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)

RESPONDENT JOSEPH GRONOTTE'S ANSWERING BRIEF ON THE MERITS

"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)"

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION.

Respondent Joseph Gronotte is a former board member of The Conrad Prebys Foundation[1]. Mr. Gronotte was a long-time employee and confidant of Conrad Prebys and was honored to be personally nominated by Conrad Prebys to serve on the Foundation board overseeing Mr. Prebys' endowment of more than $1 billion in assets which will dramatically impact the San Diego arts community as he consistently did during his lifetime. But for this derivative litigation by former board member Debra Turner, Mr. Gronotte would still be serving on the board but decided to step down given Ms. Turner's use of this litigation to effectively remove him from a substantive board role and to hijack the business of the Foundation. As a result of Ms. Turner's well-funded litigation agenda, only one original member of the Foundation board originally envisioned by Mr. Prebys has remained serving. Ms. Turner's derivative litigation, which continues to be maintained against the wishes of an entirely independent board litigation committee, effectively disenfranchised the entire board selected by Mr. Prebys and has caused millions of dollars of legal fees to the Foundation.

Given the oversight role of the Attorney General including the option to appoint a relator, standing to bring derivative claims on behalf a charitable foundation should be limited to currently serving board members. Once the plaintiff board member is no longer on the board, for whatever reason, it should be left to the Foundation's independent board members or the Attorney General, directly or through a relator, to pursue the claims if there is perceived merit sufficient to justify the expense and distraction of litigation. Allowing a former board member to pursue

[1] Hereafter, the "Foundation."

derivative litigation is the wrong public policy even if the minority board member is removed. To hold otherwise ignores the long-standing California continuous standing rules, ignores the holding of *Grosset* and allows the Attorney General to cede its oversight power to someone who does not qualify as a relator against the express wishes of the Legislature.

II. ISSUES PRESENTED.

Do California Corporations Code sections 5142(a), 5223(a) and 5233(c) permit a former board member of a nonprofit public benefit corporation to initiate or maintain a derivative action without being granted relator status by the Attorney General?

III. FACTUAL AND PROCEDURAL BACKGROUND.

1. ***Decedent's Trust and Creation of the Foundation*.**

Decedent Conrad Prebys[2] established his trust in 1982 and created the Foundation in 2005 as a nonpublic benefit corporation. *Turner v. Victoria*, 67 Cal. App. 5th 1099, 1109 (2021). Decedent amended his trust several times during his lifetime. *Id*. at 1110. Relevant here, Decedent originally created a separate gift trust for his son in 2007. *Id*. at 1109. 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, held in trust during the son's lifetime with taxes paid on the bequest. *Id*. at 1109-10. In October 2014, after another alleged falling out, Decedent amended his trust again to remove the son's gift trust entirely. *Id*. at 1110.

In 2015, Decedent named Laurie Anne Victoria[3] as chief executive officer of his company and recommended another person employed at his

[2] Hereafter, the "Decedent."
[3] Hereafter, "Victoria."

company to serve on the Foundation's Board. *Turner*, 67 Cal. App. 5th at 1110.

In 2016, Decedent again amended and restated his trust, naming Victoria as successor trustee and defining amounts to pour into previously identified gift trusts. *Id.* The remainder of the trust estate was to be held as a separate trust and was to be 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." *Id*. 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. *Id*. at 1112. 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. *Id*. at 1111.

2. *Events After Decedent's Death and Basis of Appellant'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. *Id*. at 1110. Victoria allegedly began discussing a potential contest by the son with her attorney. *Id*. Decedent's 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 Appellant Turner unduly influenced Decedent. *Turner*, 67 Cal. App. 5th at 1110-11.

In September 2016, at the first Foundation Board meeting after Decedent's death, the Board elected Appellant as president of the

Foundation and chairperson of the Board. *Id*. at 1111. Victoria's attorney attended the meeting and, among other Foundation business, discussed with the Board the potential trust contest threatened by Decedent's son and warned the Board members of the effects of potential trust litigation. *Id*. 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 the son's attorney. *Id*. Appellant expressed her personal disagreement with the son's contest and opined that Decedent historically did not settle personal matters. *Id*. No settlement amounts were discussed, and the issue was tabled without a vote. *Id*.

After the meeting, Appellant expressed to Victoria's attorney that she believed it was a conflict of interest for Victoria and the other person who was employed at Decedent's company to serve on the Foundation's Board. *Id*. In November 2016, the Board met again, and Appellant 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. *Id*. Appellant alleges she never received signed acknowledgments from the other directors and that they became dismissive of Decedent's wishes. *Id.*

In December 2016, the son's attorney sent a letter to Victoria's attorney alleging that Decedent lacked capacity as a result of his chemotherapy treatments and that Appellant had limited son's contact with Decedent and otherwise controlled their communications from 2013 through 2016. *Turner*, 67 Cal. App. 5th at 1112. Son offered to settle his claims for payment of the gift Decedent initially established for him. *Id*.

In December 2016, the Board met to discuss a potential settlement with the son. *Id*. 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. *Id*. Victoria's attorney again warned of other consequences of litigation and expressed concern regarding proof of Decedent's capacity closer to his death. *Id.* Ultimately the Board voted in favor of approving an offer of $12 million to settle the son's claims, with the trust paying any associated estate tax. *Id*. at 1112-13.

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. *Id*. at 1113. With taxes, the value of the settlement was approximately $15 million. *Id*. at 1113.

3. *2017 Foundation Board Election*.

On November 7, 2017, the Board met for the purpose of holding an election for directors whose terms expired according to the Foundation bylaws. *Id*. at 1113-14. Four directors nominated one another for reelection as directors, and the Board voted to renew their terms, with Appellant as the sole dissenting vote. *Id*. Appellant did not nominate herself for reelection, though she had the option to do so. *Id*. Similarly, no other member nominated Appellant for reelection. *Id*. Appellant's term as a board member expired and, as a result of the election process, Appellant was asked to leave the Board meeting. *Id*.

The Board minutes from the meeting reflect that the Foundation's executive director suggested a process of self-nomination, but Appellant

alleged that she did not know she could nominate herself and thought that only applied to the election of officers. *Id*. Appellant alleged that it would have been futile for her to nominate herself. *Id*.

Sometime after the meeting was complete, Appellant sent a letter nominating herself for reelection as a director; Appellant alleged she received no response. *Id*.

Significantly, in the interim period since Appellant filed her first action, the composition of the Foundation's board of directors has completely changed. Only a single member of the Foundation's current board of directors sat on the Board during the period Appellant was on the Board. Accordingly, regardless of the veracity of Appellant's claims against those prior members, there is no question the current Board members share no connection to those claims.

4. *Procedural History*.

i. Probate Case Proceeding.

While still an active member of the board of directors, on May 15, 2017, Appellant filed a petition in San Diego County Superior Court – Probate Division, 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. *Turner*, 67 Cal. App. 5th at 1114. Appellant alleged the first three causes of action on behalf of the Foundation against the other directors. *Id*. Appellant alleged the remaining causes of action derivatively on behalf of the Foundation against Victoria as trustee of the trust. *Id*.

Appellant brought the action in her role as a director and president of the Foundation pursuant to Sections 5142(a)(2) and (3) and 5233(c)(2) and (3), and derivatively on behalf of the Foundation as a member under Section 5710. She also alleged she was a beneficiary of one of the gift trusts. *Id*. at 1114-15.

Still during Appellant's tenure on the Board, in July 2017, Appellant amended the probate petition and named the Attorney General as a nominal respondent. *Id*. at 1115. 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. *Id*.

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. *Id*. The probate court determined the fifth through ninth causes of action against the trustee were based on Appellant's standing to act derivatively on behalf of the Foundation pursuant to Section 5710(b) and stayed decision on the demurrer until Appellant's standing was determined in the civil action. *Id*. at 1116.

ii. Civil Case Proceeding.

Appellant filed a civil complaint in the San Diego County Superior Court – Civil Division, alleging the first causes of action from the probate petition on behalf of the Foundation. *Turner*, 67 Cal. App. 5th at 1116. Appellant again named the Attorney General as a nominal defendant. *Id*. Again, the Attorney General made a general appearance and indicated that it would not participate unless ordered by the Court. *Id*. By this time,

Appellant's tenure on the Foundation's Board and her position as its president had ended. Defendants demurred to the derivative claims for lack of standing. *Id.*

After the initial demurrer was sustained with leave to amend on standing grounds, Appellant 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. *Id.* Appellant 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(a)(2) and (3), and 5233(c)(2) and (3) and derivatively on behalf of the Foundation under Sections 5142(a)(1) and 5710. *Id.* 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. *Id.* 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." *Turner*, 67 Cal. App. 5th at 1116.

Appellant prayed for removal of the directors and asked the court to hold them jointly and severally liable to the Foundation for damages. *Id.* She also sought her attorney's fees and costs. *Id.* Defendants again demurred based on lack of standing given that Appellant was no longer an officer or member of the Board. *Id.*

The civil court sustained the demurrers to the amended complaint without leave to amend, concluding that Appellant, as a former director and member, no longer had standing to bring derivative claims on behalf of the Foundation. *Id*.

Following the civil court's judgment, the probate court also concluded that Appellant lacked standing, sustained the demurrers to the remaining causes of action and entered a judgment of dismissal. *Id*. at 1116-17.

After the ruling by the civil court, the probate court inquired about the Attorney General's intention with respect to this matter. *Id*. at 1133-34. 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." *Id*. The court asked if the Attorney General would come into the case if Appellant 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 on the $15 million…." *Id*. at 1134. The deputy Attorney General stated, "If my office does determine that a petition or complaint is necessary, we would absolutely file that." *Turner*, 67 Cal. App. 5th at 1134. To date, however, the Attorney General has not filed a separate petition or granted Appellant relator status. *Id*.

iii. Fourth District Court of Appeals Decision.

After the civil court and the probate court's rulings sustaining the Respondents' demurrers without leave to amend, Appellant appealed both judgments and consolidated those appeals. After briefing and argument, the Fourth District Court of Appeals issued a unanimous opinion affirming

the lower court judgments, but remanding "with directions for the civil and probate courts to grant 60 days leave to amend, limited to the issue of whether a proper plaintiff may be substituted to pursue the existing claims," so that the "Attorney General may consider . . . granting relator status to [Appellant] or another individual." *Id*. at 1108-09.

The Fourth District rejected Appellant's contention that she had perpetual standing under Corporations Code sections 5142, 5223 and 5233 to pursue claims on the Foundation's behalf simply because she was a director and officer when she filed suit. *Id*. at 1134-35. The Fourth District determined that "[n]either the text nor the legislative history of these statutes suggests an intention to depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation" and concluded that "the statutory scheme and public policy considerations require a continuous relationship with the public benefit corporation that is special and definite to ensure the litigation is pursued in good faith for the benefit of the corporation." *Id*. at 1108.

Applying general principles of standing and corporate law, the Fourth District also concluded that Sections 5142, 5223 and 5233 "requires continuous membership in the nonprofit public benefit corporation to bring a derivative action. As with general corporations, the derivative claim belongs to the nonprofit public benefit corporation." *Id*. at 1127. Further, the power to proceed on the nonprofit corporation's behalf was granted only to those who, unlike Appellant, had current, ongoing "fiduciary duties to the nonprofit." *Id*.

The Fourth District also rejected Appellant's interpretation of the *Summers v. Colette*, 34 Cal. App. 5th 361 (2019) decision, holding: "the *Summers* court was concerned with equitable considerations surrounding the removal of a director and the absence of notice to the Attorney General." *Id*. at 1129. Here, "[u]nlike the *Summers* plaintiff, [Appellant] was not removed as a director under the Foundation's bylaws. She was simply not reelected at the board's annual meeting." *Id*. And unlike *Summers*, "there is no concern here that the Attorney General may not be in the position to become aware of wrongful conduct" because "the Attorney General had notice of both the probate and civil actions, has been involved in these cases since the beginning, and is well aware of the issues." *Id*. at 1133.

Finally, the Fourth District analyzed and rejected Appellant's policy contentions concerning the "practical limitations on the resources of the Attorney General," holding California's "statutory scheme adequately protects the nonprofit public benefit corporation and its beneficiaries from gamesmanship or improper attempts by the accused directors to terminate litigation" "by allowing litigation on behalf of a public benefit corporation by a defined class of individuals in addition to the Attorney General." *Turner*, 67 Cal. App. 5th at 1133-34. Specifically, "even if a qualified individual who initiated suit on behalf of the corporation loses standing during the litigation," "the statutory scheme provides the nonprofit public benefit corporation with protection through the Attorney General, who may pursue any necessary action either directly or by granting an individual relator status," which "minimizes the risk that a nonprofit public benefit

corporation and its directors could become embroiled in expensive retaliatory or harassing litigation by a disgruntled individual." *Id*. at 1132, 1134.

Accordingly, the Fourth District held that a vexatious, self-interested former director "who no longer stands in a definite and special relationship" with the Foundation "could divert the board and the organization's resources from the organization's charitable purpose by pursuing litigation for personal interests rather than the best interest of the corporation." *Id*. at 1134-35. In light of this, the court held Appellant lost standing to pursue the Foundation's causes of action as a director or officer when her term as director expired. *Id*. at 1135.

On November 10, 2021, this Court granted review.

IV. LEGAL DISCUSSION.

1. ***The Court Should Overrule Summers.***

It is long-standing law in California that a plaintiff must have standing to initiate and maintain an action. The Legislature, in adopting Corporations Code section 5710 used just that "intimate and maintain" language related to derivative actions. In *Grosset v. Wenaas*, 42 Cal. 4th 1100 (2008), this Court held that a former shareholder lost standing to pursue a derivative action when her shares were involuntarily exchanged in a merger. *See Grosset*, 42 Cal 4th at 1104. The holding was based on the same "instituted and maintained" language now found in Section 5710. As this Court held, "instituted and maintained" is more restrictive than the sole term "instituted" as used in other state's derivative action statutes, and the language implies a continuous relationship requirement. The language of

Section 5710 is equivalent to the statutory language in *Grosset.* "[I]t is not to be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." *See County of Los Angeles v. Frisbie*, 19 Cal. 2d 634, 644 (1942); *People v. Cardenas*, 31 Cal. 3d 897, 913-14 (1982). "We presume the Legislature intended everything in a statutory scheme, and we do not read statutes to omit expressed language or to include omitted language." *See Tyrone v. Superior Court*, 151 Cal. App. 4th 839, 850 (2007).

Following *Grosset*, *Wolf v. CDS Devco*, 185 Cal. App. 4th 903 (2010), held that a former director lost standing to inspect books and records when not reelected. *See Wolf*, 185 Cal. App. 4th at 916-17. As *Grosset* left room for an equitable exception to a continuous relationship rule, *Wolf* discussed whether such an equitable exception was warranted under the facts finding, nonetheless, that 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." *Id.* at 921. In its reasoning, *Wolf* relied on this 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." *Wolf*, 185 Cal. App. 4th at 916-17; *see also Apartment Assn. of Los Angeles*

County, Inc. v. City of Los Angeles, 136 Cal. App. 4th 119, 128 (2006) ("A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. Standing goes to the existence of a cause of action and the lack of standing may be raised at any time in the proceedings."); *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 438 (1989). Standing is a fundamental barrier to granting or denying a litigant's requested relief, as without such standing "no justiciable controversy exists." *See Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God*, 173 Cal. App. 4th 420, 445 (2009); *see also Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.*, 111 Cal. App. 4th 912, 920-21 (2003) ("[A]nyone other than a real party in interest lacks standing and is subject to a demurrer for the failure to state a cause of action."); *Payne v. Anaheim Memorial Medical Center*, 130 Cal. App. 4th 729, 745 (2005) (holding "the issue of standing is so fundamental that it need not even be raised below as a prerequisite to our consideration.").

A derivative claim does not belong to the person asserting it; thus, standing to maintain such a claim is justified only by a continued relationship between the plaintiff and the entity. *See Grosset*, 42 Cal. 4th at 1114. Consistent with *Grosset* and *Wolf*, a continuous relationship between the plaintiff and the entity should be required for a derivative plaintiff to maintain standing. For a party to have standing he or she "must be beneficially interested in the controversy … [t]his interest must be concrete and actual, and must not be conjectural or hypothetical." *See Iglesia Evangelica Latina, Inc.*, 173 Cal. App. 4th at 445. This is the very point of

the Legislature's designation of the Attorney General to appoint a relator when no one with standing steps forward to pursue the claims, and the Attorney General considers the claims potentially meritorious.

The *Summers* court incorrectly interpreted Sections 5142, 5223 and 5233 as creating a new exception to long-established standing precedent, holding public policy "weigh[s] against reading into the statutes at issue here a continuous directorship requirement that would unnecessarily deprive the Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue an action under those statutes." *See Summers*, 34 Cal. App. 5th at 371-72. The Second District also discounted the risk of harm associated with disregarding the general rules of standing in the charitable corporation context, asserting "those permitted to maintain an action in the absence of a continuous directorship requirement are sufficiently few in number" to minimize the potential for harassing litigation. *See id*. at 372.

The plain language of Sections 5142, 5223 and 5233 reveals no Legislative intent, either express or implied, to create a new exception to California's longstanding principles of legal standing. Further, the Second District's reasoning that former charitable directors are "sufficiently few in number" to warrant upending traditional rules of standing is both wrong and shortsighted, a position the Fourth District articulated in its opinion below. *See Turner*, 67 Cal. App. 5th at 1130 (relating to Sections 5142, 5223 and 5233, "We are not persuaded by the *Summers*' court's analysis of [these sections'] statutory purpose and public policy … [and its] analysis is too thin a reed upon which to lean in discarding ordinary standing

requirements and does not sufficiently protect nonprofit benefit corporations."); *accord* Cal. Corp. Code § 5047 ("[a] person who does not have authority to vote as a member of the governing body of the corporation is not a director as that term is used in this division regardless of title.").

Ultimately, the *Summers* decision should be overturned for several reasons. First, where, as here, a charitable corporation is accused of misconduct, the Attorney General will always have standing to investigate and litigate those claims. California law provides the Attorney General has the "primary responsibility for supervising charitable trusts . . . and for protection of assets held by charitable trusts and public benefit corporation." *See* Cal. Gov't. Code § 12598(a); *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 754 (1964) ("[T]he Attorney General has been empowered to oversee charities as the representative of the public, a practice having its origin in the early common law."). Conferring standing upon the Attorney General in such limited instances "addresses pragmatic concerns that charities would be embroiled in vexatious litigation, constantly harassed by suits brought by parties with no stake in the charity." *Turner*, 67 Cal. App. 5th at 1131. "[C]oncern that the corpus of the charity might be dissipated in litigation also has encouraged standing limitations, and for the public good courts try to protect charitable resources so that charitable dollars can be spent on the charity's philanthropic purpose." *Id*.

Second, the Corporations Code plainly states that the Attorney General is empowered to grant Appellant the legal standing she now

unilaterally asserts. Specifically, the Attorney General is authorized to grant any qualified third person "relator status," thus permitting an otherwise non-interested person to prosecute a claim in the Attorney General's stead. *See* Cal. Corp. Code § 5233(c)(4). Significantly, *Summers* ignored this "relator status" provision set forth in Section 5233, instead holding that "a continuous directorship requirement . . . would unnecessarily deprive the Attorney General and the public of the assistance of 'responsible individuals' wishing to pursue an action under those statutes." *See Summers*, 34 Cal. App. 5th at 371-72. This is simply not the case, as Section 5233 clearly states the Attorney General may, at all times, request the assistance of and confer legal standing to such "responsible individuals" who seek to pursue claims under Sections 5142, 5223 and 5233. *See* Cal. Corp. Code § 5233(c)(4).

Third, Appellant has used the *Summers* decision to make an "end run" around the Attorney General's independent discretion in determining whether she is a "qualified relator." Rather than depend on the Attorney General to arrive at this conclusion, Appellant has conferred "relator status" upon herself, thus giving her standing to prosecute these claims on the Foundation's behalf. Such a unilateral decision not only contradicts long-established principles of legal standing, it renders meaningless Section 5233 and the Legislature's decision to grant the Attorney General sole discretion in appointing a qualified relator. *See Manufacturers Life Ins. Co. v. Superior Court*, 10 Cal. 4th 257, 274 (1995) ("Well-established canons of statutory construction preclude a construction which renders a part of a

statute meaningless or inoperative."); *Californians for Disability Rights*, 39 Cal. 4th at 233.

Fourth, the "relator status" conferred under Section 5233 operates as an important check against the risk of vexatious litigants exhausting the charity's resources or otherwise impeding charitable objectives. Specifically, once relator status is conferred, the Attorney General is responsible for overseeing the relevant proceedings and the relator is responsible for all costs associated with those proceedings. *Turner*, 67 Cal. App. 5th at 1134. "This minimizes the risk that a nonprofit public benefit corporation and its directors could become embroiled in expensive retaliatory or harassing litigation by a disgruntled individual who no longer has a dog in the hunt." *Id.* The *Summers* decision, without any analysis or explanation, discarded this essential check afforded under Section 5233 and created the erroneous cornerstone on which Appellant's argument is now based.

Finally, *Summers* incorrectly assumed that the lack of an explicit reference to a continuous standing requirement in Sections 5142, 5223 and 5233 creates a presumption that no such requirement should apply. *See Summers*, 34 Cal. App. 5th at 374 ("In the absence of contrary legislative direction, we decline to read into these statutes a continuous directorship requirement."). In fact, basic principles of statutory interpretation demand a contrary finding: "We presume the Legislature intended everything in a statutory scheme, and we do not read statutes to omit expressed language or to include omitted language." *See Tyrone*, 151 Cal. App. 4th at 850; *Brodie v. Workers' Comp. Appeals Bd.*, 40 Cal. 4th 1313, 1325 (2007) ("We do not

presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such an intention is clearly expressed or necessarily implied."). The Legislature's omission of reference to continuous legal standing in Sections 5142, 5223 and 5233 does not betray an intent "to overthrow long-established principles" of standing, and *Summers*' findings to the contrary are mistaken.

Summers creates bad law and contradicts long-established California precedent on legal standing. The Court should use this opportunity to overrule *Summers* in its entirety.

2. ***The Attorney General's Broad Interpretation of Standing Conflicts with the Plain Language of the Corporations Code.***

A governmental agency "is a creature of statute and only possesses such powers as [the statute] conferred upon it." *See People v. Harter Packing Co.*, 160 Cal. App. 2d 464, 468 (1958). Here, the Legislature has granted the Attorney General the statutory authority to confer standing to otherwise uninterested persons as "relators," thus creating a statutory exception to the general continuous standing requirement. *See* Cal. Corp. Code §§ 5142(a)(5), 5233(c)(4). Relying solely on the analysis in *Summers*, the Attorney General now asserts Sections 5142, 5223 and 5233 create an additional statutory exception for former charitable directors. [*Amicus Curiae* Brief of the Attorney General of California in support of Appellant, p. 15.]

First, it defies logic that the Legislature would create an express, narrow exception to general principles of legal standing (i.e., Cal. Corp. Code §§ 5142, 5233(c)(4)) yet simultaneously create the implied, broad

exception that was inferred by the *Summers* court. *See Summers*, 34 Cal. App. 5th at 374 ("In the absence of contrary legislative direction, we decline to read into these statutes a continuous directorship requirement."). *Summers*' "declination to read" is particularly problematic here, where such refusal results in the upsetting of fundamental notions of standing long articulated by this Court. *See Californians for Disability Rights*, 39 Cal. 4th at 232-33 ("For a lawsuit 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.").

Second, this Court has long held that every California statute requires continuous legal standing unless the Legislature provided an express exception to that general rule. *See Grosset*, 42 Cal. 4th at 1113. In *Grosset*, the Court held that derivative claims are subject to a continuous standing rule in part because "nothing in [the statute's] history, just as nothing in its text, indicates that the Legislature rejected a continuous ownership requirement, or that construing the statute to include such a requirement would be contrary to legislative intent." *Id*. Ultimately, the Court in *Grosset* concluded that, in the absence of direction from the Legislature, the statutory language supported a continuous standing requirement. *Id*. at 1113–14.

Significantly, the Attorney General (like the Appellant) relies solely on the *Summers* decision to support its argument to broaden the statutory exception for legal standing, and such tactics underscore the importance of overturning that decision.

3. ***If Not Overruled, Summers Should be Limited to its Facts Which are Not Present Here.***

If the Court does not overrule *Summers,* the Court should limit *Summers* to its facts. Unless a former director alleges with particularity facts showing he was ousted in bad faith to block the litigation, the sitting board should continue to control the entity's agenda unless the Attorney General steps in either directly or through a relator. This limiting rule is consistent with the statutory language of Corporations Code section 5710 including "instituted and maintained," consistent with Corporations Code section 5233(c)(2) which does not include "former," consistent with Corporations Code section 9142 allowing a "former member" to bring suit in the context of a religious corporation, consistent with Code of Civil Procedure section 367 continuous interest requirement, consistent with *Grosset,* consistent with *Wolf* and consistent with the Opinion. *See Turner,* 67 Cal. App. 5th at 1134 ("…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.").

Appellant (1) naturally and non-contentiously concluded her term as director of the Foundation and, despite having the power to do so, failed to self-nominate to continue that directorship, (2) failed to allege wrongdoing at any point during the Foundation's election process, and (3) joined the Attorney General as a party to this action. *Summers*, on the other hand, involved (1) a board of directors who called a special meeting to take affirmative action to ouster the former director/plaintiff to defeat standing, (2) the Attorney General had not been added as an indispensable party nor

given notice of the proceeding and (3) the trial court had not granted leave to amend to join the Attorney General. *See Summers*, 34 Cal. App. 5th at 364; *Turner*, 67 Cal. App. 5th at 1133 ("Unlike in *Summers* … there is no concern here that the Attorney General may not be in the position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact [as] [Appellant] informed the Attorney General of her concerns even before she commenced the probate action.").

Significantly, Appellant cannot (and does not) allege she was wrongfully removed from her position as director of the Foundation. In fact Appellant, cognizant of this factual incongruence with *Summers,* sidesteps the issue entirely by conjecturing Appellant's efforts for re-election to the Board "would have been futile" because "Respondents never would have voted to re-elect her by the majority vote needed under the charity's bylaws." [Opening Brief, p. 19.] Through such thin pleading, Appellant makes an awkward attempt to fit within the factual framework of *Summers* when in fact the two cases are completely dissimilar. [*Id*., at pp. 67-8.]

The Fourth District identified additional, material distinctions between this case and *Summers* decision, including:

(1) The Second District in *Summers* concluded the trial court erred by not granting the former director/plaintiff leave to amend to add the Attorney General as an indispensable party. Here, Appellant was granted sixty (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 former director/plaintiff in *Summers* was involuntarily removed from a charitable 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."

Turner, 67 Cal. App. 5th at 1129-30, 1138.

It is not unusual for a party, such as Appellant, to lose standing following the initiation of litigation. What is unusual, and was identified as such by the Fourth District, would be "allowing perpetual standing to an individual who no longer stands in a definite and special relationship with the nonprofit public benefit corporation." *See Turner*, 67 Cal. App. 5th at 1134. To rule otherwise and broaden the rules of standing to any former director would "encourage frivolous suits that will divert fiduciaries and deplete charitable funds in the defense of lawsuits" and "encourage disaffected persons . . . or disgruntled members of the public, to use the courts to attempt to force trustees and directors to take desired courses of action." *See id*. at 1135.

4. ***The Out-of-State Authorities Relied Upon in Appellant's Petition Are Factually Distinct.***

The out-of-state authorities on which Appellant and *Summers* rely do not involve similar standing language or standards. *Workman v. Verde Wilderness Wellness Center, Inc.*, 240 Ariz. 597 (Ariz. Ct. App. 2016) and *Tenney v. Rosenthal*, 6 N.Y. 2d 204 (N.Y. 1959) involved foreign standing rules that differ significantly from California's standing rules. Standing in New York and Arizona (1) is not jurisdictional and (2) is waivable. *See Tenney*, 6 N.Y. 2d at 208; *Dobson v. State*, 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 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; *Grosset*, 42 Cal. 4th at 1110 (holding derivative claims require continuous standing); *Apartment Assn. of Los Angeles County, Inc.*, 136 Cal. App. 4th at 128; *see also* Cal. Code Civ. Proc. § 367. Given the fundamental differences between California, Arizona and New York law as it relates to standing, Appellant's reliance on *Workman* and *Tenney* is misplaced.

Workman and *Tenney* also include allegations of wrongful ouster which are not present in this case. 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. *Workman*, 240 Ariz.

at 600. Similarly, *Tenney* involved the director defendants moving before an election to prevent plaintiff's reelection. *Tenney*, 6 N.Y. 2d at 207. While *Grosset* allowed room for an equitable exception when the director is wrongly ousted to avoid standing, Respondent argues that no such carve-out can be made in this case as Appellant's board term expired naturally. *Accord Wolf*, 185 Cal. App. 4th at 919 (director's action to inspect books and records rightly dismissed following her failure to be reelected on the grounds the director no longer had the "status and standing that are required to justify" representative actions).

5. *Common Cause and Turner's Other Cases are Not Informative.*

Appellant cites several non-derivative claim cases to argue for perpetual standing. First, Appellant cites *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432 (1989) to support her assertion that an ousted director possesses sufficient interest in an action to maintain standing under Sections 5142, 5223 and 5233. [Opening Brief, p. 38.] In fact, *Common Cause* concerned standing pursuant to Code of Civil Procedure section 526a concerning whether a taxpayer has standing to force a municipality to expend funds to adopt a new program. *See Common Cause*, 49 Cal. 3d at 438. The standing issues in *Common Cause* are completely irrelevant to the standing issues present here.

Appellant also cites *San Diegans for Open Gov't. v. Public Facilities*, 8 Cal. 5th 733 (2019) to support her standing claim because she has "an actual justiciable controversy and some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." [Opening Brief, p. 39.]

Again, the facts in *San Diegans for Open Gov't.* are completely dissimilar from those here and concerned standing pursuant to Government Code section 1092 and whether a taxpayer organization had standing to invalidate governmental contracts. *See San Diegans for Open Gov't.*, 8 Cal. 5th at 736-37.

Third, Appellant relies on *Kim v. Reins*, 9 Cal. 5th 73 (2020) to support her assertion that Sections 5142, 5223 and 5233 support a private right of action for directors where there is simply an "unabated" violation against a non-profit. [Opening Brief, pp. 44-5.] Once the suit commences, Appellant argues, those statutes do not require a continued director status if the claimed harm continues. [*Id*.] *Kim*, however, has nothing to do with standing in the context of Sections 5142, 5223 and 5233. Rather, it concerned standing under Labor Code section 2698 *et seq*. and whether employees lose standing to pursue a claim under the Private Attorneys General Act if they settle and dismiss claims for individual Labor Code violations. *See Kim*, 9 Cal. 5th at 80. Significantly, the Supreme Court in *Kim* held the Private Attorneys General Act specifically deputized current **or former** employees to step into the shoes of the Labor Commissioner and sue for Labor Code violations. *See* Labor Code § 2698 *et seq*.; *Kim*, 9 Cal. 5th at 776 (holding plaintiff was "aggrieved" former employee for standing purposes because he had suffered a violation.). Here, Sections 5142, 5223 and 5233 simply say "director," omitting any reference to "former directors."

Fourth, Appellant cites *Barefoot v. Jennings*, 8 Cal. 5th 822 (2020) to support her claim that a former director has standing to continue

litigation against her former board of directors. [Opening Brief, pp. 46-7.] Once again, *Barefoot* is not a derivative action case and has nothing to with standing in the context of Sections 5142, 5233 or 5233. Rather, *Barefoot* concerned whether beneficiaries named in a superseded trust had standing to sue the beneficiaries named in the new trust pursuant to Probate Code section 17200. In a successful trust contest, beneficiaries named in the prior trust would take the trust assets and, on such grounds, had a clear continuing financial interest in the outcome. *See Barefoot*, 8 Cal. 5th at 825. Appellant incorrectly assumes that, because the Supreme Court held former trust beneficiaries do not lose standing to challenge a trust amendment after they were eliminated as trust beneficiaries, former charitable directors also do not lose standing to litigate entity owned claims. [Opening Brief, p. 47.] There are no grounds that would justify Appellant's broad extension of this Court's holding in *Barefoot* to derivative actions filed on behalf of charitable corporations by a former director.

V. JOINDER IN ANSWER BRIEF OF BOARD OF DIRECTOR MEMBER LAURIE ANNE VICTORIA.

Mr. Gronotte, as a similarly situated board of director member, joins in the Answer Brief on the Merits of Laurie Anne Victoria to the extent such brief offers argument in addition to that submitted here and is submitted in her position as board member.

VI. CONCLUSION.

Appellant Debra Turner's derivative litigation is an abuse of the litigation process and contrary to the Foundation's goals. The current, independent majority board members do not want it pursued.

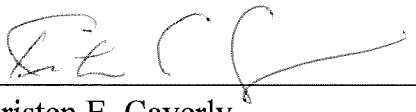
Presently serving board members and the Attorney General, directly

or through a relator, are sufficient safeguards against self-dealing in California charitable foundations. Unless the Legislature expressly expands derivative standing to current and former board members, the Court should impose a continuance standing requirement regardless of how and why the former board member is no longer serving. Reasonable leave to amend to add a new plaintiff is an appropriate procedure to permit meritorious cases to proceed while preventing former board members from dictating the business of the entity.

The Court should affirm the Court of Appeals Opinion and overrule *Summers*.

Dated: April 7, 2022

HENDERSON, CAVERLY, PUM & TRYTTEN LLP



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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 **Respondent Joseph Gronotte's Answering Brief on the Merits** Excluding the cover, table of contents, table of authorities and certificate of compliance is less than 7,300 words as counted by the Microsoft Word for Office 365 version word processing program used to generate this document.

Dated: April 7, 2022

By: _____
Kristen E. Caverly
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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.

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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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Executed at San Diego, California on April 5, 2022.

Jason E. Sinford

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Case Number: **S271054**
Lower Court Case Number: **D076318**

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4/8/2022

Date

/s/Jason Sinford

Signature

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