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RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

REBUTTAL TESTIMONY

OF

JOE GIMENEZ III

ON BEHALF OF

WINDERMERE OAKS WATER SUPPLY CORPORATION

JUNE 7, 2021

REBUTTAL TESTIMONY OF
JOE GIMENEZ III

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REBUTTAL TESTIMONY OF JOE GIMENEZ III

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME, OCCUPATION, AND BUSINESS ADDRESS.

A. My name is Joe Gimenez III. I am the President of the volunteer Board of Windermere Oaks Water Supply Corporation ("WOWSC" or the "Corporation"), a non-profit, member-owned, member-controlled water supply and sewer service corporation. My business address in this capacity is 424 Coventry Road, Spicewood, Texas, 78669.

Q. ARE YOU THE SAME JOE GIMENEZ III WHO PROVIDED DIRECT TESTIMONY IN THIS CASE?

A. Yes.

II. PURPOSE OF REBUTTAL TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY IN THIS PROCEEDING?

A. The purpose of my rebuttal testimony is to respond to certain recommended adjustments presented by the Public Utility Commission ("Commission") Staff in direct testimony. Specifically, I respond to Staff witness Maxine Gilford's recommendations to remove all

outside legal costs from WOWSC's rates.[1] I also respond to Commission Staff witness Stephen Mendoza's recommendations on WOWSC's base rates.[2]

Further, I respond to factual inaccuracies and general policy issues addressed in the Direct Testimonies of Ratepayer Representatives of the Windermere Oaks Water Supply Corporation ("Ratepayers") related to WOWSC's Board activity and procedural history of the legal expenses included in the rate increase addressed in this appeal.

III. RESPONSE TO INITIAL TESTIMONY OF MAXINE GILFORD

Q. WHAT ADJUSTMENTS DID STAFF RECOMMEND TO WOWSC'S REVENUE REQUIREMENT?[3]

A. Staff witness Maxine Gilford recommends adjusting WOWSC's total revenue requirement to remove the entire $171,337 included for accounting and legal fees. Subtracting this amount from WOWSC's previous total, Staff recommends an adjusted revenue requirement of $404,855.

Q. DO YOU AGREE WITH STAFF'S PRIMARY RECOMMENDATION REGARDING OUTSIDE LEGAL EXPENSES?[4]

A. No. WOWSC Treasurer Mike Nelson and NewGen Strategies Analyst Grant Rabon will provide in their rebuttal testimonies the numerical analyses demonstrating the harmful effects this proposed revenue requirement will have on the Corporation. My main concern with Ms. Gilford's primary recommendation is it would put WOWSC on path to violate loan covenants with its lender CoBank—not only for the $350,000 already received in

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[1] Direct Testimony of Maxine Gilford (May 5, 2021) (Gilford Direct).

[2] Direct Testimony of Stephen Mendoza (May 5, 2021) (Mendoza Direct).

[3] Gilford Direct at 6:13-19.

[4] Gilford Direct at 12:8-19.

2020, but also the $300,000 which CoBank has approved for the WOWSC's use in 2021 for purchasing a clarifier tank to keep up with community growth.[5] WOWSC has already been informed that it was difficult for CoBank to approve the loan requests given the impact of legal fees on the Corporation's revenue stream. Staff's primary recommendation would jeopardize all three loans. Nonetheless, the Corporation still needs the clarifier and without the CoBank loan, would be forced to seek commercial loans, likely at higher rates and shorter durations, requiring more in monthly principal and interest charges. CoBank specializes in lending to non-profit corporations like WOWSC at low, long-term rates because it has federal government support.

Q. DO YOU AGREE WITH MS. GILFORD'S CONTENTION THAT THE CORPORATION SHOULD NOT HAVE SOUGHT TO HAVE ANY OF ITS OUTSIDE LEGAL EXPENSES CONSIDERED IN THE APPEALED 2020 RATE INCREASE?[6]

A. No. By recommending that WOWSC remove all legal expenses, Ms. Gilford is effectively suggesting that the volunteer Board of Directors for the non-profit Corporation should not have engaged legal counsel for its handling of lawsuits, mediation, PIA ("PIA") requests, contract review, and general corporate activities (collectively, "Legal Matters"). The WOWSC Bylaws ("Bylaws") governing the Board of Directors *entitle* directors to rely on outside counsel for legal and other matters,[7] and the corresponding expenses were necessary to address the Corporation's significant increase in Legal Matters in 2019.

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[5] *See* CoBank Promissory Notes (provided as Attachment JG-19).

[6] Gilford Direct at 12:6-19.

[7] Direct Testimony of Joe Gimenez, Attachment JG-2 at Article 8 § 19 (Mar. 10, 2021) (Gimenez Direct).

Q. WHAT IMPACTS FROM 2019 CONVINCED THE BOARD IN MARCH 2020 TO RAISE RATES AND INCLUDE OUTSIDE LEGAL EXPENSES?

The Board determined it needed to raise rates to continue adequate service after a series of events. First, in September–October 2019 the plaintiffs in the lawsuit styled *TOMA Integrity v. WOWSC*[8] ("*TOMA* Lawsuit") began discovery requests and setting deposition dates, sending the clear message that they would further increase the legal expenses forced on WOWSC. The impact of the plaintiffs' actions on the financial outlook of the Corporation was clearly demonstrated when, on December 19, 2019, WOWSC received two invoices from the law firm of Lloyd Gosselink Rochelle & Townsend, P.C.: $30,012.00 for services rendered in the *TOMA* Lawsuit and $17,579 for General Counsel services in November 2019. On December 25, 2019, WOWSC received a separate invoice from the law firm of Enoch Kever for $14,488.33 for its services in November. The plaintiffs structured their lawsuit in such a way as to require the use of different law firms for a proper defense, one for the Corporation, and one for the directors. Soon after, the Corporation did its due diligence in protecting its members and being proactive by preparing December financials and working with a Certified Public Accountant. On January 11, 2020, the Board received those financials, showing total available account balances of $150,994.44 for the Corporation. The outstanding loan balance was $224,546.24. After reviewing, WOWSC contacted James Smith with Texas Rural Water Association ("TRWA") regarding the possibility of increasing rates to help alleviate the Corporation's financial strain. If the Corporation paid all of the legal services bills immediately, it would have depleted nearly all of the operating cash from the Corporation

[8] *TOMA Integrity v. Windermere Oaks Water Supply Corporation*, No. 47531 (33rd Dist. Ct., Burnet County, Tex., Dec. 12, 2017) (*TOMA* Lawsuit).

(WOWSC tries to keep $75,000 in cash reserves for emergencies) and the Board knew that more legal bills for December 2019 had not yet been presented. Given this cash draw-down, paying for the Corporation's monthly operating expenses to produce and distribute water would become extremely difficult. Other possible options, such as obtaining additional loans, would have been virtually impossible, or would have come with rates detrimental to our membership. In 2018, the previous Board President did not renew a revolving line of credit that was available to the Corporation through First United Bank, so in January 2020, the Corporation was considering all options to raise money.

Q. WAS THE BOARD CONSIDERING OTHER FINANCIAL COMMITMENTS FOR THE SUPPLY OF WATER TO ITS MEMBERS?

Yes. The Board also knew about other obligations that would come in 2020, including a $40,000 commitment to pay for the installation of the TCEQ-required generator. The Corporation had also in 2019 committed $34,000 to conservation projects in order to receive $14,000 in matching LCRA grant money. So, overall, in January of 2020, the Corporation knew of $136,079 in binding expenses with only $150,000 of liquid assets in the bank. These binding expenses did not include the December 2019 legal invoices and the prospect of having to continuously respond to the numerous demands resulting from plaintiffs' persistent litigation against the Corporation. This left the Board with raising monthly base rates as the only and most reasonable option to maintain the financial integrity of the Corporation and serve its members.

Q. DID ANY BOARD MEMBERS HAVE LEGAL EXPERTISE SUCH THAT THE VOLUNTEERS COULD HAVE DEALT WITH THE LEGAL ISSUES WITHOUT EXTERNAL COUNSEL?

A. No. Neither I nor any current Board members, nor any Board members in 2019, are or were attorneys. As such, because of the by-law entitlement and requirement to rely on legal counsel to determine the liabilities and obligations that would have been imposed by the Legal Matters, it was appropriate and necessary to engage legal counsel as the appropriate source of professional and expert competence.

Q. DID WOWSC FILE THE LAWSUITS GENERATING MUCH OF THE CORRESPONDING LEGAL EXPENSES?

A. No. The Corporation and eight directors were defendants. A small group of Corporation members, purporting to represent the interests of the Corporation, filed the *TOMA* Lawsuit and the lawsuit styled *Rene Ffrench, et al. v. Friendship Homes & Hangers, LLC, et al.*[9] ("*Double F Hanger* Lawsuit"). In their early stages, Danny and Patti Flunker were parties to those suits, Danny Flunker as a member of TOMA Integrity LLC in the *TOMA* Lawsuit, and Patti Flunker in her own capacity. Patti Flunker is now the ratepayer representative (with Josie Fuller) in this case.

Q. BUT THE WOWSC BOARD DID FILE A LAWSUIT AGAINST THE ATTORNEY GENERAL IN 2019, CORRECT?

A. Yes. As will be discussed herein, the Corporation did file a lawsuit in Travis County District Court[10] to protect legal strategies in attorney-client privileged legal invoices that had been requested by Mr. Flunker in his May 28, 2019 PIA request. The release of these

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[9] *Rene Ffrench, John Richard Dial, Stuart Bruce Sorgen, and as Representatives for Windermere Oaks Water Supply Corporation v. Friendship Homes & Hangers, LLC, WOWSC, and its Directors William Earnest; Thomas Michael Madden; Dana Martin; Robert Mebane, and Patrick Mulligan* (originally styled *Double F Hanger Operations, LLC, Lawrence R. Ffrench, Jr., Patricia Flunker, and Mark A. McDonald v. Friendship Homes & Hangers, LLC, and Burnet County Commissioners Court*), No. 48292 (33rd Dist. Ct., Burnet County, Tex. Jul. 9, 2018) (*Double F Hanger* Lawsuit)

[10] *Windermere Oaks Water Supply Corporation v The Honorable Ken Paxton, Attorney General of Texas*, No. D-1-GN-19-006219 (201st Dist. Ct., Travis County, Tex. Sept. 16, 2019) (*Paxton* Lawsuit).

invoices, in the opinion of legal counsel, would have provided the plaintiffs and their attorney with information that could offer insights about WOWSC's strategy for both their suits, the *TOMA* Lawsuit and the *Double F Hanger* Lawsuit. Both cases were actively being litigated throughout most of 2019, and the Directors have a duty to defend the Corporation. The lawsuit WOWSC filed was an administrative suit limited in its scope and cost to the Corporation. In 2020, the Attorney General's office changed its position, agreed with the WOWSC, and encouraged settlement. The case was non-suited in 2021.

Q. WAS THE UNDERLYING SALE OF LAND AT ISSUE IN THE LAWSUITS CONDUCTED AT ARMS LENGTH?

A. This is the central issue in the cases filed by the plaintiffs in 2018 and 2019. In 2020 and 2021, the Directors' attorneys in the *Double F Hanger* Lawsuit provided the Court with the applicable laws governing the ability of the Directors to make such sale. On May 3, 2021, the Court issued an Order granting the Directors' Motion for Summary Judgment (with the exception of Director Martin),[11] illustrating that the Boards acted within their powers to sell the land, that the Directors would not be held personally liable for damages or legal fees, and that only the 'interested' Director Dana Martin, the purchaser of the land, would still need to defend as an individual Director at trial.[12]

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[11] *Double F Hanger* Lawsuit, Order, May 3, 2021 (provided as Attachment JG-20).

[12] *Double F Hanger* Lawsuit, Directors' Motion for Summary Judgment (provided as Attachment JG-21) at 9-12 (description of the sale) and at 21-33 (relevant discussion of the law governing such transactions): "The sale of land is within the statutorily authorized functions of water supply corporations, is consistent with WOWSC's Articles of Incorporation, and does not violate Texas Business Organizations Code Section 22.230(b) (governing interested director transactions). Further, the plaintiffs have not alleged, nor is there any evidence supporting, that the Directors acted illegally in entering into the Original Transaction."

Q. PLEASE EXPLAIN WHY THE LEGAL EXPENSES INCURRED TO LITIGATE THESE MATTERS ARE JUST AND REASONABLE EXPENSES THAT MAY BE RECOVERED THROUGH RATES.

A. As Ms. Gilford acknowledges in her testimony, WOWSC was required to defend itself in these lawsuits.[13] In fact, Chapter 8 of the Texas Business Organizations Code authorizes—and in conjunction with the WOWSC's Bylaws arguably requires—advancement of defense costs to directors and officers of the Corporation. The Order Granting Motion for Summary Judgment issued on May 3, 2021 in the *Double F Hanger* Lawsuit, now requires the Corporation to fully pay for the named Directors' legal costs.[14] Furthermore, and as laid out in the Defendant Directors' Motion for Summary Judgment that the Court granted, volunteer boards would not exist if non-profit corporations such as WOWSC did not defend these board members and directors from legal attacks. Foreseeing the need to protect volunteer directors to ensure enough community members are willing to step into those roles, both the Texas Legislature and Congress have enacted multiple measures to provide volunteer directors of non-profit corporations with robust protections from personal liability in the absence of the most egregious abuses. As indicated by the recent order in the *Double F Hanger* Lawsuit, seven of the eight named Directors did not come close to such level of abuse and thus these measures of protection are designed specifically for the current scenario. This requires the Corporation to pay for all of the legal expenses these seven Directors had to incur and without any other means available it is reasonable for the Corporation to recover these costs in its rates.

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[13] Gilford Direct at 13:14-15 ("...I understand that Windermere could not just ignore the TOMA and Ultra Vires suits...").

[14] *Double F Hanger* Lawsuit, Reply in support of Director Defendants Motion for Summary Judgment at 19-20 (Mar. 24, 2021) (provided as Attachment JG-22).

The Corporation also could not have accepted, in any year, plaintiffs' demands that WOWSC seek to break the 2016 contract with Ms. Martin for the underlying sale of land in dispute. Since 2017, three different sets of attorneys have advised three different WOWSC Boards that any attempt to use legal processes to coerce the land's return at the original sale price of $200,000 from Ms. Martin could at the very least subject the Corporation to a lawsuit or counterclaim asserting a breach of the land sale contract. WOWSC even received correspondence from counsel from Friendship Homes that if the Corporation bailed on the land transaction, then Friendship Homes may assert a breach action against WOWSC. Such action, as desired by the plaintiffs, would thus have very likely invited separate litigation with Ms. Martin's title company—enabling countersuits, costing hundreds of thousands of dollars and exposing the corporation to loss and damages—with no guarantee of success. The title company's deep pockets far exceed those of the Corporation or its ratepayers' ability or appetite to fund a quixotic pursuit given the low probability for success. Any potential benefit to the WOWSC for recovery of the land (and to then resell it at prices which the plaintiffs believe possible) would not justify the Corporation's legal costs for an expensive and WOWSC-initiated lawsuit, especially when those legal costs would not be recoverable in court.

Moreover, as to any benefit to the Corporation in defending a transaction to which it is a party, there is one rather clear and obvious benefit: the Corporation held and still holds 7 acres which it can further seek to sell at some point. Corporate reputation matters and if the Corporation is to have any reasonable prospects of selling that property for material value (i.e., what the plaintiffs and Ratepayers' ultimately want), a record of abandoning and not defending its transactions would make such future transactions quite unattractive to any potential buyers. The Corporation made a deal. One court has already

refused to undo that deal and the Corporation continues to stand by this because to refuse to do so would tell all future buyers not to enter into any deals with WOWSC. These decisions are all within the scope of judgment of the Corporation and its directors, and they had to weigh all of these factors—and numerous other factors—in deciding on when and how to defend itself in the litigation and thus the legal expenses incurred are perfectly reasonable and were justly included in the Corporation's rate increase.

Q. WOULD WOWSC'S INSURANCE COMPANY NOT COVER THOSE LITIGATION EXPENSES AGAINST MS. MARTIN AND THE TITLE COMPANY IF THE COMPANY HAD CHOSEN TO PURSUE RETURN OF THE LAND THROUGH AN ATTEMPTED BREACH OF CONTRACT?

A. No. WOWSC would have had to raise rates to fund such a lawsuit against Ms. Martin.[15]

Q. WHY SHOULD THE BOARD DIRECTORS NOT BEAR THE LITIGATION COSTS SINCE THE BOARD MEMBERS WERE NAMED IN THE SUIT?

The Directors should not be personally liable for lawsuits brought against them based simply on their capacity as a volunteer director of the Corporation.[16] Additionally, unlike investor-owned utilities, the Corporation does not have shareholders to pay for additional costs incurred outside of the revenue requirement. WOWSC is a small, member-owned water supply corporation whose Board participates as volunteers. The repeated and

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[15] The water company has consistently informed the membership of these dynamics. One WOWSC letter in October 2019 stated, "Three different WOWSC Boards, following the counsel of three different sets of attorneys since 2017, have authorized spending these [legal fees] to protect WOWSC from the litigants. The judgments they have sought from the courts would potentially enmesh the corporation in even more litigation and potential liability. More importantly, the paths they proposed were not in the opinion of our counsel and in the evaluation of the Board, legally viable or beneficial to the corporation." *See* https://wowsc.org/documents/778/October_18_2019_Letter_to_members_with_terms_of_proposed_agreement.pdf; *see also* https://wowsc.org/documents/778/Newsletter_April_4.10.2018_Board_approved.pdf.

[16] Tex. Bus. Orgs. Code Ann. § 7.001(b); *see also* Gimenez Direct, Attachment JG-2 at Article 8 § 18 ("No director shall be liable to the Corporation or to the Corporation's membership for monetary damages for any act or omission in the director's capacity as a director of the Corporation…").

continued litigation against the Corporation directly taxes the financial well-being of the utility and its approximately 280 rate-paying members, not some distant corporate entity with hundreds of thousands of customers.

Q. ARE YOU CONFIRMING THAT THE CORPORATION IS PAYING FOR THE LEGAL DEFENSE OF THE DIRECTORS?

Yes. WOWSC is paying for the defense of its volunteer Directors. It does so for several reasons. As a matter of law, Board Directors are entitled to the advancement of legal defense fees.[17] Protecting volunteers is a necessary function of the Corporation and serves as an incentive to ensure that future volunteers will similarly provide services. There are accepted protections for volunteers, in state and federal laws which were cited in the Directors' Motion for Summary Judgment,[18] and confirmed by the Court in its Order granting the Directors' Motion for Summary Judgment.[19]

Q. WHY DID THE 2019 BOARD AGREE TO HAVE THE CORPORATION PAY FOR THE LEGAL EXPENSES OF THE 2015-16 BOARD MEMBERS?

WOWSC Board members in 2019 (none of whom were on the 2015–2016 Boards in question) conducted their own independent research and investigations into the matters of what occurred in 2015–2016 and they reviewed the Bolton appraisal, conducted in 2018, three years after the land sale. The Board members discussed their findings and conclusions openly at two meetings: 1) the October 26, 2019 WOWSC member meeting about the land sale contract;[20] and 2) the WOWSC February 1, 2020 annual meeting of

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[17] Tex. Bus. Orgs. Code Ann. §§ 8.001-.105.

[18] *See* Attachment JG-21.

[19] *See* Attachment JG-20.

[20] https://wowsc.org/documents/778/2019-10-26_WOWSC_Board_Meeting_Minutes_Approved.pdf (provided as Attachment JG-23).

members.[21] After being provided the results from the independent review of the above issues, the 2019 Board concluded that defending WOWSC's former Directors was appropriate. Furthermore, WOWSC's Board believed it appropriate to defend the 2019 Board members (Mike Nelson, Dorothy Taylor, and myself) when the plaintiffs added the additional Directors to the *Double F Hanger* Lawsuit in November 2019.[22]

Q. IS THERE A LEGAL BASIS FOR A NON-PROFIT CORPORATION TO PAY THE LITIGATION COSTS FOR DIRECTORS?

A. Yes. The 2019 Board voted to pay defense costs for all the Directors sued in the *Double F Hanger* Lawsuit. As the Directors' attorneys referenced in the Motion for Summary Judgment, such action is authorized—and arguably required—by both the Texas Business Organizations Code, Chapter 8, and the WOWSC Bylaws.[23] Furthermore, now that the Court in the *Double F Hanger* Lawsuit granted summary judgment in favor of the current and former Directors (except Martin), it is *mandatory* for the company to fully pay the Directors' legal costs.[24]

Q. PLEASE RESPOND TO STAFF'S CONCERNS THAT THE LEGAL EXPENSES WERE CAUSED BY "UNREASONABLE AND UNNECESSARY LITIGATION MATTERS INVOLVING BOARD MEMBERS OF THE WATER SUPPLY CORPORATION."[25]

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[21] https://wowsc.org/documents/778/01Feb2020_Annual_Members_Meeting_Minutes_Approved.pdf (provided as Attachment JG-24).

[22] *See Double F Hanger Lawsuit*, First Amended Original Petition (Nov. 4, 2019) (provided as Attachment JG-25).

[23] *See* Attachment JG-22 at 19-20.

[24] *Id.*; Tex. Bus. Orgs. Code Ann. § 8.051.

[25] Gilford Direct at 6:20-7:2.

A. WOWSC did not initiate the proceedings and, as Ms. Gilford acknowledges, WOWSC could not simply ignore these matters once plaintiffs filed suit. As explained in the preceding responses, WOWSC has been in a no-win situation. Accepting the plaintiffs' demands would have necessitated that WOWSC initiate a separate lawsuit, and denying the plaintiffs' demands has caused them to further pursue costly litigation against the Corporation. In either case, WOWSC faced increasing Legal Matters and, as a non-profit business entity comprised of volunteer Board members without a dedicated in-house legal staff, had to rely on outside legal counsel for navigating these issues. This is in line and consistent with WOWSC's use of legal counsel for the review of contracts, to respond to members' questions about the conduct of Corporation business, and to help interpret and fulfill PIA requests, especially when there is ongoing litigation. These were all legitimate uses of legal counsel in 2019, and therefore the legal expenses incurred and included in the rate change were reasonable.

Q. WERE THE LEGAL EXPENSES INCURRED OUTSIDE OF THE TEST YEAR?

A. Ms. Gilford states that the outside legal expenses represent a cumulative amount incurred outside of a single test year instead of an annual, recurring amount. She also states that these expenses are extraordinary, unusual, non-recurring, and that they do not represent a normal, ongoing cost of providing water and wastewater utility services.[26] The Board only wishes that were the case, but the plaintiffs and their allies have continued forcing regular and extensive legal expenses upon the Corporation, as most recently demonstrated by this rate case against the Corporation in 2020 and 2021. Also, the legal expenses included in the TRWA rate analysis were only those legal expenses that had been paid in 2019 (and

[26] Gilford Direct at 12:22-13:1.

even excluded legal expenses incurred in November and December of that year). The 2019 legal fees represent both litigation fees and those for general counsel services not related to litigation.

Actions by WOWSC members requiring legal responses and expenses have not subsided since the test year. In 2020, Patti and Danny Flunker submitted 32 additional PIA requests to WOWSC. Former Board director Bill Billingsley, led a removal petition effort of the entire Board of Directors in late 2020. Ratepayers filed this Rate Appeal in April 2020 and have lodged various complaints about the Corporation's 2021 election dates.[27] Each of these actions has required the Corporation to incur additional legal fees that, unfortunately, are recurring costs.

Q. HOW DID THE INSURANCE COMPANY'S DENIAL OF COVERAGE IN DECEMBER 2019 AFFECT BOARD DECISION MAKING ABOUT THE MARCH 2020 RATE INCREASE?

A. The insurance company's decision weighed heavily on the decision-making process of the 2020 rate increase. The Corporation recognized then that the insurance company's denial of coverage would further impact WOWSC's ability to ensure safe, adequate water supplies because it would require the Corporation to pay its Directors' attorney fees while the cases (the *TOMA* Lawsuit, *Double F Hanger* Lawsuit, and *Paxton* Lawsuit) proceeded in 2020. The insurance decision indicated a pressing need for higher rates to ensure system integrity, both from a safety standpoint and also a financial integrity standpoint. None of the Board members were attorneys. WOWSC relied on legal counsel for their opinion about the insurance denial. However, the Board also decided it would be in the best interest

[27] *See* "Ratepayers Representatives Request for Administrative Law Judge Review and Ruling of Current Windermere Oaks Water Supply Corporation Director Representative Appearances Under TAC section 22.101(a)" (March 12, 2021) (arguments against the Board's conduct of its election process).

of its members to pursue a challenge to the denial. In February 2020, the Board hired the Shidlofsky Law Firm to evaluate the situation and ask the insurance company to reconsider its position.[28] WOWSC is now challenging the December 19, 2019 denial of coverage in federal court, and as Ms. Gilford acknowledges, the matter is currently unresolved.

Q. DID THE BOARD TRY MEDIATION OR OTHER EFFORTS OUTSIDE OF LITIGATION TO RESOLVE THESE MATTERS PRIOR TO LITIGATION?

A. Yes, there have been numerous ongoing efforts to resolve these matters with the plaintiffs outside the court process. The Corporation has attempted various strategies and tactics, through demand letters, mediations, community meetings, etc. WOWSC Boards comprised of different members in 2018, 2019, 2020, and 2021 have consistently endeavored to seek resolution to these complicated matters in ways that might hopefully placate the plaintiffs, inform Ms. Martin of community concerns, and cut short the legal proceedings and expenses. The plaintiffs have not compromised their goal of wresting the land away from Ms. Martin at the sale price of $200,000. Specifically, the Corporation's efforts have included: 1) Community/ratepayer meeting January 12, 2019, inviting questions and comments of members, including issuance of demand letter and possible commencement of litigation;[29] 2) A demand letter sent on January 25, 2019 to Ms. Martin for the purpose of opening discussions about the contract;[30] 3) Mediation with Ms. Martin in September 2019; 4) A community/ratepayer meeting in October 2019 where concessions

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[28] *See* Letter from Shidlofsky Law Firm's Blake Crawford to Allied World Specialty Insurance Company (May 18, 2020) (provided as Attachment JG-26).

[29] https://wowsc.org/documents/778/2019-1-12_WOWSC_Board_Meeting_Minutes_Approved.pdf (provided as Attachment JG-27).

[30] *See* Letter from Lloyd Gosselink's Jose de la Fuente to counsel for Dana Martin re: Friendship Homes & Hangers, LLC purchase of real property interests from Windermere Oaks Water Supply Corporation (Jan. 25, 2019). (provided as Attachment JG-28)

from Ms. Martin and extra consideration of $20,000 for the land were received (pending final resolution of litigation within one year);[31] 5) A Motion for Summary Judgment on res judicata, filed in December 2019 (denied);[32] 6) Mediation with plaintiffs in August 2020 (left open but unsuccessful); 7) A Motion for Summary Judgment, filed in November 2020[33] (granted), 8) Continued discovery, depositions, and a reply through March 2021; and 9) A second unsuccessful mediation with plaintiffs in April 2021.

Only one of these efforts really proved successful, as in May 2021, the judge issued an Order Granting Defendant's Motion for Summary Judgment in favor of seven of eight Defendant Directors.[34] However, since the court found that these Directors have no personal liability, the Corporation is legally obligated to cover the legal expenses the Directors incurred. If WOWSC is not successful in recouping insurance funds to cover the successfully adjudicated legal expenses, then it will be forced in coming months and years to turn to the same depleted accounts that are already struggling to cover just the regular costs of maintaining adequate service. If rates are reduced to Staff's recommendations, the Corporation's financial integrity would be threatened, as well as the ability for the Corporation to ensure adequate and safe water provided to its members.

Q. **PLEASE EXPLAIN WHY LITIGATING THESE MATTERS WAS NECESSARY AS OPPOSED TO OTHER OPTIONS, SUCH AS MEDIATION.**

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[31] *See* Attachment JG-23.

[32] *See Double F Hanger* Lawsuit, Defendants Windermere Oaks Water Supply Corporation's and its Directors' Joint Motion to Dismiss under Rule 91a; First Amended Joint Brief in Support of Their Pleas to the Jurisdiction; and First Amended Joint Motion for Summary Judgment (Dec. 23, 2019) (provided as Attachment JG-29).

[33] *See* Attachment JG-21; *see also* Attachment JG-20.

[34] *See* Attachment JG-20.

A. As the plaintiffs' attorney, Kathryn Allen, states: "The Plaintiffs have never sought any relief vis-à-vis the Corporation other than to restore the Corporation's property [at the original sale price of $200,000]."[35] However, as explained above, the Corporation cannot just unilaterally grant itself that relief, no matter how much plaintiffs want it to be so; this relief would require WOWSC to breach its 2016 contract and would necessarily invite expensive and drawn-out litigation with Ms. Martin's title company, causing WOWSC to incur additional legal expenses. In short, WOWSC was placed into a position where it was subjected to either litigation adverse to plaintiffs, or litigation adverse to the buyers of the property.

Q. DO YOU AGREE WITH MS. GILFORD'S ASSESSMENT OF THE CORPORATION'S LEGAL EXPENSES AS INTENTIONAL TORTS OR EMPLOYEE MISCONDUCT?

A. No. First, the Directors and WOWSC have been granted summary judgment in the *Double F Hanger* Lawsuit. That is, the court found that there was no actionable conduct by the dismissed Directors—torts, employee misconduct, or otherwise. The issue has been determined—and plaintiffs' improper allegations (which is all they were, allegations)—were determined not to support any claim against the dismissed Directors. Second, the docket to which Ms. Gilford relies on in making this comparison relates to the largest investor-owned transmission and distribution electric utility in the state of Texas. In that proceeding, the Commission found that the utility may not recover self-insurance for funding related to intentional torts or for employee misconduct. To the extent Ms. Gilford is adjudicating the underlying litigation, she is incorrect. To the extent that she draws

[35] Direct Testimony of Kathryn E. Allen at 13:14-16 (Apr. 7, 2021) (Allen Direct).

comparisons to a large IOU with shareholders who can fund outside legal expenses, she is drawing a false equivalency.

Q. WHAT IS YOUR RESPONSE TO MS. GILFORD'S SUGGESTION THAT BECAUSE THE AMOUNT OF LEGAL EXPENSES ATTRIBUTED TO PIA REQUESTS IS ONLY AN ESTIMATE, IT SHOULD THEREFORE BE DISALLOWED IN ITS ENTIRETY?[36]

A. In response to Staff's Second Request for Information, WOWSC responded that it incurred approximately $44,862 in legal expenses related to PIA requests.[37] The response explained that this figure is only an estimate because while some entries were solely for work related to PIA requests, others included work on separate matters, and thus the invoices did not allow for a specific calculation. WOWSC would like to clarify that it took a conservative approach in coming up with this estimate, and the $44,862 figure was calculated based only on entries clearly and wholly related to PIA requests, including filing suit to protect legal strategy in attorney-client privileged invoices. It did not include any amounts whatsoever where entries contained work in addition to, and separate from, any PIA requests. Therefore, while $44,862 is an estimate, it is necessarily an under-estimate, and thus it is an accurate "at least" number. As Ms. Gilford acknowledges, WOWSC should be allowed to recover legal expenses for work related to PIA requests.

Q. COULD WOWSC AFFORD TO PROVIDE ADEQUATE SERVICE TO ITS MEMBERS IF THESE EXPENSES ARE NOT ALLOWED?

A. No. The rates and refunds suggested by staff would force cuts upon the minimalist budget already in place at the organization. There are no excess *discretionary* funds in the non-

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[36] Gilford Direct at 15:18-20.

[37] Gilford Direct, *see* Attachment MG-8.

profit Corporation—Directors do not receive compensation for serving on the Board. There are no shareholder profits or dividends to cut. All Corporation plans to replace aging pipes and valves, prevent zebra mussels from clogging our intakes, expand dispersal fields, add storage and processing tanks, increase conservancy and otherwise keep up with community growth would have to be deferred indefinitely or scrapped entirely, especially in view of the legal bills which the Corporation incurred to defend against the disastrous relief sought by the plaintiffs, to litigate the recovery of the 4.3 acres in dispute.

Q. HOW WOULD THE REMOVAL OF THESE EXPENSES IMPACT THE FINANCIAL INTEGRITY OF WOWSC?

A. The proposed rates, refunds and disallowance would be disastrous to the Corporation's financial integrity. Several impacts come to mind, most notably, if these expenses are removed and rates are reduced to Staff's recommendations, the Corporation would be required to notify CoBank of the drastic decrease in the Corporation's rates. This would likely compromise both the current loan (of $350,000 approved in 2020), as well as the $300,000 promise of pre-approved funds for Corporation purchase of the clarifier. This would severely negatively impact its members because the Corporation would not be able to financially function without these loans, and may be at risk for defaulting on the current loan. Again, this compromises the financial integrity of the Corporation and is thus detrimental to every member of WOWSC. The latter offer, if withdrawn, would cause WOWSC to seek another commercial lender with much higher rates, which would again be passed on to WOWSC's members and customers through a rate increase. Additionally, WOWSC would not be able to pay for its legal bills incurred in 2020 and 2021 to protect the Corporation from the ongoing litigation matters which plaintiffs continue to pursue.

Finally, by disallowing these expenses and adopting the reduced rates, WOWSC would have no financial means of providing refunds to members.

Q. WOULD THERE BE ANY OTHER IMPACT?

A. Yes. A larger clarifier is sorely needed for the Corporation to keep up with water supplies to its growing membership base. The current clarifier was installed years ago when the membership base was 150 or less. Now, with approximately 280 members, that clarifier is insufficient. There were instances in 2020 when demand was outstripping the WOWSC system's ability to produce and store water. WOWSC's manager had to truck water in to replenish storage.

Q. DO YOU AGREE WITH STAFF'S ASSERTION THAT WOWSC BEGAN TO ACCRUE THESE EXPENSES IN 2016[38] AND THUS ANY RELATED RECOVERY SHOULD OCCUR OVER THE SAME TIMEFRAME?

A. No. While the underlying actions of the land sale took place starting in 2015–2016 (prior to any of the current Board members elected), the litigation driving the majority of these expenses did not begin until 2018 and continued through 2019–2021. WOWSC should recover these expenses over a corresponding 2-year period and such expedited recovery is necessary to avoid further financial detriment from these costs. The Corporation needs the current rate structure to quickly satisfy its legal expenses so that it can then, just as quickly, return the rates back to lower levels before the lawsuits while also attempting to keep pace with membership growth and water demand.

Q. DOES WOWSC INTEND TO ADD A SURCHARGE TO ITS TARIFF TO ALLOW FOR RECOVERY OF THESE EXPENSES?

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[38] Gilford Direct at 16:19-22.

A. Yes. The Board has now received counsel that it can add surcharges to its tariff. It would most likely agree to that, especially given that the Judge granted Defendant Directors' Motion for Summary Judgment in the *Double F Hanger* Lawsuit and outstanding legal fees can be calculated and amortized in a surcharge.

IV. RESPONSE TO INITIAL TESTIMONY OF STEPHEN J. MENDOZA

Q. PLEASE DESCRIBE STAFF'S RECOMMENDATION AS TO WOWSC'S MONTHLY BASE RATES.[39]

A. Commission Staff witness Stephen Mendoza recommends adjusting WOWSC's monthly base water rate from $90.39 down to $45.92 and its monthly base wastewater rate from $66.41 down to $33.87 (note—both of these recommendations are lower than WOWSC's existing base rates prior to the 2020 change, which were $50.95 for water and $40.12 for wastewater). Mr. Mendoza states he calculated these monthly base rates based on the primary recommendation of Staff witness Maxine Gilford for WOWSC's total revenue requirement. The Corporation is concerned about these rate calculations because it is uncertain whether they consider its membership base. Roughly one-quarter of WOWSC's membership uses very little water each month because they are airplane Hangers. Page three of the December 31, 2019 Directors Report shows that 52 accounts have zero usage, and 58 accounts used less than 1,000 gallons.[40] This aspect of its membership base may be somewhat unique among non-profit water utilities and because of this, the Corporation has devised its rate structure so that its base rate is equitably distributed among all members. WOWSC has avoided creating higher gallonage charges so that homeowners would not bear an unfair burden.

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[39] Mendoza Direct at 4:20-5:2.

[40] WOWSC December 2019 Directors' Report (provided as Attachment JG-30)

Q. DO YOU AGREE WITH STAFF'S RECOMMENDATION?

A. No, Mr. Mendoza does not sufficiently account for how these adjusted base rates fit into the overall calculation of the total revenue requirement. As explained in further detail in the rebuttal testimony of Grant Rabon and Mike Nelson, Mr. Mendoza's recommended monthly base rates of $45.92 for water and $33.87 for wastewater would fall far short of recovering Staff's recommended total revenue requirement of $404,855 and compromises the Corporation's financial integrity. Nevertheless, Mr. Mendoza does not discuss any volume charges or otherwise explain how WOWSC would make up the substantial deficit remaining between Staff's two recommendations.

V. RESPONSE TO INITIAL TESTIMONY OF DANIEL FLUNKER

Q. DO YOU AGREE WITH MR. FLUNKER'S TESTIMONY THAT MR. FLUNKER SUBMITTED A TOTAL OF SEVENTEEN PIA REQUESTS IN 2019?[41]

A. No, I do not.

Q. HOW MANY WERE RECEIVED BY WOWSC FROM JANUARY 1, 2019 THROUGH DECEMBER 31, 2019?

A. I have reason to believe that WOWSC received about 50 total in that time frame, but I can speak specifically to the 46 it received from March 9, 2019 through December 31, 2019. I was first elected to the Board on March 9, 2019. On March 19, 2019, I received the first of the 46 PIA requests I would handle. I believe there were several others in 2019, before I came on the Board, as I have seen them produced by attorneys in depositions. However, I am unaware where they are located, as they were among hundreds of files and thousands of pages produced for the *Double F Hanger* Lawsuit.

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[41] Direct Testimony of Daniel Flunker at 3:17 (Apr. 7, 2021) (D. Flunker Direct).

Q. PLEASE CLARIFY WHETHER ALL PUBLIC INFORMATION REQUESTS WERE HANDLED BY ATTORNEYS, AS MR. FLUNKER ASSERTS.[42]

A. Mr. Flunker's testimony says that: "Per WOWSC website all requests are processed by their attorneys."[43] However, the actual wording on the website says, "In order to fulfill requests accurately, the WOWSC Public Information Officer sends requests to our general counsel attorneys for review."[44] "Review" is not "processing." Few requests are actually "processed" by attorneys as they do not have the documents necessary to fulfill the requests. As a more complete description, please refer to WOWSC's Response to Staff's Second Request for Information, with all the PIA requests and inclusion of comments about the fulfillment of each request.[45] In order to fulfill requests accurately and in compliance with the Texas PIA, the WOWSC Public Information Officer ("PIO") sends the requests to our general counsel attorneys for scheduling. The PIO then endeavors to locate the documents. If necessary, the PIO might ask the attorneys for review of certain items.

Q. HAS THE VOLUME OF REQUESTS AFFECTED PIA FULFILLMENT?

A. The volume of the requests has been such that keeping track of all the requests and their deadlines has been burdensome for the PIO and thus the need of support for tracking. This was particularly true in the four months, from March 2019 through July 2019, when, as the PIO on behalf of WOWSC, I responded to 27 PIA requests, 19 of which were from Danny and Patti Flunker.[46] Since WOWSC does not have any employees, the PIO had to rely on

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[42] D. Flunker Direct at 3:21-22.

[43] D. Flunker Direct at 3:22.

[44] https://www.wowsc.org/public-information-act-requests (Jun. 1, 2021).

[45] *See* WOWSC's Response to Staff's RFI 2-5 and voluminous Attachment Staff 2-5 (provided as Attachment JG-33).

[46] *See* WOWSC PIO Report (Dec. 14, 2019) (provided as Attachment JG-31) which was presented to the Board at its Dec. 19, 2019 meeting; *see also* https://wowsc.org/documents/778/2019-12-19_WOWSC_Board_Meeting_Minutes_Approved.pdf (provided as Attachment JG-32).

the general counsel for this scheduling service. At the same time, as PIO, I fulfill as much of these requests as possible without attorney assistance. If the Corporation has additional questions regarding the requests, it consults with the attorneys for further guidance. WOWSC pays for the attorneys' time to review and thus these expenses have become a part of the ongoing operating budget.

Q. HOW MANY DID YOU HANDLE PERSONALLY?

A. From the date I was first elected to the Board of Directors, on March 9, 2019, through the end of 2019, I personally handled 46 of them.[47]

Q. MR. FLUNKER LISTS ALL OF THE DATES HE ASSERTS HE MADE PUBLIC INFORMATION REQUESTS.[48] WERE THERE ADDITIONAL REQUESTS THAT ARE MISSING FROM MR. FLUNKER'S TESTIMONY?

A. Yes, there are several additional requests that Mr. Flunker made, which are not listed in his testimony. He made additional PIA requests on the following days: March 21, 2019; April 4, 2019; April 11, 2019; June 26, 2019; July 8, 2019; August 26, 2019; September 2, 2019; and an additional request from September 26, 2019.[49] A comparison of Mr. Flunker's testimony with the document previously submitted to Staff will confirm this, as will a report of the PIO to the Board in 2020.[50]

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[47] *See* Attachment JG-33; *see also* Attachment JG-31 (the December 2019 report says there were 45 requests, but one request had been accidentally omitted and then later included in subsequent reports in 2020).

[48] D. Flunker Direct at 4:16-7:21.

[49] Gimenez Direct, Attachment JG-9.

[50] Windermere Oaks Water Supply Corporation, Public Information Officer Report (June 16, 2020) (provided as Attachment JG-40).

Q. REFERRING TO MR. FLUNKER'S TESTIMONY REGARDING "SECRET FINANCIALS,"[51] HAS WOWSC PROVIDED ALL INFORMATION REQUIRED BY LAW REGARDING FINANCIALS OF WOWSC FOR EACH CORRESPONDING PUBLIC INFORMATION REQUEST?

A. Yes, we have. None of Mr. Flunker's 2019 (or subsequent) PIA requests have specifically requested documents referring to the financials of the Corporation. When Mr. Flunker requested cancelled checks and contracts, they were provided to him. Additionally, on July 19, 2019, the Corporation received a PIA request from Plaintiff Rene Ffrench asking to "inspect and make copies of the following corporate books and records with my agents(s)."[52] Mr. Ffrench requests bank statements, charts of accounts, original budgets, balance sheets, and asset lists for the years 2017–2019. The Corporation provided all those to Mr. Ffrench. Mr. Ffrench and Mr. Flunker are business partners now, and were original founding members together in 2017 of TOMA Integrity LLC for the *TOMA* Lawsuit. In 2020, WOWSC also similarly made all its QuickBook ledger files available to Ms. Michele Christenson, another acquaintance of Mr. Flunker. And the Corporation has provided all of its voluminous financial records to the plaintiffs as part of its discovery production. The Corporation has made every effort to supply members with financial information of WOWSC, including supplying them with references to members for annual meetings.

Q. PLEASE EXPLAIN MR. FLUNKER'S ASSERTION THAT THE ATTORNEY GENERAL "AGREED WITH" HIS REQUEST REGARDING LEGAL INVOICES.[53]

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[51] D. Flunker Direct at 4:1-2.

[52] Gimenez Direct, Attachment JG-9.

[53] D. Flunker Direct at 8:2-3.

A. The Attorney General's Office initially agreed that the invoices were not privileged. However, after WOWSC appealed the original opinion, which is part of the legal process under the Texas PIA, the Office of the Attorney General further reviewed the information and agreed with WOWSC, listed several redactions that WOWSC was entitled to maintain, and recommended a settlement based on that agreement. Mr. Flunker refused the offer of redactions, and then with Ms. Allen as attorney, intervened in the settlement. The settlement and intervention occurred in 2020 and both are irrelevant to the issues in this proceeding.

Q. PLEASE EXPLAIN MR. FLUNKER'S CLAIM THAT WOWSC DID NOT "PROMPTLY REPLY TO" A REQUEST MADE ON MAY 28, 2019.[54]

A. This request was made at 5:36 p.m. on May 28, 2019, after business hours of 5:00 p.m.[55] The filing date would then be May 29, 2019. Thus, *day one* for the requirement to respond was May 30, 2019. The tenth business day, as required by law, was June 12, 2019. On June 12, 2019, within the legal time period, WOWSC provided notice to Mr. Flunker that the request was being appealed to the Attorney General's Office. Additionally, on June 7, 2019, at 8:34 p.m., Mr. Flunker responded to a requested clarification of ours, which would have extended the response deadline another ten days, to June 26, 2019. Therefore, WOWSC promptly replied in compliance with statutes, in fact, much earlier than required by statute.

Q. MR. FLUNKER CLAIMS THAT LEGAL INVOICES AND DOCUMENTS WERE NOT PROVIDED TO HIM.[56] **IS THIS ACCURATE?**

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[54] D. Flunker Direct at 8:5-7.

[55] Tex. Gov't Code § 552.021.

[56] D. Flunker Direct at 8:11-15.

A. No. WOWSC provided the legal invoices directly to Mr. Flunker and the entire WOWSC membership via links that were included in a letter that was mailed on or about February 12, 2021.[57] This was prior to WOWSC non-suiting the referenced *Paxton* Lawsuit. Therefore, the Corporation complied with Mr. Flunker's request and made the legal invoices accessible not only to him, but to all members.

Q. MR. FLUNKER CLAIMS THAT WOWSC WAS REQUIRED TO LET HIM KNOW THE RESULTS OF AN ATTORNEY GENERAL'S OPINION.[58] DO YOU BELIEVE THIS TO BE ACCURATE?

A. This is not accurate. The Office of the Attorney General communicates to each party in the suit and provides all parties notice of its opinion. The Corporation is not required to reach out to a requestor and provide the Attorney General's opinion.

Q. PLEASE EXPLAIN KEY CIRCUMSTANCES SURROUNDING THE DECISION TO FILE SUIT REGARDING THE MAY 28, 2019 PUBLIC INFORMATION REQUEST FOR ATTORNEY INVOICES.

A. WOWSC had been engaged in correspondence regarding these PIA requests with Mr. Flunker and the Attorney General's office for some time.[59] Mr. Flunker fails to mention in his testimony that the Attorney General's office reversed its initial finding against WOWSC and had approved settlement with WOWSC before Mr. Flunker intervened in the lawsuit, with the assistance of plaintiffs' attorney and Ratepayers' witness, Ms. Allen, in

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[57] The letter is available on the WOWSC website, https://wowsc.org/documents/778/WOWSC_2_pg_Letter_to_Water_customers_2.12.2021.pdf (provided as Attachment JG-41). The invoices are posted on the WOWSC website here: https://wowsc.org/legal-matters and labeled as "Invoices Suit 1" and "Invoices Suit 2".

[58] D. Flunker Direct at 9:6-7.

[59] WOWSC correspondence regarding protection of attorney-client privileged invoices 2019 (May 28, 2019) (provided as Attachment JG-34).

2020. This case had bearing on the March 23, 2020 rate increase to the extent that the Board knew, in 2019 and early 2020 that this case existed and was necessary to protect the Corporation's legal strategy from plaintiffs' attorney in the *Double F Hanger* Lawsuit.

Q. WHAT AUTHORITY DID WOWSC HAVE TO FILE THIS SUIT?

In addition to authority provided in WOWSC's Bylaws, the Board took further actions in March and May of 2019 to allow for this suit. First, on March 9, 2019, the Board voted for me to serve as President,[60] a position which enables and authorizes me to enact duties described in the Bylaws, including "see(ing) that all orders and resolutions of the Board are carried out."[61] On March 14, 2019, the Board voted to approve myself and Mike Nelson to serve on the Legal Sub-Committee, authorizing us—in consultation with WOWSC's attorneys—to conduct business on behalf of the Board in legal matters requiring immediate attention. Then, at its May 8, 2019 meeting, the Board voted to appoint me Chief Administrative Officer ("CAO") because the Texas PIA states that the CAO serves as the PIO. All these authorized roles legitimized decision-making actions in response to legal actions required, especially in response to deadlines, on behalf of the Corporation.

Q. DID THESE AUTHORIZATIONS GIVE YOU THE ABILITY TO FILE SUIT?

A. Yes. The action at issue, namely to file suit in a Travis County District Court against the Attorney General to protect the client-attorney privileged invoices on behalf of the Corporation in response to a PIA request, was certainly within the authorities granted. This was especially so as the alternative of releasing attorney-client privileged information would only have added further ramifications to the Corporation since it was in the middle of litigation and the requestor, Mr. Flunker, was a close acquaintance of the plaintiffs. Such

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[60] *See* https://wowsc.org/documents/778/2019-3-9_WOWSC_Board_Meeting_Minutes_Approved.pdf (provided as Attachment JG-35).

[61] Gimenez Direct, Attachment JG-2 at Article 9 § 4.

action could not be unilaterally authorized. Due to the numerous requests from Mr. Flunker, there were several deadlines approaching in September, and action needed to be taken immediately to best serve the interests of the Corporation and its members and to comply with the Texas PIA. At that point, the Board was not required to vote for the suit to be filed, as it was related to administrative matters and compliance with required deadlines, both of which actions were voted upon at a previous Board meeting. However, out of an abundance of caution, and to keep the Board privy to the matters, the suit was placed on the October 9, 2019 Board agenda, at which time it was discussed in Executive Session, as allowed by law. After exiting Executive Session and entering into Public Meeting, I read a statement advising the members present about the necessity of retaining and protecting attorney-client privileged information contained in the invoices and the previously granted authorities allowing me to "direct(ing) our legal team to file an administrative appeal of the August Attorney General ruling to protect the rights of the WSC while the lawsuit remains ongoing."[62] The Board then took action in open session to "authoriz(e) the continuing defense of the WSC's position of protecting attorney client privileged information in response to PIA requests including maintaining all pending appeals in court at the direction of the Board President/Public Information Officer."[63]

Q. WHAT IS THE "SECOND TEXAS AG SUIT"[64] MENTIONED BY MR. FLUNKER?

A. This referenced suit was from 2020, and it similarly involved Mr. Flunker's request for attorney-client privileged invoices. It had no impact on the rates from 2019, but it further

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[62] https://wowsc.org/documents/778/2019-10-9_WOWSC_Board_Meeting_Minutes_Approved.pdf at 4-6 (provided as Attachment JG-36)

[63] *See* Attachment JG-36 at 6, Item No. 6.

[64] D. Flunker Direct at 10:20-21.

demonstrates an earlier point, that Mr. Flunker pursued additional PIA requests in 2020 requiring additional legal expenses on a recurring basis.

VI. RESPONSE TO INITIAL TESTIMONY OF PATTI FLUNKER

Q. PLEASE ADDRESS MS. FLUNKER'S TESTIMONY REGARDING A COMMUNITY LIFT STATION.[65]

A. This lift station that Ms. Flunker refers to is from 2016-2017, and has no relationship to the 2019 rates.

Q. MS. FLUNKER CLAIMS THAT WOWSC MEETINGS WERE NOT OPEN TO THE PUBLIC.[66] **IS THIS ACCURATE?**

A. No, it is not. WOWSC complies with the Open Meetings Act, and unless the Board convenes in Executive Session, all meetings are open to the public.[67] Before I became President on March 9, 2019, the Corporation would typically host its meetings at the water plant, where a small room of approximately 200 square feet would serve as the meeting place. Attendees often sat at, or close to, a table with the Directors and freely asserted their opinions in discussion. I am unaware of any previous Board turning anyone away from or denying entry into that room, although people were asked to leave when the Board went into Executive Session. Upon becoming President, I opted to move WOWSC's Board meetings to the neighborhood pavilion where more people could easily attend. Or, if the weather seemed non-cooperative, meetings were instead held at a community center within a few miles of the plant. After I became president, only one Board meeting was held at the

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[65] D. Flunker Direct at 5:7-18.

[66] Direct Testimony of Patti Flunker at 6:1-2 (Apr. 7, 2021) (P. Flunker Direct).

[67] *See* Tex. Att'y Gen. Op. Nos. JM-6 (1983) at 1-2 (stating that only members of the governmental body have the right to convene in executive session) and KP-0006 (2015) at 2 (The term "governmental body" includes WOWSC.); *see also* Tex. Gov't Code § 551.003(3)(k), and Tex. Att'y Gen. LO-96-146 (1996) at 5.

water company room mentioned. Danny Flunker attended with plaintiffs Bruce Sorgen and Rene Ffrench. It is hard to imagine what Ms. Flunker is referring to.

Q. PLEASE ADDRESS MS. FLUNKER'S ASSERTION THAT THE NUMBER OF GALLONS TREATED WAS NOT INCORPORATED INTO THE 2020 WATER/WASTEWATER RATE STUDY.[68]

A. This response refers to TRWA's analysis.[69] Gallonage charges are included in TRWA's analysis, specifically referring to line 77. To share the increased legal expenses burden across all members, WOWSC's Board decided to only adjust base rates and to not change gallonage rates. The new monthly base rates of $90.39 for water and $66.41 for waste-water total $156.80 which was less than the base rates total of $174.59 (cell K56) in TRWA's analysis enabling the Board to move forward with base rates only changes. The base rates changes were calculated to pay an additional $65.73 x 253 = $16,629.69 per month towards legal balances. The base rates were not changed to maximum determined by the TRWA analysis.

Q. DO YOU AGREE WITH MS. FLUNKER'S TESTIMONY THAT WOWSC USED ADDITIONAL FORMULAS BEYOND THE TRWA WATER/WASTEWATER STUDY TO DETERMINE THE EFFECTIVE RATES?[70]

A. No, I do not. No additional formulas were used.

Q. PLEASE CLARIFY WHETHER JAMES SMITH WITH TRWA PERFORMED ONLY A WATER STUDY, OR IF HE PERFORMED A WATER AND WASTEWATER STUDY, AND EXPLAIN ANY SPECIFIC INFORMATION

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[68] P. Flunker Direct Testimony at 7:17-18.

[69] *See* Direct Testimony of Mike Nelson, Attachment MN-2 at Sheet 1.

[70] P. Flunker Direct at 8:8-11.

MISSING FROM THE MINUTES OF THE FEBRUARY 2020 ANNUAL MEMBERS MEETING REGARDING THE SAME.[71]

A. As I understand it, James Smith performed one calculation to produce one rate that was then allocated to water and wastewater services by a 60/40% split. I've asked Smith to confirm this as recently as May 12, 2021 and he did.[72] The minutes Ms. Flunker refers to do not encompass every detail, but provide an overview in as much written detail needed to summarize the meeting and the action taken at the same. Minutes reflect conversation of Board members and contractors who would not, in every single instance say "water and wastewater." Accordingly, any references to water services in the meeting minutes should be interpreted as both water and wastewater services. But WOWSC can certainly understand Ms. Flunker's confusion given that there was only one study produced by Mr. Smith in 2020 and there had, apparently, been two in 2018.

Q. IN HER TESTIMONY, MS. FLUNKER SAYS SHE WORKED AS A PARALEGAL FOR THE TEXAS RURAL WATER ASSOCIATION, OF WHICH WOWSC IS A MEMBER, WHERE SHE "COLLABORATED WITH STAFF ATTORNEYS REGARDING RESOLUTIONS TO LEGAL ISSUES WITH UTILITY MEMBERS SPECIFIC TO OPERATIONS, GOVERNANCE AND REGULATORY REQUIREMENTS." DID SHE EVER ADVISE THE WOWSC, AT THE MANY MEETINGS SHE ATTENDED,[73] THAT A LAND SALE TO A SITTING DIRECTOR WAS ILLEGAL OR CONTRARY TO THE BUSINESS CODES GOVERNING WOWSC?

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[71] P. Flunker Direct at 9:19.

[72] Email correspondence to James Smith regarding waste water study (May 12, 2021) (provided as Attachment JG-37).

[73] P. Flunker Direct at 4.

A. No. The minutes do not reflect that she ever advised the Board, in either an official TRWA capacity or as a member, that it was illegal, either before or after the sale. She was correct in not advising the Board it was illegal. But neither did she endeavor to tell the community, or apparently her husband Danny Flunker, that such a sale was not contrary to the business code. Or if she did, I am not aware of it.

VI. RESPONSE TO INITIAL TESTIMONY OF BILL STEIN

Q. PLEASE EXPLAIN WHETHER THE BOARD IS REQUIRED TO CONDUCT AN AUDIT OF FINANCIALS PRIOR TO RAISING WATER OR WASTEWATER RATES.

A. The WOWSC Board operates through its Bylaws. There are no WOWSC bylaws that require the Board to approve an audit prior to raising water or wastewater rates. WOWSC followed its existing Bylaws in 2020. That said, Mr. Stein references a recommendation from the 2018 Board to future Boards. If some issue were to rise to the level of needing a bylaw change, then that Board could certainly have brought it to the attention of the membership for a bylaw change. Mr. Stein was not involved further with that issue, as he resigned from the Board in April 2018. Furthermore, the 2019 Board *did* consider conducting an audit of its 2019 books in response to member concerns. The Corporation's manager had secured quotes for an accountant and WOWSC added this to the 2020 budget.[74] But that was before the legal bills of November and December 2019 had arrived. Once those were received in late December and early January, the Board believed that this extra $10,000 would add an unnecessary expense to rate payers, and thus potentially

[74] Email correspondence from George Burriss regarding audit quote (Nov. 19, 2019) (provided as Attachment JG-38).

compromise the Corporation's financial integrity.[75] Looking at any previous year's audit would not add to the vital information needed for addressing 2019 and future obligations of the Corporation, which was the driving concern of the Board at that time.

VII. RESPONSE TO INITIAL TESTIMONY OF KATHRYN E. ALLEN

Q. DO YOU AGREE WITH MS. ALLEN'S CHARACTERIZATION OF WOWSC'S ACTIONS IN THE UNDERLYING LITIGATION THAT RESULTED IN THE LEGAL FEES INCLUDED IN THE RATE INCREASE?

A. No. Ms. Allen's characterizations and description of events are inflammatory, biased, and in some cases, plainly false. The Administrative Law Judges have indicated that they will only rely on Ms. Allen's testimony to the extent it bears on the issues in the preliminary order.[76] The only issue in the Preliminary Order that relates to Ms. Allen's testimony is as follows:

> 8. Were Windermere Oak's outside legal expenses related to defending civil suits included in the rates appealed? If so, what amount of outside legal expenses was included in the rates appealed?[77]

Ms. Allen includes unnecessary and often incorrect information in her direct testimony regarding the underlying litigation that necessitated the legal fees included in the rate increase. Furthermore, her testimony provides information on an uncontested issue, as WOWSC has always indicated that it included outside legal expenses related to defending civil suits included in the rates appealed. WOWSC has also testified as to the amount of

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[75] https://wowsc.org/documents/778/2020-02-11_WOWSC_Board_Meeting_Minutes_Approved.pdf at 2 (Feb. 11, 2020) (provided as Attachment JG-39).

[76] SOAH Order No. 9 Ruling on Objections to Direct Testimony; Granting Motion to Extend Time to File Response at 3 (May 3, 2021).

[77] Preliminary Order at 5 (Jul. 16, 2020).

legal expenses that was included in the rates appealed. However, Staff witness Maxine Gilford relied on blatant misrepresentations in Ms. Allen's testimony to support her recommendation to disallow the outside legal expenses in WOWSC's revenue requirement.[78] Therefore I will address these issues more specifically below.

Q. PLEASE RESPOND TO MS. ALLEN'S TESTIMONY WHEREIN SHE STATES "THE CORPORATION HAS SPENT AN ASTONISHING AMOUNT OF RESOURCES TO PRESERVE A LAND TRANSACTION THE CORPORATION'S OWN LAWYERS HAVE OPINED WAS GROSSLY UNFAIR TO THE CORPORATION."[79]

A. Ms. Allen's suggestion that the Corporation has needlessly expended resources to defend itself in litigation is a serious mischaracterization. For one, the "opinion" she references was not a legal opinion, but was in fact a demand letter, stated at a particular place and time, which was the beginning of 2019, and intended to re-open discussion about the contract in mediation. Using this demand letter to suggest that WOWSC still had the same opinion regarding the transaction at the time of the rate increase—well over a year later—or that WOWSC continues to have this same opinion to this day completely ignores the evidence that has since been developed. Indeed, WOWSC has no such opinion currently nor did it offer or otherwise suggest it had this opinion at the time of the rate increase. Positions change as additional information is revealed, and Ms. Allen's omission of that acknowledgement is a strong indication of the strategy of half-truths and incomplete facts that the plaintiffs and Ratepayers have repeatedly presented to the courts, the Commission, and WOWSC members.

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[78] Gilford Direct at 12:8-19.

[79] Allen Direct at 13:5.

The value of the property underlying the lawsuits is a highly disputed matter. While Ms. Allen excitedly testifies—with no qualifications to do so—it is "real estate worth more than $700,000,"[80] what she fails to mention is that to this day nobody has ever offered to buy the property for that amount of money nor has any buyer ever even been identified who would. Thus, regardless of the single appraisal and the initial demand letter, there is no actual basis for her assertion that the Corporation could have simply just sold the property for $700,000 and then easily dispensed with any lingering financial troubles. Despite this, the property sale in question happened long before the Board made the decision to increase rates, and at this later time—with a Board consisting of entirely different Directors than were involved in the sale—any solution theoretically enabling the WOWSC to sell the land for a higher price would have required the Corporation to spend over $200,000 to buy the property back (that is, if the previous buyers were even willing to sell the property back). This was simply not an option for WOWSC, as was made clear in the *TOMA* Lawsuit. That the plaintiffs were seeking this specific relief and that providing for the same would have put the Corporation in seriously precarious financial and legal positions is exactly why WOWSC felt the need to defend itself against the plaintiffs' demands.

Q. WHAT POSITION DID THE COURTS TAKE IN THE TOMA LAWSUIT?

A. After considering the relief requested and the violation at issue, after all parties had ample opportunity to develop the record, the trial court pointedly refused to grant the plaintiffs' requested remedy of voiding the land-sale contract that had long-since been closed. The plaintiffs then appealed and the court of appeals carefully considered the record of the case, which included the uncontested fact that WOWSC did not have the liquidity to pay over

[80] Allen Direct at 9:11.

$200,000 to buy back the property, and determined that the trial court's judgment declining that order should be sustained. Despite these clear rulings, Ratepayers have brought Ms. Allen in to take yet another time-consuming and expensive shot at arguing for the same relief that has already been denied by a court. This stubbornness and the persistent attempts to re-litigate issues WOWSC has already been forced to litigate once only adds to WOWSC's legal expenses.

Q. PLEASE RESPOND TO MS. ALLEN'S SUGGESTION THAT WOWSC HAS NEEDLESSLY DEFENDED ITSELF AGAINST REPEATED LITIGATION.

Ms. Allen suggests that WOWSC has needlessly insisted on defending itself against the plaintiffs' and Ratepayers' claims and has wasted countless Corporation dollars defending the land sale. It is quite ironic for the Ratepayers, who include the plaintiffs in the underlying litigation, to present testimony herein and on one hand argue that it is unreasonable for WOWSC to participate in the litigation process, and on the other hand, be the *exact same* people who forced that process on the Corporation. The WOWSC did not initiate either the *TOMA* or *Double F Hanger* Lawsuits, nor has it brought a single claim against these plaintiffs. Any lawsuit necessarily requires costs to evaluate the possible risks and rewards and paths forward in the case. Despite her testimony to the contrary then, a lawyer of Ms. Allen's experience surely understands that the Corporation was not in a position to make any decision regarding these multiple lawsuits, both real and threatened, without first obtaining counsel and working to better understand and evaluate its potential positions and liability.

Furthermore, many of WOWSC's legal expenses were not incurred in pursuing any specific "defense" strategy as Ms. Allen suggests—they were simply a cost of being trapped as a party in litigation: responding to tons of written discovery; finding and

producing lots of responsive documents; representing active board members at deposition; and attending the depositions of former board members. These up-front discovery costs are necessary to develop an informed position of the claims and would have been incurred regardless of any actual decision to litigate or not litigate. This again goes back to the same point that Ms. Gilford acknowledges in her testimony, that the Corporation could not just ignore or otherwise opt out of the significant parts of the litigation process that were imposed on it.

In fact, to the extent the Corporation did have some control over which legal processes it would or would not be involved in, WOWSC specifically exercised its business judgment *not* to bring a claim against the buyer of the property at issue (thus avoiding the legal costs that would be incurred in doing so), as it was entitled to do. As testimony in this proceeding has evidenced, litigation of a claim seeking to undo the transaction has cost the plaintiffs (i.e., Ratepayers') a significant amount of legal fees. It is not at all unreasonable for the Corporation to have determined that it would have incurred a similar amount of fees had it pursued such a claim, all with no guarantee of success. As mentioned above, WOWSC even received correspondence from counsel for Friendship Homes stating that if the Corporation bailed on the land transaction, then Friendship Homes may assert a breach action against WOWSC. So what Ms. Allen has failed to address is that the Corporation was trapped between two dueling plaintiffs, with threatened liability if the Corporation did not defend the same transaction that Ms. Allen declares should have been undone.

Therefore, Ratepayers' true complaint, and what Ms. Allen's testimony essentially suggests, is not only that WOWSC has spent money defending the transaction against the plaintiffs' spurious claims, but also that the Corporation should have spent more money to

bring those exact claims itself against the buyer. In short, the Ratepayers' position is that WOWSC should have incurred significant legal fees, with no guarantee of success, no matter what. The essential fact is that in *either* scenario, the Ratepayers' would have WOWSC spend significant legal fees with no guarantee of recovery and thus to suggest that one of these positions is more financially valid than the other is simply without merit.

Q. PLEASE EXPLAIN WHY THE BOARD FELT IT WAS FINANCIALLY NECESSARY TO DEFEND THE CORPORATION FROM THE CLAIMS IN THE DOUBLE F HANGER LAWSUIT.

The trial court's record in the *Double F Hanger* Lawsuit reveals that, regardless of Ms. Allen's allegations, the property should be sold in one piece, and the Board exercised its discretion and judgment using the information made available after the demand letter from January 2019 that it was advantageous to the Corporation to sell a portion of the property instead of the whole. This was done in accordance with Texas law, which gives non-profit corporations near-absolute discretion to dispose of real property and to exercise its judgment as to the appropriate terms and conditions of a sale.

Ms. Allen testifies that the *Double F Hanger* Lawsuit simply sought to set aside the land transaction and the plaintiffs have not sought any other relief as against the Corporation. What Ms. Allen fails to mention is that the lawsuit included numerous allegations against various past and present Directors claiming they violated the law and should be held individually responsible for the actions taken in their capacity as board members. As explained above, the Corporation not only has a duty but also a strong incentive to protect its volunteer board members and directors against potential liability for actions taken in their roles for the Corporation. This is imperative for the non-profit WOWSC to maintain its ability to get people to serve in these positions and effectively run

the Corporation. Therefore, there was much more at stake as a result of the plaintiffs' litigation than Ms. Allen suggests.

Ms. Allen further testifies that the reasonable and future-looking actions of the Corporation to defend its board members were instead short-sighted, knee-jerk reactions to obstruct plaintiffs' purpose, and left the same plaintiffs with no choice but to sue the Directors' individually. That assertion is false. The plaintiffs had a choice. They should have chosen not to bring extensive, punitive claims that the court has now plainly told them do not have merit. Ms. Allen specifically says that the October 2019 actions by the Directors, who were attempting to settle the litigation, were patently illegal and in fact were the basis for adding the Directors to the case. However, the trial court recently considered these allegations—which plaintiffs allege they had "no choice" but to bring—and summarily dismissed those claims as to all of the Directors except only for Dana Martin. Thus, it is actually WOWSC that is left with no choice, as the plaintiffs' fruitless pursuit of these claims has generated even more legal expenses that WOWSC will be forced to cover on behalf of its Directors.

Q. PLEASE RESPOND TO MS. ALLEN'S TESTIMONY REGARDING WOWSC'S ACTIONS IN THE PAXTON LAWSUIT.

A. Following the trial court proceedings in the *TOMA* Lawsuit, Danny Flunker made a PIA request for the attorney invoices related to the suit. As previously discussed, the Corporation sought an Attorney General opinion to prevent disclosing these invoices to Mr. Flunker, who was affiliated with the plaintiffs in the *TOMA* Lawsuit, on the basis that the invoices contained privileged attorney-client information related to the lawsuit. Ms. Allen correctly testifies that the Corporation filed suit against the Attorney General based on its initial determination, but again leaves out important factual details when attempting

to support her assertion that every dollar spent on this litigation was wasted. Ms. Allen's entire basis for this assertion is that the Corporation ultimately decided to release the invoices at issue voluntarily, which was opposite to its position in initiating the suit. Ms. Allen states, "[n]othing changed between the time the Board authorized the Corporation's lawyers to oppose public disclosure and the time the Board voted to put the invoices on the Corporation's website."[81] This is plainly false. What Ms. Allen fails to mention is that the AG had actually reversed its initial position and had entered into a settlement agreement with the Corporation acknowledging that it was proper for WOWSC to withhold the invoices from disclosure. Things had clearly and most certainly changed.

In the time period Ms. Allen references, the AG's reversal of its opinion and agreement with WOWSC to settle the case confirmed that the Corporation in fact had the superior legal position as opposed to Mr. Flunker. This alone demonstrates that the litigation was reasonable and the expenses justifiable, refuting Ms. Allen's testimony that these dollars were simply wasted. However, and despite this, when the Corporation learned that Mr. Flunker was going to nevertheless seek to keep the *Paxton* Lawsuit alive, which would cost WOWSC even more in legal expenses, the Corporation weighed its interests against these additional costs and against its strong preference opted to release the information to avoid incurring further expense. Simply put, WOWSC affirmatively chose to reduce further costs, even though it was on legally superior ground, because it thought it was the right thing to do for the Corporation financially. Ms. Allen's testimony is therefore disingenuous at best, especially considering that had Mr. Flunker instead chosen to not continue pursuing an unmeritorious position, chasing after information related to a lawsuit that the plaintiffs already lost, there would have been no need for any legal fees

[81] Allen Direct at 12:9-11.

whatsoever. The fact that Mr. Flunker complains about obtaining the result he desired despite having an inferior position perfectly demonstrates the difficulty WOWSC faces and the Board's reasonable concern that the stubborn dissatisfaction of these certain members will continue indefinitely and subject WOWSC to ever-increasing legal expenses.

VIII. CONCLUSION

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes, it does.

COBANK

Loan No. 00122964T01

SINGLE ADVANCE TERM PROMISSORY NOTE

THIS SINGLE ADVANCE TERM PROMISSORY NOTE (this "**Promissory Note**") to the Credit Agreement dated July 24, 2020 (such agreement, as may be amended, hereinafter referred to as the "**Credit Agreement**"), is entered into as of July 24, 2020 between **COBANK, ACB,** a federally-chartered instrumentality of the United States ("**Lender**") and **WINDERMERE OAKS WATER SUPPLY CORPORATION**, Spicewood, Texas, a nonprofit corporation (together with its permitted successors and assigns, the "**Borrower**"). Capitalized terms not otherwise defined in this Promissory Note will have the meanings set forth in the Credit Agreement.

SECTION 1. SINGLE ADVANCE TERM COMMITMENT. On the terms and conditions set forth in the Credit Agreement and this Promissory Note, Lender agrees to make a single advance loan to the Borrower in an amount not to exceed $230,000.00 (the "**Commitment**").

SECTION 2. PURPOSE. The purpose of the Commitment is to refinance some of the Borrower's indebtedness to First United Bank and Trust and identified on Exhibit A hereto (individually or collectively, the "**Existing Loan(s)**").

SECTION 3. TERM. The Commitment will expire at 12:00 p.m. Denver, Colorado time on October 30, 2020, or on such later date as Lender may, in its sole discretion, authorize in writing (the "**Term Expiration Date**").

SECTION 4. LIMITS ON ADVANCES, AVAILABILITY, ETC. The loans will be made available as provided in Article 2 of the Credit Agreement.

SECTION 5. INTEREST. The Borrower agrees to pay interest on the unpaid balance of the loan(s) in accordance with the following interest rate option(s):

(A) Weekly Quoted Variable Rate. At a rate per annum equal at all times to the rate of interest established by Lender on the first Business Day of each week. The rate established by Lender will be effective until the first Business Day of the next week. Each change in the rate will be applicable to all balances subject to this option and information about the then current rate will be made available upon telephonic request.

(B) Quoted Rate. At a fixed rate per annum to be quoted by Lender in its sole discretion in each instance. Under this option, rates may be fixed on such balances and for such periods, as may be agreeable to Lender in its sole discretion in each instance, provided that: (1) the minimum fixed period will be 365 days; (2) amounts may be fixed in an amount not less than $100,000.00; and (3) the maximum number of fixes in place at any one time will be five.

The Borrower will select the applicable rate option at the time it requests a loan hereunder and may, subject to the limitations set forth above, elect to convert balances bearing interest at the variable rate option to one of the fixed rate options. If the Borrower fails to elect an interest rate option, interest will accrue at the variable interest rate option. Upon the expiration of any fixed rate period, interest will automatically accrue at the variable rate option unless the amount fixed is repaid or fixed for an additional

period in accordance with the terms hereof. Notwithstanding the foregoing, rates may not be fixed for periods expiring after the maturity date of the loans and rates may not be fixed in such a manner as to cause the Borrower to have to break any fixed rate balance in order to pay any installment of principal. All elections provided for herein will be made telephonically or in writing and must be received by 12:00 p.m. Denver, Colorado time. Interest will be calculated on the actual number of days each loan is outstanding on the basis of a year consisting of 360 days and will be payable monthly in arrears by the 20th day of the following month or on such other day as Lender will require in a written notice to the Borrower ("**Interest Payment Date**").

Notwithstanding the foregoing, not later than the last day funds are advanced under this Promissory Note the Borrower will work with Lender to fix the interest rate applicable hereunder through maturity, unless this provision is waived by Lender.

SECTION 6. PROMISSORY NOTE. The Borrower promises to repay the unpaid principal balance of the loan in 240 consecutive, monthly installments, payable on the 20th day of each month, with the first installment due on November 20, 2020, and the last installment due on October 20, 2040. The amount of each installment will be the same principal amount that would be required to be repaid if the loan(s) were scheduled to be repaid in level payments of principal and interest and such schedule was calculated utilizing the rate of interest in effect on the date funds are advanced under this Promissory Note. Principal due on the first payment date will constitute a month's amortization, regardless of any partial month's interest due in accordance with the provisions set forth herein.

In addition to the above, the Borrower promises to pay interest on the unpaid principal balance of the loan at the times and in accordance with the provisions set forth herein.

SECTION 7. PREPAYMENT. Subject to the broken funding surcharge provision of the Credit Agreement, the Borrower may, on one Business Day's prior written notice, prepay all or any portion of the loan(s). Unless otherwise agreed by Lender, all prepayments will be applied to principal installments in the inverse order of their maturity and to such balances, fixed or variable, as Lender will specify.

SECTION 8. SECURITY. The Borrower's obligations hereunder and, to the extent related hereto, under the Credit Agreement, will be secured as provided in Section 2.3 of the Credit Agreement, except that the loans hereunder will be secured by Borrower's personal property rather than by all real and personal property of Borrower.

SECTION 9. FEES. INTENTIONALLY OMITTED.

SECTION 10. FINANCIAL COVENANT. While this Promissory Note is in effect and unless Lender otherwise consents in writing, the Borrower will establish by December 31, 2020 and maintain a debt service reserve account (the "**Reserve**") in the amount of $9,000.00. The funds in the Reserve will be held in a financial institution acceptable to Lender, or in a cash investment services account at Lender and invested in obligations of Lender. The Borrower hereby pledges and grants to Lender a security interest in the Reserve (including all interest earned thereon) as security for the Borrower's obligations to Lender under the Loan Documents. If requested by Lender, the Borrower will cooperate with Lender in obtaining control with respect to the Reserve if it is maintained with a financial institution other than Lender (the "**Bank**") including entering into a written agreement among the Bank, the Borrower and Lender that the Bank will comply with instructions originated by Lender directing disposition of funds in the Reserve without further consent by the Borrower. However, as long as no Event of Default or Potential Default will have occurred and be continuing, interest on the Borrower's investments in the

Reserve may be paid to the Borrower in the ordinary course. Investments in Lender are uninsured and unsecured general obligations of Lender. Lender is regulated by the Farm Credit Administration and exempt from registration under federal law.

SIGNATURE PAGE FOLLOWS

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood, Texas
Promissory Note No. 00122964T01

SIGNATURE PAGE TO PROMISSORY NOTE

IN WITNESS WHEREOF, the parties have caused this Promissory Note to the Credit Agreement to be executed by their duly authorized officer(s).

WINDERMERE OAKS WATER SUPPLY CORPORATION

By: _____

Name: _____

Title: 9-10/20 / President

APPROVED
By Daphne at 2:03 pm, Sep 29, 2020

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood, Texas
Promissory Note No. 00122964T01

SIGNATURE PAGE TO PROMISSORY NOTE

IN WITNESS WHEREOF, the parties have caused this Promissory Note to the Credit Agreement to be executed by their duly authorized officer(s).

COBANK, ACB

By: _____

Name: Christen Spencer

Title: Assistant Corporate Secretary

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood, Texas
Promissory Note No. 00122964T01

EXHIBIT A

To Promissory Note No. 00122964T01

DESCRIPTION OF EXISTING LOAN(S) TO BE REFINANCED

The Existing Loan(s) is/are as follows:

LENDER	LOAN DESIGNATION
First United Bank and Trust	8001111555

COBANK

Loan No. 00122964T02

SINGLE ADVANCE TERM PROMISSORY NOTE

THIS SINGLE ADVANCE TERM PROMISSORY NOTE (this "**Promissory Note**") to the Credit Agreement dated July 24, 2020 (such agreement, as may be amended, hereinafter referred to as the "**Credit Agreement**"), is entered into as of July 24, 2020 between **COBANK, ACB,** a federally-chartered instrumentality of the United States ("**Lender**") and **WINDERMERE OAKS WATER SUPPLY CORPORATION**, Spicewood, Texas, a nonprofit corporation (together with its permitted successors and assigns, the "**Borrower**"). Capitalized terms not otherwise defined in this Promissory Note will have the meanings set forth in the Credit Agreement.

SECTION 1. SINGLE ADVANCE TERM COMMITMENT. On the terms and conditions set forth in the Credit Agreement and this Promissory Note, Lender agrees to make a single advance loan to the Borrower in an amount not to exceed $150,000.00 (the "**Commitment**").

SECTION 2. PURPOSE. The purpose of the Commitment is to finance various capital expenditures.

SECTION 3. TERM. The Commitment will expire at 12:00 p.m. Denver, Colorado time on October 30, 2020, or on such later date as Lender may, in its sole discretion, authorize in writing (the "**Term Expiration Date**").

SECTION 4. LIMITS ON ADVANCES, AVAILABILITY, ETC. The loans will be made available as provided in Article 2 of the Credit Agreement.

SECTION 5. INTEREST. The Borrower agrees to pay interest on the unpaid balance of the loan(s) in accordance with the following interest rate option(s):

(A) Weekly Quoted Variable Rate. At a rate per annum equal at all times to the rate of interest established by Lender on the first Business Day of each week. The rate established by Lender will be effective until the first Business Day of the next week. Each change in the rate will be applicable to all balances subject to this option and information about the then current rate will be made available upon telephonic request.

(B) Quoted Rate. At a fixed rate per annum to be quoted by Lender in its sole discretion in each instance. Under this option, rates may be fixed on such balances and for such periods, as may be agreeable to Lender in its sole discretion in each instance, provided that: (1) the minimum fixed period will be 365 days; (2) amounts may be fixed in an amount not less than $100,000.00; and (3) the maximum number of fixes in place at any one time will be five.

The Borrower will select the applicable rate option at the time it requests a loan hereunder and may, subject to the limitations set forth above, elect to convert balances bearing interest at the variable rate option to one of the fixed rate options. If the Borrower fails to elect an interest rate option, interest will accrue at the variable interest rate option. Upon the expiration of any fixed rate period, interest will automatically accrue at the variable rate option unless the amount fixed is repaid or fixed for an additional period in accordance with the terms hereof. Notwithstanding the foregoing, rates may not be fixed for

periods expiring after the maturity date of the loans and rates may not be fixed in such a manner as to cause the Borrower to have to break any fixed rate balance in order to pay any installment of principal. All elections provided for herein will be made telephonically or in writing and must be received by 12:00 p.m. Denver, Colorado time. Interest will be calculated on the actual number of days each loan is outstanding on the basis of a year consisting of 360 days and will be payable monthly in arrears by the 20th day of the following month or on such other day as Lender will require in a written notice to the Borrower ("**Interest Payment Date**").

Notwithstanding the foregoing, not later than the last day funds are advanced under this Promissory Note the Borrower will work with Lender to fix the interest rate applicable hereunder through maturity, unless this provision is waived by Lender.

SECTION 6. PROMISSORY NOTE. The Borrower promises to repay the unpaid principal balance of the loan in 240 consecutive, monthly installments, payable on the 20th day of each month, with the first installment due on November 20, 2020, and the last installment due on October 20, 2040. The amount of each installment will be the same principal amount that would be required to be repaid if the loan(s) were scheduled to be repaid in level payments of principal and interest and such schedule was calculated utilizing the rate of interest in effect on the date funds are advanced under this Promissory Note. Principal due on the first payment date will constitute a month's amortization, regardless of any partial month's interest due in accordance with the provisions set forth herein.

In addition to the above, the Borrower promises to pay interest on the unpaid principal balance of the loan at the times and in accordance with the provisions set forth herein.

SECTION 7. PREPAYMENT. Subject to the broken funding surcharge provision of the Credit Agreement, the Borrower may, on one Business Day's prior written notice, prepay all or any portion of the loan(s). Unless otherwise agreed by Lender, all prepayments will be applied to principal installments in the inverse order of their maturity and to such balances, fixed or variable, as Lender will specify.

SECTION 8. SECURITY. The Borrower's obligations hereunder and, to the extent related hereto, under the Credit Agreement, will be secured as provided in Section 2.3 of the Credit Agreement, except that the loans hereunder will be secured by Borrower's personal property rather than by all real and personal property of Borrower.

SECTION 9. FEES. INTENTIONALLY OMITTED.

SECTION 10. FINANCIAL COVENANT. While this Promissory Note is in effect and unless Lender otherwise consents in writing, the Borrower will establish by December 31, 2020 and maintain a debt service reserve account (the "**Reserve**") in the amount of $5,000.00. The funds in the Reserve will be held in a financial institution acceptable to Lender, or in a cash investment services account at Lender and invested in obligations of Lender. The Borrower hereby pledges and grants to Lender a security interest in the Reserve (including all interest earned thereon) as security for the Borrower's obligations to Lender under the Loan Documents. If requested by Lender, the Borrower will cooperate with Lender in obtaining control with respect to the Reserve if it is maintained with a financial institution other than Lender (the "**Bank**") including entering into a written agreement among the Bank, the Borrower and Lender that the Bank will comply with instructions originated by Lender directing disposition of funds in the Reserve without further consent by the Borrower. However, as long as no Event of Default or Potential Default will have occurred and be continuing, interest on the Borrower's investments in the

Reserve may be paid to the Borrower in the ordinary course. Investments in Lender are uninsured and unsecured general obligations of Lender. Lender is regulated by the Farm Credit Administration and exempt from registration under federal law.

SIGNATURE PAGE FOLLOWS

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood, Texas
Promissory Note No. 00122964T02

SIGNATURE PAGE TO PROMISSORY NOTE

IN WITNESS WHEREOF, the parties have caused this Promissory Note to the Credit Agreement to be executed by their duly authorized officer(s).

WINDERMERE OAKS WATER SUPPLY CORPORATION

By: _____

Name: Joseph J Gimenez III

Title: President

APPROVED
By Daphne at 2:04 pm, Sep 29, 2020

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood. Texas
Promissory Note No. 00122964T02

SIGNATURE PAGE TO PROMISSORY NOTE

IN WITNESS WHEREOF, the parties have caused this Promissory Note to the Credit Agreement to be executed by their duly authorized officer(s).

COBANK, ACB

By: _____

Name: Christen Spencer

Title: Assistant Corporate Secretary

CoBANK

Loan No. 00122964T03

MULTIPLE ADVANCE TERM PROMISSORY NOTE

THIS MULTIPLE ADVANCE TERM PROMISSORY NOTE (this "**Promissory Note**") to the Credit Agreement dated July 24, 2020 (such agreement, as may be amended, hereinafter referred to as the "**Credit Agreement**"), is entered into as of July 24, 2020 between **COBANK, ACB,** a federally-chartered instrumentality of the United States ("**Lender**") and **WINDERMERE OAKS WATER SUPPLY CORPORATION**, Spicewood, Texas, a nonprofit corporation (together with its permitted successors and assigns, the "**Borrower**"). Capitalized terms not otherwise defined in this Promissory Note will have the meanings set forth in the Credit Agreement.

SECTION 1. MULTIPLE ADVANCE TERM COMMITMENT. On the terms and conditions set forth in the Credit Agreement and this Promissory Note, Lender agrees to make loans to the Borrower from time to time during the period set forth below in an aggregate principal amount not to exceed $300,000.00 (the "**Commitment**"). Under the Commitment, amounts borrowed and later repaid may not be re-borrowed.

SECTION 2. PURPOSE. The purpose of the Commitment is to provide financing for a new clarifier/pre-treatment tank and UV treatment equipment.

SECTION 3. TERM. The term of the Commitment will be from the date hereof, up to 12:00 p.m. Denver, Colorado time on October 29, 2021, or on such later date as Lender may, in its sole discretion, authorize in writing (the "**Term Expiration Date**").

SECTION 4. LIMITS ON ADVANCES, AVAILABILITY, ETC. The loans will be made available as provided in Article 2 of the Credit Agreement, except that proceeds of the loans will be made available upon receipt of a draw request in the form and substance acceptable to CoBank.

SECTION 5. INTEREST. The Borrower agrees to pay interest on the unpaid balance of the loan(s) in accordance with the following interest rate option(s):

(A) Weekly Quoted Variable Rate. At a rate per annum equal at all times to the rate of interest established by Lender on the first Business Day of each week. The rate established by Lender will be effective until the first Business Day of the next week. Each change in the rate will be applicable to all balances subject to this option and information about the then current rate will be made available upon telephonic request.

(B) Quoted Rate. At a fixed rate per annum to be quoted by Lender in its sole discretion in each instance. Under this option, rates may be fixed on such balances and for such periods, as may be agreeable to Lender in its sole discretion in each instance, provided that: (1) the minimum fixed period will be 365 days; (2) amounts may be fixed in an amount not less than $100,000.00; and (3) the maximum number of fixes in place at any one time will be five.

The Borrower will select the applicable rate option at the time it requests a loan hereunder and may, subject to the limitations set forth above, elect to convert balances bearing interest at the variable rate option to one of the fixed rate options. If the Borrower fails to elect an interest rate option, interest will accrue at the variable interest rate option. Upon the expiration of any fixed rate period, interest will automatically accrue at the variable rate option unless the amount fixed is repaid or fixed for an additional period in accordance with the terms hereof. Notwithstanding the foregoing, rates may not be fixed for

periods expiring after the maturity date of the loans and rates may not be fixed in such a manner as to cause the Borrower to have to break any fixed rate balance in order to pay any installment of principal. All elections provided for herein will be made telephonically or in writing and must be received by 12:00 p.m. Denver, Colorado time. Interest will be calculated on the actual number of days each loan is outstanding on the basis of a year consisting of 360 days and will be payable monthly in arrears by the 20th day of the following month or on such other day as Lender will require in a written notice to the Borrower ("**Interest Payment Date**").

Notwithstanding the foregoing, not later than the last day funds are advanced under this Promissory Note the Borrower will work with Lender to fix the interest rate applicable hereunder through maturity, unless this provision is waived by Lender.

SECTION 6. PROMISSORY NOTE. The Borrower promises to repay the unpaid principal balance of the loans in 240 consecutive, monthly installments, payable on the 20th day of each month, with the first installment due on November 20, 2021, and the last installment due on October 20, 2041. The amount of each installment will be the same principal amount that would be required to be repaid if the loan(s) were scheduled to be repaid in level payments of principal and interest and such schedule was calculated utilizing the rate of interest in effect on the Term Expiration Date. Principal due on the first payment date will constitute a month's amortization, regardless of any partial month's interest due in accordance with the provisions set forth herein.

In addition to the above, the Borrower promises to pay interest on the unpaid principal balance of the loans at the times and in accordance with the provisions set forth herein.

SECTION 7. PREPAYMENT. Subject to the broken funding surcharge provision of the Credit Agreement, the Borrower may, on one Business Day's prior written notice, prepay all or any portion of the loan(s). Unless otherwise agreed by Lender, all prepayments will be applied to principal installments in the inverse order of their maturity and to such balances, fixed or variable, as Lender will specify.

SECTION 8. SECURITY. The Borrower's obligations hereunder and, to the extent related hereto, under the Credit Agreement, will be secured as provided in Section 2.3 of the Credit Agreement, except that the loans hereunder will be secured by Borrower's personal property rather than by all real and personal property of Borrower.

SECTION 9. FEES. INTENTIONALLY OMITTED.

SECTION 10. FINANCIAL COVENANT. While this Promissory Note is in effect and unless Lender otherwise consents in writing, the Borrower will establish by December 31, 2020 and maintain a debt service reserve account (the "**Reserve**") in the amount of $10,000.00. The funds in the Reserve will be held in a financial institution acceptable to Lender, or in a cash investment services account at Lender and invested in obligations of Lender. The Borrower hereby pledges and grants to Lender a security interest in the Reserve (including all interest earned thereon) as security for the Borrower's obligations to Lender under the Loan Documents. If requested by Lender, the Borrower will cooperate with Lender in obtaining control with respect to the Reserve if it is maintained with a financial institution other than Lender (the "**Bank**") including entering into a written agreement among the Bank, the Borrower and Lender that the Bank will comply with instructions originated by Lender directing disposition of funds in the Reserve without further consent by the Borrower. However, as long as no Event of Default or Potential Default will have occurred and be continuing, interest on the Borrower's investments in the Reserve may be paid to the Borrower in the ordinary course. Investments in Lender are uninsured and

unsecured general obligations of Lender. Lender is regulated by the Farm Credit Administration and exempt from registration under federal law.

SIGNATURE PAGE FOLLOWS

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood, Texas
Promissory Note No. 00122964T03

SIGNATURE PAGE TO PROMISSORY NOTE

IN WITNESS WHEREOF, the parties have caused this Promissory Note to the Credit Agreement to be executed by their duly authorized officer(s).

WINDERMERE OAKS WATER SUPPLY CORPORATION

By: Joseph J Gimenez III

Name: Joseph J Gimenez III

Title: President

APPROVED
By Daphne at 2:04 pm, Sep 29, 2020

WINDERMERE OAKS WATER SUPPLY CORPORATION
Spicewood. Texas
Promissory Note No. 00122964T03

SIGNATURE PAGE TO PROMISSORY NOTE

IN WITNESS WHEREOF, the parties have caused this Promissory Note to the Credit Agreement to be executed by their duly authorized officer(s).

COBANK, ACB

By: _____

Name: Christen Spencer

Title: Assistant Corporate Secretary

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD DIAL, AND STUART BRUCE SORGEN, INDIVIDUALLY AND AS REPRESENTATIVES FOR WINDERMERE OAKS WATER SUPPLY CORPORATION INTERVENOR PLAINTIFFS	§	IN THE DISTRICT COURT
v.	§	33RD JUDICIAL DISTRICT
FRIENDSHIP HOMES & HANGARS, LLC, WINDERMERE OAKS WATER SUPPLY CORPORATION, AND ITS DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR, DEFENDANTS	§	BURNET COUNTY, TEXAS

ORDER ON DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR'S TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

After considering Defendants Windermere Oaks Water Supply Corporation Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, Mike Nelson, and Dorothy Taylor's ("Directors") Traditional and No-Evidence Motion for Summary Judgment ("Motion"), the pleadings and other filings, the response, the reply, the declarations, the arguments of counsel, and other evidence on file, the Court hereby **GRANTS** the Directors' Motion as to all Directors EXCEPT Dana Martin. (MGM) The Motion as to Defendant Dana Martin is DENIED.

Accordingly, the Court **ORDERS** that Intervenor Plaintiffs Rene Ffrench, John Richard Dial, and Stuart Bruce Sorgen, individually and as representatives of Windermere Oaks Water Supply Corporation, take nothing on each of their causes of action against the Directors: Earnest, Madden, Mebane, Mulligan, Gimenez, Nelson, and Taylor. (MGM)

ALL Objections to Summary Judgment Evidence are Hereby Denied. MGM

SIGNED this 3rd day of May, 2021.

Judge Margaret G. Mirabal
Presiding Judge

Filed: 11/4/2020 6:53 PM
Casie Walker, District Clerk
Burnet County, Texas
By: Amy Tippie, Deputy

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD DIAL, AND STUART BRUCE SORGEN, INTERVENOR PLAINTIFFS	§	IN THE DISTRICT COURT
v.	§	
FRIENDSHIP HOMES & HANGARS, LLC, WINDERMERE OAKS WATER SUPPLY CORPORATION, AND ITS DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR, DEFENDANTS	§	33RD JUDICIAL DISTRICT
	§	BURNET COUNTY, TEXAS

DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR'S TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

Under Texas Rule of Civil Procedure 166a(c) and (i), Defendants Windermere Oaks Water Supply Corporation Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, Mike Nelson, and Dorothy Taylor ("Directors") file this Traditional and No-Evidence Motion for Summary Judgment ("Motion"), asking this Court to render a take-nothing judgment in the Directors' favor.

INTRODUCTION/GROUNDS FOR SUMMARY JUDGMENT

The Plaintiffs' entire lawsuit is premised on their belief that the Windermere Oaks Water Supply Corporation ("WOWSC") sold land to a former sitting director for less money than it was worth. In reality, the Business Organizations Code authorizes non-profit corporations to enter into contracts with sitting directors when certain conditions are met. And WOWSC has the absolute right to sell its land, with no statutory restriction on price. Additionally, the land at issue has been

thoroughly appraised, and previous offers were made on that land showing a variety of opinions regarding its worth (with the retrospective David Bolton appraisal relied on by the Plaintiffs being the outlier).

Regardless, the exact value of the land is not at issue in this Motion, and that is because courts neither micromanage the business decisions of non-profits, nor hold non-profit volunteer directors personally liable except in the most egregious of circumstances. The Plaintiffs seek to hold the Directors personally liable under Texas Business Organizations Code section 20.002(c)(2) (the ultra vires statute), seeking damages out of these volunteer Directors' own pockets. But Texas's narrow ultra vires statute only authorizes a director to be held personally liable for the acts of a corporation if the director (1) exceeded an ***expressed limitation on his or her authority*** as set forth in a certificate of formation, and (2) also ***acted illegally***. ***Both*** must be proved. Even if the facts the Plaintiffs pleaded are true (particularly the value of the land set forth in the Bolton appraisal), the Directors did not exceed an expressed limitation on their authority ***and*** act illegally by selling the land, settling litigation, and paying defense costs so as to potentially open them up to personal liability, and there is no evidence proving otherwise.

Foreseeing the need to protect volunteer directors to ensure enough community members are willing to step into those roles, both the Texas Legislature and Congress have also enacted multiple measures to provide volunteer directors of non-profit corporations with robust protections from personal liability in the absence of the most egregious abuses. The Directors here volunteered their time to serve on the board of directors of the small, non-profit WOWSC. Therefore, these statutory and other protections apply to the Directors. Specifically:

- Even if the facts the Plaintiffs pleaded are true, the Directors are not personally liable under the business judgment rule and Texas Business Organizations Code section 22.221 and 22.235 (safe harbor provisions) because they acted in good faith,

with ordinary care, and in a manner that each Director reasonably believed to be in the best interest of WOWSC—and there is no evidence proving otherwise.

- Even if the facts the Plaintiffs pleaded are true, the Directors are not personally liable under the statutory provisions protecting volunteer directors (Texas Civil Practice and Remedies Code, Chapter 84 (Charitable Immunity and Liability Act of 1987) and 42 U.S.C. § 14501 (Volunteer Protection Act))—and there is no evidence proving otherwise.

- Even if the facts the Plaintiffs pleaded are true, at a minimum, disinterested Directors are protected from personal liability by the WOWSC Bylaws and Texas Business Organizations Code section 7.001.

Additionally, some of the Plaintiffs' theories are barred by res judicata, the doctrine of mootness, and the statute of limitations. The Plaintiffs also have not alleged any claim that would entitle them to attorney's fees.

This Court should grant this motion for summary judgment and render a take-nothing judgment on each of the Plaintiffs' claims against the Directors.[1] At a bare minimum, the Court should render a take-nothing judgment on each of the Plaintiffs' claims against Directors Bob Mebane, Pat Mulligan, William Earnest, Thomas Michael Madden, Joe Gimenez, Dorothy Taylor, and Mike Nelson. There is no evidence whatsoever that any of these Directors received any benefit from the land transaction between WOWSC and Friendship Homes & Hangars, LLC ("Friendship")/Dana Martin. In fact, the Directors' declarations negate this. The Plaintiffs'

[1] The Directors read the Plaintiffs' pleading as seeking to enjoin (and purportedly set aside) the land sale to Friendship under BOC § 20.002(c)(1), a claim they have brought against the WOWSC. The Plaintiffs' pleading specifies that the Directors themselves are being sued for damages under BOC § 20.002(c)(2). Third Amended Petition ("Petition") at 9, 40. Many of the Directors (Bill Earnest, Mike Madden, Dana Martin, Pat Mulligan, and Bob Mebane) are not on the Board anymore and obviously cannot take any action regarding the transaction. Ex. 1 through 5. The Directors who are currently still on the Board (Joe Gimenez, Dorothy Taylor, and Mike Nelson) are not the entire current Board, and some of them are up for election in 2021—they alone cannot "rescind" or take other action regarding the transaction. Ex. 6 through 8, 8-CC; https://www.wowsc.org/board-members. Any claim to enjoin or purportedly "set aside" the transaction must be against the WOWSC and Friendship themselves—the parties to the Original Transaction and 2019 Transaction. The claim against the Directors can only be for damages since they have no power, individually, to take any action regarding WOWSC's transactions. This motion for summary judgment asks for summary judgment on the Plaintiffs' claims for damages and attorney's fees against the Directors.

pleading is singularly focused on Friendship, who purchased the land at issue, and its principal, Martin. The other seven Directors are being held hostage by this litigation as apparent leverage for the Plaintiffs. At a minimum, these seven disinterested Directors should be let go even if the Court believes there is an issue to be tried regarding the land transaction.

EVIDENCE IN SUPPORT OF SUMMARY JUDGMENT MOTION

Exhibit 1: Declaration of Dana Martin

Exhibit 2: Declaration of Bob Mebane

Exhibit 3: Declaration of Pat Mulligan

Exhibit 4: Declaration of Mike Madden

Exhibit 5: Declaration of Bill Earnest with exhibits

Exhibit 5-A: Email from Pat Mulligan to Kenny Dryden and Bill Earnest (Jan. 13, 2014)

Exhibit 5-B: Offer from Windermere Oaks Property Owners Association for portion of 11 acres of WOWSC airport land (Jul. 7, 2015)

Exhibit 5-C: Email from Kevin Jackson to the WOWSC Board (Mar. 11, 2015)

Exhibit 5-D: Email from Danny Flunker to WOWSC Board (Oct. 1, 2015)

Exhibit 6: Declaration of Joe Gimenez

Exhibit 7: Declaration of Dorothy Taylor

Exhibit 8: Declaration of Mike Nelson with exhibits

Exhibit 8-A: WOWSC Articles of Incorporation

Exhibit 8-B: WOWSC Bylaws

Exhibit 8-C: WOWSC Minutes of Meeting of the Board (Aug. 24, 2013)

Exhibit 8-D: Letter of Intent, Frank Greenburg (May 8, 2013)

Exhibit 8-E: Offer from Windermere Oaks Property Owners Association

Exhibit 8-F: WOWSC Minutes of Meeting of the Board (Dec. 19, 2015)

Exhibit 8-G: Unimproved Property Contract (Dec. 19, 2015)

Exhibit 8-H: Warranty Deed and Warranty Deed with Vendor's Lien (Mar. 11, 2016)

Exhibit 8-I: Settlement Statement

Exhibit 8-J: Option and Right of First Refusal Agreement (Mar. 10, 2016)

Exhibit 8-K: WOWSC Corporate Resolution (Mar. 10, 2016)

Exhibit 8-L: Correction Warranty Deed with Vendor's Lien (recorded Nov. 1, 2019)

Exhibit 8-M: Addendum to Right of First Refusal Agreement (Feb. 16, 2017)

Exhibit 8-N: Appraisal of Real Property by Jim H. Hinton II (Sept. 1, 2015)

Exhibit 8-O: Appraisal of Real Property by Paul Hornsby & Company (May 13, 2019)

Exhibit 8-P: Burnet Central Appraisal District Appraised Value

Exhibit 8-Q: Appraisal of Real Property by Curt Friedland & Associates (Dec. 5, 2006)

Exhibit 8-R: Appraisal of Real Property by Bolton Real Estate (Dec. 3, 2018)

Exhibit 8-S: Demand Letter from Counsel for WOWSC to Counsel for Friendship Homes & Hangars and Dana Martin (Jan. 25, 2019)

Exhibit 8-T: WOWSC Minutes of Meeting (Oct. 26, 2019)

Exhibit 8-U: WOWSC Notice of Special Meeting for Oct. 26, 2019

Exhibit 8-V: Non-Exclusive Access Easement Agreement and Restrictive Covenant (Oct. 29, 2019)

Exhibit 8-W: Waiver of Right of First Refusal (Oct. 31, 2019)

Exhibit 8-X: Amended, Restated, and Superseding Agreement (Oct. 30, 2019)

Exhibit 8-Y: WOWSC Membership Roster (Sept. 2019)

Exhibit 8-Z: WOWSC Minutes of Meeting (Jun. 12, 2019)

Exhibit 8-AA: WOWSC Minutes of Meeting (Nov. 14, 2019)

Exhibit 8-BB: Sworn Statements Regarding Indemnification and Payment of Defense Costs

Exhibit 8-CC: WOWSC Minutes of Meeting (Feb. 1, 2020)

Exhibit 8-DD: Survey of Tract H on Piper Lane (Mar. 8, 2016)

Exhibit 8-EE: WOWSC Minutes of Meeting (Mar. 11, 2017)

Exhibit 8-FF: Email from William Keller to WOWSC (Sept. 8, 2005)

Exhibit 9: Excerpts from Deposition of Joe Gimenez (Nov. 19, 2019)

Exhibit 10: Excerpts from Deposition of Robert Mebane (Nov. 20, 2019)

Exhibit 11: Excerpts from Deposition of Dana Martin (Dec. 10, 2019)

Exhibit 12: Official Warranty Deed for Tract G (May 18, 2015)

All other prior summary judgment and other evidence filed of record in this case.

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of the Parties to this Lawsuit

This case has many parties. For the Court's ease of reference, the Directors provide this Court with a description of the parties.

Plaintiffs

Rene Ffrench, John Richard Dial, and Stuart Bruce Sorgen. The Plaintiffs are members of the approximately 250-member WOWSC. They are actually intervenor plaintiffs. This case originated as a lawsuit brought by the Plaintiffs' friends Patricia Flunker and Mark McDonald (plus Rene Ffrench's business entity and Ffrench himself), against Friendship and the Burnet County Commissioners Court, seeking to undo WOWSC's land sale to Friendship. *See* Original Verified Petition for Injunction and Declaratory Judgment (Jul. 9, 2018). The original plaintiffs nonsuited their claims and, in May 2019, the Plaintiffs intervened in the case and brought ultra vires claims against WOWSC, Friendship, and the WOWSC Directors who served in 2015—but

without seeking money damages. Later, the Plaintiffs amended their pleading to also sue Directors who served on the 2019 Board and to recover damages from all Directors. *See* Plaintiffs' Second Amended Petition (Nov. 5, 2019).

As the Court is aware, the Plaintiffs, through their litigation entity TOMA Integrity, Inc., also brought a separate lawsuit under the Texas Open Meetings Act ("TOMA") to set aside the land sale. In that suit, this Court found that the notice for the December 2015 meeting at which the Original Transaction was authorized violated TOMA because the subject of the prospective sale was not included in the published notice of the meeting. This Court correctly refused, though, to set aside the transaction.[2] While agreeing the meeting notice defective, the Sixth Court of Appeals likewise held that the Plaintiffs' claim for injunctive or mandamus relief based on the mistake was not available and was moot. *TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp.*, No. 06-09-00005-CV, 2019 WL 2553300, at *2-3 (Tex. App.—Texarkana Jul. 23, 2019, pet. denied).

Defendants

WOWSC: WOWSC is non-profit water supply corporation governed by Texas Water Code, Chapter 67 (governing water supply corporations) and Texas Business Organizations Code, Chapter 22 (governing non-profits). Exhibit ("Ex.") 8-A, 8-B. WOWSC has approximately 250 members and provides water services to the Windermere Oaks community in Spicewood. *Id.*; Ex. 8-Y. WOWSC sold 4.3 out of approximately 11 acres of Spicewood Airport land to Friendship ("Original Transaction"). Ex. 8-F through 8-M. Later, in 2019, WOWSC amended, restated, and superseded the Original Transaction after mediating with Friendship ("2019 Transaction"). Ex. 8-X.

[2] *See* WOWSC's and the Directors Joint Brief in Support of their Pleas to the Jurisdiction and Motion for Summary Judgment, Exhibits 5 through 7.

Friendship: Friendship is an LLC whose principal is former WOWSC Director Dana Martin. Ex. 1. Friendship bought the 4.3 acres of WOWSC airport land when Martin was on the WOWSC board. *Id.* Friendship later sold a portion of the 4.3 acres to a third party, the Mairs, who the Plaintiffs have now sued as well.[3]

2015 Board of Directors ("2015 Board"):

- **Bob Mebane**: Mr. Mebane was president of the board in 2015 and early 2016 when WOWSC sold the land at issue to Friendship. Ex. 2.

- **Pat Mulligan**: Mr. Mulligan was on the board when the land was sold to Friendship in 2015/2016 and was previous president of the board. Ex. 3.

- **Mike Madden**: Mr. Madden was secretary of the board when the land was sold to Friendship in 2015/2016. Ex. 4.

- **Dana Martin**: Ms. Martin was on the board when the land was sold to her company, Friendship, in 2015/2016. She disclosed her ownership of Friendship (though this was already known to the board) and recused herself from that vote. Ex. 1.

- **Bill Earnest**: Mr. Earnest was on the board when the land was sold to Friendship in 2015/2016, but he was not at the board meeting when that vote was taken and did not participate in that vote. Ex. 5.

2019 Board of Directors ("2019 Board"):

- **Joe Gimenez**: Mr. Gimenez is the current board president and was president when the board voted in 2019 to amend, restate, and supersede the Original Transaction. He was not on the board in 2015/2016 when the 2015 Board sold the land to Friendship. Ex. 6.

- **Dorothy Taylor**: Ms. Taylor is currently on the board and was on the board when it voted in 2019 to amend, restate, and supersede the Original Transaction. Ms. Taylor was also on the board at various times before and after the Original Transaction. She was not on the board in 2015/2016 when the 2015 Board sold the land to Friendship. Ex. 7.

- **Mike Nelson**: Mr. Nelson is currently on the board and was on the board when it voted in 2019 to amend, restate, and supersede the Original Transaction. He was not on the board in 2015/2016 when the 2015 Board sold the land to Friendship. Ex. 8.

- **Bill Earnest**: Mr. Earnest joined the board again and was on the board when it voted in 2019 to amend, restate, and supersede the Original Transaction. Ex. 5.

[3] The Mairs do not appear to have been served and have not answered.

B. WOWSC (through the 2015 Board) sold Spicewood Airport land to an entity owned by a sitting director, who recused herself from the vote.

In August 2013, the WOWSC board of directors discussed and approved building a new, much needed wastewater treatment plant. Ex. 8-C. The cost for construction of the new wastewater treatment plant was anticipated to be $750,000. *Id.* At that same meeting, the board discussed selling WOWSC-owned property in the Spicewood Airport to pay down some of the debt incurred for the construction of the new wastewater treatment plant. *Id.*

By the fall of 2015, the 2015 Board was considering listing the subject property for sale. Ex. 1, 5. Rather than listing the property, in an open meeting on December 19, 2015, the 2015 Board (minus Bill Earnest, who was not present, and Dana Martin, who recused herself) voted to instead accept a proposal from Friendship to purchase approximately 4.3 acres of the airport land for $203,000, or roughly $50,000 an acre. Ex. 1 through 5, 8-F. Friendship was also given a right of first refusal to the remaining approximately 7 acres of the 11-acre tract. Exhibit 8-J. Dana Martin had been doing business as Friendship for some years prior to that time, using it as a DBA, and Friendship was formed as a limited liability company before the March 2016 closing on the property. Ex. 1, 8-H, 8-L. There is no dispute that the 2015 Board was aware of Martin's affiliation with Friendship both before and after its formation as an LLC when the Board reviewed and approved the proposed offer from Friendship to purchase the property. Ex. 1 through 5.

Dana Martin recused herself from the vote and stepped outside while the other board members discussed the offer. Ex. 1 through 4. The 2015 Board made a counteroffer, which included certain use limitations and specified that its sales expenses would be capped at $3,000, so that it would net $200,000 in sales proceeds. Ex. 1. Friendship accepted the counteroffer. *Id.* Bill Earnest was not present at the December 2015 board meeting and thus did not participate in

this vote. Ex. 5, 8-F. Pat Mulligan, Bob Mebane, and Mike Madden were the sole members of the 2015 Board who voted to approve the Original Transaction. Ex. 8-F.

For several reasons, the 2015 Board determined the sale to Friendship was a good price.

- The Board had received previous offers that were significantly lower in price. Ex. 1 through 5. In May 2013, Frank Greenberg had offered $175,000 for seven of the 11 acres of the land (approximately $25,000 an acre). Ex. 8-D. Then in July 2015, the Windermere Oaks Property Owners Association ("POA") had offered $20,000 for approximately two-thirds of one acre of the 11 acres of the land. Ex. 5-B, 8-E. A few years earlier, William Keller submitted an offer to purchase approximately one acre of the 11 acres for $15,000. Ex. 3-A.

- WOWSC had received several separate oral valuations of the land (1) by a real estate agent that had done work for WOWSC in the past, Kenny Dryden; (2) by a central Texas airport developer; (3) by a member of the Texas Department of Transportation Aviation Division; and (4) by a Lakeway real estate agent who had dealt with airport property in the past. Ex. 1 through 5. A few years earlier, seven of the acres had been appraised at $50,000 an acre. Ex. 3, 8-Q. In 2011, the Spicewood Pilots Association had offered to buy approximately 7 acres of airport property for $100,000. Ex. 3. Jim Hinton appraised 10.85 acres of the airport property at $185,000. Ex. 3, 8-N. Board members reviewed the MLS and were generally aware of what land was selling for in the area. Ex. 3, 5; 10, pp. 99-101.

- The airport property needed significant work to make it usable at an airport, such as fill to make it level, and the area was experiencing a drought that impacted real estate prices. Ex. 2, 3, 5; Ex. 10, pp. 40-42, 51-52; 11, p. 240.

- It was widely known in the Windermere Oaks community that WOWSC intended to sell the land, but there was no interest beyond the offers from Frank Greenberg and the POA. Ex. 2, 5.

- Friendship's offer also came to the Board at a good time. The Board had incurred debt building a new wastewater treatment facility and hoped to pay down the debt with the sale. Ex. 3, 4.

Based on these factors, each member of the 2015 Board believed the fair value of the land to range from $20,000-$50,000 an acre. Exhibit 1 through 5; 10, pp. 19-21, 58-60, 66-72, 99-101, 113. Also, by negotiating a purchase with Friendship before it went on the market, the six percent brokers fees and other marketing costs would be saved. Exhibit 1, 4, 5. Though the exact value of the land is not relevant to this Motion, it is relevant for the Court to be aware of the various known

values that have been assigned to the subject 11 acres of land (4.3 acres of which were sold to Friendship):

2007 bank appraisal	$350,000 for 7.027 acres (**$49,807 per acre**)
2013 Frank Greenberg offer	$175,000 for 7 acres (**$25,000 per acre**)
2015 WOPOA offer	$20,000 for approximately 2/3 of 1 acre (**$30,000 per acre**)
2015 Burnet Co. Appraisal District value	$246,500 of 7.12 acres (**$34,620 per acre**)
Fall 2015 independent realtor opinion	$225,000 for 4 acres (**$56,250 per acre**)
2015 Jim Hinton appraisal	$185,000 for 10.85 acres (**$17,050 per acre**)
2018 Bolton appraisal (as of 2015) (post litigation)	$1.3 million for 10 acres/$700,000 for 3.86 acres (**$130,000 per acre**)
2019 Hornsby appraisal (as of 2015) (post litigation)	$221,000 for 3.86 acres (**$57,253 per acre**)

Ex. 1 through 5, 8-D, 8-E, 8-N through 8-R; 11, pp. 264-269. The sale of the 4.3 acres to Friendship was for approximately **$47,209 per acre**, but without the payment of the usual six percent realtor fees. Ex. 8-G.

The sale closed in March 2016, at which time WOWSC received the stipulated $200,000, plus closing costs, and WOWSC conveyed the property to Friendship. Ex. 8-H through 8-L. The contract required the conveyance of 4.3 acres as identified on a survey. Ex. 8-G. Some months later after this dispute arose, it was discovered that the title company that had prepared the legal attachments and descriptions for the closing documents, including the deed, had left out a strip of land covered by the contract on which a portion of Piper Lane is located. Ex. 1, 8-G, 8-H. As such, instead of receiving the 4.3 acres identified in the Earnest Money Contract, Friendship received only 3.86 acres. *Id.* The legal description was corrected through a correction deed recorded on

November 1, 2019, which relates back to the March 14, 2016 recording date of the original deed. TEX. PROP. CODE §§ 5.029, 5.030; Exhibit 8-L.

C. WOWSC (through the 2019 Board) voted to supersede, restate, and amend the Original Transaction.

In 2018, because of concerns raised by the Plaintiffs and their allies, the WOWSC board (at that point comprised of David Bertino, Norman Morse, Mike Nelson, Dorothy Taylor, and Bill Billingsley) decided to commission a retrospective appraisal of the land sold to Friendship. Ex. 6 through 8. WOWSC and the Plaintiffs selected David Bolton to conduct the appraisal. Ex. 8-R.[4] After receiving the Bolton appraisal, in February 2019, the WOWSC board voted to send a demand letter to Friendship and Martin because of the disparity between the appraisal and the amount of the sale. Ex. 6 through 8, 8-R, 8-S. The Plaintiffs' entire lawsuit centers around the Bolton appraisal and this demand letter.

The 2019 Board had concerns about the high cost of litigating with Friendship, particularly when it was invariable that Friendship's title company would defend the title (therefore resulting in continued, expensive litigation) and they had been advised it would be challenging to win a suit to recover the land, particularly since the trial court had already denied that relief in the TOMA lawsuit. Thus, they believed it was not in the best interest of WOWSC to pursue this course. Ex. 5 through 8. Additionally, some members of the 2019 Board had concerns about the Bolton appraisal—namely that it was such an outlier compared to other valuations. *Id.* The 2019 Board (comprised of Joe Gimenez, Mike Nelson, Dorothy Taylor, and Bill Earnest) decided to mediate with Friendship and Martin instead. Ex. 5 through 8. The mediation resulted in the 2019 Transaction with Friendship, which was considered, debated, and approved by the 2019 Board at

[4] The Bolton appraisal identifies WOWSC and Double F Hangar Operations, LLC as the clients. Double F Hangar Operations is owned by Plaintiff Rene Ffrench.

an open meeting on October 26, 2019. Ex. 5 through 8, 8-T through 8-X. The 2019 Transaction corrected the deed error explained above regarding Piper Lane, gave WOWSC $20,000 in additional consideration for the sale, required Friendship to give up its right of first refusal to the remaining approximately 7 acres of the 11 acres, and strengthened the easement connecting Piper Lane to WOWSC's remaining airport acreage. *Id.* The 2019 Board also incorporated member input made at the October 26, 2019 open meeting. Ex. 6, 8-T. Thus, the 2019 Board did not "ratify" the Original Transaction since there were several changes made to the transaction.

Meanwhile, after this Court found the TOMA violation in the TOMA lawsuit as to the meeting notice but refused to set aside the Original Transaction, the Plaintiffs intervened in this case, seeking another bite at the apple to undo the Original Transaction—this time, though, under the ultra vires statute (Texas Business Organizations Code section 20.002(c)(1) and (c)(2)) rather than TOMA.

D. The Plaintiffs amended their pleading to seek money damages against the Directors.

Initially, the Plaintiffs did not seek money damages from the Directors. *See* Plaintiffs' Original Petition in Intervention (May 14, 2019). After the 2019 Board entered into the 2019 Transaction with Friendship, though, the Plaintiffs turned up the heat substantially by joining the 2019 Board in the suit and seeking to hold the Directors ***personally liable*** for purported damages related to the Original Transaction and 2019 Transaction. Plaintiffs' Second Amended Petition (Nov. 5, 2019). The 2019 Board voted to pay defense costs for the sued Directors as authorized by Texas Business Organizations Code, Chapter 8. Ex. 8-AA.[5] WOWSC obtained sworn statements

[5] The Board previously also voted to hire legal counsel for the 2015 Board when they were sued, though at that point there was no attempt by the Plaintiffs to hold the Directors liable. Ex. 8-Z. Before the Plaintiffs filed their Second Amended Petition joining the 2019 Board in the case and seeking to hold all the Directors personally liable, legal costs were, of course, quite small for the Directors.

regarding indemnification and payment of defense costs from each of the sued Directors. Ex. 8-AA, 8-BB.[6]

After this Court entered an order finding the Plaintiffs have standing only to bring an ultra vires claim against the Directors in a representative capacity under BOC section 20.002(c)(2), the Plaintiffs amended their pleading. *See* Order (Feb. 24, 2020). The Plaintiffs' Third Amended Petition, while not a model of clarity, appears to allege the Directors generally committed the following purported ultra vires acts:

- The Original Transaction is invalid because the 2015 Board allegedly sold the land to a sitting board member for less than it is worth.
- The 2019 Board allegedly lacked authority to enter into the 2019 Transaction because the Original Transaction was ultra vires.
- The 2019 Board lacked authority to authorize WOWSC's indemnification and defense of the Directors.

Outside of this lawsuit, the Plaintiffs and their allies (namely, some of the previous plaintiffs in this case, the Flunkers and the McDonalds) have also perpetrated an unrelenting harassment campaign against the Directors. The Plaintiffs and their allies have sent abusive emails around the community, posted defamatory comments on social media and the internet, and sent letters to law enforcement (including the Attorney General) and the media accusing the Directors of organized crime. *See* Directors' Motion for Protective Order and Reply in Support of Motion for Protective Order, with exhibits (Jul. 17, 2020 and Aug. 6, 2020). Needless to say, law enforcement and the media have not taken the bait—and for good reason. There is, quite simply, nothing to see here.

[6] As the Plaintiffs are aware, WOWSC has an insurance policy covering the Directors, but unfortunately the claim for coverage was denied. WOWSC is contesting that decision with the carrier.

This lawsuit and the Plaintiffs' accusations are part of an ongoing neighborhood spat that is not worthy of the Court's attention, let alone the extreme litigation costs that are literally destroying the WOWSC and poisoning the community.[7] More critically, the Directors did not do anything—and the Plaintiffs have not even accused them of doing anything—that would open them up to personal liability. This case is the posterchild for why courts generally do not interfere in internal non-profit affairs except in the most egregious circumstances—and courts certainly do not hold non-profit, volunteer directors personally liable for acts of the corporation in circumstances such as these. This Court should render a take-nothing judgment in the Directors' favor on the Plaintiffs' claims.[8]

ARGUMENT IN SUPPORT OF SUMMARY JUDGMENT

I.
Summary Judgment Standard

The Directors move for traditional and no-evidence summary judgment. "A traditional motion for summary judgment requires the moving party to show that no genuine issue of material

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[7] The Plaintiffs and their allies have brought other litigation as well. Plaintiffs Bruce Sorgen and Rene Ffrench and some of their allies filed a rate case at the Public Utility Commission of Texas after WOWSC was forced to increase its rates because of the costs in defending against the Plaintiffs' chronic litigation. Another ally, Danny Flunker (husband of Patricia Flunker, one of the original plaintiffs in this case), has bombarded WOWSC with Public Information Act requests, which have also turned into expensive litigation. The PIA requests have been so chronic that WOWSC had to appoint a public information officer (Joe Gimenez) because of the large amount of time the volunteer board was having to spend on these requests. The Plaintiffs also sought to remove Joe Gimenez from the board (unsuccessfully) and are now seeking to remove ***all*** the current directors from the board (including two board members who were not on the board during the 2019 Transaction and are not parties to this case). Most of the Plaintiffs' activities are detailed on their website, though their website is replete with misrepresentations. https://integritynow1.net/; *see also* Directors' Motion for Protective Order and Reply in Support of Motion for Protective Order, with exhibits.

[8] The Plaintiffs' Third Amended Petition contains numerous misstatements. For instance, they state "[n]o one seriously disputes there has been misconduct involving former Director Dana Martin and her alter ego Friendship Homes and Hangars." Petition at 2. The Directors dispute these statements—they absolutely disagree that there has been misconduct, for example, or that the Bolton appraisal somehow offers conclusive value regarding the land. In any event, these sorts of inflammatory, untrue statements are not material to this Motion.

fact exists and that it is entitled to judgment as a matter of law. If the movant carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment." *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018) (citations omitted); *see* TEX. R. CIV. P. 166a(c). For a non-evidence motion for summary judgment, "[a]fter adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence or one or more essential elements of a claim ... on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i).[9] "Under this standard, the nonmovant has the burden to produce more than a scintilla of evidence to support each challenged element of its claims." *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 130 (Tex. 2018).

II.
The Court should render a take-nothing judgment on the Plaintiffs' ultra vires claim for damages against the Directors.

A. The Plaintiffs' ultra vires claim for damages against the Directors fails as a matter of law and is unsupported by evidence.

The Plaintiffs have brought a representative claim on behalf of WOWSC under Texas Business Organizations Code ("BOC") section 20.002(c)(2) against the Directors, alleging they are ***personally liable*** because of purportedly engaging in ultra vires acts on behalf of the WOWSC. This claim fails as a matter of law.

[9] The Plaintiffs have had adequate time for discovery. This lawsuit has now been pending for a couple of years, and the Plaintiffs intervened in June 2019. This Court entered an order finding it has jurisdiction to entertain the Plaintiffs' representative ultra vires claim on February 24, 2020. The Plaintiffs took fulsome depositions of Joe Gimenez, Bob Mebane, and Dana Martin, using almost the full six hours allotted under the Texas Rules of Civil Procedure for some of them. The Plaintiffs have served written discovery requests on the Directors, WOWSC, and Friendship, which have been responded to. The Plaintiffs noticed the depositions of Bill Earnest and Pat Mulligan in August 2020 (on dates agreed to by the parties), but mysteriously cancelled at the last minute. Dorothy Taylor agreed to a date in August 2020 for her deposition, but the Plaintiffs never noticed it. In the event the Plaintiffs complain they have not had an adequate time for discovery, this complaint should not be heard by the Court.

1. Legal Framework

In relevant part, section 20.002 provides:

> (b) **An act of a corporation or a transfer of property by or to a corporation is not invalid because the act or transfer was:**
>
> (1) beyond the scope of the purpose or purposes of the corporation as expressed in the corporation's certificate of formation; or
>
> (2) **inconsistent with a limitation on the authority of an officer or director to exercise a statutory power of the corporation, as that limitation is expressed in the corporation's certificate of formation.**
>
> (c) **The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding:**
>
> (1) by a shareholder or member against the corporation to enjoin the performance of an act or the transfer of property by or to the corporation;
>
> (2) **by the corporation, acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person's authority**; or
>
> (3) by the attorney general to:
> (A) terminate the corporation;
> (B) enjoin the corporation from performing an unauthorized act; or
> (C) enforce divestment of real property acquired or held contrary to the laws of this state.

BOC § 20.002(b), (c) (emphasis added).

Historically, the ultra vires doctrine was used by corporations to evade contractual obligations by claiming a transaction was ultra vires and void. *See, e.g., Inter-Cont'l Corp. v. Moody*, 411 S.W.2d 578, 585-86 (Tex. App.—Houston 1966, writ ref'd n.r.e.). The Legislature enacted Section 20.002, reducing ultra vires claims to those specified in section 20.002(c). *See id.* Thus, to the extent they have standing or capacity to do so,[10] the Plaintiffs may only bring a

[10] *See* Section II.C, *infra.*

proceeding against the Directors in a representative capacity (on behalf of the WOWSC) for "exceeding that person's authority" as expressed in the WOWSC's certificate of formation or read into the certificate by the Business Organizations Code.

Notably, and as expressed in the language of the statute, the ultra vires doctrine is very narrow in Texas. An act by a corporation or its directors is only ultra vires if the act is ***wholly beyond the power of the corporation or the board as defined by the corporation's charter or governing statute***. *Inge v. Walker*, No. 3:16-CV-0042-B, 2017 WL 4838981, at *2 (N.D. Tex. Oct. 26, 2017) ("An ultra vires act is one that goes 'beyond the scope of the powers of a corporation as defined by its charter or the laws of the state of incorporation.'") (quoting *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984)); *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *11 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("An ultra vires act is an act that is beyond the scope of the powers of the corporation as defined by its charter or the law of the state of incorporation."); *Desdemona State Bank & Tr. Co. v. Streety*, 250 S.W. 286, 289 (Tex. App.—El Paso 1923, no writ) (the term ultra vires "applies only to those acts which are wholly beyond the power of the corporation ... to perform under any circumstances").

Thus, the ultra vires doctrine is much more limited than the fiduciary duties governing directors. A director breaches his or her fiduciary duties to the corporation when he or she fails to devote his or her honest business judgment solely for the benefit of the corporation. *Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014); *Carmichael v. Tarantino Props., Inc.*, 604 S.W.3d 469, 478 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (claims against officers "for self-dealing and for failing to exercise judgment are not claims that the Officers committed acts beyond the scope of the Association's expressed purposes or that that Officers' actions are inconsistent with the express limitation on the Officers' authority" under section 20.002(c)(2)). In contrast, a director

acts ultra vires when he or she violates an expressed prohibition in governing corporate documents or governing statute and the corporation receives no benefit. BOC § 20.002(c)(2); *Resolution Trust Corp. v. Holmes*, No. H-92-0753, 1992 WL 533256, at *6 (S.D. Tex. 1992).[11]

Critically, the Texas Supreme Court and other courts have explained that a director may only be held ***liable personally for money damages*** if the alleged act is not only unauthorized (i.e., ultra vires), ***but is also illegal and the director knows it is illegal***. *Staacke v. Routledge*, 241 S.W.994, 999 (Tex. 1922); *see also Campbell*, 2000 WL 19143, at *11 ("[A] director may be personally liable if the [ultra vires] act, or violation of the statute in question, is also illegal."); *Gearhart*, 741 F.2d at 719 ("An ultra vires act, negligent or not, may be voidable under Texas law, but the director is not personally liable for it unless the action in question is also illegal."); *Sutton v. Reagan & Gee*, 405 S.W.2d 828, 836 (Tex. App.—San Antonio 1966, writ ref'd n.r.e.) ("[O]ur Supreme Court has held that the doing of an ultra vires act is not a sufficient basis for imposing liability on the officers or directors of the corporation."); *Resolution Trust Corp. v. Norris*, 830 F. Supp. 351, 357 (S.D. Tex. 1993) (a director must knowingly commit an illegal act for the director to potentially be personally liable); *Resolution Trust Corp. v. Bonner*, No. H-92-430, 1993 WL 414679, at *2 (S.D. Tex. 1993) (citations omitted) ("A director will be liable for ultra vires acts only if the director actually participated in or had actual knowledge of the illegal act. Further, allegations that the director willfully ignored signs of wrongdoing do not fall within the scope of

[11] This Court previously entered an order stating the plaintiffs had standing to assert common law theories such as breach of fiduciary duty within the context of their ultra vires claim. Order (Feb. 24, 2020). But having standing and a claim succeeding on the merits are two separate inquiries, and the parties did not previously brief the merits. *See Pike v. Texas EMC Mgmt., LLC*, No. 17-0557, 2020 WL 3405812, at *9 (Tex. Jun. 19, 2020). On the merits, Texas law is clear that the ultra vires doctrine is much narrower than the fiduciary duties governing directors. A director can breach fiduciary duties without acting ultra vires—i.e., violating an express prohibition in a corporation's governing documents or statute. *Campbell*, 2000 WL 19143, at *10. Certainly, it is possible for a plaintiff with appropriate standing and capacity to assert that a director breached fiduciary duties by acting ultra vires—but the converse is unsupported by Texas law. *Carmichael*, 604 S.W.3d at 478, 481.

ultra vires."); *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 18 S.W. 691, 693 (Tex. 1891) ("It is true that a distinction is made between the act of a corporation which is merely without authority and one which is illegal. In the one case, it is a question of authority; in the other, of legality.").

An illegal act is one which is inherently and essentially evil or immoral (malum in se), violates a positive statutory prohibition, or is against public policy. *Whitten v. Republic Nat'l Bank of Dallas*, 397 S.W.2d 415, 418 (Tex. 1965). Thus, a director acting in violation of or beyond a limitation on a power granted may be ultra vires, but does not necessarily also commit an illegal act. To be illegal, the act instead must be expressly prohibited by specific statute. *Id.* Additionally, an act is not against public policy when only shareholders and creditors of a corporation are impacted because the act would not impact the public at large. *Id.*

Given the narrow scope of the ultra vires doctrine in Texas, few modern cases allege ultra vires conduct by corporate directors in which a plaintiff seeks to hold a director personally liable for actions taken on behalf of the corporation. This is particularly true in the non-profit context. Texas courts interfere in the actions of non-profits only where the actions of the organization are illegal or against some public policy, arbitrary, capricious, or fraudulent. *Butler v. Hide-A-Way Lake Club, Inc.*, 730 S.W.2d 405, 410 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).[12] As a court of appeals explained:

> The policy of non-intervention in the affairs of private, non-profit associations, as shown above, is a well-established and a wise and necessary policy. Without such policy, clubs such as appellee simply could not function. If the courts were to interfere every time some member, or group of members, had a grievance, real or imagined, the non-profit, private organization would be fraught with frustration at

[12] In a case challenging a contract entered into by a non-profit corporation, the court upheld a summary judgment in the non-profit's favor. The "summary judgment proof offered by defendants shows, as a matter of law, that defendants acted properly when they entered into the agreements with Hide-A-Way Lake, Inc., Lake-Hide-A-Way, Inc., and James Fair. The affidavits of Norman H. Vaneck, together with the minutes of board meetings and other summary judgment proof, established that the defendants' actions were not illegal, against some public policy, arbitrary, capricious, or fraudulent. Therefore, the trial court properly refused to interfere with the management of defendants' affairs." *Butler*, 730 S.W.2d at 410.

> every turn and would founder in the waters of impotence and debility. For instance, if the law required a court and jury, every time a member of the Club desired to sell his membership under the Club's rules and by-laws, to determine whether the fee established at that time for such sale by the Board of Governors was reasonable or not, sales of memberships by members would be impossible. To countenance such an interference would lead to futility and the possible cessation of operations.

Harden v. Colonial Country Club, 634 S.W.2d 56, 60 (Tex. App.—Fort Worth 1982, no writ).

This lawsuit demonstrates to a "T" why courts generally do not interfere in the internal affairs of non-profits—and certainly why member plaintiffs bringing a representative ultra vires claim against volunteer, non-profit directors face an extreme uphill battle in holding a director personally liable. At its core, the Plaintiffs seek to hold the Directors personally liable for a WOWSC land sale that the Plaintiffs believe was for an unfair price. This is the Plaintiffs' purported damage model. This Court should conclude that, as a matter of law, the transaction was not ultra vires and illegal so as to open the Directors up to potential personal liability, and no evidence demonstrates otherwise.[13]

2. The Directors did not act ultra vires and illegally in voting to authorize WOWSC to enter into the Original Transaction with Friendship/Martin.

The Plaintiffs assert that WOWSC's act of selling land to Friendship here constitutes an ultra vires act. It does not. The sale of land is within the statutorily authorized functions of water supply corporations, is consistent with WOWSC's Articles of Incorporation, and does not violate Texas Business Organizations Code Section 22.230(b) (governing interested director transactions). Further, the Plaintiffs have not alleged, nor is there any evidence supporting, that the Directors acted illegally in entering into the Original Transaction.

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[13] The Plaintiffs' pleading periodically refers to the Directors as "agents" of WOWSC. A person can at times be vicariously liable for the acts of its agents. *See, e.g., Great Am. Life Ins. v. Lonze*, 803 S.W.2d 750, 754 (Tex. App.—Dallas 1990, writ denied). Because agency is a theory where a person seeks to hold the principal rather than the agent liable (which here, if an agency relationship exists at all, would be WOWSC), the Directors do not read the pleading as somehow seeking to hold *the Directors* liable under an agency theory.

a. Sale of land is not an ultra vires act for directors of non-profit water corporations.

Non-profit water supply corporations are unique entities under Texas law. They are not political subdivisions but are nonetheless subject to the Open Meetings Act and Open Records Act. Op. Tex. Att'y Gen. No. JM-596 (1986).[14] Non-profit water supply corporations are governed by both Texas Business Organizations Code, Chapter 22, and Texas Water Code, Chapter 67. *See* TEX. WATER CODE § 67.004. The Business Organizations Code applies to the powers of non-profit water supply corporations to the extent it does not conflict with Chapter 67 of the Water Code. *Id.* While chapter 67 of the Water Code is silent on the ability of water supply corporations to sell land, the Business Organizations Code explicitly authorizes domestic entities (including corporations) to "sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of property."[15] BOC § 2.101; *see also id.* § 22.225 ("A corporation may convey real property of the corporation when authorized by appropriate resolution of the board of directors or members."); Ex. 8-F, 8-K.

The ability to sell land is not beyond the scope of powers of non-profit corporations. In fact, it is specifically authorized as a function of such corporations. Therefore, the 2015 Board on WOWSC's behalf were operating within the scope of WOWSC's statutory power when selling land.

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[14] In Plaintiffs' pleading, they refer to the Directors as "local elected officials." Petition at 2. This is inaccurate. The Directors are not "elected officials" for the government. They are volunteer directors of a non-profit corporation who are elected by the members, as are board members for any other non-profit. To the extent Plaintiffs are contending the Directors are local governmental officials, the Directors would be immune from any suit for money damages under governmental immunity. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-71 (Tex. 2009).

[15] BOC section 2.101 governs all "domestic entities." "Domestic entity" is defined as "an organization formed under or the internal affairs of which are governed by this code." BOC § 1.002.

b. Sale of land is not inconsistent with WOWSC's Articles of Incorporation

Plaintiffs argue that WOWSC's sale of land violated WOWSC's Articles of Incorporation provision that states:

> The Corporation shall have no power to engage in activities or use its assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative or sewer service cooperative as recognized by 1434a and Internal Revenue Code 501(C)(12)(A).[16]

Ex. 8-A, art. 6.[17]

The legitimate business of a water supply corporation is to provide water and wastewater services to its members, as set forth in WOWSC's articles of incorporation and the Texas Water Code. Ex. 8-A, art. 4; 8-B, art. 3; TEX. WATER CODE § 67.002. A water supply corporation like WOWSC may "construct, acquire, lease, improve, extend, or maintain a facility, plant, equipment,

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[16] Tex. Rev. Civ. Stat. art. 1434a has been repealed and replaced by the statutory scheme outlined above.

[17] The WOWSC bylaws contain a similar provision. Ex. 8-B, art. 4. The Plaintiffs' petition discusses WOWSC's tax exempt status under Internal Revenue Code 501(c)(12)(A), as referenced in the Articles of Incorporation. It is unclear the Plaintiffs' point here. If the Plaintiffs are claiming WOWSC is not in compliance with its tax status (which is false), only the IRS may file suit to remedy the violation, followed by the right to administrative appeal and judicial review. *See Nationalist Movement v. C.I.R.*, 37 F.3d 216, 218-19 (5th Cir. 1994); *Alpert v. Riley*, 272 S.W.3d 277, 293 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Only the United States Tax Courts, the United State Court of Federal Claims, or the United States District Court for the District of Columbia have jurisdiction over a case for judicial review regarding an organization's tax-exempt status. 26 U.S.C. § 7428. This Court does not have jurisdiction to review whether WOWSC is in compliance with its tax-exempt status.

If the Plaintiffs' point in discussing WOWSC's tax exempt status is to further its "cooperative" argument, under which it claims the members of WOWSC have standing to sue as purported "owners in cotenancy of the property at issue in this lawsuit," Petition at 7, this Court's February 24, 2020 Order functionally dismissed this theory in dismissing the Plaintiffs' individual claims against the Directors. Additionally, this argument is belied by the corporate documents and real estate deeds. WOWSC owns its real estate (there is no evidence WOWSC's members have title to WOWSC's real estate), and its Board has the right to sell the land, as discussed above. If Plaintiffs have a property interest in WOWSC that would somehow entitle them to bring claims, as they seem to allege, then it would presumably be necessary for all 250+ members of the WOWSC to be joined in this suit to afford complete relief and prevent multiple suits based on the same alleged injury to property owned jointly. *Myer v. Cuevas*, 119 S.W.3d 830, 834–35 (Tex. App.—San Antonio 2003, no pet.). This is, obviously, an absurd result in the corporate context. Plaintiffs do not have a property interest in WOWSC. They are simply members of WOWSC, a non-profit water supply corporation—which is the term used throughout the Articles of Incorporation and Bylaws. *See* Ex. 8-A, 8-B.

or appliance helpful or necessary to provide more adequate sewer service, flood control, or drainage for a political subdivision." TEX. WATER CODE § 67.009. Chapter 67 also authorizes a corporation to obtain money from any political subdivision of this state, federal agency, or other entity to finance the acquisition or construction of a project or improvement for an authorized purpose. TEX. WATER CODE § 67.010. The minutes from WOWSC board meetings reflect that WOWSC wished to build a new water treatment facility and sold its land to help pay for that project. Ex. 8-C, 8-F, 8-CC. The sale of land, permitted by statute, in order to pay off statutorily authorized debt from a statutorily authorized facility, is well within WOWSC's ability to use its assets in a manner that are in furtherance of the legitimate business of a water supply cooperative. Ex. 8-A, art. 4.

Appearing to recognize the 2015 Board's ability to sell WOWSC land, the Plaintiffs seize on the ***price*** the land was sold for. As an initial matter, the true value of the land is obviously debatable. *See* Ex. 1 through 5, 8-C, 8-E, 8-N through 8-R. It is worth noting, though, that several valuations of the land put the value at around what it was ultimately sold for. *Id.* For instance, around 2006, a bank appraisal of approximately 7 acres of the 11 acres of airport land found it valued at $350,000 ($49,807 per acre). Ex. 8-Q. Jim Hinton appraised the 11 acres in September 2015 at $185,000 ($17,050 per acre). Ex. 8-N. In May 2019, Paul Hornsby, at the request of Friendship Homes, appraised the four acres purchased by Friendship Homes retrospective to December 2015 at $221,000 ($57,253 per acre). Ex. 8-O. The Burnet Central Appraisal District appraised the market value of the 7 acres of which the 4 acres were part at $246,570 in 2015 ($34,620 per acre). Ex. 8-P. WOWSC had received previous offers for the subject land that were for less than the Friendship/Martin offer. Ex. 2 through 5, 3-A, 5-B, 8-D, 8-E. The outlier is the 2019 retrospective David Bolton appraisal, which found the total market value of the 11 acres as

$1.3 million ($130,000 per acre), with the tract sold to Friendship valued at $700,000. Ex. 8-R. This appraisal stands alone in its inflated value. Further, this appraisal was not even in existence when the 2015 Board made the decision to sell the property to Friendship. WOWSC through the 2015 Board sold the land to Friendship for $203,000 and netted $200,000, which is almost $50,000 an acre—well within the range of appraisals and valuations the 2015 Board had before it at that time. Ex. 8-G, 8-I.

But regardless, even if the Bolton appraisal were accurate, it is not ultra vires ***and*** illegal for the board of directors of a non-profit to sell land for less than it is worth. The transaction was not "unauthorized" under the Business Organizations Code, the Water Code, or the WOWSC Articles of Incorporation. It was also not illegal. As explained above, WOWSC has the absolute right to sell its land, and it certainly has the right to sell property to obtain liquid assets for building a new water treatment plant. There is also no dispute that WOWSC netted $200,000 from the sale and therefore obtained benefit from the transaction. Ex. 1, 8-F through 8-I. The Plaintiffs have not identified any express prohibition in a statute that was knowingly violated by the 2015 Board or any other illegal act so as to potentially open them up to personal liability. *See, e.g.*, *Whitten*, 397 S.W.2d at 418.

The Plaintiffs raise other complaints about the Original Transaction that are meritless. First, they complain that the 2015 Board purportedly "gave away" a portion of Piper Lane (.51 acres) to Friendship without consideration. This assertion is belied as a matter of law by the documents effectuating the Original Transaction and the 2019 Transaction. The contract for sale signed by WOWSC and Friendship/Martin clearly included 4.3 acres—not the 3.8 acres that mistakenly ended up in the deed. Ex. 8-G, 8-H; Ex. 1; 9, pp. 176; 11, p. 203, 289-90. This mistake was rectified by the title company with a correction deed. Ex. 8-L. There is no evidence that this was anything

other than a title error given that the purchase contract plainly stipulated that the entire 4.3 acres (that is, including Piper Lane) was included in the transaction. Ex. 8-G, 8-L. Additionally, even though part of Piper Lane was conveyed, it is the subject of an easement that allows others to use it as a taxiway to access the airport runway. Ex. 1. It is untrue that Friendship somehow now "controls" the runway, as suggested by the Plaintiffs. There is no evidence that the 2015 Board knowingly acted ultra vires and illegally in this regard.

Second, the Plaintiffs have suggested that the WOWSC's remainder 7.0127 tract is "landlocked" and inaccessible for aircraft purposes. This assertion too is plainly belied by the documents. WOWSC has use of an easement running along the west end of the property and going to the remainder tract. This was set forth in the Original Transaction, but then was clarified in the 2019 Transaction. Ex. 8-G, Bates No. WOWSC000030; 8-H, Bates No. WOWSC000038; 8-L, 8-V; 10, pp. 147-151, 220-221; 11, pp. 190-197. The easement, as set forth in the non-exclusive access easement agreement, provides WOWSC's access to a runway from the remaining seven acres owned by WOWSC. Ex. 8-V (easement benefitting "[t]hat certain 7.0127 acres owned by Grantee shown on Exhibit A hereto" and describing that the easement extends to the remaining seven acres from Piper Lane); *see* also 8-T, Bates No. WOWSC000648; 8-L; 8-DD; 8-X; 9. Friendship, the Mairs (who now own part of the land at issue), and WOWSC all signed off on the easement agreement. Ex. 8-V. To the extent the Plaintiffs are complaining the easement in the Original Transaction was somehow inadequate, that complaint is moot by virtue of the 2019 Transaction, which clarified the easement. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). But even if the remainder land is "landlocked" for runway purposes (which no evidence supports), that would not make the sale of the 4.3 acres knowingly ultra vires and illegal so as to potentially open the Directors up to personal liability. It is not illegal to sell land for less than it is worth or take

actions that might inadvertently decrease the value of land.[18] The Plaintiffs have not identified any express prohibition in a statute that was knowingly violated by the 2015 Board or any other illegal act so as to potentially open them up to personal liability. *See, e.g.*, *Whitten*, 397 S.W.2d at 418.[19]

Third, the Plaintiffs have suggested that the 2015 Board did not adopt an appropriate resolution to transfer the property to Friendship, referring to it as a "sham" resolution. *See* Ex. 8-K. The Plaintiffs never complained about the March 2016 resolution in any form until they filed their First Amended Petition on November 4, 2019. The Plaintiffs' March 14, 2019 Original Petition in Intervention does not mention or complain about this resolution at all. A claim regarding a defect in the resolution (including purported lack of authority of a corporate board) is barred by the two-year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 16.033(a). It is undisputed the resolution here is dated in March 2015, and any claim concerning it is therefore time-barred. In any event, to the extent there are any defects in the resolution (which the Directors dispute), this certainly is not a knowing ultra vires or illegal act that would open the 2015 Board up to personal liability. *See, e.g.*, *Whitten*, 397 S.W.2d at 418. Additionally, the 2015 Board ***did*** approve the transaction, as reflected in the December 2015 Board meeting minutes, and the resolution reflected the approval. Ex. 8-F. The Plaintiffs do not cite any statute or even provision of the WOWSC

[18] And the land would not be truly "landlocked" and inaccessible in any event—photos and descriptions plainly show roads running beside and to the remaining tract. *See, e.g.*, Ex. 8-O, Bates No. WOWSC000056; 8-R, Bates No. WOWSC000695; 11, pp. 74-75. In any event, an easement connects the land to the runway.

[19] The Plaintiffs complain the Hinton appraisal was "fraudulent." Pet. at 21. Except that they do not agree with its value, it is not clear why they believe it was "fraudulent." There is no evidence the Hinton appraisal contained knowing or reckless false, material misrepresentations to WOWSC with intent that the WOWSC act on it. *Int'l Bus. Machs. Corp. v. Lufkin Indus.*, 573 S.W.3d 224, 228 (Tex. 2019). Further, there is no evidence of some sort of collusion between Hinton and the 2015 Board, as the Plaintiffs hint at without directly alleging. In fact, the evidence is that Hinton is an independent appraiser who had no relationship with anyone on the Board. Ex. 11, pp. 47-53. It is also obviously not illegal to obtain a appraisal before selling land, even if the Plaintiffs believe the appraisal is inaccurate.

Articles of Incorporation or Bylaws that required a second vote when the sale was already approved by the Board.

Fourth, the Plaintiffs have complained about a right of first refusal that was part of the Original Transaction. Petition at 29; *see* Ex. 8-J, 8-M. Any complaint about the right of first refusal is moot since this was superseded in the 2019 Transaction, under which Friendship relinquished the right of first refusal. Ex. 8-W. There is no controversy regarding the right of first refusal when it has been relinquished, and WOWSC never put the remainder tract up for sale when the right of first refusal was in place. *Williams*, 52 S.W.3d at 184.[20]

Finally, if every contention that a corporation arguably sold property for less than it is worth opens up a non-profit director to personal liability under the ultra vires statute, Texas courts would begin down a very slippery slope. The Plaintiffs invite this Court to interpret the ultra vires statute as an avenue to interfere in non-profit affairs and allow a jury to decide whether a non-profit director is ***personally liable*** anytime a corporation sells property for $5 that is arguably worth $10. *See Harden*, 634 S.W.2d at 60. In fact, the Plaintiffs' theory seems to be that selling property for even a dollar less than it is worth would present a fact question for a jury as to whether the act is ultra vires and illegal. The ultra vires statute—both by its plain terms and as interpreted by Texas courts—does not allow this. *See* Section II.A.1, *supra*.

The "standard" for director personal liability promoted by the Plaintiffs would also discourage any person in Texas from ever volunteering to sit on the board of a non-profit again. Indeed, few are stepping up to sit on the WOWSC nowadays, likely because of fear that they, too, could be sued by the Plaintiffs. Ex. 6, 8-CC. Under the Plaintiffs' logic, members of any non-profit

[20] The right of first refusal also simply gave Friendship the ability to match an offer received by WOWSC for the remaining land—it did not give Friendship and Martin "first dibs" on the land, regardless of price. Ex. 8-J, 8-M. Regardless, though, Friendship relinquished the right of first refusal in the 2019 Transaction.

could seek to hold directors personally liable for a previous property sale simply because they believe there are other land sales in the area showing greater value. This is clearly an absurd result. The Texas ultra vires statute does not create a recognized cause of action for a purported "illegal" sale of land based on an allegation that the corporation could have gotten more money for the sale. Thankfully, the Plaintiffs' theory, which would open the floodgates against volunteer, non-profit directors in corporate litigation, is not countenanced under Texas law. *See* Section II.A.1, *supra.* A sale of property for arguably less than it is worth is not unauthorized and illegal so as to create an ultra vires claim against a non-profit director for personal liability.

c. WOWSC's sale of land falls within section 22.230 protecting interested director transactions.

The Plaintiffs next complain that WOWSC through the 2015 Board sold the land to a sitting director, Dana Martin, and suggest this was ultra vires. BOC section 22.230 governs contracts or transactions involving interested directors. *In the Matter of Estate of Poe*, 591 S.W.3d 607, 628 (Tex. App.—El Paso 2019, pet. filed) (evaluating comparable provision for for-profit corporations). Even if a transaction is otherwise a self-dealing transaction by an interested director, the transaction is nonetheless valid and enforceable if a majority of disinterested directors approve the transaction. BOC § 22.230(b).[21] Importantly, section 22.230(b) is irrelevant in an ultra vires claim for damages: the section speaks only to the requirements for ***validity and enforceability*** of contracts with interested directors and does ***not*** create any grant or limit on corporate authority or otherwise attempt to create personal liability for a director. The statute does not create an express

[21] A self-dealing transaction is also valid if it is fair to the corporation. *Id.*

prohibition, the violation of which might open a director up to personal liability. *See, e.g.*, *Whitten*, 397 S.W.2d at 418.

Regardless, section 22.230 applies to this transaction. The Original Transaction was an interested director transaction. In 2015, WOWSC contracted to sell some of its land to Friendship/Dana Martin. Dana Martin sat on the 2015 Board, and she is the principal of Friendship. Ex. 1 through 5. Section 22.230 provides the legal framework for when interested director transactions are valid and enforceable. Section 22.230 states:

> (b) An otherwise valid and enforceable contract or transaction is valid and enforceable, and is not void or voidable, notwithstanding any relationship or interest described by Subsection (a), if any one of the following conditions is satisfied:
>
> (1) **the material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by:**
>
> **(A) the corporation's board of directors, a committee of the board of directors, or the members, and the board, the committee, or the members in good faith and with ordinary care authorize the contract or transaction by the affirmative vote of the majority of the disinterested directors, committee members or members, regardless of whether the disinterested directors, committee members or members constitute a quorum**; or
>
> (B) the members entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith and with ordinary care by a vote of the members; or
>
> (2) the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the members.

BOC § 22.230(b) (emphasis added).

The material facts of the Original Transaction were known to the Board. The Board knew that Dana Martin was a director of WOWSC at the time and was also the principal at Friendship. Ex. 1 through 5; 11, pp. 237-238. Dana Martin made her good faith offer and then recused herself from the vote. Ex. 1 through 5, 8-F; 11, pp. 264-269. A majority of the disinterested Directors present at the meeting—Bob Mebane, Pat Mulligan, and Mike Madden—then affirmatively voted

to authorize the Original Transaction. *Id.* None of these three gentlemen has any interest in Friendship, financial or otherwise, or in the transaction. Ex. 2 through 4; 11, pp. 248-249; *see* BOC § 22.230(a); *Campbell*, 2000 WL 19143, at *11.[22] The evidence demonstrates that these three gentlemen believed they were acting in good faith and with ordinary care in authorizing the transaction. *Id.* All three of these men have explained why they believed Friendship's/Martin's offer was a fair one. Ex. 2 through 4; 10, pp. 19-21.

Additionally, Dana Martin and Bill Earnest did not participate in the vote. Ex. 8-F. Dana Martin recused herself from the discussion and vote, and Bill Earnest was not even at the meeting where the Original Transaction was authorized. *Id.*; Ex. 1, 5, 8-F. To the extent the Plaintiffs believe Dana Martin was somehow prohibited from making an offer for the property at all, as a matter of law, this cannot constitute an ultra vires act. There would be no need for the Legislature to have enacted section 22.230 if directors cannot enter into contracts with the corporation on whose board they sit. It is unclear what the Plaintiffs' theory is regarding Bill Earnest in relation to the Original Transaction when he did not even participate in the vote. Certainly, he did not act ultra vires in regard to the Original Transaction when the undisputed evidence shows he had any part in the transaction (in fact, the evidence demonstrates the opposite). Ex. 5, 8-F.

At a minimum, if an ultra vires claim against a director for damages could be had for the contract purportedly not meeting the section 22.230 requirements (which the Directors dispute), it would solely be against Dana Martin and not any of the other Directors. Section 22.230(d) states:

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[22] Under the Business Organizations Code, a person is "disinterested" in approval of a contract, transaction, or other matter if the person or person's associate: (1) is not a party to the contract or transaction or materially involved in the conduct that is the subject of the claim or challenge; ***and*** (2) does not have a material financial interest in the outcome of the contract or transaction or the disposition of the claim or challenge. BOC § 1.003; *see also id.* § 1.004 (defining "independent person"). There is no evidence any Director besides Dana Martin had any financial interest, let alone a material financial interest, in the Original Transaction. *See* Ex. 2 through 8.

"If at least one of the conditions of Subsection (b) is satisfied, neither the corporation nor any of the corporation's shareholders will have a cause of action against any of the persons described by Subsection (a) for breach of duty with respect to the making, authorization, or performance of the contract or transaction because the person had the relationship or interest described by Subsection (a) or took any of the actions authorized by Subsection (d)." Subsection (a) and (d) solely concern the ***interested*** director—not ***disinterested*** directors. There is no evidence any of the Directors besides Martin had any interest in the Original Transaction (or 2019 Transaction, for that matter). In fact, the opposite is established by conclusive evidence. All seven Directors who are not Martin have stated under penalty of perjury that they had no interest in these transactions or in Friendship and received no benefit of any sort from the transactions. Ex. 2 through 8 Ex. 2; *see* Ex. 8-G through 8-M, 8-V through 8-X.

d. The 2015 Board's TOMA violation does not open them up to personal liability under the ultra vires statute—and any claim under TOMA is barred by res judicata.

To the extent the Plaintiffs rely on the 2015 Board's violation of TOMA as the purported illegal act that would open them up to personal liability, that is unsupportive. The TOMA violation itself has already been litigated and is barred by res judicata. *See Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008). Additionally, there is no evidence any Director was ever convicted of a TOMA violation (and there in fact was no criminal conviction). Further, the act of approving the sale—which is what the Plaintiffs are attacking here—was not illegal under TOMA. The act that violated TOMA was, at most, not posting the topic of the meeting, as previously found by this Court.[23] *See* WOWSC's and the Directors Joint Brief in Support of their

[23] *See* WOWSC's and the Directors Joint Brief in Support of their Pleas to the Jurisdiction and Motion for Summary Judgment, Exhibits 5 through 7.

Pleas to the Jurisdiction and Motion for Summary Judgment, Exhibits 5 through 7; *TOMA Integrity, Inc.*, 2019 WL 2553300, at *1. TOMA does not render the act taken in violation of TOMA illegal—just the meeting itself. The WOWSC certainly violated TOMA, as found by this Court, and TOMA authorizes a court to void a transaction made at a meeting that was in violation of TOMA. But the Court declined to do so here. *Id.*

More critically, no provision of TOMA that could even arguably apply here opens up an individual to personal liability, nor is there any case in which a court has imported a TOMA violation into the ultra vires doctrine.[24] It would open a Pandora's Box to conclude that a violation of the technical requirements of TOMA can open a person up to personal liability under section 20.002(c)(2) when TOMA does not provide for this remedy. And as explained, the TOMA violation here was failure to post the topic of the meeting—***not*** the sale itself. The Plaintiffs' pleading seeks to hold the Directors personally liable not for a technical violation of TOMA, but because they believe the sale itself was improper.

3. The Directors did not act ultra vires and illegally in entering into the 2019 Transaction.

The Plaintiffs allege that the 2019 Board (Gimenez, Taylor, Nelson, and Earnest) committed an ultra vires act by approving the 2019 Transaction, again pointing to the Articles of Incorporation provision stating that WOWSC has "no power to engage in activities or use its assets in a manner that are not in furtherance of the legitimate business" of a water supply corporation. Ex. 8-A, art. 5. The Plaintiffs go on to claim the 2019 Board had a "non-discretionary duty" to unwind the transaction. As explained above, the Original Transaction itself was not ultra vires or

[24] There is only one provision of TOMA that even mentions personal liability. Texas Government Code section 551.146 imposes potential personal liability if a person without lawful authority knowingly discloses to a member of the public the certified agenda or recording of a meeting that was lawfully close to the public and causes injury. TEX. GOV'T CODE § 551.146. That is the only provision of TOMA that does so, and there is no such allegation here.

illegal. *See* Section II.A.2, *supra*. Certainly, the 2019 Transaction was not either. There is no statute requiring the Board to unwind the transaction, and the Plaintiffs do not identify one. And the 2019 Board had the absolute right to settle with Friendship rather than sue to recover the land.

Non-profit water supply corporations have the right to enter into contracts, including those related to real property and to settle litigation. BOC § 2.101; TEX. WATER CODE § 67.010. More generally, all entities (and directors on behalf of entities) have the right to settle conflicts and are under no legal obligation to file suit. *Id.*; *see, e.g.*, *Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015).[25] The 2019 Board reviewed the David Bolton appraisal and evaluated filing suit to recover the land, but decided based on all the information before them, in their business judgment, that this was not in the best interest of the WOWSC. Ex. 5 through 8; 9, p. 201-202. The 2019 Board instead mediated with Friendship/Martin and entered into the 2019 Transaction—which is even more favorable to the WOWSC than the Original Transaction. Ex. 8-T through 8-X. The 2019 Board did not act ultra vires in entering into the 2019 Transaction, and this Court should not interfere in the WOWSC's internal business affairs in this regard. *See, e.g.*, *Inge*, No. 2017 WL 4838981, at *2; *Butler*, 730 S.W.2d at 410.

Additionally, the Plaintiffs do not even allege an illegal act that would open the 2019 Board up to personal liability. *See, e.g.*, *Staacke*, 241 S.W. at 999; *Campbell*, 2000 WL 19143, at *11. There is no evidence the 2019 Board violated a statute, any public policy, or acted "evilly" in entering into the 2019 Transaction. *Whitten*, 397 S.W.2d at 418. The Plaintiffs simply do not like the substance of the 2019 Transaction and wish WOWSC had filed suit against Friendship Homes

[25] The right to sue or settle is a component of the business judgment rule, which is discussed further in Section II.B.1, *infra*.

instead. The Plaintiffs' personal feelings about the transaction does not make the 2019 Board's actions ultra vires and illegal so as to potentially open these Directors up to personal liability.[26]

4. The Directors did not act ultra vires and illegally in voting for WOWSC to advance expenses to the sued Directors.

The Plaintiffs complain that the Directors are receiving "illegal distributions" by the WOWSC advancing defense costs in this lawsuit. Petition at 5-6. As a matter of law, the 2019 Board did not act ultra vires or illegally in making this business decision, nor are the Director recipients accepting "illegal" distributions as suggested by the Plaintiffs.

WOWSC through the 2019 Board voted to advance defense costs to the Directors who the Plaintiffs sued, as is expressly authorized by Texas Business Organizations Code, Chapter 8. Corporations routinely vote to defend directors who are sued in their capacity as corporation directors, as expressly allowed by Chapter 8. And for good reason: if corporations did not, they would have difficulty recruiting anyone to take on a board position (and particularly a volunteer board position like here). *See In re Auguilar*, 344 S.W.3d 41, 43-44 (Tex. App.—El Paso 2011, orig. proceeding) (in suit by corporation against for-profit director alleging breach of fiduciary duties, advancement of defense costs by the corporation was required because "indemnification encourages corporate service by protecting an official's personal financial resources from depletion by the expenses incurred during litigation that results from the official's service"); *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005) ("Advancement is an especially

[26] The Plaintiffs point to the ratification subchapter of Chapter 22. There was no corporate "ratification" here in the meaning of the chapter. There was instead an amended, restated, and superseded agreement (the 2019 Transaction) which contained different terms from the Original Transaction. Chapter 22 also does not set forth a mechanism for a derivative claim against Directors by members, nor sets forth a provision authorizing money damages against a Director. *See, e.g.*, BOC § 22.512. The Directors read the Plaintiffs' references to Chapter 22 as concerning their claim against WOWSC to enjoin or "set aside" the transactions.

important corollary to indemnification" because it provides corporate officials with immediate interim relief from the burden of paying for a defense.).

Chapter 8 of the Business Organizations Code authorizes advancement of defense costs to directors and officers of a corporation. Chapter 8 applies to all domestic entities or organizations subject to the laws of this State, except for general partnerships and limited liability companies. BOC §§ 8.001(2), 8.002. Thus, it applies to WOWSC, a non-profit corporation. The chapter provides the following framework regarding advancement of defense costs:

- An enterprise ***may*** pay or reimburse reasonable expenses incurred by a ***present governing person*** who was, is, or is threatened to be made a defendant in a proceeding in advance of the final disposition of the proceeding ***without making the determinations required under section 8.101(a)*** when the enterprise receives: (1) a written affirmation by the person of the person's good faith belief that the person has met the standard of conduct necessary for indemnification under this chapter; and (2) a written undertaking by or on behalf of the person to repay the amount paid or reimbursed if the final determination is that the person has not met that standard or that indemnification is prohibited by Section 8.102. BOC § 8.104.[27] A resolution of the board or an agreement that requires the payment or reimbursement permitted under this section authorizes that payment or reimbursement after the enterprise receives an affirmation and undertaking described by Subsection (a). *Id.*

- A corporation may also advance expenses to a person who is ***not a governing person*** as provided by general or specific action by the corporation's board, contract, or common law. *Id.* § 8.105. Notwithstanding any authorization or determination specified in Chapter 8, an enterprise may pay or reimburse, in advance of the final disposition in a proceeding and on terms the enterprise considers appropriate, reasonable expenses incurred by a former governing person who was, is, or is threatened to be made a defendant in the proceeding. *Id.*[28]

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[27] The determinations under section 8.101(a) are that the person acted in good faith, reasonably believed they were acting in the best interest of the corporation, that the amount of expenses is reasonable, and that indemnification should be paid. *Id.* § 8.101(a).

[28] Chapter 8 also includes provisions regarding indemnification of a judgment. If a director prevails, indemnification by the corporation is mandatory. *Id.* § 8.051. Even if the director does not prevail, permissive indemnification can be appropriate. *Id.* §§ 8.101-8.102. At this point, the WOWSC has not indemnified any judgment against the directors because none has been rendered.