Foundation and to bring claims derivatively on its behalf. (Appellant's Opening Brief ("AOB") at p. 19.) Appellant, thus, is not the real party in interest.

The Foundation, as the real party in interest, has a right to challenge Appellant's standing to sue on its behalf. "[W]hile the corporation cannot 'challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit,' it 'may assert defenses contesting the plaintiff's right or decision to bring suit, such as asserting the … plaintiff's lack of standing ….'" (*Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 239, citation omitted; accord *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1005, *as modified on denial of reh'g* (Nov. 21, 2008).)

B. Standing to Sue for a Third Party Must be Authorized by Statute.

"'As a general rule, a third party does not have standing to bring a claim asserting a violation of someone else's rights.'" (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 499, *as modified (Nov. 28, 2018), review denied* (Feb. 27, 2019), quoting *Brenner v. Universal Health Services of Rancho Springs, Inc.* (2017) 12 Cal.App.5th 589, 605.) Thus, standing is an issue "when a plaintiff attempts to assert *the rights of third parties*." (*Jasmine Networks, Inc.*, *supra*, 180 Cal.App.4th at p. 991, emphasis in original.) When a plaintiff "seeks to assert the rights of others *instead of* his own … the question may properly arise whether his

action is barred by a lack of 'standing.'" (*Id.* at p. 992, emphasis in original.)

When an individual is not the real party in interest, standing must be provided by statute. (Code Civ. Proc., § 367; *see Jasmine Networks, Inc.*, *supra*, 180 Cal.App.4th at p. 992.) "[A] plaintiff suing under a particular statute … must show that it is among those with 'a statutory right to relief.'" (*San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 739.) Courts strictly apply statutory standing rules. (*See Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 917.)

C. Standing is an Issue of Particular Concern When Corporate Claims are Asserted Derivatively.

Where, as here, an individual attempts to assert corporate claims derivatively, standing is a matter of particular concern for two reasons.

First, derivative claims, by their nature, seek to usurp the authority of the corporation's board of directors. "The authority to manage the business and affairs of a corporation is vested in its board of directors …." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108; *see also* Corp. Code, § 5210 ("the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board").) "This includes the authority to commence, defend, and control actions on behalf of the corporation." (*Id.*) The fundamental purpose of a derivative suit is to provide a means by which a plaintiff with standing may seek to enforce the rights of a corporation when the corporate board refuses or fails to do so. (*Id.* at p. 1114.) Thus, in a derivative suit, the

plaintiff seeks the extraordinary right to displace the board's authority. (*South v. Baker* (Del. Ch. 2012) 62 A.3d 1, 13.)[9]

Second, there is a "well-known potential for abuse and harassment in derivative actions, which are often brought by plaintiffs for reasons of their own and contrary to the best interests of the corporation they purport to represent." (*Condren v. Slater* (N.Y. App. Div. 1981) 85 A.D.2d 507, 508.) Thus, the strict standing rules for derivative cases are intended, in part, to curb the potential for abuse by the plaintiff bringing the case. (*See, e.g., Kamen v. Kemper Financial Services, Inc.* (1991) 500 U.S. 90, 95–96 ("To prevent abuse of this remedy, however, equity courts established as a precondition 'for the suit' that the shareholder demonstrate 'that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions.'"); *Apple Inc.*, *supra*, 18 Cal.App.5th at p. 232 (the pre-suit demand is required "in order to curb potential abuse"); *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790 ("The demand requirement is also intended to prevent the abuse of the derivative suit remedy.")) As this Court has explained, "the continuous ownership rule [which requires a plaintiff to maintain its relationship with the corporation throughout the case] aims to 'prevent the abuses frequently associated with a derivative suit.'" (*Grosset*, *supra*, 42 Cal.4th at p. 1109, quoting *Lewis v. Anderson* (Del. 1984) 477 A.2d 1040, 1046.)

[9] California and Delaware law regarding derivative suits and a board's authority to manage a corporation's affairs are largely in accord. (*See Grosset*, *supra*, 42 Cal.4th at p. 1119; *Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1621.) Further, in the absence of any California cases on point, California courts look to how other jurisdictions have dealt with an issue, such as Delaware on matters of corporate law. (*See Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1190, *as modified on denial of reh'g* (Oct. 14, 1998).)

D. In All Cases, Standing Must be Maintained Through Entry of Judgment.

In every case, not just derivative cases, standing must be maintained throughout the litigation. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233–34.) "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." (*Ibid.*; accord *Pae v. Select Portfolio Servicing, Inc.* (N.D. Cal., Jan. 5, 2016, No. 15-CV-01132-BLF) 2016 WL 7664286; *Wolf*, *supra*, 185 Cal.App.4th at p. 916; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345.) Standing is a jurisdictional issue and may be raised at any time in the proceeding. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.) Thus, "[i]t is elementary that a plaintiff who lacks standing cannot state a valid cause of action …." (*McKinny v. Oxnard Union High School Dist. Bd. of Trustees* (1982) 31 Cal.3d 79, 90.)

E. A Change of Circumstances Can Lead to a Loss of Standing.

"A plaintiff may lose standing where an actual controversy existed 'but, by the passage of time or a change in circumstances, ceased to exist.'" (*Wolf*, *supra*, 185 Cal.App.4th at p. 916–17.)

Weatherford v. City of San Rafael (2017) 2 Cal.5th 1241 is instructive. *Weatherford* involved a taxpayer suit in which this Court issued a ruling that clarified the types of taxes that must be paid in order to have standing under Code of Civil Procedure section 526a. (*Weatherford*, *supra*, 2 Cal.5th at p. 1245.) Section 526a, among other things, allows an action against any officer, agent or other person acting on behalf of any county, town, city, or city and county of the state "by a citizen resident therein." (*Id.* at p. 1246.) The Court noted that after oral argument, plaintiff's counsel

informed the court that the plaintiff moved out of California. (*Id.* at p. 1245 n.2.) The Court acknowledged that while the plaintiff's departure from the state may have rendered the appeal moot, the Court elected to retain jurisdiction over the matter "to resolve a potentially recurring question of public importance." (*Ibid.*) Nevertheless, the Court noted that "on remand, the superior court may consider what effect, if any, Weatherford's decision [to move] has on her ability to continue this lawsuit." (*Ibid.*)

While *Weatherford* did not rule on the precise issue before the Court, it shows that if a plaintiff's status that gives rise to standing to bring a case changes during the course of litigation, plaintiff's ability to continue with the lawsuit is impacted. This is consistent with the Court's holding in *Californians for Disability Rights* that standing must be maintained throughout the duration of the case. (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 233–34.)

V. *TURNER* CORRECTLY HELD THAT APPELLANT LACKS STANDING UNDER THE RELEVANT STATUTES

Appellant argues she has standing to sue on the Foundation's behalf under Corporations Code sections 5142, 5223, 5233, and 5710(b). "'The prerequisites for standing to assert statutorily-based causes of action are to be determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute. [Citation.]'" (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1127.) The court "must begin by considering the statute's language and structure, bearing in mind that [its] fundamental task in statutory interpretation is to ascertain and effectuate the law's intended purpose." (*Weatherford*, *supra*, 2 Cal.5th at p. 1246.)

Corporations Code section 5142 gives standing to bring an action for breach of charitable trust to the corporation, a member of the corporation,

an officer of the corporation, or a director of the corporation. (Corp. Code, § 5142, subd. (a).) Section 5142 also allows gives standing to the Attorney General or any person granted relator status by the Attorney General. (*Id.*)

Corporations Code section 5223 provides that the superior court may, at the suit of a director, remove another director from a board for fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty imposed by statute. (Corp. Code, § 5223, subd. (a).)

Corporations Code section 5233(c) gives standing to bring an action to challenge an "interested director" transaction to the corporation, a member of the corporation, a director of the corporation, or an officer of the corporation. (Corp. Code, § 5233, subd. (c).) Like section 5142, it also allows the Attorney General or any person granted relator status by the Attorney General to sue. (*Id.*)

Corporations Code section 5710(b) provides, in part, "[n]o action may be instituted or maintained in the right of any corporation by any member[10] of such corporation unless" certain conditions are met. (Corp. Code, § 5710, subd. (b).) Section 5710(b), thus, in some circumstances provides standing to members of a nonprofit public benefit corporation to bring a derivative claim on behalf of the corporation.

A. The Statutory Text and Judicial Precedent Establish Appellant's Lack of Standing.

Turner correctly concluded that based on the statutory text and California precedent, Appellant lost standing under these statutes when her term as an officer and director expired and she ceased to be a member of

[10] The members of the Board are the Foundation's members. (9 AA 2016; 9 AA 2122 [Exhibit 4 to FAC].)

the Foundation.[11] To have standing, Appellant must be an officer, a director, or a member of the Foundation, and at the time the trial court dismissed the derivative claims for lack of standing, Appellant held none of these positions.

This Court's decision in *Grosset*, *supra*, 42 Cal.4th 1100, is instructive. *Grosset* held that Corporations Code section 800, which permits shareholders of for-profit corporations to bring derivative suits, imposes a "continuous ownership" rule for standing. (*Id.* at p. 1107.) The relevant language in section 800 is nearly identical to the relevant language in section 5710 discussing when a member can bring a derivative suit on behalf of a nonprofit public benefit corporation. (*Compare* Corp. Code, § 800, subd. (b) *with* Corp. Code, § 5710, subd. (b).) Section 800 reads "[n]o action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares or of voting trust certificates of the corporation unless" certain conditions are met. (Corp. Code, § 800, subd. (b).) The plaintiff in *Grosset* was a shareholder when he filed the derivative action, but lost shareholder status when required to sell his stock as part of a merger. (*Grosset*, *supra*, *Grosset*, *supra*, 42 Cal.4th at p. 1104.)

Grosset held that the plaintiff lost standing to continue the derivative action once he was no longer a shareholder, concluding that nothing in 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." (*Grosset*, *supra*, 42 Cal.4th at p. 1113.) Moreover, the Court concluded

[11] Because the Foundation's directors are its members, Appellant ceased to be a member when her term as a director expired.

"[n]ot only does a requirement for continuous ownership further the statutory purpose to minimize abuse of the derivative suit, but the basic legal principles pertaining to corporations and shareholder litigation all but compel it." (*Id.* at p. 1114.)

The Court explained "[b]ecause 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." (*Ibid.*) Therefore, once this relationship ceases to exist — even if the loss of status is involuntary — the derivative plaintiff lacks standing to proceed with the derivative claim. (*Id.* at p. 1114–15.)

Turner is also consistent with the Fourth District's holding in *Wolf v. CDS Devco* that 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.) As the court explained in that case, "[w]hen [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.)

The legal principles pertaining to derivative suits discussed in *Grosset* and *Wolf* apply equally to nonprofit public benefit corporations. An on-going relationship with the entity as a member, or as an officer or director, provides a derivative plaintiff with a sufficient interest in nonprofit public benefit corporation to justify standing to sue on the entity's behalf. This continuous relationship requirement also helps protect the corporation and its volunteer board members from abuse by personal grievances

litigated under the guise of a derivative suit. (*See Grosset*, *supra*, 42 Cal.4th at p. 1114.) When the relationship to the nonprofit public benefit corporation ends, as in Appellant's case, standing ceases.

Such a result is consistent with *Holt v. Coll. of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, 757 (*Holt*). *Holt* rejected the argument that statutes then in effect gave only the Attorney General the authority to enforce a charitable trust administered by a nonprofit corporation, stating that although the Attorney General had "primary responsibility" for enforcement, "responsible individuals" could also sue on behalf of the charitable corporation. (*Id.* at p. 755.) In concluding that directors or trustees of the charitable corporation could bring derivative suits on behalf of the trust, the Court emphasized that directors "are fiduciaries in performing their trust duties." (*Id.* at p. 756.) Fiduciary duties require a director to act "in good faith, in a manner that director believes to be in the best interests of the corporation." (Corp. Code, § 5231, subd. (a).) Thus, while recognizing the need for "protection of charities from harassing litigation[,]" the Court found this consideration "'inapplicable to enforcement by the fiduciaries who are both few in number and charged with the duty of managing the charity's affairs.' [Citation.]" (*Holt*, *supra*, at p. 755.)

However, "former directors owe no fiduciary duties." (*In re Walt Disney Co. Derivative Litigation* (Del. Ch. 2005) 907 A.2d 693, 758, *aff'd* (Del. 2006) 906 A.2d 27; accord *Wolf*, *supra*, 185 Cal.App.4th at p. 919.) Thus, *Turner*'s conclusion that Appellant lost standing to sue on the Foundation's behalf once her fiduciary duties as a director ended does not conflict with *Holt*.

B. *Turner* is Consistent with the Statutes' Purpose.

Nonprofit corporations make positive and valuable contributions to society. (*Turner*, *supra*, 67 Cal.App.5th at p. 1131 [citing Blasko, Mary Grace Blasko et. al., *Standing to Sue in the Charitable Sector* (1993) 28 U.S.F. L. Rev. 37 ["*Standing to Sue*"].) 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, and by statute has "[t]he primary responsibility" for supervision and enforcement. (Gov. Code, § 12598.) Placing primary responsibility with the Attorney General addresses pragmatic concerns that if the public at large had standing to bring suit, "charities would be embroiled in 'vexatious' litigation, constantly harassed by suits brought by parties with no stake in the charity." (*Turner*, at p. 1131 [quoting *Standing to Sue*, pp. 41-42].)

The harm that unwarranted litigation does to nonprofit corporations is well recognized. The United States Congress was sufficiently concerned with such risks to pass the Federal Volunteer Protection Act of 1997, codified at 42 U.S.C. § 14501. Congress recognized that "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them" and that "as a result, many nonprofit public and private organizations … have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities[.]" (42 U.S.C. 14501(1), (2).) Congress also noted that the negative impact of "high liability costs and unwarranted litigation costs" on nonprofit organizations. (42 U.S.C. 14501(6).) Congress thus acted to "clarify[] and limit[] the liability risk assumed by volunteers" in the face of "the

legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits." (42 U.S.C. § 14051(7).)

As a practical matter, however, the Attorney General's limited resources may prevent prosecution of all complaints received, even those that are meritorious. The California legislature addressed this problem by allowing, in addition to the Attorney General, a defined class of responsible individuals with a special and definite relationship to the nonprofit public benefit corporation to litigate on its behalf. (*See* Corp. Code, § 5142, subd. (a); § 5233, subd. (c).) Granting standing only to such persons reduces the risk that "the corpus of the charity might be dissipated in litigation" and "protect[s] charitable resources so that charitable dollars can be spent on the charity's philanthropic purpose." (*Turner*, *supra*, 67 Cal.App.5th at p. 1131 [quoting *Standing to Sue*, at pp. 41-42].)

As *Turner* recognized, the statutes also provide a mechanism for continued litigation of a derivative action if — as occurred here — someone who was once within the defined class of individuals entitled to litigate on a corporation's behalf loses his or her relationship to the corporation and, thereby, standing. (*Turner*, *supra*, 67 Cal.App.5th at p. 1131.) In such event, the Attorney General could grant the formerly qualified person, or another individual, relator status to continue pursuing the derivative claims. The relator is responsible for all costs and expenses incurred in the prosecution of the matter. (Cal. Code Regs., tit. 11, § 6.) This cost-shifting mechanism addresses the limited public resources of the Attorney General. And because the Attorney General must grant relator status and retains ultimate control over the litigation, the statutory framework provides a check against an individual who may seek to use derivative claims to pursue actions furthering his or her personal interests to

the detriment of the public benefit corporation. (*See* 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 may seem fit and proper; or may, at his option, assume the management of said proceeding at any stage thereof.]."")

Insofar as *Holt* sought to relieve the burden on the Attorney General to supervise California's nonprofit corporations, the statutory scheme does that. It is therefore not necessary, nor justifiable, to read into these statutes an exception to the requirement that standing must be maintained at all times. (*See Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 233–34.) Appellant's proposed reading of the statues upsets the balance the legislature has struck in authorizing derivative suits while limiting standing to bring them.

As *Turner* explained, regardless of whether Appellant is pursuing this particular action in bad faith, Appellant's interpretation of the standing requirements poses "a significant and potentially devastating risk [] 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." (*Turner*, *supra*, 67 Cal.App.5th at p. 1135.)

C. *Turner* Properly Rejected Appellant's Proposed Statutory Interpretation.

Appellant's argument that *Turner* was wrongly decided relies on and tracks the Second District's reasoning in *Summers*, *supra*, 34 Cal.App.5th at p. 364.) *Summers* is factually distinguishable. There, the plaintiff was twice removed as director in retaliation for the derivative claims she alleged against the defendant. (*Id.* at p. 364–65.) Unlike the plaintiff in *Summers*,

Appellant was not "ousted" in retaliation for attempting to bring derivative claims. After she filed this lawsuit, Appellant's term as an officer and director expired and she was not reelected, but she did not nominate herself for reelection nor challenge the validity of the election. (3 AA 522, 543-44.)

Moreover, Appellant and *Summers*' interpretation of the relevant statutes and applicable judicial interpretation is flawed. To the extent *Summers* holds that a plaintiff who is an officer, director, or member of a charitable corporation at the time of filing derivative litigation under Corporations Code sections 5142, 5223, and 5233 has perpetual standing to pursue derivative action on the corporation's behalf if he or she subsequently ceases to hold a qualifying position, *Summers* is wrongly decided and should be overturned.

1. Appellant's Parsing of Language is Inconsistent with *Grosset.*

Appellant, as did the Second District in *Summers*, focuses on a couple of phrases in the statutes — "bring an action" and "at the suit of a director." (*Summers*, *supra*, 34 Cal.App.5th at p. 368–70.)[12] Appellant, like *Summers*, asserts that these terms only speak to the commencement of a case and thus establish that a plaintiff is not required to remain a director or officer throughout a case to have standing. (AOB at pp. 29-30.) *Summers* noted that section 5710, like Corporations Code section 800 examined by *Grosset*, uses the words "instituted or maintained," which are not found in sections 5233 and 5142. (*Summers*, *supra*, 34 Cal.App.5th at p. 370) It then concluded, "the absence of something comparable to the phrase, 'or maintained,' in sections 5233 and 5142 points away from a continuous

[12] AOB at pp. 29-30.

directorship requirement in the same way that the phrase's presence in section 800 'points to' a continuous stock ownership requirement." (*Ibid.,* citing *Grosset*, *supra*, 42 Cal.4th at p. 1113.)

This is inconsistent with *Grosset. Grosset* observed that standing statutes identify what must be alleged in a complaint to establish standing at the outset of a case. (*See Grosset*, *supra*, 42 Cal.4th at p. 1113.) The Court then explained "the failure to explicitly address an issue that might later arise during the pendency of an action, such as the loss of the plaintiff's stock, is hardly surprising." (*Ibid.*)[13] The Court also noted that while Delaware imposed a continuous ownership rule, the Delaware derivative suit statute (like Corporations Code sections 5233 and 5142) only speaks to the commencement of the derivative suit. (*Id.* at p. 1108–09, quoting Del. Code, tit. 8, § 327.) Thus, a statute's statement of what must be pled to establish standing at the start of a case does not mean that a plaintiff cannot later lose standing if circumstances change.

Further, *Grosset* did not rely on the "or maintained" language in finding a continuous ownership requirement since at least one other California appellate decision found that the term "'maintained' was intended to 'allow one who, by operation of law, becomes an owner of shares which already are the basis of a derivative action, to continue that litigation.'" (*Grosset*, *supra*, 42 Cal.4th at p. 1113–14, quoting *Gaillard v. Natomas Co.* (1985) 173 Cal.App.3d 410, 415.) Instead, *Grosset* held "other considerations" ultimately supported a continuous ownership

[13] Indeed, pleading standing in a complaint does not resolve and remove the issue of standing from the case. Instead, a defendant's answer places in issue whether the plaintiff has standing, requiring factual determination later in the case, including at trial. (*See Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 758.)

requirement, including "further[ing] the statutory purpose to minimize abuse of the derivative suit," and "the basic legal principles pertaining to corporations and shareholder litigation all but compel it." (*Id.* at p. 1114.)

Appellant essentially concedes that the presence or absence of language like "or maintained" is inconclusive as to whether a continuous directorship or membership requirement exits under a standing statute. Despite taking the position (as did *Summers*) that the lack of words like "or maintained" in Sections 5142 and 5233 means there is no continuous directorship requirement to have standing under those sections (AOB at pp. 36-37), Appellant later argues that the phrase "or maintained" in Section 5710 does not clearly indicate a continuous membership requirement to have standing under that section. (AOB at p. 64 [citing *Grosset*, *supra*, 74 Cal.4th at pp. 1110, 1114].)

2. Appellant Misconstrues *Holt*, Which *Turner* Properly Applied.

Turner does not conflict with *Holt. Holt* held that directors or trustees could sue on behalf of a charitable trust under the statutes then in existence. (*Holt*, *supra*, 61 Cal.2d at p. 755.) *Turner* correctly noted that *Holt* "relied on the special interest the trustees had as fiduciaries to the charitable corporation" and the fact that the trustees "'are fiduciaries in performing their trust duties.'" (*Turner*, 67 Cal.App.5th at 1099 [quoting *Holt*, at p. 756].) *Holt* supports *Turner's* conclusion that Appellant, who is not an officer, director, or member of the Foundation, has no standing to sue on the Foundation's behalf.

In contrast, Appellant, as did *Summers*, mistakenly focuses solely on *Holt*'s finding that "'[t]here is no rule or policy against supplementing the Attorney General's power of enforcement by allowing other responsible

individuals to sue in behalf of the charity.'" (*Summers*, *supra*, 34 Cal.App.5th at 371 [quoting *Holt*, *supra*, 61 Cal.2d at p. 755].) Appellant ignores that under *Holt*, "responsible individuals" are those acting in furtherance of their fiduciary duties. *Holt* stated: "The protection of charities from harassing litigation does not require that only the Attorney General be permitted to bring legal actions in their behalf. This consideration '... is quite inapplicable to enforcement by the fiduciaries who are both few in number and charged with the duty of managing the charity's affairs.'" (*Holt*, *supra*, 61 Cal.2d at p. 755.)

Fiduciary duties serve as a check against the potential for abuse of derivative litigation to settle personal scores, but such duties are not owed by former directors and officers. (*See Wolf*, *supra*, 185 Cal.App.4th at p. 919; *In re Walt Disney Co. Derivative Litigation*, *supra*, 907 A.2d at p. 758.) A former director, like Appellant, is not acting in furtherance of fiduciary duties to the Foundation and is not a "responsible individual" as contemplated by *Holt*.[14]

Simply because a case was initiated by an individual serving as a director at the time a case was filed does not remove concerns about vexatious or harassing litigation if the plaintiff later ceases to be bound by fiduciary duties to the corporation. Concern that Appellant might be driven by personal motivations rather than the Foundation's best interests is warranted here, given that derivative claims arise out of the Board's allegedly wrongful vote to settle claims of wrongdoing by Appellant

[14] In cases involving for-profit corporations, courts point to the indirect financial interest of a shareholder bringing a derivative suit as a moderating force, similar to the moderating force supplied by the fiduciary obligations of a nonprofit officer or director. (*See Grosset*, *supra*, 42 Cal.4th at p. 1114.)

herself.[15] Such an assumption is also inconsistent with *Grosset*, in which the change of circumstances caused by a plaintiff's loss of stock in a company eliminated the plaintiff's interest in the case and therefore standing to proceed. (*Grosset*, *supra*, 42 Cal.4th at p. 1115–16.)

3. Appellant's Reliance on Other States' Law and Nonbinding Sources is Misplaced.

Appellant's argument based on Arizona and New York decisions is misplaced as the law of standing in Arizona and New York is fundamentally different from California law. (*See* AOB at pp. 56-59.) *Summers* did the same, citing these out of state decisions despite acknowledging that in Arizona and New York, standing is merely a "waivable rule of judicial restraint," while standing in California is jurisdictional and may be raised at any time in the proceeding. (*Summers*, *supra*, 34 Cal.App.5th at p. 373; *Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 233–34.)

Likewise, Appellant's point that under the American Bar Association's 1987 Revised Model Nonprofit Corporation Act ("RMNCA"), 2008 RMNCA, and 2021 Draft Revision of the RMNCA, a plaintiff need only be a director or member at the time of bringing a derivative action to have standing is unpersuasive. (AOB at p. 59.) The RMNCA is not California law nor binding in the interpretation of California law. In California, "[f]or 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." (*Californians for Disability Rights*,

[15] Little imagination is needed to conceive of a situation in which a disgruntled nonprofit board member may seek to retaliate against her former colleagues on the board for something as mundane as not being renominated to serve another term on the board by filing a derivative claim just before the board member's term ends.

supra, 39 Cal.4th at p. 233–34.) Standing can be lost through "the passage of time or a change in circumstances." (*Wolf*, *supra*, 185 Cal.App.4th at p. 916–17.) The RMNCA's standing provisions are of no relevance since they conflict with *Californians for Disability Rights*, other California decisions on standing, and they were never adopted by the California legislature.

Appellant's reliance on the Restatement of Charitable Nonprofit Organizations ("Restatement") and its discussion of other states' law is also unavailing. (AOB at pp. 59-60.) Section 6.02 of the Restatement allows "a former member of the board of the charity who is no longer a member for reasons related to that member's attempt to address the alleged harm to the charity[.]" (Restatement, § 6.02.) This section is inapplicable here since the end of Appellant's directorship was a result of the expiration of her term, not retaliation for filing of the lawsuit. Moreover, the Restatement, like RMNCA, is not controlling law in California.

State legislatures strike differing balances in authorizing standing to derivative actions and limiting who has standing to pursue them. (*See* Restatement, § 6.02, general comments.) The Restatement acknowledges that while derivative actions have value, a derivative action "may undermine the authority of the charity, its board, or its membership" and "use resources that are better spent advancing the charity's purposes." (*Ibid.*) Circumscribing standing to pursue derivative actions serves to "protect charitable assets from being depleted by vexatious, wasteful lawsuits, and to allow charities to manage themselves within the confines of the law." (*Ibid.*, general comments.) While some states grant standing to former directors, California has limited standing under the statutes at issue to officers, directors, and members, and in all cases, requires standing be

maintained through judgment. (*See Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 233–34.)

4. No Equitable Exception Grants Appellant Standing to Continue Pursuing Derivative Action.

The "equitable considerations" described in *Grosset*, even if they justify an exception in some cases, are not present here. *Grosset* observed, in dicta, "equitable considerations may warrant an exception to the continuous ownership requirement if the merger itself is used to wrongfully deprive the plaintiff of standing," but did not decide the issue because no such circumstances appeared in that case. (*Grosset*, *supra*, 42 Cal.4th at 1119.) The same is true here. Appellant's term as director expired, and Appellant was not nominated for reelection by herself or anyone else. Appellant's derivative action did not challenge the validity of the election process in which she was not reelected.

Barefoot v. Jennings (2020) 8 Cal.5th 822 (*Barefoot*), in which an individual challenged trust amendments that eliminated her beneficiary status as arising from incompetence, undue influence, or fraud, has no bearing on this case. (*See* AOB at p. 47.) *Barefoot* held that individuals "whose well-pleaded allegations show that they have an interest in a trust — because the amendments purporting to disinherit them are invalid — [have standing] to petition the probate court" to challenge the amendments. (*Barefoot*, 8 Cal.5th at 828.) Here, unlike *Barefoot*, even if Appellant prevailed in the underlying litigation, she would not be restored to a position with the Foundation that would confer standing.

Appellant's argument that she has standing to pursue derivative claims because although no longer a director she faces "potential criminal and civil liability" for breaches occurring during her tenure also lacks merit.

(AOB p 43.) There is no scenario under which Appellant faces liability for the Board's advisory vote on a settlement with E. Prebys, which she voted against. Furthermore, a former director or officer facing potential liability for breach of a charitable trust during his or her tenure is not one of the statutorily enumerated categories of responsible individuals with standing to bring a derivative action on behalf of a charitable corporation.

5. Appellant's Reliance on the Attorney General's Arguments is Misplaced.

Appellant relies heavily on the Attorney General's amicus briefs in this case and *Summers*, arguing that the Attorney General's arguments are "entitled to deference." (AOB at pp. 47–55.) But Appellant has provided no authority for that proposition.

Amicus briefs merely "represent[] the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11; *see also Smith v. Anderson* (1967) 67 Cal.2d 635, 641, fn. 5 ["Nevertheless, the fact remains that the construction of a statute is a judicial rather than an administrative function … and] this court is not bound to follow the interpretation placed on this statute by the Attorney General."].) Amicus briefs are not "opinions of the Attorney General" that "have been accorded great respect by the courts," which are the Attorney General's official advisory opinions issued pursuant to Government Code section 12519.

Turner recognized the "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," which underlies the Attorney

General's arguments for its preferred interpretation of the statutes at issue. (*Turner*, *supra*, 67 Cal.App.5th at p. 1132.) But, as discussed above, *Turner* explained that the "California statutory scheme addresses these practical concerns." (*Ibid.*) It does so in part by allowing "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." (*Ibid.*) Consequently, discarding the requirement that standing must be maintained at all times is not required to address the concern raised by the Attorney General because it has the ability to appoint a responsible individual to continue a meritorious case in the event the original plaintiff loses standing during the litigation.

VI. APPELLANT DOES NOT HAVE STANDING UNDER SECTION 5710(B)

While Appellant argues that the absence of the words like "or maintained" in sections 5142, 5233, and 5223 supports her claim to standing under those code sections, in the next breath she contends that the use of such language in section 5710(b) is not determinative under that code section. To be sure, *Grosset* explained that "the 'instituted or maintained' language does not clearly impose" a continuous ownership requirement under Corporations Code section 800. (*Grosset*, *supra*, 42 Cal.4th at p. 1114.) But *Summers*, on which Appellant places much reliance, effectively recognizes that Corporations Code section 5710(b) imposes a continuous membership requirement analogous to section 800's continuous ownership requirement. (*Summers*, *supra*, 34 Cal.App.5th at p. 369–70.) Consequently, the conclusion that Appellant lacks standing under sections 5142, 5233, and 5223 is even more unassailable under section

5710(b). For this reason alone, Appellant's fallback argument that she has standing under section 5710(b) should be dismissed.

Appellant's argument that the Court should create an equitable exception to the continuous membership requirement should be dismissed as well.[16] This argument is based on the erroneous premise that Appellant was involuntarily ousted from the Foundation's Board. (AOB at p. 67.) But the record shows that Appellant was not ousted. Instead, she was not nominated or elected to serve another term.

"[N]ot being renominated [after a director's term expired] is not exactly the same as being removed." (*Wolf*, *supra*, 185 Cal. App. 4t at p. 921.) *Wolf* explained,

> Despite his public policy arguments promoting corporate accountability, he has not been transformed into an ombudsman or freelance investigator, for purposes of inspecting corporate records. When he 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. (*Common Cause*, *supra*, 49 Cal.3d 432, 439–440, 261 Cal.Rptr. 574, 777 P.2d 610.) The current record does not support a claim that he was unlawfully removed, and he has not shown how he can plead around the fact that his term expired, in order to plead an equitable right to inspection.

(*Ibid.*)

Appellant does not address *Wolf* in arguing that she was somehow ousted. This is not surprising as Appellant did not allege that the Board election was improper, that she failed to receive adequate notice, or that she was otherwise excluded from the vote. Indeed, as Board Chair, Appellant

[16] *Grosset* observed that "equitable considerations may warrant an exception to the continuous ownership requirement." (*Grosset*, *supra*, 42 Cal.4th at p. 1119.)

presided over the very meeting at which the election occurred. Carving out an exception to the continuous membership requirement under 5710(b) where an individual was merely not reelected after her term ended would cause the exception to swallow the rule that standing under section 5710(b) requires a continuous membership in the nonprofit public benefit corporation.

Finally, Appellant fails to address the requirement in section 5710(b)(2) that she must establish with allegations of particular facts

> 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.

(Corp. Code, § 5710, subd. (b)(2).) Since Appellant has failed to meet her burden to show that the Board wrongfully refused any demand made by her or that she is excused from making such a demand, she does not have standing under section 5710(b) for this reason alone.

VII. IF ADOPTED, APPELLANT'S ARGUMENTS WOULD UPEND THE LAW OF STANDING

As discussed above, standing must be maintained throughout the litigation. (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 233–34.) Standing as an issue does not disappear from the case after the pleading stage. Instead, standing can remain an issue for ultimate resolution at trial. (*See Pillsbury*, *supra*, 22 Cal.App.4th at p. 758.) This is especially true where, as here, the plaintiff is not the real party in interest. (*See Jasmine Networks, Inc.*, *supra*, 180 Cal.App.4th at p. 991-92.) Thus, *Grosset* observed that standing statutes identify what must be alleged in a

complaint to establish standing at the outset of a case and "the failure to explicitly address an issue that might later arise during the pendency of an action, such as the loss of the plaintiff's stock, is hardly surprising." (*See Grosset*, *supra*, 42 Cal.4th at p. 1113.)

In the face of the basic principle that standing must be maintained at all times even where that requirement has not been expressly addressed by the legislature, Appellant argues she need only establish standing at the time she filed her case. This argument, if adopted, would constitute a sea change in the law of standing and would call into question the holdings of cases like *Californians for Disability Rights* and *Grosset*.

Such a change, as shown above, is not required by the governing statutes and is not supported by any overarching public policy. Instead, it is contrary to the established public policy of this state. Therefore, for this additional reason, Appellant's attempt to change the law of standing should be rejected and the decision of the court below should be affirmed.[17]

[17] That the legislature did not confer standing on former officers, directors, and members of nonprofit public benefit corporations is not an oversight. In Corporations Code section 9142, the parallel statute governing nonprofit religious corporations (enacted through the same bill), the legislature added "former member" to the list of individuals who could bring a representative action. (Corp. Code, § 9142, subd. (a)(1).) The legislature, however, chose not to include "former director" (or "former member") in section 5142 or the other standing statutes at issue here.

VIII. CONCLUSION

For the reasons set forth above, the Foundation respectfully requests that the Court affirm decision and holding in *Turner*.

DATED: April 8, 2022

Respectfully Submitted,

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Pursuant Rule 8.520(c), California Rules of Court, the undersigned hereby certifies that this RESPONDENT'S ANSWERING BRIEF contains 10,971 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

DATED: April 8, 2022

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