S271054

IN THE SUPREME COURT OF CALIFORNIA

Debra Turner

Petitioner/Plaintiff and Appellant,

v.

Laurie Anne Victoria *et al.*

Defendants and Respondents.

After a Decision By the Court of Appeal,
Fourth Appellate District, Division One,
Case No. D076318 *consolidated with* D076337

San Diego County Superior Court

Honorable Julia C. Kelety
(San Diego County Super. Ct. Case No. 37-2017-00009873-PR-TR-CTL)

Honorable Kenneth J. Medel
(San Diego County Super. Ct. Case No. 37-2018-00038613-CU-MC-CTL)

ANSWER TO DEBRA TURNER'S PETITION FOR REVIEW

"Service on The Office of The Attorney General Charitable Trusts Section as Required by Probate Code Sections 17200, 17203, Corporations Code Sections 5142, 5223, and 5233 and CRC 8.29(a)"

Kristen E. Caverly (State Bar No. 175070)
Lisa B. Roper (State Bar No. 282152)
Stephen D. Blea (State Bar No. 294339)
Henderson, Caverly, Pum & Trytten LLP
12760 High Bluff Drive, Suite 150
San Diego, CA 92130
Telephone: (858) 755-3000
Facsmile: (858) 755-9900
Email: kcaverly@hcesq.com
Email: lroper@hcesq.com
Email: sblea@hcesq.com

Attorneys for Respondent Joseph Gronotte

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I. ISSUES PRESENTED.

Does the plaintiff in a derivative action involving a charitable foundation lose standing when her tenure as a member of the Board of Directors comes to a natural end and, without any wrongdoing by the other members of the Board of Directors, she is not reelected to another term?

II. ANSWER TO DEBRA TURNER'S PETITION FOR REVIEW.

Review should not be granted because:

1. the Opinion is not in conflict with *Summers v. Colette et al.,* 34 Cal. App. 5th 361 (2019), where the plaintiff board member was removed by the director defendants allegedly in retaliation for the lawsuit, and the Attorney General had no notice of the lawsuit;
2. the law on standing to bring derivative claims on behalf of a California charitable foundation, *i.e.*, not for profit corporation, is settled; and
3. there is no significant public interest to protect as the Attorney General has notice of this action and is in a better position than petitioner Debra Turner, who herself is accused of wrongdoing in the underlying, threatened trust contest and will be a witness in any action related thereto, to intervene or designate a relator if it deems the allegations to have potential merit.

III. RESPONDENT'S STATEMENT OF FACTS.

The petition goes far beyond the Court of Appeal's recitation of the facts, and improperly includes alleged facts that the Court of Appeal determined were speculative contentions or conclusions of law. [*See*

Opinion[1], p. 35 ("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.").] Petitioner did not file a petition for rehearing in the Court of Appeal and, therefore, her petition for review must be decided based on the statement of issues and facts as stated by the Court of Appeal. *See* Cal. Rules of Court, Rule 8.500(c) (Supreme Court accepts Court of Appeal's statement of issues and facts unless party has called Court of Appeal's attention to alleged omission or misstatement in petition for rehearing).

The relevant statement of facts is set forth by the Court of Appeal.

1. <u>Decedent's Trust and Creation of the Foundation</u>.

Decedent Conrad Prebys ("Decedent") established his trust in 1982 and created The Conrad Prebys Foundation (the "Foundation") in 2005 as a nonpublic benefit corporation. [Opinion, p. 4.] Decedent amended his trust several times during his lifetime. [Opinion, pp. 4-5.] Relevant here, Decedent originally created a separate gift trust for his son in 2007. [Opinion, p. 5.] Decedent allegedly had a falling out with his son in 2014 and amended his 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 on the bequest. [Opinion, p. 5.] In October 2014, after another alleged falling out,

[1] Opinion from consolidated appeals, case numbers D076318 and D076337 filed August 17, 2021 "Opinion."

Decedent amended his trust again to remove the son's gift trust entirely. [Opinion, p. 5.]

In 2015, Decedent named Victoria as chief executive officer of his company and recommended another person employed at his company to serve on the Foundation's Board. [Opinion, p. 5.]

In 2016, Decedent again amended and restated his trust, naming Victoria as successor trustee and defining amounts to pour into previously identified gift trusts. [Opinion, p. 5.] 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." [Opinion, pp. 5-6.] The 2016 restated trust also 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. [Opinion, p. 6.] Lastly, the 2016 restatement noted that the son's gift trust was previously revoked in its entirety and expressly made no provision for Decedent's son. [Opinion, p. 6.]

2. Events After Decedent's Death and the Basis of Petitioner's Litigation.

Decedent died in July 2016, and Victoria assumed the duties as successor trustee, engaging the attorney who prepared the trust to represent her in that role. [Opinion, p. 6.] Victoria allegedly began discussing a potential contest by the son with her attorney. [Opinion, p. 6.] Son hired an attorney to challenge the trust amendments that disinherited him alleging

that they were invalid because Decedent lacked competence due to his illness, and Petitioner Turner unduly influenced Decedent. [Opinion, p. 6.]

In September 2016, at the first Foundation Board meeting after Decedent's death, the Board elected Petitioner as president of the Foundation and chairperson of the Board. [Opinion, p. 7.] Victoria's attorney attended the meeting and, among other Foundation business, discussed with the Board the potential trust contest threatened by son and warned the Board members of the effects of potential trust litigation. [Opinion, p. 7.] Victoria expressed her desire to settle the litigation and the Board discussed, but did not decide, on a dollar amount that Victoria could use to negotiate with son's attorney. [Opinion, p. 7.] Petitioner expressed her disagreement with son's contest and that Decedent historically did not settle personal matters. [Opinion, pp. 7-8.] No settlement amounts were discussed, and the issue was tabled without a vote. [Opinion, p. 8.]

After the meeting, Petitioner expressed to Victoria's attorney that she believed it was a conflict of interests for Victoria and the other person who was employed at Decedent's company to serve on the Foundation's Board. [Opinion, p. 8.] In November 2016, the Board met again, and Petitioner asked the other Board members to sign an acknowledgement confirming that they received, read, understood, and agreed to a copy of a conflict-of-interest policy and IRS regulations regarding self-dealing. [Opinion, p. 8.] Petitioner alleges she never received signed acknowledgments from the other directors and that they became dismissive of Decedent's wishes. [Opinion, p. 8.]

In December 2016, son's attorney sent a letter to Victoria's attorney alleging that Decedent lacked capacity as a result of his chemotherapy treatments and that Petitioner had limited son's contact with Decedent and otherwise controlled their communication from 2013 through 2016. [Opinion, p. 8.] Son offered to settle his claims for payment of the gift Decedent initially established for him. [Opinion, p. 8.]

In December 2016, the Board met to discuss a potential settlement with son. [Opinion, p. 9.] Victoria's attorney attended the meeting and encouraged the Board to approve a settlement amount, warning it could cost over one million in legal fees to defend a trust contest by the son. [Opinion, p. 9.] Victoria's attorney again warned of other by products of litigation and expressed concern regarding proof of Decedent's capacity closer to his death. [Opinion, p. 9.] Ultimately the Board voted in favor of approving Victoria offering as much as $12 million to settle the son's claims, with the Trust paying any associated estate tax. [Opinion, pp. 9-10.]

Victoria, in her role as trustee, and her attorney then negotiated a settlement with the son for $9 million, tax free, which was paid in January 2017. [Opinion, p. 10.] With taxes, the value of the settlement was approximately $15 million. [Opinion, p. 10.]

3. <u>2017 Foundation Board Election</u>.

On November 7, 2017, the Board met for purposes of election of directors whose terms expired according to the Foundation bylaws. [Opinion, p. 11.] The four other directors nominated one another for reelections as directors, and the Board voted to renew their terms, with

Petitioner as the sole dissenting vote. [Opinion, p. 11.] Petitioner did not nominate herself for reelection. [Opinion, p. 11.] Similarly, no other member nominated Petitioner for reelection. [Opinion, p. 11.] Petitioner's term as a board member expired and, as a result of the election process, Petitioner was asked to leave the Board of Directors meeting. [Opinion, p. 11.]

The Board minutes from the meeting reflect that the Foundation's executive director suggested a process of self-nomination, but Petitioner alleged that she did not know she could nominate herself and thought that only applied to election of officers. [Opinion, p. 11.] Petitioner alleged that it would have been futile for her to nominate herself. [Opinion, p. 11.]

Sometime after the meeting was complete, Petitioner sent a letter nominating herself for reelection as a director; Petitioner alleged she received no response. [Opinion, p. 11.]

4. <u>Procedural History</u>.

i. Probate Case Proceeding.

While still an active member of the Board of Directors, on May 15, 2017, Petitioner filed a petition in probate court, alleging 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. [Opinion, p. 12.] Petitioner alleged the first three causes of action on behalf of the Foundation against the other directors. [Opinion, p. 12.] Petitioner alleged the remaining causes of

action derivatively on behalf of the Foundation against Victoria as Trustee of the Trust. [Opinion, p. 12.]

Petitioner 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. [Opinion, p. 12.] She also alleged she was a beneficiary of one of the gift trusts. [Opinion, p. 12.]

Still during Petitioner's tenure on the Board of Directors, in July 2017, Petitioner amended the probate petition and named the Attorney General as a nominal respondent. [Opinion, p. 12.] The Attorney General entered a general appearance acknowledging the joinder in the action but indicated that it would not participate in conferences or trial unless ordered by the Court. [Opinion, p. 12.]

After rounds of demurrers, the probate court severed the first through fourth causes of action pursuant to Probate Code section 801 and transferred them for a separate civil proceeding. [Opinion, pp. 13-14.] The probate court determined the fifth through ninth causes of action against the trustee were based on Petitioner's standing to act derivatively on behalf of the Foundation pursuant to section 5710, subdivision (b) and stayed decision on the demurrer until Petitioner's standing was determined in the civil action. [Opinion, p. 14.]

ii. Civil Case Proceeding.

Petitioner filed a civil complaint alleging the first causes of action from the probate petition on behalf of the Foundation. [Opinion, p. 14.] Petitioner again named the Attorney General as a nominal defendant.

[Opinion, p. 14.] Again, the Attorney General made a general appearance and indicated that it would not participate unless ordered by the Court. [Opinion, p. 14.] By this time, Petitioner's tenure on the Foundation's Board of Directors and her position as its president had ended. [Opinion, p. 11.] Defendants demurred to the derivative claims for lack of standing. [Opinion, pp. 14-15.]

After the initial demurrer was sustained with leave to amend on standing grounds, Petitioner filed an amended complaint acknowledging she was no longer an officer or director of the Foundation because her term had ended, and she had not been renominated by herself or another director. [Opinion p. 15.] Petitioner realleged her derivative 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 former 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. [Opinion, p. 15.] 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. [Opinion, p. 15.] The fourth cause of action 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." [Opinion, p. 15.] Petitioner prayed for removal of the directors and asked the court to hold them jointly and severally liable to the Foundation for damages. [Opinion,

p. 15.] She also sought her attorney fees and costs. [Opinion, p. 15.] Defendants again demurred based on lack of standing given that Petitioner was no longer an officer or member of the Board of Directors. [Opinion, p. 15.]

The civil court sustained the demurrers to the amended complaint without leave to amend, concluding that Petitioner, as a former director and member, no longer had standing to bring derivative claims on behalf of the Foundation and did not have standing under the director statutes. [Opinion, p. 15.]

Following the civil court's analysis, the probate court also concluded that Petitioner lacked standing, sustained the demurrers to the remaining causes of action and entered a judgment of dismissal. [Opinion, pp. 15-16.]

After the ruling by the civil court, the probate court inquired about the Attorney General's intention with respect to this matter. [Opinion, p. 41.] 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." [Opinion, p. 41.] 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…." [Opinion, p. 41.] The deputy Attorney General stated, "If my office does determine that a petition or complaint is necessary, we would absolutely file that." [Opinion, p. 41.] To date, however, the Attorney General has

not filed a separate petition or granted Turner relator status. [Opinion, p. 41.]

IV. LEGAL DISCUSSION.

Supreme Court review is discretionary. *See People v. Davis*, 147 Cal. 345, 347-48 (1905). The grounds for Supreme Court review are exclusively provided for in California Rules of Court, Rule 8.500(b). Petitioner argues that review is necessary to secure uniformity of decision and to settle an important question of law – neither is present here.

The Attorney General's amicus position in support of review to further its goal of allowing any former board member or officer of a public charity to sue derivatively, because the Attorney General does not have the resources to investigate the merits of derivative claims, is a gross departure from the oversight role envisioned by the Legislature and would have to be addressed by the Legislature. For now, to address any shortage of resources, the Legislature has provided the Attorney General with the option of using the relator statute to designate an appropriate plaintiff whose conduct of the litigation must be supervised so as not to permit former officers and directors with a personal axe to grind the platform to drag charities into court.

1. <u>The Opinion Does Not Create a Split Among the Courts of Appeal</u>.

This Court should not allow Petitioner to manufacture a split of authority between the *Summers* Court and the Opinion to influence review. An honest reading of the two cases limits each to their own facts, and creates a single, uniform rule of law.

The Opinion held that a plaintiff who ceased to serve as a board member at the end of her term, does not allege wrongdoing in the Board election process and properly joins the required parties, including the Attorney General, who all have notice of the action and an opportunity to participate in the litigation, does not maintain standing to sue derivatively on behalf of a charitable foundation to which she maintains no relationship. [*See* Opinion, pp. 31, 34 ("[W]e note the *Summers* court was concerned with equitable considerations surrounding the removal of a director and the absence of notices to the Attorney General. These considerations are not before us.").]

In so holding, the Fourth District Court of Appeal followed the California Corporations Code, including the legislative history and relevant public policy considerations, and elected not to "depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation." [*See* Opinion, p. 3.] The Court thoroughly examined the relevant public benefit corporation statutes, the general Corporations Code and the legislative history surrounding their adoption. [*See generally* Opinion, pp. 18-25.]

The Opinion also examined judicial interpretations under the Corporations Code and held consistently with those historic decisions. [*See* Opinion, pp. 26-31 (*citing Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 755 (1964) (responsible individuals can sue on behalf of the charitable corporation); *San Diego etc. Boy Scouts of Am. v. Escondido*, 14 Cal. App. 3d 189, 195 (1971) (right of Attorney General to sue to enforce charitable trust is not exclusive and other responsible

individuals may be permitted to sue on behalf of the charity); *Grosset v. Wenaas*, 42 Cal. 4th 1100, 1104 (2008) (derivative standing lost when plaintiff forced to sell stock as part of merger of for profit corporation); *Wolf v. CDS Devco*, 185 Cal. App. 4th 903, 916-917 (2010) (for profit corporation director lost standing to assert statutory right to inspect corporate documents when he was not reelected to serve)).] From this judicial history, the Court discussed two cases in particular detail.

The Opinion examined its prior decision in *Wolf*, holding that where, as here, a director is not reelected to serve on a board of directors, that former director "lacks the required status and standing to assert inspection rights that are properly due to a corporate director." [*See* Opinion, p. 30 (*citing Wolf*, 185 Cal. App. 4th at 908, 919).] *Wolf* held the former director "c[ould] not successfully plead, as a matter of law, that it was wrongful for the board to decline to renominate him as a director. In the first place, not being renominated is not exactly the same as being removed, and [further, plaintiff]'s term expired." *Wolf*, 185 Cal. App. 4th at 921. In arriving at this conclusion, *Wolf* relied on the Supreme Court's holding in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006), stating "standing must exist at all times until judgment is entered and not just on the date the complaint is filed. … 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.'" *See Wolf*, 185 Cal. App. 4th at 916-917 (*citing* 3 Witkin, Cal. Proc., Actions § 21, pp. 84-86).

Ultimately, the *Wolf* court held that when the former director "lost his seat on the board, he lost standing to assert recognized inspection rights,

since [such rights] are intended to promote the appropriate exercise of a director's fiduciary duties." *Id*. at 921. As Mr. Wolf was not removed as a director rightly or wrongly, rather his term expired like Petitioner's, the *Wolf* court did not discuss whether or how its analysis would be affected had plaintiff alleged a "wrongful" removal occurred. Similarly, the Opinion is consistent with *Summers* as Petitioner's term expired and, as a matter of law, she could not allege wrongful removal as was alleged in *Summers*.

The Opinion also analyzed the Supreme Court's ruling in *Grosset*, highlighting the public policy rationale for requiring a plaintiff to maintain "continuous ownership" of stock to preserve standing in a derivative action. [*See* Opinion, p. 29 (*citing Grosset*, 42 Cal. 4th at 1114).] There, the Supreme Court noted that the "continuous ownership" requirement 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 [the continuous ownership requirement]." *Id*. Ultimately, "a derivative claim does not belong to the stockholder asserting it, [thus] standing to maintain such a claim is justified only by the stockholder relationship." *Grosset*, 42 Cal. 4th at 1114. If "continuous ownership" ceases to exist, that plaintiff "lacks standing because he or she no longer has a financial interest in any recovery pursued for the benefit of the corporation." *Id*.

Grosset underscored the inherent absurdity in Petitioner's position, reasoning: "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." *See Grosset*, 42 Cal. 4th at 1114. Consequently, it is irrelevant whether the "continuous relationship" terminates voluntarily or involuntarily for the purpose of standing, as "plaintiffs who lose their shares involuntarily have no greater interest in the continued well-being of a corporation than plaintiffs who willingly sell their shares. Neither class of plaintiff retains a proprietary interest in the corporate enterprise." *Id*. at 1115-1116. The only possible exception to this general rule is noted in concluding dicta to the Supreme Court's opinion, stating: "[E]quitable considerations may warrant an exception to the continuous ownership requirement if [a] merger itself is used to wrongfully deprive the plaintiff of standing, or if [a] merger … does not affect the plaintiff's ownership interest." *See id.* at 1118-1119 (emphasis added).

Summers is not in conflict with these prior decisions or the Opinion. *Summers* dealt with equitable considerations recognized in *Grosset* as a limited exception to the continuous interest requirement – equitable considerations not present in this litigation. *Summers* held that when a plaintiff director brought an action alleging self-dealing and misconduct by another director, that plaintiff did not lose standing when: (1) the board took affirmative, and allegedly wrongful, action to remove the plaintiff from the board to defeat standing; and (2) the Attorney General had not been added as an indispensable party nor given notice of the proceeding, and the trial court had not granted leave to amend to join the Attorney General. *See Summers v. Colette*, 34 Cal. App. 5th 361, 364 (2019).

The Opinion provides these significant factual distinctions from *Summers*:

> (1) *Summers* concluded the trial court erred by not granting leave to amend to add the Attorney General as an indispensable party. The Opinion granted Petitioner 60 days leave to amend to determine "whether a proper plaintiff may be substituted to continue this action."
>
> (2) "[T]he *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."
>
> (3) The plaintiff in *Summers* was involuntarily removed from a non-profit board after confronting another director with allegations that she "engaged in acts of self-dealing and breaches of fiduciary duty." "Unlike the *Summers* plaintiff, Turner was not removed as a director …. She was simply not reelected at the board's annual meeting." Petitioner failed to factually plead "that her removal was wrongful."

[*See generally* Opinion, pp. 34, 35, 47.]

Summers involved a fundamentally different factual situation, namely the calling of a special meeting solely to proactively remove a litigating director from office. Petitioner's term elapsed naturally. That is not an "ouster," and Petitioner "cannot successfully plead, as a matter of law, that it was wrongful for the board to decline to renominate [her] as a director." *See Wolf*, 185 Cal. App. 4th at 921. This is a critical distinction from those facts relevant to *Summers*. Under Petitioner's proposed interpretation of *Summers*, Petitioner could have quit her directorship position even before her term ended and, nevertheless, retained standing to

prosecute her claims on behalf of the non-profit. A former director who ceased being a director through no wrongdoing by the rest of the Board should not have standing to sue on behalf of an organization she is no longer involved with.

In dicta, the Opinion notes disagreement with *Summers'* analysis of the statutory purpose and public policy surrounding the California Corporations Code [Opinion, p. 34], but as stated in the Opinion, the holding of each case is necessarily limited to its facts. Dicta cannot justify Supreme Court review as it does not create a split of authority among the Courts of Appeal. *See generally Simmons v. Superior Court*, 52 Cal. 2d 373, 378 (1959) ("Incidental statements of conclusions not necessary to the decision are not to be regarded as authority.").

Neither *Summers*, nor any other relevant case law, holds that a former director has standing to prosecute litigation on the non-profit's behalf after that director quits or otherwise fails to be reelected to the board. The Opinion is a unanimous decision on that basis. There is no current or likely future split of authority to warrant review.

2. The Holdings of the Opinion and *Summers* are Limited to their Facts and do not Create an Important Question of Law.

Derivative standing is settled law. There is no important legal issue presented in the Opinion which would benefit Californians generally to be resolved by this Court. *Cf. South Coast Framing, Inc. v. Workers' Comp. App. Bd.*, 61 Cal. 4th 291 (2015) (review granted to broadly clarify standard for compensability in workers' compensation cases); *People v. Garcia*, 97 Cal. App. 4th 847, 954 (2002) ("[T]he Supreme Court generally [grants

review] only where necessary … to settle and important question of law in matters of statewide impact."); *Southern Cal. Ch. of Assoc. Builders etc. Com. v. California App. Council*, 4 Cal. 4th 422, 431 n.3 (1992) ("[T]his court limits its review to issues of statewide importance.").

Here, the Court's limited holding is important to the parties but not the general public. The Attorney General's interest is in expanding standing, a job for the Legislature, not clarifying when an equitable exception to the continuous interest doctrine applies as no facts to support an equitable exception are presented here. It has been many years since *Grosset* and *Wolf* were decided, and *Summers'* affirmative ouster of the director at a special set meeting in retaliation for his allegations is the only published example of an equitable exception to the continuous standing rule. The natural expiration of a director's term without even a self-nomination is not the factual case to use to clarify for the public when an equitable exception should apply to the continuous interest rule nor is it the right case to expand standing to former directors generally unless that expansion would be so broad as to include even former directors who are themselves accused of wrongdoing in the facts motivating the underlying litigation. The Attorney General is joined as a party with the full opportunity to participate in the litigation whether in its own right or through the relator procedure authorized by statute.

3. <u>The Out-of-State Authorities Relied Upon Are Factually Distinct and Irrelevant</u>.

The out-of-state authorities on which Petitioner relies in support of her petition have no bearing on this case. These cases were not decided

under the California Corporations Code or similar standing language, and neither *Workman v. Verde Wilderness Wellness Center, Inc.*, 240 Ariz. 597, 382 P.3d 812 (Ariz. Ct. App. 2016) nor *Tenney v. Rosenthal*, 6 N.Y.2d 204, 160 N.E.2d 158 (N.Y. 1959) involved a plaintiff whose term naturally expired due to the passage of time. Rather, analogous to *Summers*, both cases "concerned whether, under a [foreign] statute authorizing a director to bring an action on behalf of a corporation to remedy malfeasance by another director, the plaintiff lost standing to pursue the action if, after filing it, he or she was removed as a director." *Accord Summers*, 34 Cal. App. 5th at 373. In *Workman*, "within hours after [plaintiff] filed her complaint, [the board] held a special meeting and removed her as a director" and, when the vote was shown to be procedurally improper, changed the bylaws and held "another special meeting" where they again voted to remove plaintiff. *See Workman*, 240 Ariz. at 600. Similarly, *Tenney* involved a unique circumstance where the director defendants filed a motion before the election to prevent plaintiff's reelection. *See Tenney*, 6 N.Y.2d at 207.

Further, *Workman* and *Tenney* concerned state standing rules that differ significantly from California's standing rules. Unlike California, standing in New York and Arizona (1) is not jurisdictional and (2) is waivable. *See Tenney*, 6 N.Y.2d at 208; *see also Dobson v. State*, 233 Ariz. 119, 309 P.3d 1289, 1292 (Ariz. 2013) ("Under Arizona's Constitution, standing is not jurisdictional, but instead is a prudential doctrine requiring a litigant seeking relief in the Arizona courts to first establish standing to sue."). California law on the other hand requires that "standing must exist

at all times until judgment is entered and not just on the date the complaint is filed." *See Californians for Disability Rights*, 39 Cal. 4th at 232-33; *see also Grosset*, 42 Cal. 4th 1100 (holding derivative claims require continuous standing). Given the fundamental differences between California, Arizona and New York law as it relates to standing, Petitioner's reliance on *Workman* and *Tenney* is misplaced.

Here, the Fourth District's holding in *Wolf* is the controlling, relevant authority. *Wolf* affirmed dismissal when the director plaintiff failed to be reelected on the grounds the director no longer had the "status and standing that are required to justify" representative actions. *See Wolf*, 185 Cal. App. 4th at 919. Review is not warranted to revisit the same holding eleven years later.

V. CONCLUSION.

The Opinion is not in conflict with *Summers* and does not present a novel opportunity for the Supreme Court to address a legal issue of general importance. Review should be denied.

Dated: October 13, 2021

HENDERSON, CAVERLY, PUM & TRYTTEN LLP

By: _____

Kristen E. Caverly
Attorneys for Respondent/Defendant
Joseph Gronotte

CERTIFICATE OF COMPLIANCE

(California Rules of Court, Rule 8.504 (d)(1))

Pursuant to California Rules of Court, Rule 8.504 (d)(1), I certify that the total word count of the instant **ANSWER TO DEBRA TURNER'S PETITION FOR REVIEW** excluding the cover, table of contents, table of authorities and certificate of compliance is less than 7,000 words as counted by the Microsoft Word for Office 365 version word processing program used to generate this document.

Dated: October 13, 2021

By: _____

Kristen E. Caverly
Attorneys for Respondent
Joseph Gronotte

PROOF OF SERVICE

I am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is Henderson, Caverly, Pum & Trytten LLP, 12760 High Bluff Drive, Suite 150, San Diego, CA 92130. My email address is jsinford@hcesq.com.

On October 13, 2021, I served the following:

1. ANSWER TO DEBRA TURNER'S PETITION FOR REVIEW

as follows:

Steve Strauss, Esq. — *Attorneys for Debra Turner*
Erin C. Trenda, Esq.
Cooley LLP
4401 Eastgate Mall
San Diego, CA 92121
Email: sms@cooley.com
Email: etrenda@cooley.com

Alexander K. Mircheff, Esq. — *Attorneys for Laurie Anne Victoria*
Megan M. Cooney, Esq.
Jillian N. London, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Email: amircheff@gibsondunn.com
Email: mcooney@gibsondunn.com
Email: jlondon@gibsondunn.com

Scott A. Edelman, Esq. — *Attorneys for Laurie Anne Victoria*
Gibson, Dunn & Crutcher LLP
2029 Century Park E, Suite 4000
Los Angeles, CA 90067
Email: sedelman@gibsondunn.com

J. Christopher Jaczko, Esq. — *Attorneys for Gregory Rogers*
Procopio, Cory, Hargreaves & Savitch LLP
12544 High Bluff Drive, Suite 400
San Diego, CA 92130
Email: chris.jaczko@procopio.com

Sean Sullivan, Esq.
Procopio, Cory, Hargreaves & Savitch LLP
525 B Street, Suite 2200
San Diego, CA 92101
Email: sean.sullivan@procopio.com

Attorneys for Gregory Rogers

Reginald Vitek, Esq.
Scott W. Perlin, Esq.
Seltzer Caplan McMahon Vitek
750 B Street, Suite 2100
San Diego, CA 92101-8177
Email: vitek@scmv.com
Email: perlin@scmv.com

Attorneys for Anthony Cortes

Robert W. Brownlie, Esq.
Brownlie Hansen LLP
10920 Via Frontera, Suite 550
San Diego, CA 92127
Email: robert.brownlie@brownliehansen.com

Attorneys for The Conrad Prebys Foundation

S. Andrew Pharies, Esq.
DLA Piper LLP (US)
4365 Executive Drive, Suite 1100
San Diego, CA 92121
Email: andrew.pharies@dlapiper.com

Attorneys for The Conrad Prebys Foundation

Rob Bonta, Esq.
Sandra Barrientos, Esq.
Tania Ibanez, Esq.
Caroline K. Hughes, Esq.
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Email: Caroline.hughes@doj.ca.gov
Email: Sandra.Barrientos@doj.ca.gov
Email: teresa.depaz@doj.ca.gov

Attorneys for Attorney General, State of California

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Honorable Julia C. Kelety
c/o Clerk of the Court
San Diego Superior Court
1100 Union Street, 5th Floor, Dept. 503
San Diego, CA 92101

San Diego County Super. Ct. Case No. 37-2017-00009873-PR-TR-CTL

Honorable Kenneth J. Medel
c/o Clerk of the Court
San Diego Superior Court
330 West Broadway, 4th Floor, Dept. C-66
San Diego, CA 92101

San Diego County Super. Ct. Case No. 37-2018-00038613-CU-MC-CTL

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

Executed at San Diego, California on October 13, 2021.

Jason E. Sinford

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **TURNER v. VICTORIA**
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Caroline Hughes Dept of Justice	caroline.hughes@doj.ca.gov	e-Serve	10/13/2021 3:18:19 PM
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Jillian London Gibson Dunn & Crutcher LLP 319924	jlondon@gibsondunn.com	e-Serve	10/13/2021 3:18:19 PM
Kristen Caverly Henderson Caverly Pum & Trytten LLP 175070	kcaverly@hcesq.com	e-Serve	10/13/2021 3:18:19 PM
Stephen Pharies DLA Piper LLP (US)	andrew.pharies@dlapiper.com	e-Serve	10/13/2021 3:18:19 PM
Richard Heller	richard.heller@procopio.com	e-	10/13/2021

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Sandra Barrientos ATTORNEY GENERAL OF 163808	sandra.barrientos@doj.ca.gov	e-Serve	10/13/2021 3:18:19 PM
Erin C. Trenda 277155	etrenda@cooley.com	e-Serve	10/13/2021 3:18:19 PM
Alexander K. Mircheff 245074	amircheff@gibsondunn.com	e-Serve	10/13/2021 3:18:19 PM
Megan M. Cooney 295174	mcooney@gibsondunn.com	e-Serve	10/13/2021 3:18:19 PM
Sean Sullivan 254372	sean.sullivan@procopio.com	e-Serve	10/13/2021 3:18:19 PM
Scott W. Perlin 311169	perlin@scmv.com	e-Serve	10/13/2021 3:18:19 PM
Teresa De Paz	teresa.depaz@doj.ca.gov	e-Serve	10/13/2021 3:18:19 PM
Lisa Roper 282152	lroper@hcesq.com	e-Serve	10/13/2021 3:18:19 PM
Stephen Blea	sblea@hcesq.com	e-Serve	10/13/2021 3:18:19 PM
Jason Sinford	jsinford@hcesq.com	e-Serve	10/13/2021 3:18:19 PM

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

10/13/2021

Date

/s/Jason Sinford

Signature

Caverly, Kristen (175070)

Last Name, First Name (PNum)

Henderson Caverly & Pum LLP

Law Firm