

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KOREAN AMERICAN
PRESBYTERIAN CHURCH,

Plaintiff and Appellant,

v.

HUN SUNG PARK, et al.,

Defendants and
Respondents.

B284852

(Los Angeles County
Super. Ct. No. BC582128)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed in part, reversed in part and remanded with directions.

Benedon & Serlin, Gerald M. Serlin, Kelly Riordan Horwitz; Law Offices of Peter A. Kim and Peter A. Kim for Plaintiff and Appellant.

McKay, deLorimier & Acain, Paul A. deLorimier and Michael P. Acain for Defendants and Respondents Hun Sung Park, Nahm Eul Kim, Samuel Lee (aka Sang Chae Lee), Philip K. Yi (aka Kyu Bo Yi), Chun Kyung Kim, Oon Young Lee, Jong Yoon

Jung, Young Chong Oh, Seung Wook Lee, Kelly Kim (aka Kyoung Ae Kim), So Yun Ahn and In Hwa Ahn.

Korean American Presbyterian Church (KAPC) and three former directors of the International Reformed University & Seminary (IRUS) sued 12 current and former directors of IRUS (collectively Park defendants)¹ alleging causes of action for declaratory relief, breach of fiduciary duty, conversion and trademark infringement. IRUS was named in the action as a nominal defendant. The court dismissed the individual plaintiffs on demurrer and summary judgment, leaving KAPC as the only remaining plaintiff.

Prior to the admission of any evidence at the court trial, the court ruled KAPC lacked standing to pursue a derivative claim on IRUS's behalf under Corporations Code section 5710² because KAPC had not alleged, and could not prove, it had ever been a member of IRUS. The court rejected KAPC's assertion it had standing to proceed directly as a real party in interest. The court also denied KAPC's request for leave to amend its complaint to allege standing pursuant to section 9142, which authorizes actions on behalf of a religious corporation to remedy a breach of

¹ The individual defendants named in the lawsuit and to whom we refer collectively as the Park defendants are Hun Sung Park, Nahm Eul Kim, Samuel Lee (aka Sang Chae Lee), Philip K. Yi (aka Kyu Bo Yi), Chun Kyung Kim, Oon Young Lee, Jong Yoon Jung, Young Chong Oh, Seung Wook Lee, Kelly Kim (aka Kyoung Ae Kim), So Yun Ahn and In Hwa Ahn.

² Statutory references are to this code unless otherwise stated.

trust relating to assets of the corporation. The court found KAPC had proceeded throughout the case on the theory IRUS was a public benefit corporation, not a religious corporation, and amendment on the eve of trial would prejudice the Park defendants. After further briefing the court also ruled KAPC's trademark-related claims were barred by a prior settlement agreement and release. The court entered judgment in favor of the Park defendants.

On appeal KAPC concedes it lacked standing to pursue a derivative action under section 5710, but contends the court erred in concluding it lacked standing to pursue direct claims against the Park defendants. Alternatively, KAPC argues the court erred in denying its request for leave to amend to allege standing under section 9142. KAPC also asserts the court erred in concluding its trademark-related claims were barred by the prior settlement agreement and release.

We reverse the judgment because the court erred in denying KAPC leave to amend its complaint. We affirm the court's ruling KAPC's trademark claims are barred by the prior settlement agreement and release.

FACTUAL AND PROCEDURAL BACKGROUND

1. KAPC's Lawsuit

KAPC and three former IRUS directors (collectively KAPC plaintiffs) filed this lawsuit against the Park defendants in May 2015. In the operative first amended complaint the KAPC plaintiffs alleged KAPC is a Pennsylvania nonprofit religious corporation that operates as a denomination of the Presbyterian Church overseeing 30 district presbyteries and 650 churches across North, Central and South America, and IRUS is a

nonprofit public benefit corporation that operates as a seminary for KAPC.

The KAPC plaintiffs alleged that in 1979 IRUS, “by and through” its then-president Chun Il Cho, “donated the seminary” to KAPC. From 1979 through 2012 IRUS’s bylaws required that KAPC members hold a majority on the seats on IRUS’s board; and IRUS, through its constitution and bylaws, pledged its “allegiance to KAPC.” Although IRUS’s bylaws were amended several times over the years, as late as 2011 they continued to provide for KAPC’s control of IRUS and made clear that, upon dissolution of IRUS, all remaining assets of the seminary belonged to KAPC. However, the KAPC plaintiffs alleged, “everything changed” in 2013 when “a dissident faction of apostates” wrested control of IRUS away from KAPC by improperly removing KAPC-affiliated directors from IRUS’s board and illegally changing IRUS’s bylaws to eliminate any required association with KAPC, thus fundamentally altering IRUS’s mission of providing ordained ministers for KAPC. KAPC also alleged the Park defendants improperly used the KAPC name and trademark to hold themselves out as KAPC.

Other than stating “some Plaintiffs are suing derivatively, and this action, in part, is brought as a derivative action on [IRUS’s] behalf,” the first amended complaint did not identify or distinguish between derivative and direct claims. It alleged causes of action by all plaintiffs against all defendants for (1) declaratory relief as to the rights and obligations of the parties in IRUS; (2) injunctive relief prohibiting the Park defendants from serving on IRUS’s board or using KAPC’s trademarks in its advertising or for recruitment; (3) breach of fiduciary duty; and (4) conversion. KAPC alone alleged

additional causes of action against the Park defendants for violation of the Lanham Act (15 U.S.C. § 1051 et seq.) and common law trademark and sought an accounting to determine the full scope of the Park defendants' misuse of IRUS funds.

2. The Park Defendants' Demurrer to the First Amended Complaint

The Park defendants demurred to the first amended complaint, arguing the individual plaintiffs lacked standing to bring a derivative action under section 5710 because none had been a member of IRUS at the time of the events alleged in the complaint.³ The trial court sustained the Park defendants' demurrer to the first amended complaint without leave to amend as to individual plaintiffs Chun Il Cho and David Kwon and overruled their demurrer as to Sang Deok Kim.

3. The Park Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication

On July 22, 2016 the Park defendants moved for summary judgment or summary adjudication arguing (1) Sang Deok Kim lacked standing to bring a derivative action because the undisputed evidence established he had not been a member of IRUS during the time periods identified in the first amended

³ In their demurrer to the original complaint, the Park defendants argued neither KAPC nor the individual plaintiffs had standing. The court (a different judge from the one who presided at the time of trial) sustained the demurrer with leave to amend as to the individual plaintiffs and overruled it with respect to KAPC, concluding KAPC had adequately alleged its standing "to sue in its own right." Neither the original complaint nor the Park defendants' demurrer was provided in the record on appeal.

complaint; (2) his action challenging his removal from the board for nonpayment of dues was barred by a nine-month statute of limitations; and (3) all causes of action on behalf of KAPC “individually and collectively derivatively on behalf of IRUS” were barred by the release provision of a settlement agreement that had resolved prior litigation between the parties. The Park defendants did not challenge KAPC’s standing in their motion.

The trial court granted the Park defendants’ motion for summary judgment as to Sang Deok Kim and denied it as to KAPC. Although the court indicated KAPC’s trademark claims were precluded by the settlement agreement and release, it denied summary adjudication regarding those claims because the Park defendants had not appropriately directed their motion to them.

4. *The Trial Briefs*

a. *The renewed dispute over KAPC’s standing*

In a February 21, 2017 trial brief submitted in connection with the trial scheduled for March 7, 2017, the Park defendants argued KAPC’s claims for declaratory and injunctive relief, breach of fiduciary duty and conversion (the first through fourth causes of action) alleged injury to IRUS and, therefore, were derivative. To establish standing to proceed derivatively on IRUS’s behalf, the Park defendants continued, KAPC had to allege it was a member of IRUS during the relevant time period and KAPC had not, and could not, allege it had ever been a member of IRUS. Thus, like the individual plaintiffs who had been previously dismissed, the Park defendants argued, KAPC lacked standing to proceed on all but its direct trademark claims.

Believing the standing issue had been settled in prior rulings, KAPC did not address standing in its opening trial brief.

In a supplemental trial brief filed March 2, 2017 KAPC insisted it had standing as a real party in interest to pursue a direct claim for the Park defendants' usurpation of its seminary.

Alternatively, KAPC requested leave to amend its complaint to maintain an action against IRUS directors under section 9142 for breach of trust. Although section 9142 applied to nonprofit religious corporations and KAPC had alleged IRUS was a nonprofit public benefit corporation, KAPC argued the difference was primarily technical, not substantive. The gravamen of its action had always been that it had held a direct interest in IRUS's assets or a reversionary interest upon IRUS's dissolution, and it could therefore pursue a claim for breach of trust against IRUS's directors.⁴

The Park defendants objected to what they characterized as KAPC's last minute change in legal theory. They argued KAPC had pleaded a derivative claim for breach of fiduciary duty and conversion on behalf of a public benefit corporation, not a breach of trust on behalf of a religious corporation, and it would be unfair and prejudicial to allow KAPC to amend its pleading to state an entirely new legal theory.

The trial court agreed with the Park defendants and denied KAPC leave to amend.⁵ After all parties suggested the remaining

⁴ Section 9142 provides, "(a) Notwithstanding Section 9141, any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a trust under which any or all of the assets of a corporation are held: [¶] . . . [¶] (4) a person with a reversionary, contractual, or property interest in the assets subject to such trust."

⁵ The court stated, "This court finds that there would be and there is prejudice to the defendant, and will not allow the

trademark issues might be resolved by agreement or by further briefing without the need for a trial, the court continued the trial and ordered the parties to submit further briefing on those claims.

b. *The trademark claims*

In additional supplemental briefing the Park defendants argued prior litigation over the use of the KAPC name between KAPC, on the one hand, and Korean American Presbyterian Church, a California nonprofit corporation (a corporation related to the Park defendants) and two of the Park defendants, on the other hand (*Korean American Presbyterian Corporation v. Korean American Presbyterian Corporation* (Super. Ct. L.A. County, 2014, No. BC540136)), had been resolved with a settlement agreement and release that barred KAPC's trademark claims, which indisputably arose prior to that settlement. The Park defendants argued, and KAPC did not dispute, that the release, if applicable, covered all Park defendants, including those who were not signatories of the agreement.⁶

amendment to proceed and to allege that defendant is a religious corporation, rather than, as originally alleged and continuously reasserted, that defendant is a California nonprofit public benefit corporation. So, given the nature of the entity and give the fact that . . . plaintiff does not have standing, that plaintiff is not a member of the board, then I, I believe I am obligated to find in favor of the defendant in this matter.”

⁶ The release provided, “Settling Parties, on behalf of themselves, their executors, successors or predecessors in interest, and assigns hereby covenant not to sue and fully and generally release each other, and each of their agents . . . successors, assigns, partners, corporations, corporate parents, subsidiaries, affiliated companies, and divisions from all claims,

In arguing its claims were not barred, KAPC emphasized the settlement agreement and release expressly excluded certain claims: “The Settlement Agreement shall not be construed as releasing any claims or otherwise affecting the matter of [*IRUS*] *v. John Eun Whang, et al.*,” Los Angeles Superior Court “Case no. BC518771” and “cannot be used for any purposes in any matters or cases relating to said claims.” KAPC argued this exception was intended to preserve all IRUS-related claims brought by KAPC and its affiliates, not just the claims pending in the *Whang* litigation. At the very least, it argued, the agreement on this point was ambiguous and the intended meaning of the *Whang* exemption should be resolved by a trier of fact.

The court concluded the release was unambiguous, the *Whang* exemption did not apply to claims asserted in this case, and KAPC’s trademark claims were barred.

DISCUSSION

1. *The Trial Court Properly Concluded KAPC Lacked Standing To Maintain a Derivative Action Under Section 5710 or a Direct Action as a Real Party in Interest*

a. *Governing law*

“Every action must be prosecuted in the name of the real party in interest except as otherwise provided by statute.” (Code Civ. Proc., § 367.) A real party in interest is a person aggrieved by the alleged conduct or otherwise “beneficially interested” in

demands, causes of action, obligations, damages and liabilities, whether or not now known, suspected or claimed, arising out of or based upon the facts and circumstances giving rise to the Action, and any and all transactions or interactions between the Parties prior to the date of this Agreement.”

the controversy. (See *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796; *Summers v. Colette* (2019) 34 Cal.App.5th 361, 367.) The purpose of the real party-in-interest requirement is to protect a defendant against whom a judgment may be obtained from further litigation by some other claimant to the same demand. (*O’Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1094; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1008, fn. 5.)

The Legislature has authorized persons who do not qualify as a real party in interest to pursue in certain circumstances claims derivatively on behalf of the real party. (See, e.g., § 800 [authorizing shareholders to bring action on corporation’s behalf]; see generally *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1110 [although corporate entity is named as a nominal defendant in shareholder derivative action under section 800, action is brought on its behalf and for its benefit].) In the context of nonprofit public benefit corporations organized under section 5110, standing to maintain a derivative action is governed by section 5710, which authorizes a member of a nonprofit public benefit corporation to bring an action on behalf of the corporation, provided the plaintiff was a member of the corporation when the acts complained of occurred and made efforts to secure from the board the action plaintiff desires or explained why such efforts would be futile.⁷

⁷ Section 5710, subdivision (b), provides in part, “No action may be instituted or maintained in the right of any corporation by any member of such corporation unless both of the following conditions exist: [¶] (1) The plaintiff alleges in the complaint that plaintiff was a member at the time of the transaction or any part thereof of which plaintiff complains; and [¶] (2) The plaintiff

b. *KAPC concedes it lacked standing under
section 5710*

In its appellate briefs KAPC acknowledges: (1) The first amended complaint described IRUS as a nonprofit public benefit corporation organized under section 5110; (2) section 5710 requires the action be maintained by a member of the public benefit corporation at the time the alleged injurious conduct occurred; and (3) KAPC was not a member of IRUS at any time. Accordingly, it concedes it lacks standing to assert a derivative action under section 5710.

c. *KAPC did not allege a direct cause of action*

KAPC contends, however, that the trial court erred in characterizing its action as solely derivative on behalf of IRUS. While some of its claims may have been derivative on IRUS's behalf, KAPC insists it had always asserted on its own behalf a direct action for the harm it suffered when the Park defendants

alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which the plaintiff proposes to file."

A member of a public benefit corporation is "any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors or on a disposition of all or substantially all of the assets of a corporation or on a merger or on a dissolution 'Member' also means any person who is designated in the articles or bylaws as a member and, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote on changes to the articles or bylaws." (§ 5056, subd. (a).)

eliminated IRUS's exclusive affiliation with KAPC, depriving it of its seminary. Accordingly, KAPC contends, the court erred in concluding it had not alleged, and could not prove, a direct cause of action for breach of fiduciary duty or conversion.⁸

Contrary to its contention, KAPC did not allege facts in the first amended complaint that would establish the Park defendants had breached a fiduciary duty they owed to KAPC; indeed, there are no factual allegations in the complaint that indicate the Park defendants had any fiduciary relationship to KAPC whatsoever. Rather, the complaint alleged KAPC suffered harm when the Park defendants breached their fiduciary duties to IRUS. That claim, as the court recognized, was derivatively asserted on behalf of IRUS.

KAPC urges at the very least it adequately pleaded a direct claim for conversion of its seminary, which it alleged had been

⁸ The court's ruling, based on the trial briefs and offers of proof without consideration of evidence, is akin to an order for nonsuit made after opening statement. Accordingly, we review its ruling de novo, while viewing the offers of proof most favorably to KAPC and resolving all conflicts in its favor. (Cf. *McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, 540 [court's ruling at trial based on insufficient offer of proof is akin to a motion for nonsuit after opening statement; accordingly, "we review the trial court's ruling de novo, viewing the evidence and offers of proof most favorably to [plaintiff], and resolving all presumptions, inferences and doubts in its favor; and we will uphold the order . . . only if it required as a matter of law"]; *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 28 [court's grant of motion in limine "tantamount to a nonsuit"; reviewing court must "uphold the judgment for respondents only if it was required as a matter of law"].)

“donated” to it in 1979. It supported this allegation with an offer of proof: IRUS’s bylaws from that time acknowledge a “donation.” But apart from the bare assertion of a donation, KAPC alleged no facts, either in its complaint or in an offer of proof, that identify what exactly was donated or the nature or substance of the donation. A donation of the land, for example, would make KAPC the owner of the real property on which the seminary sits, but such an allegation would not support a conversion claim. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1295 [“[t]he tort of conversion applies to personal property, not real property”].) A donation of the building itself or its library or other contents might create the necessary standing for a direct claim, but KAPC has never suggested IRUS’s former president had the capacity to make such a gift, let alone that he had actually done so. Fundamentally, as the trial court recognized, KAPC’s conversion claim was premised on allegations that the Park defendants had used IRUS assets for their own benefit, or for ultra vires purposes. That is a derivative claim.⁹

⁹ KAPC’s lack of capacity as a real party in interest to state direct causes of action for conversion and breach of fiduciary duty also affects its standing to seek declaratory relief. (See *D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484, 1489 [although Code of Civil Procedure section 1060 authorizing an action for a judicial declaration appears broad, standing and ripeness are essential elements of such an action; “[o]ne cannot analyze requested declaratory relief without evaluating the nature of the rights and duties that plaintiff is asserting, which must follow recognized or cognizable legal theories that are related to subjects and requests for relief that are properly before the court”].)

2. *The Court Erred in Denying KAPC Leave To Amend Its Complaint To Assert a Breach of Trust Action as the Holder of a Reversionary Interest in a Religious Corporation Under Section 9142*

a. *Governing law and standard of review*

A court has broad discretion to allow a party to amend a pleading at any time, up to and including trial. (See Code Civ. Proc., §§ 473, subd. (a)(1) [court may in its discretion after notice to the adverse party “allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars”], 576 “[a]ny judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order”].) “The basic rule” applicable to amendments to conform to proof is that no prejudice occurs when the amended pleading would be based on the same general set of facts as those upon which the cause of action was grounded. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1378.)

We review the trial court’s decision to grant or deny leave to amend for abuse of discretion (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31; *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175), keeping in mind both the policy affording great liberality to requests for amendment and California’s jurisprudential preference for trying cases on the merits. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240 [“leave to amend a pleading should be liberally granted as long as there is no timeliness problem under a statute of limitations or prejudice to the opposing party”].) “[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the [proposed] amendment.” (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.)

b. *Religious corporations and standing requirements*

Prior to January 1, 1980 all California nonprofit corporations were subject to the state’s general corporation law except when a statute specifically applied to nonprofit corporations. (See 3 Ballantine & Sterling, Cal. Corporation Laws (4th ed. 2019) § 402.01, pp. 19-36 to 19-37 (rel. 129-12/2015.)) In 1978 (one year after IRUS was formed) the Legislature passed the Nonprofit Corporation Law (Stats. 1978, ch. 567, §§ 5-8, pp. 1750-1924, operative Jan. 1, 1980) revising the statutory framework for nonprofit corporations and distinguishing, among other things, between public benefit corporations established for public or charitable purposes and religious corporations. (See, e.g., §§ 5111 [defining public benefit corporation as a nonprofit corporation organized under section 5110 for any public or charitable purpose], 9111 [defining a religious corporation as a nonprofit corporation formed “primarily or exclusively for religious purposes”].)

Under the Nonprofit Corporation Law a public benefit corporation organized primarily or exclusively for religious purposes prior to the effective date of the law automatically became subject to laws governing religious corporations after January 1, 1980 without any change in the corporation’s articles or bylaws. (See § 9912, subd. (a)(2).) Section 9142 subdivision (a), applicable to religious corporations, authorizes certain persons—the religious corporation or a member of the corporation in the corporation’s name, or an officer, director, or holder of a reversionary, contractual or property interest in the assets held in trust by a religious corporation—to bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a trust involving assets held by the religious

corporation in trust. Subdivision (c) of section 9142 provides that no assets of a religious corporation “shall be deemed to be impressed with any trust, express or implied,” absent an explicit commitment by the corporation or the donor that the assets be held in trust.

*c. The court erred in denying KAPC leave to
amend to state a breach of trust claim under
section 9142*

KAPC asserts it pleaded IRUS was a nonprofit public benefit corporation largely because it was at the time it was established in 1977. But after January 1, 1980 it became subject to the laws governing religious corporations pursuant to section 9912, subdivision (a)(2), as it was organized primarily, if not exclusively, for religious purposes. Characterizing its proposed amendment designating IRUS’s corporate identity as a religious corporation as more technical than substantive, KAPC argues the court erred in denying it leave to amend its complaint to establish KAPC’s standing to proceed as the holder of a reversionary interest in assets held by IRUS in trust for it.

The Park defendants persuaded the trial court that the amendment would inject new and different facts into the proceedings because KAPC had not previously alleged a breach of trust based on a reversionary interest in IRUS’s assets. However, in paragraph 65 of the first amended complaint KAPC alleged that all IRUS’s assets belonged to KAPC upon IRUS’s dissolution and that the Park defendants’ misuse of IRUS’s assets harmed that property interest. Those are effectively the same set of facts KAPC would allege to support its amendment under section 9142. While the words “reversionary interest” were not explicitly averred, the nature of KAPC’s interest in IRUS’s property upon dissolution was alleged from the beginning of the

litigation. (See generally *Duchrow v. Forrest*, *supra*, 215 Cal.App.4th at p. 1378 [amendment not prejudicial if based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded].)

Relying on language in *Brautigam v. Brooks* (1964) 227 Cal.App.2d 547, 560-561, the Park defendants contend the court properly denied leave to amend to prohibit KAPC from asserting a theory that it had expressly disavowed in its initial trial brief.¹⁰ In *Brautigam*, a case that preceded the recognition of comparative fault in negligence cases, the defendant had not pleaded contributory negligence as an affirmative defense. At the close of trial the defendant sought leave to amend his answer to assert the defense to conform to proof. The trial court denied leave to amend, concluding the late amendment would be prejudicial to the plaintiff, who had tried his case unaware of that defense. The *Brautigam* court affirmed, reasoning, “Who can say that plaintiff’s counsel, had he known he would be confronted

¹⁰ In its initial trial brief before its standing was challenged, KAPC asserted, “The Articles of Incorporation clearly demonstrate that IRUS is a general nonprofit public benefit corporation formed for the purpose of religious education. [Citation.] It is not formed under the Religious Non-profit Corporation laws, but under the General Nonprofit Corporation Laws of California. [Citation.] . . . IRUS has operated as a charitable organization since its founding, and numerous persons affiliated with KAPC, churches affiliated with KAPC, and KAPC itself have generously donated to the charitable purpose of training KAPC’s pastors. [Citation.] Accordingly, the current board cannot fundamentally change its purpose to become an independent institution that does not maintain, espouse and teach the theology and tenets of KAPC.”

with the claim of contributory negligence, would not have handled his examination of witnesses and general conduct of the case differently?” (*Id.* at p. 560; accord, *Garrick v. J.M.P., Inc.* (1957) 150 Cal.App.2d 232, 240 (*Garrick*) [“Defendants’ motion for leave to amend to conform to the proof by alleging a joint venture and a resulting loss was properly denied. Defendant Pruitt had previously testified factually and by way of conclusion that there was no joint venture, and hence defendants cannot complain of a denial of their motion to amend. They cannot blow hot and cold in this manner. ‘These two positions are entirely inconsistent. The court will not recognize or tolerate such tactics’”].)

In contrast to the requests for leave to amend in *Brautigam* and *Garrick*, KAPC made its request before the case was tried and any evidence was admitted. The obvious prejudice existing in those cases if the amendment were granted is absent here, particularly when the underlying factual allegations of a reversionary interest in IRUS’s assets were essentially, if inartfully, pleaded, undermining the Park defendants’ claims of surprise. (See *Eng v. Brown* (2018) 21 Cal.App.5th 675, 700 [“[i]f the same set of facts supports merely a different theory . . . no prejudice can result”].)

The Park defendants also argue the court found KAPC’s evidence insufficient to support its claim of a reversionary interest. The court made no such ruling. If anything, the court stated KAPC’s alleged reversionary interest was insufficient to state a direct action, a conclusion we affirm. As to its request for leave to amend under section 9142, however, the court simply stated KAPC had proceeded on the theory that IRUS was a public benefit corporation and amendment on the eve of trial would be

unfair to the Park defendants. Notably, neither the Park defendants nor the court identified with any specificity the prejudice that would ensue if the amendment were permitted, and we cannot conceive of any. The nature of IRUS's corporate identity is particularly within the knowledge of the Park defendants who sit (or did sit) on its board.

As an additional argument in support of the court's ruling, the Park defendants stress that KAPC cited no admissible evidence at trial to support its theory that any of IRUS's assets were expressly held in trust for KAPC, an essential element of a breach of trust claim under section 9142. (See § 9142, subd. (c) ["[n]o assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law" absent (1) an express commitment by the board of directors to hold those assets in trust; (2) the articles or bylaws or governing instruments expressly provide for the trust; or (3) the donor expressly imposed a trust].) The Park defendants misapprehend the nature of the court's ruling. The court did not admit any evidence at all, let alone find any offer of proof inadequate to support standing under section 9142.¹¹ It simply ruled the amendment would be prejudicial. It is to that point alone that we direct our review. It may well be that KAPC will be unable to prove that any IRUS assets are expressly held in trust for it. We hold only that the trial court erred in denying KAPC leave to amend to allege those facts.

¹¹ The parties' pretrial stipulation to the admissibility of certain documentary exhibits was not, as the Park defendants suggest, tantamount to a court trial based on that limited evidence. The trial court did not admit or consider any evidence before ruling on KAPC's standing.

The Park defendants insist it would be unfair to permit KAPC to proceed at trial on the theory that IRUS was a religious corporation when the individual plaintiffs had been dismissed earlier in the action for lack of standing on the theory that IRUS was a public benefit corporation. KAPC responds that any unfairness would be to the individual plaintiffs, not to the Park defendants. We need not enter into that debate. The distinction between IRUS as a nonprofit public benefit corporation and a religious corporation is significant only to KAPC and its allegation that it holds a reversionary interest in IRUS's assets. As to the individual plaintiffs who were proceeding derivatively under section 5710, they would have been subject to the standing requirements of section 5710 even if IRUS had been identified as a religious corporation. (See § 9142, subd. (a)(1) [authorizing derivative action by "corporation, a member or a former member asserting the right in the name of the corporation, provided that for the purpose of this paragraph the provisions of section 5710 shall apply to this action"].)

The Park defendants insist KAPC waived its arguments for leave to amend when it told the court, in an effort to save its action, that it could proceed as the holder of a reversionary interest in IRUS's assets under section 5142, applicable to nonprofit charitable corporations, without the necessity of amendment.¹² Their contention is without merit. Having been

¹² Section 5142, applicable to charitable trusts, contains standing requirements similar to those in section 9142, albeit with some additional elements. Specifically, section 5142 authorizes the Attorney General to pursue an action on behalf of the State to protect charitable trusts and requires private

denied leave to amend, KAPC then argued such leave was unnecessary for it to pursue its action as a holder of a reversionary interest in a charitable trust. In making that argument to salvage what was left of its action, KAPC neither forfeited nor affirmatively waived its right to appeal the court's earlier ruling denying it leave to amend to allege standing under section 9142. (See *Warner Constr. Corp v. City of Los Angeles* (1970) 2 Cal.3d 285, 299-300, fn. 17 [“appellant, in seeking to overcome the case made by the appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving the right to question the court's action”]; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857 [after objecting to a ruling, no waiver can be predicated on that party acting defensively to lessen the impact of the court's error].)

Finally, citing section 9132, the Park defendants urge this court to affirm on the ground the proposed amendment, supported by statements in IRUS's bylaws and not in its articles of incorporation, would be futile. (See *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 843 [leave to amend properly denied when amendment would not cure legal deficiency].) Section 9132, subdivision (a), provides that the articles of incorporation “may set forth any or all of the following provisions, which shall not be effective unless expressly provided in the articles.” Subdivision (a)(2)(A) of section 9132 continues, in the case of a subordinate corporation “instituted or created under the authority of a head organization,” the subordinate corporation “shall dissolve whenever its charter is surrendered to, taken

plaintiffs to notify the Attorney General to afford the State the opportunity to intervene in the action. (See § 5142, subd. (a)(5).)

away by, or revoked by the head organization granting it.” Subdivision (a)(2)(B) states, in the event of a subordinate corporation’s dissolution pursuant to subdivision (a)(2)(A) or “for any reason,” the assets of the subordinate corporation “shall be distributed to the head organization.” Because KAPC’s alleged reversionary interest was identified in IRUS’s bylaws and not in its articles of incorporation, the Park defendants argue, it is legally ineffective.

The Park defendants may well argue, postamendment, that section 9132 defeats KAPC’s claim to a cognizable reversionary interest. However, it is by no means clear whether IRUS, founded prior to KAPC, is a subordinate corporation instituted or created under the authority of KAPC; if it is not, section 9132 would not apply. The trial court did not deny leave to amend on the ground of futility, nor have the Park defendants definitively established on appeal the amendment would be futile.

3. *The Trial Court Did Not Err in Concluding KAPC’s Trademark Claims Are Barred by a Prior Settlement Agreement and Release*

KAPC contends the court erred in determining its trademark claims were barred by the prior settlement agreement and release. KAPC does not argue on appeal, as it did at trial, that the exemption for claims related to the *Whang* litigation applies to, and authorizes, their trademark claims. Rather, it contends the settlement agreement and release apply only to defendants Oon Lee and Nahm Kim, who were signatories to that agreement, and not to the 10 other Park defendants.

The goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time they entered into the contract. (Civ. Code, § 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) When the language of the

contract is clear, the parties' intent is determined solely by reference to the language of the agreement (Civ. Code, § 1638; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126), and the words of the agreement are to be interpreted in the ordinary and popular sense (Civ. Code, § 1644). Extrinsic evidence may be provisionally admitted to determine if an ambiguity exists, and if so, may be considered by the court to interpret the ambiguity. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

The Park defendants argued in multiple trial briefs that the settlement agreement and release were intended to cover, and did cover, all the Park defendants as agents or assigns of those who were signatories. KAPC did not dispute this contention in its filings, nor did it disavow its agreement that the scope of the settlement agreement and release and its applicability to the trademark claims in this case could be decided without the introduction of any new evidence unless the court found the *Whang* exemption ambiguous. Had that not been so, the trial court would have been able to consider extrinsic evidence if necessary to determine the parties' intent, as well as evidence regarding the relationship of the nonsignatory defendants to those who had signed the settlement agreement and release. Notwithstanding its prior positions, however, at the hearing KAPC's counsel argued that several of the defendants had not signed the settlement agreement and release and thus were not protected by them. This observation was too little and too late. KAPC did not seek a trial on that question and has forfeited its right to argue the agreement was not intended to, and does not apply to, those Park defendants who did not sign it.

DISPOSITION

The judgment is reversed, and the matter remanded to the trial court with directions to grant KAPC leave to amend its complaint to allege its standing to proceed under section 9142. The trial court shall determine whether, and to what extent, additional discovery or motion practice is necessary to permit the Park defendants to address the amended complaint. The trial court's ruling dismissing KAPC's trademark claims is affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.