Thus, under this framework, WOWSC may advance expenses to ***current*** Directors who fill out the statements required by section 8.104. *Id.* § 8.104. And WOWSC may advance expenses to ***former*** Directors without the necessity of the statements required by section 8.104. *Id.* § 8.105.

The 2019 Board voted to indemnify and advance expenses to the sued Directors. Ex. 8-Z, 8-AA, 5 through 8. The 2019 Board did so because they believed that if WOWSC did not defend its volunteer directors when they are sued in their capacity as Board members, it would be very difficult to find volunteers to serve on the Board. Ex. 5 through 8. Indeed, the Plaintiffs' serial lawsuits against WOWSC and its Directors, including claims that advancement of expenses are "illegal distributions," are having that effect. In the most recent election, only one new person was willing to step up to serve on the Board. Ex. 6, 8-CC. If the WOWSC did not defend its directors, it is easy to imagine no one being willing to serve at all. Each of the Directors filled out the statements described by section 8.104—even the former Directors, though this was not legally required for them. Ex. 8-BB.

There is nothing "illegal" about these distributions, which must be repaid if certain conditions are met as set forth in Chapter 8. Ex. 8-BB. Even though the Plaintiffs complain (improperly) that the Directors were "unfaithful fiduciaries," it is when a director is being accused of breaching fiduciary duties that advancement is most appropriate. *Aguilar*, 344 S.W.3d at 47 ("Advancement claims are frequently granted when, as in this case, the corporation is suing an official for breach of fiduciary duty. The corporation cannot defend against the advancement claim on the ground that it now believes the fiduciary to have been unfaithful because it is in those very cases that the right to advancement attaches most strong.") (citations omitted). The 2019 Board and recipient Directors complied with Chapter 8 and did not act ultra vires—let alone illegally—so as to open them up to personal liability for advancement of defense costs.

5. Any claim related to WOWSC's May 2015 sale of Tract G to the Anne McClure Whidden Trust is barred by the statute of limitations and meritless.

The Plaintiffs appear to complain about an entirely separate transaction and separate tract of land—the WOWSC's sale of Tract G at the Spicewood Airport to the Anne McClure Whidden Trust—in May 2015. Ex. 12; Petition at 20-21. The Plaintiffs suggest—without directly alleging—that the transaction may have been made in violation of TOMA or without a vote by the Board. Petition at 20. At the same time, the Plaintiffs do not complain about the price for this transaction, and they do not appear to allege damages related to or seek to void this transaction. *Id.* In an abundance of caution, however, the Directors briefly address this portion of the Plaintiffs' petition.

Any claim related to the sale of Tract G is barred by the statute of limitations. A claim alleging a purported defect in an instrument related to the sale of real property—including an alleged failure of the record to show authority of a board of directors of a corporation to enter the transaction—must be brought within two years after the day the instrument was filed for record with the county clerk of the county where the real property is located. *See* TEX. CIV. PRAC. & REM. CODE § 16.033(a). It is undisputed the Tract G deed was filed and recorded May 18, 2015. Ex. 12. The Plaintiffs first mentioned Tract G in their pleading filed in November 2019—far beyond the two-year statute of limitations.

Additionally, to the extent they are claiming a violation of TOMA, this claim too would be barred by the two-year statute of limitations. TEX. CODE CRIM. PROC. art. 12.02; *Rangra v. Brown*, 584 F.3d 206, 209 (5th Cir. 2009). There is also no evidence any Director was convicted of a TOMA violation related to Tract G (and there in fact was no criminal conviction). Additionally, no provision of TOMA that could even arguably apply here would open up the Directors to personal liability, nor is there any case in which a court has imported a TOMA violation into the ultra vires doctrine. *See* Section II.A.2.d, *supra*. Finally, as mentioned, the Plaintiffs do not appear

to claim any damage to WOWSC related to the Tract G transaction. There is no evidence of damages. Thus, to the extent the Plaintiffs allege any claim against the Directors based on WOWSC's 2015 sale of Tract G to a non-party to this suit, this claim, too, is meritless as a matter of law.

B. The Directors, as volunteer directors of a non-profit corporation, are immune and protected from personal liability by the business judgment rule and numerous state and federal statutes.

As explained above, the Directors did not act ultra vires ***and*** illegally. Therefore, they are not personally liable on any of the Plaintiffs' claims. But the Directors are also protected by the business judgment rule and various state and federal laws that insulate volunteer, non-profit directors from personal liability.

1. The business judgment rule bars Plaintiffs' claims.

The Plaintiffs' ultra vires claims against the Directors all concern the Directors' decisions and corresponding actions as directors on the WOWSC Board of Directors. The business judgment rule protects the Directors from liability for the acts Plaintiffs allege; that is, "acts that are within the honest exercise of their business judgment and discretion." *See Sneed*, 465 S.W.3d at 173 (citing *Cates v. Sparkman*, 11 S.W. 846, 849 (Tex. 1889)); *Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 WL 4930041, at *9 (Tex. App.—Austin Aug. 20, 2020, no pet.).

"In Texas, the business judgment rule protects corporate officers and directors from being held liable to the corporation for alleged breach of duties based on actions that are negligent, unwise, inexpedient, or imprudent if the acts were within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved." *Sneed*, 465 S.W.3d at 178 (internal quotations and citations omitted). In contrast, a breach of duty that would authorize court interference "is that which is characterized by ultra vires, fraudulent, and injurious practices, abuse of power, and oppression on the part of the company or its

controlling agency clearly subversive of the rights of the minority, or of a shareholder, and which, without such interference, would leave the latter remediless." *Roels*, 2020 WL 4930041, *9 (quotation marks omitted). The business judgment rule hinges on the concept that to permit a corporation to function effectively, "those having managerial responsibility must have the freedom to make in good faith the many necessary decisions quickly and finally without the impairment of facing liability for an honest error in judgment." See MARILYN E. PHELAN & ROBERT J. DESIDERIO, NONPROFIT ORGANIZATIONS LAW AND POLICY 109 (2003) (citing *Fin. Indus. Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir. 1973)). "Essentially, the business judgment rule, as pronounced long ago by the Texas Supreme Court in *Cates* and reaffirmed more recently in *Sneed*, operates at this stage of a lawsuit as a requirement that a plaintiff plead more than 'mere mismanagement,' neglect, abuse of discretion, or unwise and inexpedient acts to state a cause of action." *Roels*, 2020 WL 4930041, at *9.

Overcoming the business judgment rule is an element of Plaintiffs case.' *Matter of Estate of Poe*, 591 S.W.3d 607, 640 (Tex. App.—El Paso 2019, pet. filed) (citing cases). It is a "substantive rule of law that requires . . . both pleading and proof to avoid its reach." *FDIC v. Benson*, 867 F. Supp. 512 (S.D. Tex. 1994); *see also Resolution Trust Corp. v. Holmes*, No. Civ. A. No. H-92-0753, 1992 WL 533256, at *6 (S.D. Tex. 1992).

Sneed's analysis of the business judgment rule is instructive. 465 S.W.3d at 178. Though WOWSC is not a closely held corporation (as was at issue in Sneed), it is a small nonprofit comprised of only 250 members and is not publicly traded. The Texas Supreme Court observed in *Sneed* that "it is a foundational rule for Texas corporations that the business judgment rule generally protects corporate officers and directors, who owe fiduciary duties to the corporation, from liability for acts that are within the honest exercise of their business judgment and discretion."

Id. at 173. The *Sneed* court held that "[t]he business judgment rule continues to apply to the merits of a derivative proceeding, whether brought on behalf of a closely held corporation or any other corporation, when a corporation's officers' or directors' actions are being challenged." 465 S.W.3d at 179. It observed that to overcome the business judgment rule, "a plaintiff carries the burden on the merits to plead (and then of course to prove) something more" than "mismanagement or neglect or an abuse of discretion in conducting the affairs of the corporation." *Poe*, 591 S.W.3d at 641 (analyzing *Sneed*, 465 S.W.3d at 178). The *Sneed* court also explained that the business judgment rule can arise twice: once with a corporation's decision not to pursue a claim in its own name, and again when the merits of the underlying claim are decided. *Sneed*, 465 S.W.3d at 178.

For the Plaintiffs to establish their claims here, they must rebut the statutory presumption of good faith, proving that these Defendants acted without good faith, without ordinary care, and in a manner which they did not reasonably believe was in the best interest of the corporation. *Priddy v. Rawson*, 282 S.W.3d 588, 594-595 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) This they cannot do. None of the allegations pleaded by Plaintiffs overcomes the business judgment rule.

a. The business judgment rule protects the Directors' decision to sell the land at issue.

The Directors sold the land at issue in accordance with the WOWSC bylaws and the process outlined in the Texas Business Organizations Code—including for interested director transactions. *See* Section II.A.2, *supra*; *see* BOC § 21.418(a)(1), (c) (providing that if interested-director transaction has either been approved by Board after material facts are disclosed, shareholders will have "no cause of action" against director for breach of duty with respect to transaction); *Game Sys., Inc. v. Forbes Hutton Leasing, Inc.*, No. 02-09-00051-CV, 2011 WL 2119672, at *5, n.23 (Tex. App.—Fort Worth May 26, 2011, no pet.) (same).

It is classic business judgment for the Directors to determine the price of the sale of the land it sold to Friendship, particularly because there were so many valuations made of the property's value. Ex. 5-D, 8-D, 8-E, 8-N through 8-Q. The Board did its due diligence in understanding the value of the land at the time of the transaction. Ex. 1-5. The Board considered, among other things, one: the only prior offers, the Frank Greenberg and POA offers, that were significantly lower in price; two: the Board received three separate oral valuations of the land (1) by a central Texas airport developer (2) by a member of the Texas Department of Transportation Aviation division and (3) by a Lakeway real estate agent who had dealt with airport property in the past; and three: the Board solicited neighborhood input and reviewed appraisals and other MLS listings. Ex. 1 through 5, 8-D, 8-E, 8-N, 8-P, 8-Q; 10, pp. 19-21, 58-60, 66-72, 99-101, 113; 11, pp. 127-128. The Board considered that the airport property needed significant work to make it usable at an airport, such as fill to make it level, and that 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. Based on these factors, the Board determined the price offered by Friendship was a fair price for the land. The Board acted within its honest exercise of business judgment and discretion.

b. The business judgment rule protects the Directors' decision to settle with Friendship and advance the Directors' defense costs.

Further, as *Sneed* makes clear, the business judgment rule also applies to protect the Directors' decision to pursue or forgo corporate causes of action. 465 S.W.3d at 178; *see Cates*, 11 S.W. at 848–49. Whether a corporation should pursue a claim through litigation is a matter of the business judgment of a board of directors. *See United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917); *Mueller v. Zimmer*, 124 P.3d 340, 352–53 (Wy. 2005). "Before a shareholder can bring a derivative suit in the right of a corporation, he must show that something beyond unsound business judgment has governed the board of directors' refusal to act.

Langston v. Eagle Pub. Co., 719 S.W.2d 612, 616 (Tex. App.—Waco 1986, writ ref'd n.r.e.). Thus, the Plaintiffs' complaint that the 2019 Board settled with Friendship rather than suing also fails to scale the business judgment rule.

Additionally, as explained above, the 2019 Board had the absolute right to vote to pay the sued Directors' defense costs in accordance with Chapter 8. Certainly, this decision was made within the Board's business judgment that it should pay defense costs for its volunteer directors who are sued for acts taken on behalf of the WOWSC. *See* Section II.A.4, *supra*; Ex. 5 through 8.

c. The Directors were entitled to rely on the advice of legal counsel.

Finally, Texas Business Organizations Code section 3.102(b) makes clear that the Directors were entitled to rely on legal counsel in their sale of the land—as is also set forth in the WOWSC's bylaw. Ex. 8-B, art. 8, § 19; art. 9, § 10. Specifically, section 3.102 allows a governing person to rely on the advice of legal counsel, investment bankers, or others who the governing person reasonably believes to possess professional expertise. *See* BOC § 3.102; *Agarwal v. Villavaso*, No. 03-16-00800-CV, 2017 WL 3044545, at *3, n.6 (Tex. App.—Austin July 13, 2017, no pet.) (mem. op.). The statute provides:

> (a) ***In discharging a duty or exercising a power, a governing person***, including a governing person who is a member of a committee, ***may, in good faith and with ordinary care, rely on information, opinions, reports, or statements***, including financial statements and other financial data, ***concerning a domestic entity or another person and prepared or presented by***:
>
> (1) an officer or employee of the entity;
> (2) ***legal counsel***;
> (3) a certified public accountant;
> (4) an investment banker;
> (5) a person who the governing person reasonably believes possesses professional expertise in the matter; or
> (6) a committee of the governing authority of which the governing person is not a member.

> (b) A governing person may not in good faith rely on the information described by Subsection (a) if the governing person has knowledge of a matter that makes the reliance unwarranted.

BOC § 3.102 (emphasis added); *see also id.* § 3.105 (same).

As the Plaintiffs are aware, WOWSC has counsel defending it in this and the Plaintiffs' other lawsuits. *See, e.g.*, Ex. 8-T. As the evidence establishes, the 2019 Directors relied on legal counsel in advancing defense expenses. *See* Ex. 5 through 8; *see also* Ex. 9, p. 205. The 2015 Board additionally relied on advice of counsel in choosing not to market the land with a realtor and relied on the title company and its counsel that the Original Transaction documents would be proper. Ex. 2 through 5; 10, p. 56; 11, p. 216-217. Under these circumstances, and as explained in further detail below, the Plaintiffs bear the burden of showing that the Directors had "knowledge of a matter that makes the reliance unwarranted." *See* BOC § 3.102(b)." This they have not done and cannot do.

d. The Plaintiffs have not and cannot show the Directors acted ultra vires or fraudulently to take their actions outside the business judgment rule.

As explained above, directors are generally insulated by the business judgment rule unless the conduct complained of was either ultra vires (and illegal) or fraudulent. *See, e.g.*, *Campbell*, 2000 WL 19143, at *10; *Roels*, 2020 WL 4930041, *9. As explained in Section II.A above, the Directors did not knowingly engage in ultra vires and illegal activities that could open them up to personal liability. There is also no evidence the Directors engaged in fraudulent activity.

To recover for fraud, a plaintiff must establish the defendant knowingly or recklessly made a false, material misrepresentation to the plaintiff with intent that the plaintiff act on it, causing the plaintiff damages. *Int'l Bus. Machs. Corp. v. Lufkin Indus.*, 573 S.W.3d 224, 228 (Tex. 2019). There is no evidence here of any sort of knowing or reckless misrepresentation to the WOWSC or anyone else. The 2015 Board knew Martin was the principal at Friendship. Ex. 1 through 5. The

three Directors present (Mebane, Madden, and Mulligan) considered her offer and negotiated the transaction with her. *Id.* The Plaintiffs suggest the Jim Hinton appraisal was fraudulent. Petition at 21. Hinton, though, is an independent appraiser who is not a party to this case. Ex. 8-N; 11, pp. 47-53. Even assuming the Hinton appraisal contained misrepresentations (which it did not, and there is no evidence it contained misrepresentations), this would not be a misrepresentation made by any of the Directors. Ex. 1 through 5; *see also* n.18, *supra*. There is no evidence any of the Directors committed fraud on the WOWSC (or the plaintiffs).[29]

In sum, the Plaintiffs have not alleged facts sufficient to rebut the presumption of the business judgment rule that the Boards' decisions were taken in good faith with the intent of serving the best interests of the corporation. Notably, as explained in Section II.A.1, in the non-profit context in particular, courts are loathe to interfere in non-profit operations except in the most egregious of circumstances. *Butler*, 730 S.W.2d at 410; *Harden*, 634 S.W.2d at 60. All of the Plaintiffs' allegations, at the very most, demonstrate negligence on the part of the 2015 Board (though any claim of negligence, were it made, is denied). There is no evidence of ultra vires acts, fraud, illicit conspiracies, or anything else to overcome the business judgment rule. Negligence (and even gross negligence) and other common law claims are negated by the business judgment

[29] The Plaintiffs claim the Hinton appraisal was retrospective to September 1, 2014. Petition at 21. The Hinton appraisal states throughout that it is effective as of September 1, **2015**. Ex. 8-N, Bates No. WOWSC000005-6. The page where he typed September 1, 2014 is clearly a typo. *Id.*, Bates No. W0000015; 11, p. 91. The Plaintiffs also complain that the Hinton appraisal (which cost $600), per the Plaintiffs, conferred no benefit to WOWSC. Petition at 22. It is unclear how a valuation before the sale of land would confer no benefit—the Plaintiffs simply do not agree with the appraisal and believe the Bolton appraisal is more accurate. In any event, as the Plaintiffs are well aware, the Hinton appraisal was not the only valuation the 2015 Board relied on. Ex. 1 through 5.

rule, and summary judgment is warranted on all of Plaintiffs' claims against the Directors. *Roels*, 2020 WL 4930041, at *9.[30]

2. The Directors are immune from liability under Texas's "safe harbor" statute.

Texas has a public policy of supporting private action by protecting volunteer and nonprofit organizations from civil litigation. *See id.* Texas law reflects these principles as they concern individuals' participation in the management of non-profit corporations and unincorporated associations in multiple areas. *See, e.g.*, BOC §§ 22.235; 22.221, 252.006. To that end, the Texas Legislature has codified "safe harbor" immunity for volunteer officers and directors of private associations in several areas. Texas law provides that directors and officers of such associations have a presumption of immunity and a presumption that they acted reasonably when acting on behalf of such organizations. *See Priddy*, 282 S.W.3d at 594-595 (citing former TEX. CIV. STAT. ART. 1296-2.28(d), now BOC § 22.221); *Green v. Port of Call Homeowners Ass'n*, No. 03-18-00264-CV, 2018 WL 4100855, at *5 (Tex. App.—Austin Aug. 29, 2018, no pet.); *see also Young v Heins*, No. 01–15–00500–CV. 2017 WL 2376828, at *8 (Tex. App.—Houston [1st Dist.] 2017, no pet.). As explained below, Plaintiffs have the burden to overcome such presumption of immunity. The Plaintiffs fail to plead any actionable factual allegations.

[30] A claim of conspiracy is not the type of claim that could scale the business judgment rule. *Roels*, 2020 WL 4930041, at *9. But regardless, there is no evidence the Directors engaged in a conspiracy. To state a claim for civil conspiracy under Texas law, Plaintiffs must sufficiently allege the following elements: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). That is, a plaintiff must show participation in some underlying tort for which the plaintiff seeks to hold at least one of the main defendants liable. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). There is no evidence that the Directors jointly had an object to be accomplished, a meeting of the minds on the object or course of action, or engaged in one or more unlawful, overt acts. Again, there is no evidence any of the Directors received any financial benefit from the transactions. The Plaintiffs have yet to explain why the Directors would have reason to "conspire" with Martin in regard to the transaction. *See* Ex. 11, pp. 248-249.

At the time of the events the Plaintiffs complain of regarding each Director, the Director defendants were volunteer board members of WOWSC. Ex. 1 through 8. WOWSC is incorporated as a non-profit corporation. Ex. 8-A, 8-B. As such, sections 22.221 and 22.235 of the Texas Business Organizations Code protect its board members. *See Green* 2018 WL 4100855, at *5. The "safe harbor" provision states in relevant part:

> (a) A director shall discharge the director's duties, including duties as a committee member, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.
>
> (b) A director is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of the director must prove that a director did not act: (1) in good faith; (2) with ordinary care; ***and*** (3) in a manner the director reasonably believed to be in the best interest of the corporation.

BOC § 22.221 (emphasis added); *see also id.* § 22.235.

Though immunity is ordinarily an affirmative defense, courts have held that section 22.221's statutory protection does not constitute an affirmative defense. *Green*, 2018 WL 4100855, at *5; *see also Burns v. Seascape Owners Ass'n, Inc.*, No. 01-11-00752-CV, 2012 WL 3776513, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.) (mem. op.); *Priddy*, 282 S.W.3d 588, 594-95. Rather, this "safe harbor" provision places the burden of proof on the party seeking to impose liability on a director. *O'Hern v. Mughrabi*, 579 S.W.3d 594, 605 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Priddy*, 282 S.W.3d at 594 n.11; *Green*, 2018 WL 4100855, at *5. Thus, here, ***the Plaintiffs*** have the burden of proof to show that the Directors did not act (1) in good faith, (2) with ordinary care, and (3) in a manner he reasonably believed to be in the best interest of the corporation. *Priddy*, 282 S.W.3d at 594; *Green* 2018 WL 4100855, at *5; BOC §§ 22.221, 22.235. Because they cannot do so, the Plaintiffs claims fail under the safe harbor

statutes for the same reasons they fail under the business judgment rule, making summary judgment appropriate. *See* Section II.B.1, *supra*.[31]

3. The Directors are immune from suit under Texas's Charitable Immunity and Liability Act.

The Directors also move for summary judgment on Plaintiffs' causes of action because the alleged actions fall within the scope of their volunteer responsibilities with WOWSC, as set forth in Chapter 84 of the Texas Civil Practice and Remedies Code.

The Charitable Immunity and Liability Act of 1987 provides civil immunity to volunteers of charitable organizations. TEX. CIV. PRAC. & REM. CODE § 84.004.[32] "Charitable organization" is broadly defined and would include WOWSC here. *See id.* § 84.003(1)(B). The Texas Legislature established the Act in response to a perceived need for "robust, active, bona fide, and well-supported charitable organizations." *See id.* §84.002(1). The Act grants civil immunity to volunteers for "any act or omission resulting in death, damage, or injury" acting in the course and scope of the volunteer's duties or functions. *Id.* The statute defines "volunteers" as a person rendering services for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred. *See id.* 84.003(2). The term includes a person serving as a director, officer, trustee, or direct service volunteer, including a volunteer health care provider. *Id.* To defeat civil immunity, a plaintiff must establish that the alleged injury was the result of "***an act or omission that is intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others***." *Id.* § 84.007 (emphasis added).

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[31] The business judgment rule and safe harbor statute overlap significantly.

[32] The Act also limits the tort liability of certain charitable organizations—including nonprofit corporations, their employees, and their volunteers, for simple negligence "to money damages in a maximum amount of $500,000 for each person and $1,000,000 for each single occurrence of bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property. *See* TEX. CIV. PRAC. & REM. CODE §§ 84.001–.008, 84.006. The Act does not apply to acts or omissions that intentional, willfully, or wantonly negligent, or done with conscious indifference or reckless disregard for the safety of others. *Id.* § 84.007(a).

WOWSC is a non-profit, and the Directors each served as in the director role as volunteers. Ex. 1 through 8, 8-A, 8-B. As a matter of law, the Directors enjoy civil immunity in their capacity as volunteers of a nonprofit entity. *Id.* Plaintiffs have made no allegation supporting that the alleged injury was intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others. To the contrary, the Directors all believed they were acting in good faith. *Id.* Accordingly, under the Act, volunteer board members or officers of WOWSC are immune from personal liability for acts or omissions taken in the course and scope of their service as volunteers. Even assuming the Plaintiffs' facts are true, none of the Plaintiffs' allegations rises to the level necessary to overcome immunity as a matter of law. Summary judgment is appropriate on all of Plaintiffs' claims against the Directors.

4. The Directors are immune from suit under the Federal Volunteer Protection Act.

The Directors also move for summary judgment under the Federal Volunteer Protection Act (the Federal Act), because, as discussed with respect to Texas's Charitable Immunity and Liability Act, Plaintiffs lack any evidence that their alleged injury was the result of the Directors' willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed." *See* 42 U.S.C. § 14503(3). Summary judgment is appropriate on this basis because, as explained above, all of the Directors' alleged actions fall within the scope of their volunteer duties with WOWSC.

Aiming to encourage volunteerism and limit the potential liability of volunteers, the federal government established regulations to protect volunteers of nonprofit organizations like the Directors. *See* 42 U.S.C. §§ 14501, 14503. The Federal Act expressly seeks to clarify and limits the liability risk volunteers assume because "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them" and because of "the national scope of

the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits." *Id.* § 14501(a)(1), (7). The Federal Act also preempts the laws of any state to the extent such laws are inconsistent with the congressional intent to provide protection from suits to volunteers—but it does not preempt any state law providing additional protection from liability relating to volunteers in their performance of services for a nonprofit organization or governmental entity. *Id.* § 14502. The statute states that immunity is inapplicable to any misconduct that constitutes a crime of violence, a hate crime, involves a sexual offense, involves misconduct for which the volunteer was found to have violated a Federal or state civil rights law, or where the volunteer was under the influence of intoxicating alcohol or any drug at the time of the misconduct. *Id.* § 14503(f).

WOWSC is a non-profit organization under the Volunteer Protection Act of 1997. *Id.* § 14503; Ex. 8-A, 8-B. The Directors served as volunteers. Ex. 1 through 8. Accordingly, under the Federal Act, volunteer board members or officers of WOWSC are immune from personal liability for acts or omissions taken in the course and scope of their service as volunteers. *Id.* §§ 14503, 14505.

The declarations of each of the Directors establish that while they volunteered as directors of WOWSC and/or as officers of the association, they did not engage in willful or criminal conduct, gross negligence, reckless, misconduct, or flagrant indifference to the safety or rights of others. *See* Ex. 1 through 8. Even if the facts the Plaintiffs pleaded are true, none of these facts rises to a level that would overcome this standard. The Directors are entitled to immunity under the Federal Act, and summary judgment on Plaintiffs' claims. *See* 42 U.S.C. § 14503(f).

5. The WOWSC Bylaws and BOC section 7.001 provide the Directors with a limitation on personal liability.

The liability of the Directors is finally limited under BOC section 7.001 and the WOWSC Bylaws, which expressly limit the liability of directors ***except*** to the extent the directors breached a duty of loyalty, did not act in good faith, received an improper benefit, or engaged in an act or omission for which the liability of the person is expressly provided by an applicable statute. BOC § 7.001; Ex. 8-B, art. 8, § 18. As explained above, no Director (including Martin) obtained an "improper" benefit, nor violated an applicable statute.

But even if the Court believes there is a fact dispute regarding whether Martin received an improper benefit in Friendship's purchase of WOWSC's airport property, there is no evidence any of the other seven Directors received any benefit whatsoever from the Original Transaction or 2019 Transaction, nor that they acted in anything other than good faith and loyalty to the WOWSC. Their declarations establish the opposite. Ex 2 through 8. Nor is there evidence these Directors acted in bad faith—the evidence establishes the opposite. *Id.* Additionally, the duty of loyalty requires every director to act in good faith and not allow his personal interests to prevail over the interests of the corporation. *Gearhart*, 741 F.2d at 719. "The classic breach of loyalty is self-dealing: the director or his surrogate uses his board seat to transact business with the corporation on unfair terms or to poach a business opportunity that belongs to the corporation by right." *Life Partners*, 2015 WL 8523103, at *12. The Plaintiffs do not even allege the other Directors engaged in self-dealing. At a minimum, for the seven disinterested directors who obtained absolutely no benefit from the transaction (Gimenez, Taylor, Nelson, Mebane, Mulligan, Madden, and Earnest), there is no evidence of self-dealing, and the limitation on liability provision applies. Ex. 2 through 8.

C. Non-profit members lack capacity to bring a derivative claim under Texas law—including in the ultra vires context.

This Court previously entered an order stating that the Plaintiffs have standing to bring a representative ultra vires claim against the Directors under BOC section 20.002(c)(2). Order (Feb. 24, 2020). Even if the Plaintiffs have standing, that does not mean they have capacity to bring this claim on the face of the record, as set forth in a Texas Supreme Court opinion issued after this Courts February 2020 order. *See Pike v. Tex. EMC Mgmt, LLC*, No. 17-0557, 2020 WL 3405812 (Tex. Jun. 19, 2020). In light of the *Pike* opinion, the Directors urge the Court to conclude the Plaintiffs lack capacity to bring a representative claim under section 20.002(c)(2) since WOWSC is a non-profit corporation.

As a base consideration, as previously briefed before this Court, it is black letter law that board members of a non-profit corporation do not owe any fiduciary duties to individual members—the Board owes a fiduciary duty to the corporation as a whole. *See, e.g., Petty v. Portofino Council of Coowners, Inc.*, 702 F.Supp.2d 721 (S.D. Tex. 2010); *Harris v. Spires Council of Co-Owners*, 981 S.W.2d 892, 898 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *La Ventana Ranch Owners' Ass'n v. Davis*, 363 S.W.3d 632, 642–46 (Tex. App.—Austin 2011, no pet.); *Myer*, 119 S.W.3d at 836. Additionally, "the cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation." *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990).

The issue here is whether the Plaintiffs may use BOC section 20.002(c)(2) as an avenue to bring a representative ultra vires claim against the Directors on behalf of the WOWSC. Some Texas courts have correctly concluded that in the non-profit context, non-profit members do not have standing (or capacity) to bring representative ultra vires claims. This is because, unlike the for-profit chapter (BOC, Chapter 21), the non-profit chapter (BOC, Chapter 22) does not contain

any provisions governing derivative or representative claims. *Flores v. Star Cab Co-op Ass'n, Inc.*, No. 07-06-0306-CV, 2008 WL 3980762, at *7 (Tex. App.—Amarillo Oct. 22, 2008, pet. denied) (rejecting request from members to recognize the availability of an ultra vires claim by members of a non-profit suing in a representative capacity because of the absence of statutory authorization for derivative actions under Chapter 22). *But see Carmichael v. Tarantino Props., Inc.*, 604 S.W.3d 469, 481-82 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Notably, many states ***do*** expressly authorize derivative/representative actions in the non-profit context and establish the parameters for these claims—but Texas does not. *See, e.g.*, CAL. CORP. CODE § 7710 ; N.C. GEN. STAT. § 55A-7-40.

For for-profit corporations, the Legislature has created a statutory process for ensuring representative suits are not abusive. *See* BOC ch. 21, subch. L (governing derivative proceedings for for-profit corporations). For instance, to bring a representative suit, the shareholders must make a demand on the corporation before proceeding with suit, which must be voted on by the corporation. *Id.* § 21.553. A court may dismiss a derivative proceeding if it believes the suit is not in the best interest of the corporation. *Id.* § 21.558. A shareholder only has standing to bring the representative suit if the shareholder fairly and adequately can represent the interests of the corporation. *Id.* § 21.552.

There are no corollary provisions governing derivative/representative suits in the non-profit chapter, nor protections for ensuring a representative suit is not abusive. Thus, while true that the ultra vires statute—section 20.002(c)(2)—does ***generally*** authorize representative suits for corporations, there is no framework in Chapter 22 to govern the ***parameters of or rules for*** a representative or derivative suit. This lawsuit, brought by a small, litigious group of disgruntled WOWSC members, highlights the need for protective statutory provisions governing

representative suits. It is not a fair reading of section 20.002(c)(2) to construe it as authorizing a derivative suit in the non-profit context when there is no procedure for such suits in that chapter. *See Flores*, 2008 WL 3980762, at *7. The fairer reading is that section 20.002(c)(2) applies to representative suits when representative suits are statutorily authorized for that particular type of corporation.

In a recent Texas Supreme Court decision, the Supreme Court analyzed the issue of capacity to sue in the stakeholder context. *See Pike v. Texas EMC Mgmt., LLC*, No. 17-0557, 2020 WL 3405812 (Tex. Jun. 19, 2020). The Supreme Court noted that a plaintiff only has capacity to sue if the plaintiff falls within the class of persons authorized to sue or otherwise has a valid cause of action. *Id.* at *5. "[A] party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Id.* (quoting *Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001) (emphasis in original). On the face of the record, including the Plaintiffs' pleading, the Plaintiffs here lack standing or capacity to bring individual ***or*** representative claims against the Directors for damages. *Id.*; *see* TEX. R. CIV. P. 93.[33] This Court should render a take-nothing judgment on the Plaintiffs' purported ultra vires representative claim against the Directors. *See Pike*, 2020 WL 3405812, at *11 (a challenge to a party's legal authority to bring suit is a matter of capacity).

[33] In *Pike*, the Supreme Court held that "a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization." 2020 WL 3405812, at *10. The Directors believe that, in terms of the Plaintiffs' allegations here and their lack of financial interest in the WOWSC (for instance, the WOWSC bylaws prevent the paying of dividends to members), they lack standing to bring individual claims against the Directors, as previously found by this Court. In an abundance of caution, the Directors alternatively ask this Court to also conclude they lack capacity to bring individual claims against the Directors in light of *Pike*.

III.
The Court should render a take-nothing judgment in the Directors' favor on the Plaintiffs' claim for attorney's fees.

Attorney's fees must be authorized for a party to recover fees from an opponent. *Rohrmoos Venture v. UTSW DVA healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). Under the "American Rule," Texas litigants are generally responsible for their own attorney's fees and expenses in litigation. *Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 41 (Tex. 2012). The American Rule provides an exception for circumstances where attorney's fees are authorized by statute or contract. *See Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013); *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011). The availability of fees under a particular statute is a question of law for the court. *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, (Tex. App.—Dallas 2020, pet. filed).

The Plaintiffs have brought claims against the Directors under BOC section 20.002(c)(2). Nothing in section 20.002 authorizes the Plaintiffs to recover attorney's fees from the Directors. Therefore, the Plaintiffs' claim for attorney's fees fails as a matter of law.

CONCLUSION AND PRAYER

This motion for summary judgment gives this Court the opportunity to apply statutes and common law principles designed to limit the personal liability of volunteer, non-profit directors and stop this abusive lawsuit against the Directors. The Plaintiffs' serial litigation is harming the WOWSC's ability to function, harassing volunteer former and current Directors, and poisoning the Windermere Oaks community. The Plaintiffs do not identify any act that exceeded the Directors' authority. They instead complain about how the Directors ***exercised*** their authority. And the Plaintiffs certainly do not point to any act that is ***illegal*** so as to potentially open up a Director to personal liability. The Plaintiffs simply seize on the words "ultra vires" and attempt to shoehorn

the phrase into a claim that passes muster. Their ultra vires claims against the Directors fail as a matter of law, and the Directors are not personally liable.

Therefore, for the reasons set forth in this Motion, 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 respectfully request the Court to grant their Motion for Summary Judgment and render a take-nothing judgment in their favor on each of the Plaintiffs' claims against them. The Directors further seek such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2020, a true and correct copy of the foregoing was served electronically, via e-file Texas, on all counsel of record:

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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 REPLY IN SUPPORT OF TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

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

I.
INTRODUCTION

This case concerns a land sale by WOWSC to a company owned by a former sitting director that the Plaintiffs believe was for an unfair price. The Plaintiffs attempt to spin conspiracy theories by stacking inference upon inference and fanning the flames of suspicion. None of this intrigue constitutes evidence of the bad faith and illegality they must show to survive summary judgment.

Numerous statutes and common law rules impose a high burden on a plaintiff trying to hold a non-profit director ***personally liable*** for acts taken as a director. These include the business judgment rule and safe harbor statutory provisions immunizing directors from personal liability, including in the context of "interested director" transactions. The business judgment rule and the Texas Business Organizations Code, with their heightened protections for non-profit directors, provide the roadmap to this Court's decision. The Plaintiffs must put forth evidence of subjective bad faith, illegality, and other factors to create a fact dispute regarding the Directors' personal liability. Critically, the burden is on the Plaintiffs, not the Directors. The Plaintiffs have not met their burden.

Numerous Texas and federal courts have rendered judgment as a matter of law in favor of non-profit directors when plaintiffs seek to hold them personally liable—even if a fact dispute otherwise exists regarding the ***validity*** of a corporate transaction. The policy reason is obvious. No one would volunteer to serve on a non-profit board if these volunteers were not protected from personal liability except for the most egregious acts. It borders on frivolous for the Plaintiffs to suggest that ***this*** case is the unusual, egregious case where a fact dispute exists regarding director personal liability.

The Plaintiffs have thrown the kitchen sink at this Court with their 54-page "Facts" section and hundreds of pages of exhibits. They have done everything in their power to try confusing what should be a straightforward case. In truth, material facts relevant to the Directors' liability are not in dispute. The contemporaneous recordings and minutes of board meetings and other documents say what they say and tell the entire story—as much as the Plaintiffs try spinning a tale that the Directors ***must*** have subjectively felt some ill intent. At bottom, the undisputed evidence demonstrates that the 2015 Board believed, based on the information before them at that time, that

WOWSC was selling land to Friendship Homes & Hangars, LLC ("Friendship") for a good price.[1] The 2019 Board believed that it was best for the corporation to settle with Friendship and improve the Original Transaction for WOWSC. The exhibits the Plaintiffs attach to their Response do not refute this—they back up why the Board members voted as they did. Even if the Plaintiffs are correct that it would have been more prudent for the Directors to have voted differently (which the Directors dispute), that does not mean the Directors can be found personally liable. There is no evidence demonstrating anything other than that the Directors acted in good faith and believed they were acting in the best interest of WOWSC.

If this Court believes a fact dispute exists regarding the validity of either transaction or any part of either transaction (such as the Plaintiffs' heightened focus on the conveyance of Piper Lane), a trial could perhaps be had on the issue of validity. But this Court should render a take-nothing judgment in the Directors' favor on ***personal liability*** or, at a minimum, render a take-nothing judgment in the disinterested Directors' favor on personal liability. The Directors (except perhaps Dana Martin) need not be parties to any trial regarding contract validity because they are not parties to these transactions.[2]

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[1] "2015 Board" refers to Dana Martin, Bill Earnest, Mike Madden, Pat Mulligan, and Bob Mebane. "2019 Board" refers to Bill Earnest, Joe Gimenez, Dorothy Taylor, and Mike Nelson. (Collectively, the "Boards".) "Original Transaction" refers to the 2015/2016 land sale by WOWSC to Friendship. "2019 Transaction" refers to the October 2019 Amended, Restated, and Superseding Agreement entered into between Friendship, WOWSC, and Martin under which the 2019 Board essentially settled with Friendship and Martin and improved the terms of the Original Transaction for WOWSC.

[2] As explained in their Motion, the Directors have no individual power to take any action on either transaction. They cannot "undo" the transactions as individuals, and many of the Directors do not even sit on the WOWSC board any longer. The Original Transaction was between WOWSC and Friendship. The 2019 Transaction was between WOWSC, Friendship, and Dana Martin, the sole "interested" Director in the Original Transaction. The other seven Directors are not parties to either transaction, and the uncontroverted evidence establishes they have no personal interest in either transaction. A take-nothing judgment on personal liability in the Directors' favor (or, at a minimum, in the disinterested Directors' favor) would resolve all claims against the Directors. If the Court believes a fact issue exists on the validity of the 2019 Transaction, however, presumably Dana Martin would remain in the case on the issue of validity since she is a party to that transaction.

II.
REPLY ARGUMENT

A. Response to Plaintiffs' 54-Page "Facts" Section

The Directors are not aware of many factual disputes in this case beyond the so-called "true" value of the property (if a "true value" exists). Any fact dispute that might exist is not material to this Motion. The Directors do briefly address the following parts of the Plaintiffs' 54-page "Facts" section:

- The Plaintiffs make many factual assertions without any citation to the record. Some of their unsupported statements are untrue. Because those unsupported statements are not material to this Motion, the Directors do not go toe to toe here on the Plaintiffs' misrepresentations. The summary judgment record speaks for itself.

- The Plaintiffs often assign their own opinions regarding the Directors' motives (for instance, claiming, without evidence, that the Directors "knew" certain things "weren't true" or "weren't reliable" or somehow did not act in "good faith")—but these are not facts, and they are not backed up by the record.

- The Plaintiffs claim the Directors "nitpick over value." Response[3] at 57. In reality, there are wildly varying opinions regarding the value of the land, with the Plaintiffs' preferred valuation (assigned retrospectively by David and Chance Bolton three years after the Original Transaction) at the extreme top end. There is no principle of Texas law under which a non-profit director can be held personally liable each time he or she votes for the company to sell property for $5 that a person later claims was arguably worth $10. The "true" value of the property (if it can even be ascertained) is not material to the Directors' Motion.

- The Plaintiffs' swipes regarding what the Directors purportedly "knew" about the land's "true" value spotlight the absurdity of this lawsuit. They claim the Directors somehow "knew" the value was higher than what they sold it for because they must have:

  - "known" the previous Frank Greenberg offer was too low or was somehow "concocted,"

[3] "Response" refers to the Plaintiffs' March 17, 2021 Response filed in opposition to the Directors' Motion. In this Reply, the Directors at times cite to evidence attached to the Plaintiffs' Response. The Directors also cite to evidence attached to their Motion and to their supplemental evidence timely filed with the Court on February 19, 2021.

- "known" the previous Spicewood Pilots Association offer was too low,
- "known" the Curt Friedland bank appraisal was somehow too low and "unreliable,"
- "known" the William Keller offer was too low,
- "known" the Windermere Oaks Property Owners' Association ("POA") offer was too low, and
- "known" the Jim Hinton appraisal was too low and unreliable.

The Plaintiffs seek to have this Court impose on the Directors an unbelievably heightened, micromanaging standard regarding Director responsibilities and liability, contrary to Texas law. There is no valid reason the Directors could not rely on certified appraisals and previous offers; on opinions of the WOWSC general manager, George Burriss; on opinions of realtors and other professionals; and even on each other in believing they had received a good offer.

- The Plaintiffs complain about WOWSC defending itself and its Directors against the Plaintiffs' serial litigation. The Plaintiffs and their friends have now filed or intervened in four proceedings against WOWSC—this suit, the previous Texas Open Meetings Act ("TOMA") suit, a rate proceeding at the PUC, and a Public Information Act proceeding (to require WOWSC to produce unredacted versions of the WOWSC's and Directors' counsel's legal invoices in this litigation). The Plaintiffs' website boasts about their many lawsuits against WOWSC and its Directors, which are causing WOWSC's legal fees. https://integritynow1.net/.[4]

- The Plaintiffs incredibly suggest that, even though the Directors have sat for more than 40 hours of depositions and produced (along with Friendship and WOWSC) thousands of pages of written discovery, "the Plaintiffs have not yet had an opportunity to explore" purported inconsistencies between the board meeting recordings and deposition testimony. Response at 37. The Plaintiffs surely know that any inconsistences are minor and are due to the Original Transaction happening

[4] The Public Information Act suit was originally brought by WOWSC to protect the attorney-client privilege in response to Danny Flunker's repeated public information requests for unredacted attorney invoices. This suit had been settled with the Attorney General until Danny Flunker, represented by the same counsel as the Plaintiffs, intervened in the public information suit and kept it going. The Directors mention this for the Court's information, but it is not material to the Directors' Motion.

more than five years ago.[5] The Plaintiffs surely know that many of the Directors who served on the 2015 Board are older individuals who did their best during deposition to remember details that occurred years ago (the Plaintiffs have attached several of the Directors' full deposition transcripts to their Response). The Plaintiffs also surely know that even if some Directors might not now remember every detail, their overall account of what happened and why they did what they did has never changed. Memories regarding details fade, but the recordings and documents produced to the Plaintiffs provide contemporaneous evidence of precisely what happened and why the Boards did what they did. And the Directors' declarations and deposition testimony are consistent with those recordings and minutes.

- The Plaintiffs baldly misrepresent that WOWSC never appraised the property, nor surveyed it before it was sold. This is demonstrably false under this record. Stewart Watson surveyed the land in September 2014, and Jim Hinton appraised the property in September 2015 (and previously Curt Friedland appraised the property). These occurred before it was sold. Directors' Supplemental Evidence in Support of Motion filed Feb. 19, 2021 ("Supplemental Evidence") at Exhibit 16, pp. 12-13; *id.* at Exhibit 20, pp. 3-4; Response at Exhibit 3, pp. 155-57; Motion at Exhibits 8-N, 8-Q.[6] That the Plaintiffs do not agree with the Hinton or Friedland appraisals does not equate to not appraising the property. In any event, the Plaintiffs do not cite any law mandating a property owner must appraise and survey land before selling it, and the Directors are aware of none.

- The Plaintiffs concede that WOWSC took the $200,000 it netted from the Original Transaction to pay down its debt incurred for building the new wastewater treatment plant. Response at 52; *see, e.g.*, Supplemental Evidence at Exhibit 15-D.

B. The business judgment rule and statutory safe harbor provisions shield the Directors from personal liability.

The Plaintiffs do not dispute that it is ***their*** burden to overcome the business judgment rule and "safe harbor" provisions in the Business Organizations Code, which immunize the Directors from personal liability. *See, e.g., Burns v. Seascape Owners Ass'n, Inc.*, No. 01-11-00752-CV,

[5] For instance, they pick that Bill Earnest testified that he had attended Danny Flunker's birthday party the day of the December 19, 2015 meeting, when the meeting was in the morning and the party at night. That he might have not remembered that the meeting he missed was in the morning rather than the evening five years ago is immaterial. They point to Bob Mebane not remembering the name of the realtor he spoke to before the 2015 land sale (Doris Van Trease) during his deposition. The board meeting recordings indicate he spoke to Doris Van Trease one time five years ago. Not remembering her name five years later is hardly evidence of a lie.

[6] The Plaintiffs also do not inform the Court that the September 2014 Watson survey of the land was produced by the Directors and WOWSC in discovery. MULLIGAN000197; WOWSC000811.

2012 WL 3776513, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.); *Priddy v. Rawson*, 282 S.W.3d 588, 594-95 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *In re Estate of Poe*, 591 S.W.3d 607, 641 (Tex. App.—El Paso 2019, pet. filed). The Plaintiffs have produced no evidence meeting their high burden. In fact, the evidence establishes the opposite.

The Business Organizations Code safe harbor provisions provide that a director (or officer) of a nonprofit:

> is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of a director must prove that the director did not act:
>
> (1) in good faith;
> (2) with ordinary care; and
> (3) in a manner the director reasonably believed to be in the best interest of the corporation.

TEX. BUS. ORGS. CODE § 22.221; *see also id.* § 22.235; *Burns*, 2012 WL 3776513, at *9. A ***plaintiff*** must prove ***all three*** of these elements to overcome these safe harbors—not just one of them.

Similarly, the business judgment rule immunizes a director from liability for acts that are within the honest exercise of his or her business judgment and discretion. *Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015). "In Texas, the business judgment rule protects corporate officers and directors from being held liable to the corporation for acts that are negligent, unwise, inexpedient, or imprudent if the acts were within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved." *Id.* at 178 (internal quotations and citations omitted). Contrary to what the Plaintiffs claim, Texas courts (including binding Austin Court of Appeals' precedent) have concluded that the business judgment rule protects even acts of ***gross negligence***. *See, e.g., Roels v. Valkenaar*, No. 03-19-00502-CV, 2020 WL 4930041, at *9 (Tex. App.—Austin Aug. 20, 2020, no pet.); *Chapman v. Arfeen*, No.

09-16-00272-CV, 2018 WL 4139001, at *15 (Tex. App.—Beaumont Aug. 30, 2018, pet. denied).[7] "Texas courts to this day will not impose liability upon a non-interested corporate director unless the challenged action is ultra vires or tainted by fraud...." *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 721 (5th Cir. 1984).

The Plaintiffs lodge various complaints about the Original Transaction—that it was not for enough money, that the 2015 Board did not sufficiently market the property, that Martin was an interested director, that the 2015 Board violated TOMA, and that WOWSC's corporate resolution approving the transaction was improper. Each purported act of mismanagement the Plaintiffs allege, if true, at most constitutes negligence. The 2019 Board then attempted to "clean up" some of the mistakes in the Original Transaction with the 2019 Transaction, which superseded the Original Transaction. The Plaintiffs' complaint about the 2019 Transaction, which undisputedly was not tainted by TOMA violations, is less clear. For both Boards and transactions, there is no evidence the Directors engaged in "ultra vires" or "fraudulent" activities that might overcome the business judgment rule. And there is no evidence the Directors did not act in good faith, with ordinary care, or in a manner they reasonably believed to be in the best interest of the corporation.

1. The Original Transaction (2015 Board)

Bill Earnest

At the outset, the Plaintiffs concede that Bill Earnest did not vote on the Original Transaction. The Plaintiffs suggest—without evidence—that Earnest somehow deliberately missed the December 19, 2015 meeting because he did not want to participate in the vote. Regardless of why Earnest was not there or where he was at the time, he was not there. Motion at

[7] The Plaintiffs rely on a 1993 federal district court case attempting to apply Texas law that stated the business judgment rule does not protect against gross negligence. Response at 66 n.290. More recent Texas cases—including binding precedent from the Austin Court of Appeals—state the opposite.

Exhibit 5, ¶ 9; *id.* at Exhibit 8-F; Supplemental Evidence at Exhibit 20. He cannot be held personally liable for the Original Transaction when he did not even participate in the vote. *See* TEX. BUS. ORGS. CODE § 20.002(c) (referring to "acts" or "transfers").

Dana Martin

Dana Martin did not participate in the vote on the Original Transaction either. Motion at Exhibit 1, ¶ 4; *id.* at Exhibit 8-F; Supplemental Evidence at Exhibit 20, p. 70. As explained below, the Original Transaction was an interested director transaction that complied with Business Organizations Code section 22.230 (a separate safe harbor provision for interested director transactions). Section 22.230 would not exist if a director is precluded from even making an offer to do business with the corporation on whose board the director sits. The three disinterested Directors (Mike Madden, Bob Mebane, and Pat Mulligan) did not have to accept Friendship's offer, but they chose to do so because they believed it was a good one. Supplemental Evidence at Exhibits 15-E (WOWSC002223), 20; Motion at Exhibits 2-4. It is unclear why the Plaintiffs believe that an interested director who recuses herself from a transaction vote that is then approved by disinterested directors can be personally liable for the transaction.[8] *See* TEX. BUS. ORGS. CODE § 22.230(b)(1).

Bob Mebane, Mike Madden, and Pat Mulligan

Bob Mebane's, Mike Madden's, and Pat Mulligan's reasoning behind their decision to approve the Original Transaction on behalf of WOWSC has never wavered since the time of the

[8] Additionally, to the extent the Plaintiffs seek on behalf of WOWSC to hold Martin liable, the WOWSC, then, would be in breach of its agreement releasing Martin from any claims related to the Original Transaction or anything regarding the land sale. Motion at Exhibit 8-X, art. III, § 2. As explained in the Motion and below, the Plaintiffs do not have standing or capacity to bring claims on behalf of WOWSC, and WOWSC has not brought claims against Martin. And regardless, the Plaintiffs' claims fail on the merits as a matter of law. But if the Plaintiffs truly may bring claims on behalf of WOWSC against Martin, WOWSC would be in breach of the 2019 Transaction.

Original Transaction. Mebane's declaration and deposition testimony explain that he talked with various developers and realtors about the airport property and its worth. Motion at Exhibits 2, 10. He believed, based on those conversations, that Friendship made a good offer that was in the best interest of the corporation to accept. *Id.* The recording of the December 19, 2015 meeting—and meetings before that—back up his account of the events. Supplemental Evidence at Exhibits 17-20. Mebane reported his conversations with real estate professionals to the 2015 Board at the October 31, 2015 meeting. *Id.* at Exhibit 18. It was at the October 31, 2015 meeting that the Board, based on Mebane's conversations with developers and realtors (including Doris Van Trease), decided it financially made the most sense to sell only the portion of the property on Piper Lane rather than the entire tract. *Id.* at Exhibit 18. If someone developed the front part of the property and WOWSC retained an easement to the back part, then the front development could improve the value of the back lot. *Id.* at Exhibit 18; *see also id.* at Exhibit 17, pp 8-9; *id.* at Exhibit 15-E (WOWSC002231).

WOWSC had received previous, lower offers for the property, including from Frank Greenburg, William Keller, the Windermere Oaks POA, and the Spicewood Pilots Association. Motion at Exhibits 2-4, 8-D, 8-E, 8-FF; Supplemental Evidence at Exhibits 14-B, 14-C. Mike Madden relied on Mebane's recitation of his conversations, appraisals of the property, and some of these previous offers. Motion at Exhibit 4; Response at Exhibit 5, pp. 17-19, 23-25, 35-37, 45-48. Pat Mulligan likewise considered these previous offers, and Mebane, Madden, and Mulligan discussed some of these offers at the December 19, 2015 meeting. Motion at Exhibit 3; Supplemental Evidence at Exhibit 15-E (WOWSC002223); *id.* at Exhibit 20, pp. 42, 50. WOWSC

possessed appraisals for the property performed by Jim Hinton[9] and Curt Friedland before the December 19, 2015 meeting. Motion at Exhibits 8-N, 8-Q.

Mebane, Madden, and Mulligan did have concerns the Hinton appraisal came out lower than they believed the land was worth based on their understanding of previous offers and sales at the Spicewood Airport. Supplemental Evidence at Exhibit 17. But they did not sell the land for the amount appraised by Hinton. Motion at Exhibits 8-G, 8-N. Mebane, Madden, and Mulligan knew some people might be upset if WOWSC sold the land to Martin's company (Friendship) because "[t]here's people in the community that don't like Dana," and they were concerned it would be perceived as a "sweetheart deal." Supplemental Evidence at Exhibit 20, pp. 37, 57. They considered rejecting the offer and putting the land up for sale for 90 days instead and then, if it did not sell, going back to Friendship. *Id.*, pp. 37-40, 44, 53-55, 59-60. But ultimately, they believed it was in the best interest of WOWSC ***and*** the community to sell the land to Friendship rather than an outside developer who might not care about the impact of the development on the neighborhood. *Id.*, pp. 48-49, 57-58, 64-65. And because WOWSC had never received such a good offer for the land, they were concerned that if they rejected Friendship's offer and put the land up for sale for 90 days unsuccessfully, they would not receive such a good offer from Friendship again. Supplemental Evidence at Exhibit 14-B; *id.* at Exhibit 20, pp. 39-63. In short, they believed a $200,000 net profit for the 4.3 acres was a good price based on all the information they had before them. Motion at Exhibits 2-4; Supplemental Evidence at Exhibit 15-E, WOWSC002230 (at December 7, 2015 board meeting, board discussed selling four of the eleven acres for $200,000)

[9] In their Response, the Plaintiffs complain that one of the Directors, Bill Earnest, filed a complaint against the Plaintiffs' preferred appraiser, David Bolton, with the Texas Appraisal Licensing & Certification Board. They neglect to mention the regulatory complaints that they or their allies on their behalf have made against Jim Hinton (with the Texas Appraisal Licensing & Certification Board), Martin (with the Texas Real Estate Commission), and even WOWSC's former counsel Les Romo (with the State Bar of Texas) in connection with this dispute.

and WOWSC002233 (at April 6, 2015 meeting, board discussed selling entire 11-acre tract for at least $350,000); *id.* at Exhibit 18, p. 19; *id.* at Exhibit 20; Response at Exhibit 3, pp. 50-51, 55 (Mulligan testifying Board believed the entire 11-acre tract was worth $250,000-$350,000); *id.* at Exhibit 5, pp. 16-17; *id.* at Exhibit 11, pp. 23-34, 54. The 2015 Board was then able to take the $200,000 in proceeds from the sale and pay down the wastewater treatment plant loan. Motion at Exhibits 2-4; Response at Exhibit 11, pp. 57-58; Supplemental Evidence at Exhibit 15-D.

The Plaintiffs appear to argue that the 2015 Board could not reasonably rely on ***any*** of the information they had before them in December 2015. The Plaintiffs claim that the Hinton and Friedland appraisals were too low and unreliable and that the previous offers WOWSC had received for the land were somehow invalid. They seem to believe the Directors were precluded from doing anything short of marketing the property with a realtor, even though no law or provision of the WOWSC governing documents requires this. The heightened standard the Plaintiffs would have this Court impose on the 2015 Board is absurd and completely contrary to Texas law. The 2015 Board was statutorily entitled to rely on the advice of persons with professional expertise as an element of the safe harbor statutes and business judgment rule. TEX. BUS. ORGS. CODE § 3.102. The WOWSC bylaws similarly provide that its Directors may rely on professional advice and opinion. Motion at Exhibit 8-B, ¶ 19. Therefore:

- The 2015 Board could rely on WOWSC's attorney, Mark Zeppa, who had advised that WOWSC could sell its land without obtaining bids and could contract with a board member so long as that board member did not vote on the contract.[10] Motion at Exhibits 2-4; Supplemental Evidence at Exhibit 4-A. Notably, sometime after the Original Transaction, Zeppa directly advised Mebane that the 2015 Board had done

[10] The Plaintiffs claim Mark Zeppa was actually just advising a third party, Malcolm Bailey. In fact, Zeppa's email advice was also directed to Mulligan, who was then president of WOWSC. Supplemental Evidence at Exhibit 14-A. There is no dispute that Mark Zeppa was WOWSC's lawyer for many years. His name shows up throughout the summary judgment record.

nothing wrong in approving the Original Transaction. Supplemental Evidence at Exhibit 13-A.[11]

- The 2015 Board could rely on the appraisals they had received and former offers for the property, outlined above.

- The 2015 Board could rely on each other in making their decisions.

- The 2015 Board could rely on the advice of WOWSC's long-time general manager, George Burriss, who attended all of the Board meetings and urged the Board that Friendship's offer was a good one they should accept. Supplemental Evidence at Exhibit 20, pp. 41-43, 55; *see also* Motion at Exhibit 8-B, art. 9, ¶ 7 (authorizing WOWSC to hire general manager); Response at Exhibit 23 (attaching "Manager's Report" by George Burriss); *id.* at Exhibit 9, p. 8.

See Young v. Heins, No. 01-15-00500-CV, 2017 WL 2376828, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (safe harbor statute protected directors who relied on advice of counsel and expertise of property management company in carrying out their duties); *In re Life Partners Holdings, Inc.*, No. DR-11-CV-43-AM, 2015 WL 8523103, at *15-16 (W.D. Tex. Nov. 9, 2015) (directors were entitled to rely on professional analyses, and not consulting legal counsel does not show bad faith); *Priddy*, 282 S.W.3d at 597 (board could rely on information provided by previous boards to enjoy safe harbor immunity).

None of this evidence is in dispute. Instead, the Plaintiffs try to distract with suspicion and intrigue and ask this Court to stack inference upon inference to somehow conclude there is evidence of bad faith. But as the Texas Supreme Court has explained: "[S]ome suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence. We have also said that an inference stacked only on other inferences is not legally sufficient evidence." *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727-28 (Tex. 2003). And to show bad faith, the

[11] The Plaintiffs attach as evidence a memo from Mark Zeppa to Mebane dated December 29, 2016, discussing the Original Transaction. Response at Exhibit 85. As the Plaintiffs are aware, after Zeppa was provided minutes of the December 19, 2015 board meeting and executive session, he revised his opinion in the January 3, 2017 opinion letter. Supplemental Evidence at Exhibit 13-A.

Plaintiffs are required to show "***scienter*** on the part of the defendant director." *Life Partners Holdings*, 2015 WL 8523103, at *14 (emphasis added).

A review of the board meeting transcripts[12] (or actual recordings if the Court prefers) and meeting minutes tells the entire story of why the 2015 Board chose to sell the 4.3 acres to Friendship. And nothing in this evidence demonstrates bad faith or that the 2015 Board did not reasonably believe they were acting in the best interest of the corporation. *See* Supplemental Evidence at Exhibit 14-B (email exchange among Mebane, Madden, and Mulligan in February 2017—long before they were sued—describing the December 19, 2015 meeting and confirming among themselves that they had made a "strong ethical business decision" in the Original Transaction). At most, any flaws with the Original Transaction and how it was entered would constitute negligence. As a matter of law, the Directors cannot be found liable for negligence or even gross negligence under the business judgment rule or safe harbor provisions.[13]

2. The 2019 Board

The Plaintiffs claim for damages against the 2019 Board (Joe Gimenez, Dorothy Taylor, Mike Nelson, and Bill Earnest) is puzzling. Their complaint against the 2019 Board seems to center

[12] The Plaintiffs do not seem to like the certified transcripts of the board meetings that the Directors' counsel had prepared. Every transcription by a court reporter might contain some typographical mistakes, but any mistakes here are minor. The Directors' counsel had a neutral court reporter at Veritext transcribe the board meetings for the convenience of the Court and parties, to ensure the board meetings remain part of the record and are not lost (including if the case is appealed), and so the Court knows who said what. Certainly, if the Court or Plaintiffs prefer, they can listen to the actual recordings instead. The Directors have provided this Court with links to the actual recordings produced by WOWSC in this suit, and they are part of the evidence in this case. Supplemental Evidence at Exhibit 15, ¶ 4; *id.* at Exhibit 15-E.

[13] The Plaintiffs suggest, without briefing, that the 2015 Board "exposed the WSC to a claim by Friendship that the WSC must dedicate land for drainage facilities in the future." Response at 47-48. This is pure speculation, and there is no evidence anyone, including Friendship, is contemplating a claim against WOWSC related to drainage. They cite to an Exhibit 13 (the Friendship corporate representative deposition), but there is no Exhibit 13 attached to their Response. At the Friendship deposition, however, Martin did not state what the Plaintiffs suggest. *See* Friendship Deposition, pp. 42-49. Martin testified Friendship did ***not*** acquire some sort of easement or rights to WOWSC's remainder tract for drainage. *Id.*, pp. 49-50.

on (1) the 2019 Board settling with Friendship and Martin rather than filing suit, (2) the 2019 Transaction correcting the deed mistake in the Original Transaction to include Piper Lane, and (3) the 2019 Board approving the advancement of legal expenses to sued Directors (and, it seems, even having WOWSC defend itself against the Plaintiffs' claims). The Plaintiffs do not attempt to explain how the 2019 Board somehow did not act in good faith or in a manner they reasonably believed was in the best interest of the corporation, and they certainly do not explain how the 2019 Board acted ultra vires or fraudulently.

a. Settling Rather than Suing

The Plaintiffs do not cite even one case in which a director was held personally liable for a litigation strategy or decision made on behalf of the corporation. None exists. The business judgment rule and safe harbor provisions soundly protect directors from liability for litigation decisions made on behalf of the company. *See*, *e.g.*, *Sneed*, 465 S.W.3d at 178 ("The business judgment rule ... applies to protect the board of directors' decision to pursue or forgo corporate causes of action."). For reasons outlined in their declarations (and confirmed in their deposition testimony), the 2019 Board chose to settle with Friendship rather than pursue claims because they believed that was in the corporation's best interest. Motion at Exhibits 5-8; Response at Exhibit 9, pp. 78-79; *id.* at Exhibit 10, pp. 10-14, 47-48; *id.* at Exhibit 12, pp. 130-33.

Mike Nelson believed pursuing litigation to recover the land would cost WOWSC significant amounts and open it up to countersuits by Friendship and the title company. Motion at Exhibit 8; Response at Exhibit 10, pp. 15-18, 44-46, 48-49, 70-71. He was concerned that it would tarnish WOWSC's reputation and the value of WOWSC's other real estate if the corporation attempted to walk back on its real estate transactions. Response at Exhibit 10, pp. 44-45. Nelson was also disappointed by the Bolton appraisal for several reasons, including that it did not consider

the land sold was raw land that needed to be fully developed. Motion at Exhibit 8, ¶ 6.[14] Bill Earnest believed it unlikely a suit against Friendship and Martin would be successful, and he had concerns about the Bolton appraisal, including that it was an outlier compared to other valuations of the land. *Id.* at Exhibit 5, ¶ 10. Joe Gimenez understood that a lawsuit path would be very costly, with no guarantee of success. *Id.* at Exhibit 6, ¶¶ 6, 9-10. He also questioned the Bolton appraisal because Bolton had been supplied information by the Plaintiffs. *Id.*, ¶ 7. Gimenez believed the 2015 Board had done their due diligence, and he spoke with them to confirm what they had done before selling the property. *Id.*, ¶ 8. Dorothy Taylor had concerns about the Bolton appraisal because it was an outlier compared to all the previous offers WOWSC had received for the land. Motion at Exhibit 7, ¶ 9. Taylor hoped that the 2019 Transaction, which cleaned up some of the issues with the Original Transaction, would stop the Plaintiffs' litigation and the expense it was causing WOWSC. *Id.*, ¶ 10. She also understood that a lawsuit against Friendship would cost WOWSC significant amounts of money with no guarantee of success. *Id.*

The Plaintiffs do not explain why the 2019 Board could not rely on statements by the 2015 Board regarding their due diligence or the various valuations and appraisals WOWSC had in its records. Motion at Exhibit 5, ¶ 10; *id.* at Exhibit 6, ¶ 8; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶ 6; Response at Exhibit 9, pp. 64-66; *id.* at Exhibit 10, pp. 10-11, 33-35; *see Young*, 2017 WL 2376828, at *10; *Life Partners Holdings*, 2015 WL 8523103, at *15-16; *Priddy*, 282 S.W.3d at 597. The Plaintiffs do not explain why the 2019 Board could not, in its business judgment based on the information before it, believe other valuations besides Bolton's were more reliable. Motion at Exhibits 5-8; Response at Exhibit 10, pp. 50-53, 56-58, 60, 65-68, 75. They do not explain why they could not rely on advice of counsel and other professionals. TEX. BUS. ORGS. CODE § 3.102;

[14] Nelson's declaration contains a paragraph numbering error. This refers to the second paragraph 6.

Motion at Exhibit 8-B, art. 8, ¶ 19; Response at Exhibit 10, p. 17, 46; *id.* at Exhibit 12, pp. 133-34. They do not explain how the 2019 Board Directors can be held personally liable for decisions made to rectify mistakes they saw in the Original Transaction and ensure a superseded agreement was entered at meetings that fully complied with TOMA. Once more, the Plaintiffs improperly stack inference upon inference and suspicion upon suspicion in claiming the 2019 Board acted in bad faith. *Marathon Corp.*, 106 S.W.3d at 727-28.

b. Piper Lane

The Plaintiffs complain about Piper Lane, contending that the Original Transaction did not include Piper Lane and that the 2019 Board somehow "gave away" Piper Lane to Friendship in the 2019 Transaction. The Directors addressed this in their Motion. The Original Transaction was for 4.3 acres—the exact acreage that includes Piper Lane. Motion at Exhibit 8-G (WOWSC000027). At the WOWSC corporate representative deposition, Mike Nelson explained that the company (the 2019 Board) believed the Original Transaction included Piper Lane on the basis of the Original Transaction Contract (4.3 acres) and the Stewart Watson survey of the conveyed property from early 2016. Response at Exhibit 12, pp. 20-33, 43-46, 138; *see also* Motion at Exhibits 8-G, 8-DD; Response at Exhibit 11, pp. 5-6. WOWSC sold the 4.3 acres to Friendship for $203,000 and then received additional consideration when entering the 2019 Transaction. Motion at Exhibits 8-G, 8-X; Response at Exhibit 12, p. 139. There is no evidence the 2019 Board acted in bad faith or in a manner they did not reasonably believe was in the best interest of the corporation in agreeing to correct the deed to include Piper Lane. Motion at Exhibits 8-L, 8-X.

The Directors further note that, at least according to the Burnet County Appraisal District, Piper Lane is currently appraised at **$12,902**. https://propaccess.trueautomation.com/c

lientdb/Property.aspx?cid=85&prop_id=117532. The Plaintiffs are well aware that the 2019 Transaction provided WOWSC with additional consideration for the transaction. Motion at Exhibit 8-X. Even if there is debate regarding whether the Original Transaction included Piper Lane, the Plaintiffs' idea that WOWSC "gave away" Piper Lane is unsupportable. At most, it would be a complaint, once more, that the Board was wrong for assigning a value of $5 rather than the $10 the Plaintiffs seem to believe is the "true" value of Piper Lane. There is no Texas case holding a director personally liable for being mistaken about the "true" value of property.

The Plaintiffs suggest that only members of the Spicewood Airport and Pilots Association have the right to use Piper Lane and that the 2019 Transaction cut off WOWSC's access to its remainder tract. This is demonstrably false. The 2019 Board strengthened an easement to the remainder tract to ensure it can be accessed. Motion at Exhibits 8-V, 8-X. And there is no evidence in this record that only Pilots Association members can "use" Piper Lane and that WOWSC is somehow precluded from "using" Piper Lane.[15] The Plaintiffs' entire "landlocked" argument regarding Piper Lane and the remainder tract is a red herring.

But more to the point, the Plaintiffs provide no real explanation of how the 2019 Board Directors can be ***personally liable*** if they were wrong regarding Piper Lane. That mistake would amount to no more than mismanagement or neglect—not subjective bad faith—which are

[15] Martin's declaration does not state that Pilots Association members have exclusive use of Piper Lane. Motion at Exhibit 1, ¶ 7. She stated that all members of the Pilots Association have access to Piper Lane. *Id.* In any event, because WOWSC is a water supply corporation that, under its articles of incorporation, serves the sole purpose of furnishing water supply and sewer services, it is unclear why WOWSC would be "using" an airport taxiway. Motion at Exhibit 8-A, art. 4. WOWSC is obviously not a pilot or in the airplane or airport business. The only reason WOWSC would have "used" Piper Lane in the past is because its wastewater treatment plant was previously on the airport property. That is no longer the case—WOWSC airport land is now vacant, surplus property. Presumably, if WOWSC were to sell its remainder tract in the future, the purchaser would either choose to develop that land for airport use (and thus join the Pilots Association, as other airport users do) or else develop it for residential use and access the land by Soda Creek Road. *See* Motion at 23-27.

protected from the business judgment rule and safe harbor provisions. *Poe*, 591 S.W.3d at 641; *Life Partners Holdings*, 2015 WL 8523103, at *14. To the extent the Court believes a fact issue exists regarding whether the Piper Lane piece of the transactions is valid, it can limit trial to the validity of that part of the transaction. The Directors (besides Martin to the 2019 Transaction) were not parties to either transaction and need not be parties to such a trial.

c. Advancement of Legal Expenses

The Plaintiffs complain, without briefing, that the WOWSC should not advance legal expenses to sued Directors. The Directors explained the legal framework authorizing advancement of expenses under Business Organizations Code Chapter 8 in their Motion, which the Plaintiffs do not contradict. Motion at pp. 35-37. There is no evidence WOWSC did not comply with Chapter 8 in advancing legal expenses, and the Plaintiffs do not even attempt to explain how this chapter was not complied with. The WOWSC also previously adopted policies expressly authorizing the company to advance legal costs. Supplemental Evidence at Exhibit 15-B, art. IV. The 2019 Board relied on advice of counsel that the advancement of litigation expenses complied with Texas law. Motion at Exhibits 5-8.[16]

The Plaintiffs also state, without argument, that the Directors did not provide written affirmations until November 2019, when the 2015 Board was first sued for damages and the 2019 Board first named as defendants. Response at 55. They do not address that Chapter 8 does not require written affirmations from former Directors, nor that the Directors' legal expenses were minimal until the Plaintiffs elected to considerably complicate and ramp up expenses in this case

[16] The Plaintiffs complain that an attorney opinion regarding advancement has not been produced in this case. Response at 55. They again mislead. They are well aware that the 2019 Board Directors stated in response to interrogatories that they received advice of counsel orally during executive session. Bill Earnest Response to Interrogatory No. [14] (Dec. 10, 2020); Mike Nelson Response to Interrogatory No. [14] (Dec. 10, 2020); Joe Gimenez Response to Interrogatory No. [14] (Dec. 10, 2020); Dorothy Taylor Response to Interrogatory No. [14] (Dec. 10, 2020). There is no written opinion to produce.

by suing for damages virtually every Director who has served on the Board the past six years. *See* Motion at 35-37.[17]

Finally, the Plaintiffs suggest, without argument, that WOWSC cannot advance Martin's fees when the company has released her from liability. Response at 55. The Plaintiffs do not explain this theory. But WOWSC has not sued Martin—the Plaintiffs have. If WOWSC sued Martin, it would likely be in breach of the 2019 Transaction—but it has not. Motion at Exhibit 8-X, art. III. Additionally, Chapter 8 contains no provision prohibiting a company from advancing defense costs to a sued former or current director under circumstances suggested by the Plaintiffs. Chapter 8 broadly authorizes advancement of legal expenses to current and former directors. TEX. BUS. ORGS. CODE §§ 8.104, 8.105.

Notably, if the Directors prevail in this suit, it is ***mandatory*** for the company to fully pay the Directors' legal costs. *Id.* § 8.051. Thus, if this Court grants summary judgment in the Directors' favor, WOWSC will be required to pay the Directors' fees anyway, as a matter of law.

3. Business Organizations Code Section 7.001

As explained, to overcome the Directors' safe harbor immunity, the Plaintiffs are required to put forth evidence that the Directors did not act (1) in good faith, (2) with ordinary care, ***and*** (3) in a manner they reasonably believed was in the best interest of the corporation. They must show all three. The Directors have explained above that there is no evidence supporting subjective bad faith or that they did not reasonably believe they were acting in the best interest of the corporation. The Plaintiffs also cannot establish a lack of ordinary care because the Directors are

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[17] The Plaintiffs previously sued former directors Norm Morse and David Bertino as well, who did not even participate in the transactions the Plaintiffs complain of. The Plaintiffs exempted their allies, Bill Stein and Bill Billingsley, who also served on the Board during this time period.

As Mike Nelson testified at his deposition, if the Plaintiffs' lawsuits were dropped, WOWSC and its Directors would no longer be in litigation and the legal expenses the Plaintiffs complain about—and which they are causing—would stop. Response at Exhibit 10, p. 10.

immunized against liability for violating any duty of care under Business Organizations Code section 7.001 and the WOWSC bylaws. TEX. BUS. ORGS. CODE § 7.001; Motion at Exhibit 8-B, art. 8, ¶ 18.

Section 7.001 exculpates directors for liability for breach of the duty of care (i.e., gross negligence). *Life Partners Holdings*, 2015 WL 8523103, at *8. As authorized by section 7.001, the WOWSC bylaws similarly limit Director liability for violations of a duty of care. Motion at Exhibit 8-B, art. 8, ¶ 18. Because the Directors are immunized from liability for any violation of a duty of care, the Plaintiffs cannot satisfy the "ordinary care" element of the safe harbor provisions. Thus, the Plaintiffs cannot be held personally liable as a matter of law.

4. Texas courts routinely rule in directors' favor as a matter of law under the business judgment rule and safe harbor provisions.

This Court can rest assured that Texas courts routinely grant summary judgment and other dispositive motions in favor of directors under the business judgment rule and safe harbor provision in cases similar to this one. A representative sample is below:

- *Burns*, 2012 WL 3776513: The Houston (First) Court of Appeals affirmed a take-nothing summary judgment in favor of non-profit corporation directors under the safe harbor provision. The plaintiffs failed to put forth evidence demonstrating the directors acted in bad faith or did not "reasonably believe[] their conduct was in the best interest of the corporation" in allegedly destroying condo owner's property. *Id.* at *9-10.

- *Young*, 2017 WL 2376828: The Houston (First) Court of Appeals affirmed a take-nothing summary judgment in favor of non-profit directors. Plaintiffs had sued directors for breach of fiduciary duty, breach of contract, and other claims, contending that the directors knowingly enforced in an unlawful way HOA covenants against him, knowingly misapplied his payments for maintenance assessments, and violated statutes and deed restrictions. The plaintiffs failed to put forth evidence that the directors did not act in good faith, with ordinary care, and in a manner they reasonably believed to be in the best interest of the company. *Id.* at *9-10.

- *Priddy*, 282 S.W.3d 588: The Houston (Fourteenth) Court of Appeals affirmed summary judgment in nonprofit directors' favor under the safe harbor statute. The plaintiffs sued the directors of a non-profit corporation that administered the common areas of a subdivision comprised of airplane hangars and homes for fraud, breach of fiduciary duty, and violations of deed restrictions. The court of appeals concluded that the summary judgment evidence supported the directors' position that they relied in good faith on information prepared by previous boards and that the safe harbor statute immunized them from personal liability. *Id.* at 595-97.

- *Green v. Port of Call Homeowners Ass'n*, No. 03-18-00264-CV, 2018 WL 4100855 (Tex. App.—Austin Aug. 29, 2018, no pet.): The Austin Court of Appeals affirmed the grant of a take-nothing summary judgment rendered in favor of non-profit corporation directors. *Id.* at *4-6. The property owner plaintiffs alleged that the board of directors failed to comply with governing documents, violated statutes, misappropriated funds, and engaged in other misconduct regarding their management of the homeowners' association. The court of appeals concluded that the plaintiffs did not raise genuine issues of material fact regarding whether the directors acted in good faith, with ordinary care, or in a manner they reasonably believed to be in the best interest of the association. *Id.* at *5.

- *Resolution Trust Corp. v. Norris*, 830 F. Supp. 351 (S.D. Tex. 1993): Corporation sued directors for ultra vires acts, breach of fiduciary duty, fraud, and other claims to recover over $200 million in alleged losses related to real estate loans. The district court granted a 12(b)(6) motion to dismiss. The failure of the directors to monitor the acts of individuals charged with preparing the loans and then presenting loans that did not comply with federal or state regulations for board approval was not an "ultra vires" act so as to be excluded from the protection of the Texas business judgment rule. *Id.* at 356-57. Because there was no indication that the directors knowingly engaged in illegal conduct, the actions (including approval of loans that violated state and federal law) was not ultra vires and therefore not taken outside the business judgment rule. *Id.* at 357.

- *Life Partners Holdings*, 2015 WL 8523103, at *14: The federal district court granted summary judgment in favor of the directors of a corporation who were sued for breach of fiduciary duty and other claims. There was no genuine issue of material fact that the directors at issue were disinterested or that they acted in bad faith, which requires "***scienter*** on the part of the defendant director." *Id.* at *14, 20-21 (emphasis added).

- *Roels*, 2020 WL 4930041: The Austin Court of Appeals dismissed most of a shareholder suit brought against for-profit corporation directors under the TCPA because the shareholders did not put forth evidence overcoming the business judgment rule. *Id.* at *1, 10. Rather, the plaintiffs' true allegations concerned director actions that were "negligent, unwise, inexpedient, or imprudent"—not that were ultra vires or fraudulent. *Id.* at *9.

- *Chapman*, 2018 WL 4139001: The court of appeals affirmed the grant of summary judgment in favor of company directors under the business judgment rule. The court noted that the business judgment rule protects against negligence and even gross negligence. *Id.* at *15. Because the plaintiff's claims regarding the director's actions amounted to gross negligence rather than fraud, dishonesty, or self-dealing, summary judgment under the business judgment rule was appropriate. *Id.*

- *Moody v. Nat'l Western Life Ins. Co.*, No. 01-18-01106-CV, 2020 WL 7251459 (Tex. App.—Houston [1st Dist.] Dec. 10, 2020, no pet.): Applying Delaware law (the law of that case), the Houston (First) Court of Appeals affirmed the dismissal of the shareholder plaintiff's claims because the plaintiff failed to scale the business judgment rule. *Id.* at *14. The plaintiff's allegations that the directors "may have been motivated by some interest other than a genuine attempt to advance the best interest of the corporations" was not sufficient to survive a plea to the jurisdiction. *Id.* at *11.

- *Sneed*, 465 S.W.3d at 187: The Texas Supreme Court observed: "It is insufficient for a shareholder plaintiff to allege a derivative right to relief against a corporation's officers or directors for breach of a duty based upon "mere mismanagement or neglect ..., or the abuse of discretion lodged in them in the conduct of the company's business. ***Such allegations may be disposed of on special exceptions or summary judgment.***" (Emphasis added.) (Citations omitted.)

This Court should render a take-nothing judgment in the Directors' favor in this case as well.

C. The So-Called "Illegal and Unauthorized Acts" the Plaintiffs Allege

1. The Plaintiffs misconstrue Texas Law.

The Plaintiffs claim the business judgment rule, safe harbor provisions, and other exculpatory provisions do not apply because the Directors' acts were purportedly unauthorized by WOWSC governing documents and were fraudulent. The Plaintiffs misinterpret Business Organizations Code section 20.002 and the ultra vires exception to the business judgment rule and safe harbor provisions.[18]

[18] For sure, there are very few cases concerning alleging ultra vires acts, likely because of how expansive corporate powers are in Texas and because of the robust protections shielding directors from personal liability. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 2.001, 2.003, 2.008, 2.101, 3.005(a)(3), 22.221, 22.230, 22.235.

a. Plaintiffs must show unauthorized, illegal acts.

Section 20.002 provides that an act of the corporation to transfer property is ***not*** invalid by virtue of being beyond the scope of the purpose of the corporation or inconsistent with a limitation on the authority of a director to exercise a statutory power of the corporation, as expressed in the articles of incorporation. TEX. BUS. ORGS. CODE § 20.002(b). As relevant here, the provision goes on to state that: "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 ... by the corporation, acting ... 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...." *Id.* § 20.002(c)(2).

Notably, section 20.002(c) says nothing about damages or holding a director personally liable.[19] Texas case law and other statutory provisions, though, confirm there are heightened protections against holding a director ***personally liable***. First, as explained above, safe harbor provisions and the business judgment rule immunize directors from personal liability for negligence and even gross negligence. Second, what is considered an "ultra vires" act so that a director might lose those statutory and common law protections is not simply failure to comply with a governing document. Case law is clear that a director may only be potentially held personally liable for an alleged ultra vires act if the director knowingly commits an unauthorized ***and*** an illegal act. *See, e.g.*, *Staacke v. Routledge*, 241 S.W. 994, 999 (Tex. 1922); *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *11 (Tex. App.—Houston [14th Dist.] 2000,

[19] The only part of the section addressing damages is the provision authorizing the Court to award damages to the corporation (WOWSC) or the other party to the contract (Friendship/Martin) for loss or damages resulting from the court setting aside and enjoining performance of the contract. *Id.* § 20.002(d).

no pet.); *Sutton v. Reagan & Gee*, 405 S.W.2d 828, 836 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); *Gearhart*, 741 F.2d at 719; *Resolution Trust*, 830 F. Supp. at 357.

The Plaintiffs suggest this principle does not apply in a representative suit alleging ultra vires acts because, in that context, a director does not enjoy the protection of the corporate veil. No case supports this, and certainly not the *Sutton* case cited by the Plaintiffs. *Sutton* contains a discussion of piercing the corporate veil as a way to hold a ***shareholder*** personally liable for acts of the corporation. 405 S.W.2d at 836-37. Earlier in the opinion, *Sutton* directly addresses ***director*** liability for alleged ultra vires acts:

> While there is authority to the effect that a director is personally liable if he participates, or allows the corporation to engage, in ultra vires acts, our 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 a corporation.

Id. at 836. This is not a corporate veil-piercing case, and there is no claim attempting to pierce the WOWSC corporate veil. Texas case law is clear that a plaintiff must demonstrate an unauthorized, illegal act done knowingly to potentially hold a director personally liable.

The Plaintiffs additionally claim that "illegal acts" can be more than just violations of statute. The Directors' Motion recognizes case law stating an illegal act is one that is inherently and essentially evil or immoral, violates a positive statutory prohibition, or is against public policy. Motion at 20 (citing *Whitten v. Republic Nat'l Bank of Dallas*, 397 S.W.2d 415, 418 (Tex. 1965)). But the Texas Supreme Court has made clear that 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. *Whitten*, 397 S.W.2d at 418. And to call the actions the Plaintiffs complain about "evil or immoral" would take the ultra vires doctrine to an absurd place and is not what the term "malum in se" means. *See id.* (using corporate funds to pay the personal debt of an officer is not "evil or immoral," despite the Texas Business Corporation Act prohibiting lending money to

directors or officers); *Tovar v. State*, 978 S.W.2d 584, 587 n.4 (Tex. Crim. App. 1998) (defining "malum in se" as being "evil" and including such offenses as murder and larceny). ***Any*** alleged dereliction of corporate duties would be "evil" and akin to murder or larceny under the Plaintiffs' logic. Allegedly mismanaging corporate assets and authorizing an interested director transaction in violation of TOMA does not fall within the serious nature of malum in se. *See Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 812 & n.3 (Tex. 2019) (Blacklock, J., concurring) (noting distinction between malum in se (lawbreaking that is wrong in itself) and malum prohibitum (lawbreaking that is "wrong only because the government happens to have made it illegal")).

b. Plaintiffs must show "knowing" violations of law.

The Plaintiffs also claim a violation need not be "knowing" to hold a director personally liable. That flies in the face of the business judgment rule, which protects directors against negligence and even gross negligence, and the safe harbor provisions, which require subjective bad faith for a director to lose its protections. *See* Section II.B., *supra*. WOWSC's bylaws similarly require "intentional misconduct" or a "knowing violation of the law on the part of the director" for the corporation or the corporation's membership to seek monetary damages from the director. Motion at Exhibit 8-B, art. 8, ¶ 18; *see also* TEX. BUS. ORGS. CODE § 7.001 (authorizing companies to immunize directors from liability for damages).

Clearly, a director mistakenly violating a bylaw or statute is not sufficient to impose personal liability under Texas law or the WOWSC bylaws. Contrary to what the Plaintiffs seem to argue, the law does not impose a strict liability standard for any of the alleged violations of bylaws or statutes. *See Sutton*, 405 S.W.2d at 836 (merely committing ultra vires act is not sufficient to hold a director personally liable); *Resolution Trust*, 830 F. Supp. at 357 ("[T]o call such actions ultra vires, absent an allegation of actual knowledge of illegal conduct, distorts the meaning of

ultra vires. It blurs the already murky distinction between ultra vires acts that are outside the business judgment rule and negligent acts that are protected by the rule.").[20] The Plaintiffs seem to believe if they use the phrase "ultra vires" or bring a purported "claim" under section 20.002(c)(2), then they have automatically overcome the safe harbor provisions, business judgment rule, section 7.001, and the WOWSC bylaws. That is incorrect.

c. The Directors acted in their capacity as WOWSC directors.

The Plaintiffs also allege that the Directors were not acting as WOWSC directors in causing WOWSC to enter the Original Transaction or the 2019 Transaction. This argument is puzzling. Both transactions were entered into by WOWSC. The affairs of WOWSC are managed by its board of directors. TEX. BUS. ORGS. CODE § 22.201; Motion at Exhibit 8-A, art. 9. The Plaintiffs may believe WOWSC should not have entered into those transactions, but there is no evidence that any of these Directors were engaging in any acts except on behalf of WOWSC. There is also no evidence any Director besides Martin had any personal interest in either transaction—the evidence instead establishes the opposite. Motion at Exhibits 2-8.

2. The Plaintiffs' Laundry List of Purported Illegal, Unauthorized Acts

The Directors address below the actions the Plaintiffs claim are ultra vires and illegal.[21] *See* Response at 65-66 (listing alleged ultra vires, illegal acts). At the outset, the Plaintiffs' arguments regarding illegality are smoke and mirrors. The Plaintiffs' issue is really price. If the 2015 Board had fully complied with TOMA but still sold the land to Friendship for $203,000, the

[20] The Plaintiffs claim *Resolution Trust* is inapplicable because it concerned alleged illegal acts by employees. The opinion explains the distinction between protected acts of negligence and unprotected acts of knowing violation of the law. 830 F. Supp. at 357. Additionally, the WOWSC bylaws and Texas statutes and case law state the same, as explained above.

[21] The Plaintiffs also identify, without briefing, advancement of legal expenses, a purported "violation" of the safe harbor provisions and purported gross negligence, as supposed "illegal" acts. Response at 65-66. Those are all addressed in Section II.B. above.

Plaintiffs would invariably still have brought this suit. If the corporate resolution contained no alleged flaws, that would not resolve the Plaintiffs' complaint. That the Plaintiffs are ***still*** suing after the 2019 Board corrected many of the issues they complain about tells the full story of the nature of the Plaintiffs' complaint. Purported TOMA violations or failure to adopt a proper corporate resolution did not cause the alleged damages the Plaintiffs are claiming.[22]

a. Purported "Use of Unauthorized Powers for an Unauthorized purposes" or "Exceeding Limits on Powers"

The Plaintiffs claim the Directors exceeded expressed limitations on their powers. Apparently, they refer to the provision of WOWSC's articles of incorporation cited in their Third Amended Petition, which provides: "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...." Motion at Exhibit 8-A, art. 6. The Directors addressed this in their Motion. The WOWSC may sell property to pay down debt incurred in building a new wastewater treatment plant. Motion at 21-29 (and cited exhibits); *see also* Supplemental Evidence at Exhibit 15-D, Exhibit 20.

Again, the Plaintiffs' issue in this case and damage model is, in reality, about the selling price. And no provision of WOWSC's governing documents, nor any state law, mandates that the corporation must sell its assets for any particular price or market property with a realtor before selling. Further, as explained, the 2015 Board believed it ***was*** getting a good price based on all the information before it at that time. *See* Section II.B., *supra*. The Plaintiffs point to *Golson v.*

[22] It is also noteworthy that the Plaintiffs have not brought a declaratory judgment action to invalidate the transaction under the interested director provision (TEX. BUS. ORGS. CODE § 22.230), as plaintiffs normally do when attempting to attack interested director transactions, nor sued under TOMA to attempt to invalidate the transaction. They seem to want to ***personally*** target the Directors for money damages rather than pursue avenues that could arguably unwind the transaction. This fact highlights the Plaintiffs' motive in this suit is to hurt the Directors rather than pursue other potentially available remedies.

Capehart as supporting a suit for damages against a director for purportedly selling property for less than it is worth. Response at 63-64 (citing 473 S.W.2d 627, 628 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.)). That is not what that case says. In that estate dispute, the executor sued to set aside a land sale when land was "sold" for $1.00. *Id.* at 627-28. That was not a suit seeking to hold a corporate director personally liable, but an estate suit to unwind a transaction. The Directors can locate ***no*** case in which disinterested corporate directors have been found personally liable for purportedly selling property for an insufficient price.

In terms of the 2019 Board, it is unclear how the Plaintiffs believe they acted inconsistently with the WOWSC governing documents. WOWSC has the right to settle potential litigation, advance defense costs, and negotiate an agreement that it believes is more favorable than the initial one. *See* Section II.B., *supra*. The Plaintiffs continue to provide no real explanation regarding how the 2019 Board even conceivably acted ultra vires and illegally in taking these actions.

Finally, in many of the numerous cases set forth in Section II.B above, those plaintiffs alleged corporate directors exceeded their authority under their governing documents and violated statutory provisions. Yet courts granted judgment as a matter of law under the safe harbor provisions or business judgment rule. *See, e.g., Green*, 2018 WL 4100855, at *1-2, 4-5 (allegation that directors failed to comply with Articles of Association and Debt Collection Practices Act); *Young*, 2017 WL 2376828, at *3 (alleging directors violated deed restrictions governing HOA and Texas Property Code provisions). Simply slapping the "ultra vires" label on an allegation does not mean the Directors are not protected from personal liability.[23]

[23] The Plaintiffs point to previous Director or Board statements before the Original Transaction expressing that the Board intended to sell the entire 11 acres (rather than only a part) and that WOWSC had a duty to its members to market the land and obtain the best price for the property. The Directors do not dispute those statements were made. What they dispute is (1) that they were prohibited, as directors, from changing their mind based on new information before them, or (2) that they did not believe they were getting the best price for the land, as the summary judgment record conclusively proves.

b. Interested Director Transaction

The Plaintiffs suggest the Directors are personally liable because the Original Transaction was purportedly an invalid interested director transaction.[24] At the outset, when transactions are invalid interested director transactions, a plaintiff's primary remedy is to bring a declaratory judgment action seeking to invalidate the transaction. *See* TEX. BUS. ORGS. CODE § 22.230. Section 22.230 "saves" interested director transactions and immunizes interested directors from personal liability so long as that provision applies.

An interested director transaction is one in which a corporation enters a transaction with a sitting director or an entity in which a director is a member or has a financial interest. *Id.* § 22.230(a). Undisputedly, Martin was an interested director in regard to the Original Transaction. There is no evidence, however, that the Directors who approved the Original Transaction—Madden, Mebane, and Mulligan—had any personal interest in the transaction. The uncontroverted evidence establishes the opposite. Motion at Exhibit 2, ¶ 9; *id.* at Exhibit 3, ¶ 8; *id.* at Exhibit 4, ¶ 8; *see* Supplemental Evidence at Exhibit 20 (transcript of December 19, 2015 board meeting providing no indication Madden, Mebane, or Mulligan have any personal financial interest in Friendship or the transaction).[25] As relevant here, section 22.230 "saves" such an interested director transaction, if:

> The material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by... the corporation's board of directors..., and the board... in good faith and with ordinary care authorize the contract or transaction by the affirmative vote of the majority of the disinterested directors....

[24] The 2019 Transaction was not an interested director transaction because Martin was no longer on the WOWSC board. There is no evidence any Director from the 2019 Board has any personal interest in the Original Transaction or the 2019 Transaction. The evidence establishes the opposite. Motion at Exhibits 5-9. The Original Transaction, however, was undisputedly an interested director transaction because Martin was then on the board. The 2019 Transaction superseded the Original Transaction. *Id.* at Exhibit 8-X.

[25] Again, it is uncontroverted that Bill Earnest was not at the December 19, 2015 meeting and did not vote to approve the Original Transaction. *See, e.g.*, Motion at Exhibit 5; Supplemental Evidence at Exhibit 20.

TEX. BUS. ORGS. CODE § 22.230(b); *see also Roel*, 2020 WL 4930041, at *5.[26]

The uncontroverted evidence establishes the 2015 Board complied with this provision. It is undisputed that the 2015 Board (1) knew of the relationship between Martin and Friendship (that Friendship was her company), (2) Martin (the interested director) recused herself from the vote on Friendship's offer, and (3) a majority of disinterested Directors approved the transaction. Motion at Exhibits 1-4; Supplemental Evidence at Exhibit 20. These fundamental facts are not in dispute, and this is all the Business Organizations Code requires. The Plaintiffs seem to suggest that the "material facts" regarding the "contract or transaction" were not disclosed at the December 19, 2015 meeting. The contract, which was presented by Martin to the disinterested Directors, says what it says, and its terms were before the 2015 Board because the contract itself was presented and signed at that meeting. Motion at Exhibit 8-G; Supplemental Evidence at Exhibit 20. The material terms of the Original Transaction are contained in the contract itself.[27] The Plaintiffs also claim that Martin told the 2015 Board that she had "a partner who owned an unspecified equity interest." Response at 48. The December 19, 2015 recording does not back that up. Martin stated at the meeting that she had it "worked out with a partner and I've got the financing arranged." Supplemental Evidence at Exhibit 20, pp. 3, 7. She did not state that Friendship had other members beyond herself.[28] In any event, section 22.230 just requires that the "material facts as to the

[26] An interested director transaction can also be "saved" even if a majority of disinterested directors do not approve the transaction, if the transaction is fair to the corporation. TEX. BUS. ORGS. CODE § 22.230(b)(2). The fairness prong is not at issue in this summary judgment Motion since a majority of disinterested Directors approved the transaction.

[27] The Plaintiffs suggest Martin was required to disclose various items that are not true and represent nothing except the Plaintiffs' opinion regarding Martin's purported motives. Response at 48. Again, the contract itself sets forth its terms, and the Board reviewed and approved the contract at the meeting.

[28] The partner she could have been referring to may have been her lender for the purchase, the Whiddens. Response at Exhibit 6, pp. 167, 180, 233.

relationship or interest" are disclosed to or known by the Board. TEX. BUS. ORGS. CODE § 22.230(b). The uncontroverted evidence establishes the 2015 Board members present at the December 19, 2015 meeting knew that Friendship was Martin's business. Supplemental Evidence at Exhibit 20, pp. 39, 40, 69; *see also* Motion at Exhibits 2-4.

Additionally, section 22.230 envisions that only the ***interested*** director might potentially be liable for an interested director transaction, and this is because only an interested director could engage in self-dealing behavior that might breach the duty of loyalty to the company. TEX. BUS. ORGS. CODE § 22.230(e); *see Imperial Grp. (Tex.), Inc. v. Schonick*, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref'd n.r.e.) (duty of loyalty demands there shall be no conflict between duty and self-interest). Disinterested Directors like Madden, Mulligan, and Mebane have no self-interest in a transaction. But even the interested director is immune from liability if section 22.230 is satisfied.

The Plaintiffs grasp at straws in claiming section 22.230 does not apply because the contract was not "otherwise valid and enforceable." They contend WOWSC contracted with a "nonexistent entity," that the contract was "tainted by fraud," and that it was a contract with a sitting director. Response at 74. First, there is zero evidence of fraud in this case. To recover for fraud, a plaintiff must establish the defendant knowingly or recklessly made a false, material misrepresentation to the plaintiff with intent that the plaintiff act on it, causing the plaintiff damages. *Int'l Bus. Machs. Corp. v. Lufkin Indus.*, 573 S.W.3d 224, 228 (Tex. 2019). The Plaintiffs do no identify any "knowing" or "reckless" "false, material misrepresentation" that was made by a Director in connection with the Original Transaction or 2019 Transaction. *See* Motion at 44-45.[29]

[29] The Plaintiffs again claim appraiser Jim Hinton's appraisal was fraudulent. Response at 35. There is no evidence it was "fraudulent," and Jim Hinton is not a party in this case.

As explained above, if anything, there was negligence. Second, the unrefuted evidence demonstrates Friendship was Martin's DBA (with its own checking account and so forth) that was converted to an LLC before the Original Transaction closed. Motion at Exhibit 1, ¶ 3.[30] The Plaintiffs cite no authority supporting that the Original Transaction was invalid due to the Friendship business structure.

Finally, in regard to conflicts of interest, section 22.230 itself is what saves interested director transactions. The Plaintiffs complain the 2015 Board had not adopted a written conflict of interest policy as required by WOWSC's bylaws. Motion at Exhibit 8-B, art. 8, ¶ 18. The bylaws, though, authorize a director to engage in business with the company if the director does not vote on any matter in which they may have a pecuniary interest. *Id.* And section 22.230(d) expressly authorizes an interested director to be present in and participate in a meeting regarding the interested director transaction TEX. BUS. ORGS. CODE § 22.230(d).

c. Purported "Corporate Waste"

The Plaintiffs argue the Directors "wasted" corporate assets by selling land for less than they believe it was worth. The Directors addressed price above. A Director does not act ultra vires and illegally by selling property for less than it is arguably worth—and particularly here where all the evidence demonstrates the Directors believed WOWSC was getting a good price. *See* Section II.B., *supra*.

Few Texas cases discuss "corporate waste." Under Delaware law, a plaintiff may in rare circumstances recover on a claim of waste. "To recover on a claim of waste, a plaintiff must prove

[30] Exhibit 13 of Plaintiffs' Response was apparently supposed to have been Dana Martin's deposition transcript from the Friendship corporate representative deposition, but it was not filed or attached. In any event, as Plaintiffs are aware, Martin testified that before Friendship converted to an LLC in early 2016, Friendship operated as Martin's DBA, had done business around Windermere Oaks for years, had its own checking account, and so forth. Friendship Corporate Representative Deposition, pp. 11-15, 23-25.

that the relevant exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.' Thus, a claim of waste will lie 'only in the rare, unconscionable case where directors irrationally squander or give away corporate assets.'" *Zutrau v. Jansing*, No. 7457-VCP, 2014 WL 3772859, at *17 (Del. Chan. July 31, 2014) (quotations omitted). It is limited to extreme cases such as where "the challenged transaction served no corporate purpose or where the corporation received no consideration at all." *Arnaud van der Gracht de Rommerswael on Behalf of Rent-A-Center, Inc. v. Speese*, No. 4:17CV227, 2017 WL 4545929, at *8 (E.D. Tex. Oct. 12, 2017) (quoting *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)). "This stringent standard is a corollary of the proposition that where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose." *Id.* at *20; *see also In re Denbury Res., Inc.*, No. 05-09-01206-CV, 2009 WL 4263850, at *1 (Tex. App.—Dallas Dec. 1, 2009, orig. proceeding). "A corporate waste claim fails 'if there is any substantial consideration received by the corporation, and ... there is a good faith judgment' that under the circumstances the transaction was worthwhile." *Arnaud*, 2017 WL 4545929, at *8 (quoting *White v. Panic*, 783 A.2d 543, 583 (Del. 2001)).

In Section II.B above and in their Motion, the Directors explain their business purpose for the Original Transaction and 2019 Transaction. The 2015 Board believed, based on previous offers and professional opinions, that they were receiving a good price. The 2019 Board, after receiving public input, entered the 2019 Transaction to improve the terms of the Original Transaction and resolve the company's dispute with Friendship and Martin. It is undisputed that WOWSC netted $200,000 from the land sale, that it then used to pay down its debt incurred building its new wastewater treatment plant. Motion at Exhibits 2-4, 8-F, 8-G; Supplemental Evidence at Exhibit

15-D. This is hardly a case where the sale and later settlement "cannot be attributed to any rational business purpose" or where WOWSC received no consideration at all.

d. The Corporate Resolution

The Plaintiffs argue that WOWSC's March 2016 corporate resolution was not actually approved at the February 2016 board meeting and is therefore "fictitious" and "fraudulent." But they cannot dispute the 2015 Board did, in fact, approve the sale of the land to Friendship at the December 19, 2015 Board meeting. Motion at Exhibit 8-F; Supplemental Evidence at Exhibit 20, pp. 69-71. That the corporate resolution may bear the wrong date or was allegedly not formally and separately approved from the December 19, 2015 transaction approval does not make it somehow fraudulent. The Plaintiffs do not point to any law mandating that a board adopt a resolution at a separate board meeting from the meeting where the vote to approve the transaction occurred. TEX. BUS. ORGS. CODE § 22.255 ("A corporation may convey real property of the corporation when authorized by appropriate resolution of the board of directors or members.") The Plaintiffs also do not point to any evidence that the resolution is somehow "fraudulent" when WOWSC's board ***had*** approved the transaction at the December 19, 2015 meeting. The resolution does not memorialize a vote that never occurred.

Further, the Directors can locate no case in which a director has been held ***personally liable*** for a resolution purportedly not being "appropriate" or including wrong information. The lone case relied on by Plaintiffs regarding the corporate resolution is *Guarneri v. Kessler*, a Fifth Circuit case from 1938 concerning a deportation under the federal Immigration Act. 98 F.2d 580 (5th Cir. 1938). The immigrant was convicted of smuggling, served a prison term, and then was subject to deportation. The Fifth Circuit concluded the smuggling conviction was a crime of moral turpitude because it involved dishonesty and fraud and so the immigrant could be deported. *Id.* at 580-81.

The Plaintiffs cannot seriously equate a conviction of smuggling with a corporate resolution allegedly not being properly prepared and adopted—particularly when at an earlier meeting the 2015 Board undisputedly approved the land sale that was the subject of the resolution. Again, the Plaintiffs do not, in fact, seek to hold the Directors personally liable for the resolution purportedly not being proper. They seek to hold the Directors personally liable because they believe the land was sold to a sitting director for too little. That is the actual crux of their claim.[31] If the resolution had been formally approved in February 2016, there can be no doubt the Plaintiffs would still have brought their claim.

The Plaintiffs finally suggest the 2019 Board was required to adopt a corporate resolution under Business Organizations Code section 22.255 as well. The 2019 Transaction did not convey property—it superseded the Original Agreement, including by correcting a deed mistake in the Original Transaction. Motion at Exhibits 8-L, 8-X. Regardless, to the extent the 2019 Board was supposed to adopt a corporate resolution, the Plaintiffs do not explain how that failure would make those Directors ***personally liable*** for any alleged damages caused by the underlying transactions. There is no case or statute suggesting that failure to adopt a corporate resolution is grounds for holding a director personally liable. And there is certainly no evidence this was a "knowing" failure.

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[31] Texas Civil Practice and Remedies Code section 16.033 ***does*** time-bar any claim the Plaintiffs may have regarding the 2016 corporate resolution. The Plaintiffs have filed suit to recover real property, and they complain about defects in the corporate resolution approving the conveyance. Their pleading states they seek damages against the Directors to the extent their recovery of the real property does not compensate WOWSC for all loss and injury. Third Amended Petition ¶ 7.32. Section 16.033(a)(1) imposes a two-year limitations period on a person with ***any*** "right of action for the recovery of real property" for "failure of the record to show authority of the board of directors ... of a corporation...." The transaction deeds that the Plaintiffs claim were not properly approved by corporate resolution have been on file since 2016. Motion at Exhibit 8-H. This complaint is barred by limitations.

e. The Texas Open Meetings Act

The Plaintiffs do not appear to allege the 2019 Board violated TOMA, as they cannot. In approving the 2019 Transaction, WOWSC published notice of the subject of the meeting, solicited robust membership participation, and voted on the transaction in open meeting. Motion at Exhibits 8-T, 8-U, 8-X; *see also id.* at Exhibit 6, ¶ 10; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶¶ 6-7.

The Plaintiffs' alleged TOMA violations solely appear to concern the 2015 Board. As in their *TOMA Integrity* lawsuit, the Plaintiffs allege that the 2015 Board did not properly comply with TOMA in relation to the Original Transaction. They cite Texas Government Code section 551.002 (requiring meetings to be open except as provided by TOMA); 551.005 (requiring officials to complete open meetings training within a certain timeframe); 551.021 (requiring minutes or recordings of open meeting); 551.072 (requiring discussions of real property to occur in closed meeting); and section 551.102 (requiring final votes to occur in open meeting).[32] Notably, the Plaintiffs discuss TOMA extensively in their Response while simultaneously claiming this is not a TOMA suit.

This Court already adjudicated that WOWSC violated TOMA at the December 19, 2015 meeting. *See TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp.*, No. 06-19-00005-CV, 2019 WL 2553300, at *1 (Tex. App.—Texarkana Jun. 21, 2019, pet. denied). The court of appeals specifically discussed the requirements of several provisions of TOMA, including some of the ones the Plaintiffs point to now, in agreeing with this Court a TOMA violation occurred. *Id.*

[32] Some of these alleged violations are untrue and some debatable. For instance, the recording and transcript demonstrate the 2015 Board stated that they would bring Martin back in when they came out of executive session. Supplemental Evidence at Exhibit 20, p. 62, 70. They did not formally announce coming out of executive session, but they had stated executive session would end when she came back in. *Id.* at Exhibit 20. Another example is that, contrary to what the Plaintiffs suggest, the 2015 Board ***did*** create and publish minutes of their meetings, including the December 19, 2015 meeting. Motion at Exhibit 8-F. TOMA does not mandate publication of minutes on a website.

The Directors cannot see how any complaint concerning TOMA in relation to the Original Transaction is not barred by res judicata. *See Igal v. Brightstar Info. Tech. Grp.*, 250 S.W.3d 78, 86 (Tex. 2008); *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 58 (Tex. 2006) (res judicata applies to claims which, through the exercise of diligence, could have been litigated in a prior suit).

But there are several other issues with attempting to use TOMA as the "hook" for opening up the 2015 Board Directors to personal liability. First, any complaint under TOMA is barred by limitations. The limitations period for a criminal action against an individual under TOMA is two years, and the limitations period for a civil action is four years. TEX. CODE CRIM. PROC. art. 12.02; TEX. CIV. PRAC. & REM. CODE § 16.051. No Director has ever been convicted, indicted, or even investigated for a criminal violation of TOMA. *See, e.g.*, § 551.144 (a person commits an offense by knowingly participating in a close meeting that is not permitted under TOMA); § 551.143 (a person commits an offense if the person knowingly conspires to circumvent TOMA by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of TOMA). *But see State v. Doyal*, 589 S.W.3d 136 (Tex. Crim. App. 2019) (concluding that section 551.143 is unconstitutionally vague on its face).

Second, any alleged TOMA violations in regard to the Original Transaction were cured and mooted when the 2019 Board approved the 2019 Transaction. The 2019 Transaction, which superseded the Original Transaction, was undisputedly done in compliance with TOMA. Motion at Exhibits 8-T, 8-U, 8-X; *see also id.* at Exhibit 6, ¶ 10; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶¶ 6-7; *see Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).[33]

[33] The Plaintiffs claim that because they seek damages, the 2019 Transaction could not have mooted any controversy regarding the Original Transaction. Response at 69-70. Yet if the alleged "illegal" acts by the 2015 Board were rectified by the 2019 Board, such as adopting a superseding agreement that was undisputedly adopted in compliance with TOMA, the Plaintiffs do not explain how they would still somehow have a claim for damages related to the transactions under TOMA.

Third, and more critically, and with only one inapplicable exception, there is nothing in TOMA that imposes ***personal, civil liability*** on a person for a violation of its provisions. The purpose of TOMA is "to safeguard the public's interest in knowing the workings of its governmental bodies." *Hays Cty. v. Hays Cty. Water Planning P'ship*, 69 S.W.3d 253 (Tex. App.—Austin 2002, no pet.); *see also Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990). Texas courts ***do*** at times grant relief under TOMA to ensure it serves this purpose. That relief is generally an injunction to stop the body from holding meetings in violation of TOMA, or, when appropriate, invalidating an action that violated TOMA. TEX. GOV'T CODE § 551.141 (an action taken by a governmental body in violation of TOMA is voidable); *id.* § 551.142 (an interested person may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of TOMA by a governmental body); *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459, 461-62 (Tex. App.—San Antonio 1999, pet. denied) (enjoining water district from holding meetings in violation of TOMA); *City of Leon Valley v. Wm. Rancher Estates Joint Venture*, No. 04-14-00542-CV, 2015 WL 2405475, at *4 (Tex. App.—Austin May 20, 2015, no writ) (remedy for TOMA violation is an injunction or a reversal of the TOMA violation); *Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied) (appointment of an officer made in violation of TOMA was set as aside as void).

TOMA contains ***one*** provision imposing personal civil liability that does not apply here. *See* TEX. GOV'T CODE § 551.146 (imposing 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 closed to the public, causing injury); *City of Leon Valley*, 2015 WL 2405475, at *3. That is the ***sole*** provision imposing potential civil liability for a TOMA violation. Indeed, one

searches Texas case law in vain to find even one case imposing ***personal liability*** on an individual for a violation of TOMA. Even worse, the Plaintiffs seek to hold the Directors ***strictly liable*** for allegedly violating TOMA. The one inapplicable provision authorizing personal liability under TOMA imposes a "knowing" standard, highlighting that TOMA is not intended to impose strict liability against a director in a claim for damages.[34] Under the Plaintiffs' proposed "rule," a plaintiff could forego the remedies available under TOMA and immediately seek damages under Business Organizations Code section 20.002(c)(2) from a director. Indeed, a plaintiff could do the same under the Public Information Act and various other laws that set forth specific remedies for their violation. That result is plainly absurd and cannot be what the Legislature intended in enacting section 20.002(c)(2).[35]

TOMA is a red herring in regard to the Plaintiffs' claim for damages against the Directors.[36]

f. The Meeting Minutes

The Plaintiffs finally complain that the 2015 Board prepared "fictitious" and "fraudulent" meeting minutes, presumably referring to the December 19, 2015 meeting minutes stating the board voted in open session to approve the Original Transaction. Motion at Exhibit 8-F. As explained in Note 32 above, it is debatable whether the 2015 Board left executive session to vote on the Original Transaction, though they several times discussed going out of executive session to

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[34] The Plaintiffs state, without citing any evidence, that TOMA violations were "known" to the Director Defendants. Response at 69. That is a flagrant misrepresentation that is easily refuted by the record. The 2015 Board believed it was complying with TOMA. Response at Exhibit 11, pp. 71-81. There is no evidence any Director "knew" any alleged violation of TOMA was occurring.

[35] The Plaintiffs seem to ask this Court to "import" TOMA into section 20.002(c). Courts may not interpret separate statutory schemes enacted for different purposes years apart *in pari materia* (i.e., together). *See, e.g., DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 410-11 (Tex. App.—Dallas 2010, pet. denied).

[36] The Directors are not aware of any statement by WOWSC's counsel that the Original Transaction was "illegal." Response at 7. Presumably, Plaintiffs are referring to WOWSC's counsel's demand letter to Friendship and Martin before the settlement, which referenced the adjudicated TOMA violation but did not make any accusation that the transaction itself was illegal. Motion at Exhibit 8-S.

accept Friendship's offer. *See* Supplemental Evidence at Exhibit 20. If anything, there is ambiguity in the meeting recording. The Plaintiffs cannot refute, though, that the 2015 Board ***did*** create minutes for the December 19, 2015 board meeting. Motion at Exhibit 8-F.

TOMA requires a record of minutes of open meeting. TEX. GOV'T CODE § 551.021. The minutes must (1) state the subject of each deliberation, and (2) indicate each vote, order, decision, or other action taken. *Id.* The 2015 Board's minutes from December 19, 2015 state they considered and voted on the Original Transaction, as required under TOMA. *Id.*; Motion at Exhibit 8-F. And once more, regardless, the Plaintiffs do not identify—and the Directors cannot locate—any case or statute holding a director personally liable for meeting minutes purportedly containing an inaccuracy.

D. Volunteer Immunity Statutes

The volunteer immunity state and federal statutes provide additional immunity for the Directors. TEX. CIV. PRAC. & REM. CODE ch. 84; 42 U.S.C. § 14501, *et seq.* The Plaintiffs claim these statutes do not apply because the statutes purportedly do not apply to WOWSC. The language of the statutes belies the Plaintiffs' assertion. The Texas Charitable Immunity and Liability Act ("Texas Act") applies to any organization "organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community." TEX. CIV. PRAC. & REM. CODE § 84.003(1)(B). The Federal Volunteer Protection Act ("Federal Act") similarly applies to any non-profit organization organized and conducted for public benefit and includes organizations operated primarily for civic purposes. 42 U.S.C. § 14505. WOWSC, as a non-profit providing water and wastewater services to the Windermere Oaks community, provides for the welfare of the Windermere Oaks community and operates for "civic purposes." Courts have concluded that volunteer protection acts are extremely broad and that a variety of non-profit directors enjoy volunteer immunity. *See Ventres*

v. Goodspeed Airport, LLC, No. X07CV01402085S, 2008 WL 2426790, at *23 n.25 (Conn. Super. Ct., May 27, 2008) (directors for land trust non-profit enjoyed volunteer immunity and reciting some of the many other organizations that enjoy volunteer immunity); *Elliot v. La Quinta Corp.*, No. 2:06CV56, 2007 WL 757891, at *3 (N.D. Miss. Mar. 8, 2007) (noting the "extremely broad definition of 'organization' under the Volunteer Protection Act" and applying it to a youth athletic club).

The Plaintiffs also claim the Federal Act does not immunize the Directors from a suit brought by WOWSC. *See* 42 U.S.C. § 14.503(c). First, the Texas Act does not contain the same provision. And, the Federal Act preempts the Texas Act, "except that this chapter shall ***not*** preempt any State law that provides additional protection from liability relating to volunteers...." 42 U.S.C. § 14.502(a) (emphasis added). Second, while the Directors concede that a court in another state excluded a representative suit against directors, Response at 77 (citing *Melucci v. Sckman*, No. 516/12, 2012 WL 5192763 (N.Y. Sup. 2012)), no Texas state or federal court has held this. Thus, that case is not binding. As the Directors have explained, the Plaintiffs lack standing or capacity to bring a representative suit against the Directors in Texas.[37]

The Plaintiffs also suggest the Federal Act does not apply because the Directors purportedly did not act within the scope of their responsibilities to WOWSC. Response at 77 (citing *Owen v. Bd. of Dirs. of Washington City Orphan Asylum*, 888 A.2d 255 (D.C. 2002)). As explained above, there is no evidence the Directors somehow did not act within their capacity as WOWSC directors in approving either transaction. The Directors are entitled to sell land to pay for a wastewater treatment plant. They are entitled to settle potential litigation and improve the Original

[37] At a minimum, the Plaintiffs' own cited authority disavows their ability to sue the Directors as ***individuals***. The volunteer protection statutes preclude any suit by the Plaintiffs in their individual capacity against the Directors.

Transaction. They are entitled to rely on professional advice. To the extent the 2015 Board violated TOMA or purportedly did not prepare a "proper" resolution, that does not equate to the land sale itself being undertaken outside their capacity as WOWSC directors.

The Plaintiffs also do not explain any provision of law or governing document that the 2019 Board is alleged to have violated in entering the 2019 Transaction.

Thus, the Directors are immunized from liability under the volunteer protection acts. *See Brown v. Hensley*, 515 S.W.3d 442, 447-49 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (affirming summary judgment against volunteer board members of an HOA under the Texas Charitable Immunity and Liability Act).

E. Non-Interference in Affairs of Non-Profits

As explained in the Directors' Motion, Texas courts particularly refuse to interfere in the affairs of non-profits. The Plaintiffs claim this doctrine does not apply because of the Directors' purported illegal acts. These so-called "illegal" acts are addressed above. *See* Section II.C., *supra*. The Directors simply note that the purpose of the doctrine is to prevent court interference "every time some member, or group of members, had a grievance, real or imagined" (like in this case) because the interference would frustrate the ability of the non-profit to operate (like here). *Harden v. Colonial Country Club*, 634 S.W.2d 56, 60 (Tex. App.—Fort Worth 1982, no writ). Texas courts grant summary judgment in directors' favor because of this non-interference even when plaintiffs allege directors violated corporate bylaws. *Butler v. Hide-A-Way Lake Club, Inc.*, 730 S.W.2d 405 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).

Additionally, it is not surprising the Plaintiffs cite historic cases regarding limitations on the scope of corporate powers. Response at 67 (citing cases from 1919). As explained in Note 18 above, the modern ultra vires exception to the business judgment rule is narrow in Texas because

the Business Organizations Code grants corporations such expansive powers. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 2.001, 2.003, 2.008, 2.101, 3.005(a)(3), 22.221, 22.230, 22.235.

F. The Plaintiffs lack capacity or standing to bring their claims either individually or derivatively.

1. A pleading asserting lack of capacity need not be verified if lack of capacity is apparent on the face of the record.

A pleading claiming lack of legal capacity need not be verified if "the truth of such matters appear of record." TEX. R. CIV. P. 93. The Directors' argument that the Plaintiffs lack capacity (or standing) to bring claims individually or as representatives of WOWSC is made as a matter of law and needs not be verified by affidavit. In fact, it is not clear what the Directors would even aver to. The Plaintiffs state in the Third Amended Petition that they are members of WOWSC and are suing individually and as purported representatives of WOWSC. Third Amended Petition, pp. 1, 3, 7. The Directors attack Plaintiffs' lack of capacity to sue the Directors as members of WOWSC or as representatives of WOWSC. The Plaintiffs' lack of capacity is apparent on the face of their pleading, and the Directors need not aver to that. TEX. R. CIV. P. 93.

2. There is a split in authority regarding the Plaintiffs' standing or capacity to bring representative claims—but Texas law is clear that they lack standing or capacity as individuals to directly sue the Directors.

The Directors' Motion summarizes the case law on standing and capacity. First, in regard to representative claims, two Texas court of appeals cases conflict on the issue of representative capacity to bring claims against directors of a non-profit. The Amarillo Court of Appeals rejected the ability of non-profit members to sue directors representatively, including when bringing ultra vires claims. *Flores v. Star Cab Co-op. Ass'n, Inc.*, No.07-06-0306-CV, 2008 WL 3980762, at *7 (Tex. App.—Amarillo Oct. 22, 2008, pet. denied).[38] Conversely, the Houston (Fourteenth) Court

[38] Contrary to what the Plaintiffs claim, the *Flores* court suggested that ultra vires claims could not be brought representatively either. 2008 WL 3980762, at *7.

of Appeals recognized that non-profit members have standing to bring representative ultra vires claims against directors. *Carmichael v. Tarantino Props., Inc.*, 604 S.W.3d 469, 481-82 (Tex. App.—Houston [14th Dist.] 2020, no pet.). The Directors are aware of the language of section 20.002(c)(2). But the Directors propose that, when reading section 20.002(c)(2) together with Chapter 22—which provides no "policing" or procedures governing representative suits as the for-profit chapter does—the preferred reading is that section 20.002(c)(2) does not authorize representative actions in the non-profit context. *See* Motion at pp. 52-54. The Texas Supreme Court has not yet spoken on this issue.

The Plaintiffs rely on *Governing Board v. Pannill* to support their standing or capacity to bring a representative suit. 561 S.W.2d 517, 524 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.). First, that was a suit to enjoin a transaction—not a suit for damages. Second, that court suggested that a plaintiff seeking to bring a derivative suit must satisfy the requirements for class action lawsuits under Texas Rule of Civil Procedure 42 in seeking to represent the entirety of shareholders. *Id.*; *see also Ford v. Bimbo Corp.*, 512 S.W.2d 793, 795 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). It makes sense that if a plaintiff ***can*** bring a representative action on behalf of a non-profit, there must be ***some*** procedure governing this action.[39] Otherwise, like here, a disgruntled group of neighbors could bring actions on behalf of a community non-profit against other neighbors regardless of how representative they are of the entire "class" of members. This is obviously a neighborhood divided, and the Plaintiffs present no evidence they represent the interest of ***all*** WOWSC members. And they certainly present no evidence that ***they*** can represent the best interests of the WOWSC. To the extent the class action procedural requirements apply as *Pannill*

[39] As explained in the Directors' Motion, the for-profit chapter of Business Organizations Code contains procedures governing representative suits (Chapter 21). The non-profit chapter does not (Chapter 22).

suggests, the Plaintiffs have not demonstrated they have met them. Thus, they lack capacity to bring a representative suit. At a minimum, their standing or capacity is limited to bringing a true representative ultra vires claim—not common law breach of fiduciary duty claims "dressed" as ultra vires claims. *Carmichael*, 604 S.W.3d at 481.

Additionally, regardless of whether it should be framed as an issue of standing or capacity, *Pike v. Texas EMC Management, LLC* does not support that the Plaintiffs can ***individually*** sue the Directors for personal damages. 610 S.W.3d 763 (Tex. 2020); *see also Cooke v. Karlseng*, 615 S.W.3d 911, 913 (Tex. 2021).[40] The Texas Supreme Court noted that a limited partner, the partnership, and the general partner did not lack standing in the jurisdictional sense to bring claims against limited partners. 610 S.W.3d at 778. This is because a partner could be individually injured by virtue of loss in value of its interest in the organization. *Id.* The Plaintiffs have never explained how they have suffered individualized injury by virtue of the Original Transaction or 2019 Transaction. The Plaintiffs suggest that WOWSC would have excess money in its reserves that it could distribute to WOWSC members if only it had sold the land for more money. Response at 8, 60. But the WOWSC articles of incorporation prohibit payment of dividends or income to members. Motion at Exhibit 8-A, art. 6 ("No dividends shall ever be paid upon the memberships of the Corporation. No income of the Corporation may be distributed to members, directors, or officers in these roles."). So the Plaintiffs' suggestion that WOWSC would have provided money to its members but-for the transactions is not convincing.[41] The Plaintiffs also state, without

[40] As noted by the Plaintiffs, *Pike* applies to a partnership. The Supreme Court's rationale, though, may apply in the corporate context given language in the opinion and holding. The Supreme Court stated: "we hold that a partner ***or other stakeholder in a business organization*** has constitutional standing to sue for an alleged loss in the value of its interest in the organization." *Pike*, 610 S.W.3d at 778 (emphasis added).

[41] The Plaintiffs point to federal tax provisions in suggesting WOWSC is required to pay amounts to its members. That is not what the WOWSC articles of incorporation state. This is not a tax case or a case challenging the WOWSC tax-exempt status, which this Court does not have jurisdiction to decide. Motion at 23 n.17.

evidence, that the Directors' actions caused rate increases. Response at 60. A conclusory statement in a pleading or motion is no evidence. *See, e.g., Thanh Le v. North Cypress Med. Ctr. Operating Co., Ltd.*, No. 14-16-00314-CV, 2017 WL 1274241, at *6 (Tex. App.—Houston [14th Dist.] April 4, 2017, no pet.) (mem. op.) ("Le's unsworn assertions in his response ... are merely conclusory statements that do not constitute competent summary judgment evidence."); *La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 528 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Further, the Supreme Court acknowledged that even if a stakeholder has standing, that does not mean the stakeholder has capacity to sue or can overcome statutory provisions defining and limiting the stakeholder's ability to recover damages. *Pike*, 610 S.W.3d 763. In regard to capacity, the Supreme Court held that "whether a claim brought by a partner actually belongs to the partnership is likewise a matter of capacity because it is a challenge to the partner's legal authority to bring the suit." *Id.* at 779. The Supreme Court has many times concluded that "the cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation." *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990); *see also, e.g., Myer v. Cuevas*, 119 S.W.3d 830, 836 (Tex. App.—San Antonio 2003, no pet.) ("Corporate officers owe fiduciary duties to the corporations they serve. However, corporate officers do not owe fiduciary duties to individual shareholders unless a contract or special relationship exists between them in addition to the corporate relationship.") (citations omitted).

In regard to liability limitations, the Supreme Court acknowledged those arguments go to the merits of a case, and the Directors have addressed this above (business judgment rule, safe harbor provisions, protections for volunteer directors, and so forth). *See* Section II.B-D, *supra.*

The Plaintiffs lack standing or capacity to bring individual or representative claims against the Directors.

G. The Plaintiffs provide no argument in support of their claim for attorney's fees.

The Plaintiffs provide no briefing in support of their claim for attorney's fees. In one sentence, they state that there is a fact dispute regarding the recovery of attorney's fees. Response at 2. But whether a statute provides for the recovery of attorney's fees is a question of law for this Court. *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, 374 (Tex. App.—Dallas 2020, pet. denied). The Plaintiffs have not identified any statute that would provide for the recovery of attorney's fees against the Directors in this case.[42] This Court should render a take-nothing judgment in the Directors' favor on the Plaintiffs' claim for attorney's fees. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019); *Tucker v. Thomas*, 419 S.W.3d 292, 295); *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011).

CONCLUSION AND PRAYER

The Plaintiffs' Response is replete with strained legal arguments "supported" by suspicion stacked upon suspicion and inferences stacked upon inferences. But there is no actual evidence of the subjective bad faith and other factors that could open the Directors up to personal liability. The evidence instead establishes that the Directors acted with nothing but good faith and in a manner they reasonably believed was in the best interest of WOWSC. That the Plaintiffs take ***57 pages*** to even get to the law highlights the obvious. A review of Texas law shows that it is only in the most egregious circumstances that a director can be held personally liable. This case does not present anything approaching those sorts of egregious circumstances.

[42] The Plaintiffs have not sued under a contract that provides for the recovery of fees.

For the reasons set forth in their Motion and this Reply, 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 respectfully request the Court to grant their Motion for Summary Judgment and render a take-nothing judgment in their favor on each of the Plaintiffs' claims against them. The Directors further seek such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

By: */s/ Shelby O'Brien*

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, a true and correct copy of the foregoing was served electronically, via e-file Texas, on all counsel of record:

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2019 - 2020 Board of Directors:
Joe Gimenez, President
Bill Earnest, Vice President
Mike Nelson, Secretary/Treasurer
Dorothy Taylor, Director

Windermere Oaks Water Supply Corporation (WOWSC) meeting held: Saturday, October 26, 2019 at the Spicewood Community Center, 7901 County Road 404, Spicewood Tx, 78669

2019 - 2020 Board Members Present: Bill Earnest, Joe Gimenez, Mike Nelson, Dorothy Taylor

Minutes

The meeting was called to order at 9:00AM by Joe Gimenez. A quorum was established with four Board Members present.

1. REPLACEMENT OF BOARD VACANCY – Article 8, Section 9 of the WOWSC Bylaws states that "Any vacancy occurring in the board of directors may be filled by affirmative vote of the remaining directors, though less than a quorum of the board. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office." Following the resignation of board member David Bertino, the board shall consider and act upon filling that vacancy.
    1. Member Comment
        1. Josie Fuller:
            1. Provided notice and ballot to hold meeting Nov 16th for removal of Joe Gimenez
            2. Send out as an agenda item to members replacement of Board Member
        2. Danny Flunker: Transparency of process is important
        3. Patti Flunker:
            1. Transparency of process is important.
            2. Proposed members submit Board Member application.
        4. Mikki Bertino: Ask the person at last election who had the next highest number of votes if they still want to serve as they had expressed interest to serve
    2. Board has not received from members any interest in filling the Board vacancy for the remainder of the term (next four months).
    3. Motion made and carried by all to table item until next meeting

2. ADOPTION OF ELECTION PROCEDURES FOR THE ANNUAL MEMBERS MEETING – Board will consider possible action needed to begin adoption of election procedures for 2020 annual meeting, including but not limited to assigning specific board seats as "Place 1, Place 2, Place 3," etc., consistent with the WOWSC Bylaws.
    1. Our WOWSC Credentials Committee emailed to Board members on October 20th the ballot form, director application forms, the annual meeting packet, the meeting notice and other related forms and notices for the annual meeting.
    2. Board will need to recommend a person to fill the role of Independent Election Auditor by Dec 18th for approval by Dec 23rd.
    3. Member Comment
        1. Bruce Sorgen: Election procedure is a sham.
        2. Danny Flunker:
            1. Why is election procedure changing?
            2. When Member Comments occur is inconsistent meeting to meeting.
        3. Patti Flunker:
            1. Remember the Board is working to be consistent our Bylaws.

2. From her TRWA work experience, believes the spirit of a Board having places 1, 2, 3, 4, 5, etc. is for representation of large varied member groups in larger Water Supply Corporations. Understands Board places are in our Bylaws. Not certain if places are needed for WOWSC.

4. Beth Burdett:
    1. Why can't our Board answer all questions at Open Meetings?
        1. Jose de la Fuente: That would be acting outside of Opens Meeting Act guidelines and rules. Board can only answer fact based questions.
5. Marshall Meece: Are elections procedures with places 1, 2, 3, etc. a change?
    1. Jose de la Fuente: They are not a change from WOWSC Bylaws. But is a change from previous election year way of working.
6. Dick Dial: Did Jose de la Fuente represent both sides of the street?
7. Mikki Bertino: What is being changed?
    1. Jose de la Fuente:
        1. Holding member comments before deliberation is to comply with Open Meeting Act
        2. Assign Board seats as place 1, 2, 3, 4, 5 as outlined in our WOWSC Bylaws
8. Josie Fuller:
    1. Vacancy on Board was not clear.
    2. Bylaws says Board selects replacement Member.
9. Barry Stein: Thanked the Board for their time and effort
10. Brad Davis: Why are we having problems if everything is so wonderful?

4. Motion made and carried by all to approve the Credential Committee's recommendations for the director ballot form, director application forms, the annual meeting packet, annual meetings notice, election procedures and any other related forms for the annual meeting.
5. Next step is to send out Board applications to members
6. Previous WOWSC Board election practices did not always follow our WOWSC Bylaws. Present Board has been working to follow our WOWSC Bylaws.
7. Motion made and carried by all to add Place numbers to Board Member seats as outlined below to comply with current Bylaws:
    1. Place 1: Joe Gimenez with term ending at election 2021
    2. Place 2: Bill Earnest with term ending at election 2021
    3. Place 3: Mike Nelson with term ending at election 2021
    4. Place 4: Director Vacancy with term ending at election 2020
    5. Place 5: Dorothy Taylor with term ending at election 2020

3. ANNOUNCEMENT OF AMENDED AND SUPERSEDING AGREEMENT REGARDING SALE OF PIPER LANE PROPERTY FOR BOARD CONSIDERATION (proposed terms and other considerations summarized on page 3 of this agenda).

SUMMARY OF TERMS OF A PROPOSED AMENDED AND SUPERSEDING AGREEMENT BETWEEN WOWSC AND FRIENDSHIP HOMES AND HANGARS, LLC TO BE SUBJECT TO PUBLIC COMMENT, BOARD DELIBERATION AND POSSIBLE BOARD ACTION

- Friendship will surrender and terminate its existing "right of first refusal" as to the remaining 7.01 acres +/- tract;
- Stewart Title Guaranty Company shall pay WOWSC the sum of $20,000, $2,500 of which shall be payable upon closing of the real property transactions above, and $17,500 of which is to be held in trust until the dismissal with prejudice or a final judgment in Friendship's favor of all claims against it and Dana Martin in the currently pending "Ffrench et al v. Friendship Homes and Hangars LLC et al" lawsuit (with the first $2,500 being subject to refund if the litigation is not dismissed as described above within one year); the payment of such sum is additional purchase money for Friendship's acquisition of the 3.86 acre +/- Piper Lane tract;
- In place of the current easement, a formally recorded 50-foot non-exclusive access easement in favor of WOWSC, providing WOWSC standard easement rights, including the right to maintain, repair, and improve the easement, and the right to enforce against encroachments, in common with

Friendship Homes and Hangars, with Friendship Homes to obtain similar easement grant from Hans and Johannes Mair;

- Friendship will impose and record 25 foot setback on the northern boundary of the easement to the extent allowed LCRA and/or the county;
- WOWSC will execute a deeded conveyance to Friendship of a certain .5151 acre +/- portion/tract that was included in the sales contract but not deeded;
- WOWSC will record a restrictive covenant covering the remaining 7.01 acres +/- tract providing that if any or all of the property is sold as airport lots, the owners must become Class A members of the Spicewood Airport Pilots Association;
- Upon dismissal or final judgment as described above, WOWSC, Friendship, and Dana Martin shall be responsible for their own court costs and attorney's fees;
- WOWSC on one hand and Friendship and Dana Martin on the other shall sign a broad mutual release of the other, conditioned upon dismissal or final judgment as described above in favor of WOWSC, its former directors, Friendship, and Dana Martin as to all claims in the lawsuit; and
- Authorizing two members of the Board to coordinate with legal counsel to finalize and then execute on WOWSC's behalf the Amended and Superseding Agreement between WOWSC and Friendship Homes and Hangars, LLC, as well as any and all other agreements, contracts, and closing documents necessary to effectuate the terms and transactions described above.

4. Comments from citizens and members who have signed sign-up sheet to speak (5-minute limit per person)
    1. Joe Gimenez:
        1. 2016 WOWSC and Friendship Home property sale has been under litigation
        2. Motion is to amend and supersede the 2015-2016 contract
        3. Sale was made to pay down WOWSC debt on new WWTP
        4. Elements like right of first refusal to be amended
            1. Removes right of first refusal
            2. Strengthens easement
        5. Revaluation of property includes $20,000 additional to be paid to WOWSC
        6. Ongoing litigation costs WOWSC dollars and makes it difficult to find members who want to serve on the Board
    2. Sandy Neilson: Submitted the following statement prior to meeting that was read to meeting attendees.
        1. Dear WOWSC Board Members —
        2. I want to thank the WOWSC board for your concerted efforts to keep our Water Company moving forward. I know it has been a challenge, but I believe you are on the right path. Since I cannot attend today's meeting to personally support the board's decisions moving forward, I ask that my note be admitted in the record of minutes.
        3. It would be my hope that new residents of our community will take the time to research and understand that there has been sufficient documentation as well as commentary by the previous Board Members (and those previous to them) in open WOWSC meetings, as well as court proceedings to attest to the fact that a prior WOWSC Board performed their due diligence re: appraisal of land in question and the subsequent sale. It has also been made evident that parties fighting the WOWSC had full knowledge of the transaction and involvement, or the ability to be involved, at that time.
        4. It's a shame that a small group of people are costing us all by continuing their lawsuit against the WOWSC.
        5. Please let it be known for the record, that some of these same individuals instigated the 2017 lawsuit with the marinas. As POA Board Members, some of these same people approved over $25,000 of the community budget to fight what appeared to be a personal vendetta of the POA President. This lawsuit additionally cost a couple dozen property owners (who were also marina members) thousands of dollars each each out of their own pockets (totalling over $175,000 total) to fight bogus claims.
        6. It's appalling and shameful that these dissenters would accuse honest boards (both WOPOA & WOWSC) of impropriety when, in fact, one of the very people they support, Danny Flunker, acted as President of the WOPOA in 2016, 2017 and did so with blatant disregard to the POA bylaws in

his many many actions. His occupancy of a seat on the board itself, much less as president, was in direct contravention to the WOPOA bylaws, since he was not a property owner at the time.
7. Thank you for your perseverance in these matters.
8. Sincerely
9. Sandy Neilson
10. WOPOA Owner / WOWSC member

3. Bob Mebane: Submitted the following statement prior to meeting that was read to meeting attendees.
    1. I'd like to give a brief history re: the Property within the Airport that was sold to Friendship homes and Hangars in March of 2016.
    2. During a WOWSC Open Board meeting on August 24, 2013 the WOWSC Board discussed the proposal to build a new Waste Water Treatment Plant and in that meeting also stated that the Board would be selling property in the airport that was owned by WOWSC to pay down the debt that would be incurred for the Plant construction.
    3. There was 11 acres identified within the airport as land not required for present or future use by WOWSC, so it was known by people in the airport and the neighborhood that this property was to be sold.
    4. Before I joined the Board the prior Board had consulted with a real estate agent re: the Value of the Property.
    5. There was a contract received for a lot within the WOWSC airport property that was accepted and the sale was completed.
    6. In 2015 when I became a member of the WOWSC board, I began investigating the value of the remaining WOWSC airport property. I discussed with several people: a small airport developer, a member with the State of Texas Aviation agency, a real estate agent familiar with small airports in the area and also the agent that was previously contacted in 2013 by another WOWSC Board member
    7. I also contacted people in the neighborhood for their input. Primarily I heard from neighbors to not allow helicopters.
4. Nancy Lerner: Submitted the following statement prior to meeting that was read to meeting attendees.
    1. We support these changes.
    2. Nancy & Steve Lerner
5. Dick Dial:
    1. Question for attorney: Do you work for both sides of the street?
    2. Bob Mebane worked long on this.
6. Josie Fuller
    1. How does this work?
    2. Does the Board decide?
7. Pattie Flunker
    1. The center of ongoing litigation in Windermere Oaks is Dana Martin
    2. Patti has pointed out over the years inconsistent Board practices with regards to our WOWSC Bylaws.
    3. Previously two current Board Members discussed ongoing Board actions and practices with Patti
    4. Dorothy Taylor said Dana Martin acquired property and that WOWSC needs to do something about it
    5. Bill Earnest said books were out of order when member of the previous board
    6. WOWSC had a balloon payment and needed the cash to pay down the note
    7. WOWSC received a 2006 appraisal with value of $375K for the 11 acres at the airport
    8. POA submitted offer for small portion of land which was turned down as the Board decided to sell the entire 11 acres as a whole and to not portion it out.
    9. Get the facts out
    10. Do members have the right to request agenda items?
        1. Jose de la Fuente: Yes. But it is the Board's decision to make agenda topics, Board's discretion.
    11. Patti quoted from letter she received from her boss that Joe considered quitting from our WOWSC Board due to harassment and threatening letters from her.
8. Bruce Sorgen

1. Has better things to do with his time than attend WOWSC Board meetings
2. Bob Mebane was to work with Doris Vantrease (a realtor) to get help marketing the property but it was sold prior to getting her involved
3. Restriction on 7 acres benefits Dana and does not benefit WOWSC
4. Sell WOWSC airport property at highest possible price

9. Mikki Bertino
    1. Amended contract puts a class A membership restriction on the remaining 7 acres
    2. Her understanding is the remaining 7 acres presently have no restrictions
    3. What does WOWSC gain from adding the class A membership?
    4. What did WOWSC gain by the easements?
    5. How can Mikki learn if WOWSC bought easements?
        1. Jose de la Fuente:
            1. Board deliberations can include discussion of items raised during member comments.
            2. Board cannot take action on items not on the meeting agenda
            3. WOWSC is a non-profit corporation that needs to behave as a public entity
            4. Not all public entity laws apply to non-profit corporations
            5. Discussions are part of deliberations
            6. Open meetings act allows discussion without taking action
            7. New topics to be raised for consideration at next meeting(s)
10. John Nigh:
    1. Is WOWSC a governmental authority?
        1. Jose de la Fuente: No, WOWSC is a non profit corporation
11. Anita Dismuke:
    1. Does WOWSC have anything to do with airport restrictions?
        1. Jose de la Fuente: Only property owned by WOWSC can be restricted by WOWSC.
    2. Why do remaining 7 acres have restrictions?
    3. Am for getting out of debt and would like to sell the airport property
12. Beth Burdette:
    1. Do we know which realtors were used by the previous board?
    2. How do we get answers to questions?
    3. Why do the 7 acres have restrictions?
        1. Joe Gimenez: Will discuss after the Executive session
    4. How do we get an agenda item on Board Meetings?
        1. Jose de la Fuente: Members can request items to be placed on future agendas.
    5. Wants to move on from lawsuit
    6. Wants Board to listen to members
    7. Does not want to place restriction on the remaining 7 acres
    8. Land is sold
    9. There is a rebellion in Windermere Oaks. Board needs to do the right thing.
13. Marsha Westerman:
    1. What does Broad Mutual Release of each other in Motion mean?
        1. Jose de la Fuente: Broad mutual release in general terms is a release of claims on each other. No future litigation on the agreed upon item.
    2. Dana was Marsha's realtor
    3. Why hasn't Dana spoken today?
14. Dick Dial
    1. Why didn't the Board spend our money trying to get the land back instead of trying to keep us from getting the land back for ourselves?
    2. Why do you say the first lawsuit was decided in favor of the WSC when it found the Board violated the law and we didn't get the property back? That sound like the worst of both worlds.
    3. Why do you claim the court "confirmed the transaction was valid"?
    4. What business did the Board have opposing the request to get our property back?
    5. What is your basis for saying that the "paths" proposed in the lawsuits to get the property back were not "legally viable or beneficial to the corporation"?

15. Mark A. McDonald
    1. Joe said benefit was to mitigate legal fees moving forward
    2. WOWSC only gets $20,000 if Dana wins
    3. No business placing airport restrictions on 7 acres
16. Carol Foy
    1. Can appreciate the Board working to pay down debt
    2. Believes dirty business was done as purchaser was a Board member and the appraisal did not mention best use as airport property
    3. Sees the amendment as resolving litigation, but not addressing
    4. Requests to see details of the easements
    5. Where are the easements?
    6. Airport fees are paid by airport members
    7. Highest and best use should have been airport property
    8. Right of first refusal should not have been in the property sale
    9. Why is Stewart Title involved and why are they offering $20,000?
    10. Will the third party agree to the easements?
    11. Where is the 25' set back in the easements?
    12. Questioning benefit to WOWSC of selling Piper lane access
    13. There are other ways that Water Supply Corporations can be run.
    14. It's in our own personal interest to run our own WSC
    15. Wants our WOWSC Board to be more transparent
    16. Does not want WSC to be owned by someone else.
    17. Wants restriction on 7 acres removed
    18. Doesn't know if a Broad Release is wise for future transactions / actions.
        1. Jose de la Fuente: Releases are only backward looking and do not apply to future transactions / actions.
17. Travis Tappen
    1. Is the only way to learn all secrets of our WOWSC Board is to be on the Board?
18. Mike Burdette
    1. Accused board of 'sitting there with your chickenshit grins.'
19. Brad Davis
    1. Must be a conflict of interest
    2. Too many folks feel like they are not getting all the information
    3. Questions why Board member can purchase WOWSC property
    4. Restriction on 7 acres benefits Dana and not WOWSC
    5. Questions future use of 7 acres with the restrictions
20. LC Billingsley
    1. Was on WOWSC Board Director for two years with Bill Stein and could not learn what occurred because of President Jeff Hagar and Vice President Dorothy Taylor
21. Marshal Meece:
    1. Is Executive session open?
        1. Jose de la Fuente: No
    2. Can Board decide on Motion today?
        1. Jose de la Fuente: Yes
22. Marvin Lewis:
    1. Can Board reconvene open session at a certain time?
        1. Jose de la Fuente: There is no posted time estimate on Executive Session duration.
23. Jose de la Fuente: Restriction is if property is used as airport property, the purchaser needs to be a Class A member.
24. Danny Flunker
    1. Ripped off
    2. Motion should include $500,000
    3. Petition to remove Joe Gimenez
    4. Patti was harassed at work
    5. David Bertino was harassed at work

6. Accused board of being "monsters"

5. Executive Session under Texas Government Code § 551.071(1) and (2) regarding:
    1. Ffrench, et al., Intervenor-plaintiffs and Double F Hangar Operations, LLC, et al. v. Friendship Homes & Hangars, LLC, Windermere Oaks WSC, et al., Cause No. 48292, 33rd Jud. Dist., Burnet County Dist. Ct.; and
    2. TOMA Integrity, Inc., et al. v. Windermere Oaks WSC, Cause No. 47531, 33rd Jud. Dist., Burnet County Dist. Ct., on appeal at 6th Ct. of Appeals, No. 06-19-00005-CV.
    3. Appeal of Attorney General ruling filed in Travis County Court in the case of WOWSC v The Honorable Ken Paxton, Attorney General of Texas, for protection of corporate rights and privileges during ongoing litigation
        1. Entered session at 10:48AM
        2. Exited session at 11:44AM
        3. Restarted open session at 11:51AM

6. CONSIDERATION AND VOTE ON AMENDED AND SUPERSEDING AGREEMENT AS DESCRIBED IN AGENDA ITEM 5 AND PAGE 3 OF THIS AGENDA, AND POTENTIAL MEMBER COMMUNICATION REGARDING SAME.
    1. Board Discussion
        1. Board has heard members' comments and have taken them seriously
        2. Potential member communication regarding: Legal subcommittee will take member comments and any Board decisions and communicate to our members
        3. WOWSC is in litigation brought against it
        4. It's not easy to communicate with our members regarding questions on ongoing litigation
        5. Joe elected to Board in March 2019 and was not part of any of the ongoing litigation
        6. Joe has gotten up to speed on the litigation
        7. Making decisions that benefit WOWSC the most
        8. WOWSC is a non-profit corporation and is not bound by all Public Entity laws like those for a city, county, school district or state agency
        9. It is legal for WOWSC to do business with a Board member.
        10. It is legal for WOWSC to dispose of assets in any manner it chooses.
        11. The WOWSC sold airport property because it was not needed for future expansion
        12. Bill Earnest noted that he worked to sell property while on earlier Board
        13. He asked the attorney at the time and was told that the Board has fiduciary responsibility to WOWSC and not to the community, but Bill wanted to do what was best for the community as well.
        14. After six months of trying to work with a real estate realtor, the realtor finally admitted to Bill that he did not have the time or knowledge of airport property to work with WOWSC.
        15. Runway lot was sold for $95,000 and was then pulled out of the eleven acres and was used to pay down debt
        16. 2006 appraisal was done before real estate crash in 2007, 2008, 2009 from sub-prime lending. Property valuations started to recover ~2011.
        17. Property sale occurred in 2016
        18. WOWSC's airport revenues are ~$8000 per month which benefits our WOWSC members
        19. Joe offered more background. In 2013 Lake Travis hit a very low level of ~ 615' above sea level At that time it was difficult to sell property and homes with the very low level of the lake.2015 - 2016 Board did due diligence in learning the value of the airport property. WOWSC received an offer of $175K in Y2013 for 9 acres of the airport property. Hinton appraisal was never mentioned when offer was made by Dana. Dana offered $200,000 for the ~ 4 acres. POA offered $20,000 for 2/3rd acre in 2015, approximately $30,000 for 1 acre, pro-rata.
        20. Previous Boards had discussed selling the entire airport property as a whole
        21. Bills knows of a person who bought an entire airport for $1.3M, the same amount as the Bolton appraisal for the ~ 11 acres at the airport.
            1. Gimenez advised on Board due diligence saying different Boards deal with different issues and challenges

22. Bolton appraisal was fed information by litigants
23. Our attorneys serve the interest of our WOWSC Board and sometimes that Board direction changes and so too must the attorneys' focus.
24. Mike requested along with our attorneys an appraisal of the property to get data for discussion
25. Easement Strengthening:
    1. Easement exists in the original sales contract. But the easement was not recorded well and was not clear.
    2. Standard easement language was not in the original sales contract.
    3. Requested good clean easement
    4. Full 75' easement: 50' easement plus 25' easement; 25' paved path with 25' easements on both sides
26. Mike continued that Board consideration for future sale of remaining acreage. Lot of growth is projected in Spicewood. Discuss in future Board meetings when is best time to sell.
27. New WWTP discussion: $900K cost with two ponds
28. Suing to get land back would cost hundreds of thousands of dollars, we might lose, would get counter sued, would taint WOWSC's property as someone who sells property and then sues to get it back, making property value worthless for future buyers
29. WOWSC requested property valuation, sent Demand letter to start discussion, held several discussions, and then mediation
30. Business decision is looking for ways out of litigation
31. Board wants to stop being involved in litigation
32. Suing for land back would involve more than Dana as a third party is involved
33. Terms of mediated settlement
    1. Have heard from members regarding terminating right of first refusal
    2. Able to accomplish removal of right of first refusal
    3. Negotiated with Title Company for $20,000 in mediation
        1. Stewart Title Company represented defense of the title
        2. Value in stopping litigation
        3. Stewart Title agreed to pay $20,000 with $2500 up from subject to refund if case does not complete
    4. Legal team of Jose de la Fuente, Joe Gimenez, Mike Nelson was in mediation
    5. Class A member fees now ~$750 for maintenance of airport roads and common space
        1. Property can be sold for any legal purpose
        2. If property is sold as airport property, the Class A membership is needed
        3. Mike's question to Bill: Do all airport members have a Class A membership?
            1. Very few do not have Class A membership. A few folks are Grand fathered in who pay into the airport maintenance at a reduced rate
        4. Airport members with hangars need to buy-in to the airport for $4000
        5. Mike thought becoming an airport Class A member was similar to becoming a POA member when buying home, with automatic membership in a POA.
        6. Joe said that during mediation he considered the criticisim of the Hinton appraisal's lack of consideration for valuation of the land as airport property. His mindset was locked in to selling that land as airport property because itwould elevate land value as being airport property, but he said he understands how unrestricted covenant could help achieve highest and best use.
        7. Jose de la Fuente noted that the covenant would only apply if the property were developed as airport property, but that it was not necessary.
        8. Class A membership only applies to using the property as airport property
        9. Adding hangars will likely add to WOWSC revenue as they typically have water and sewer connections.
        10. Recent airport owners are Class A members
    6. Bill wanted to sell all acreage at once
    7. Bill wanted to compact the airport acreage
    8. Correction of Deed for 0.5151 acre is included correcting an error in the original Deed
    9. Remaining 7 acres has two ponds

10. Mike said he believes it's better to take $20,000 in cash versus spending $100,000+ on litigation for a possible net of $40,000
11. Mutual release upon termination of litigation
12. Authorize two members of Board to work with attorneys on settlement finalization
13. Easement is imposed as an obligation for Friendship Home to get agreement with the third party (Meyers) to complete settlement
14. Amends and restates transaction
15. Many hours defending lawsuit takes away Board's capacity to deal with water company issues.
16. Our WOWSC PIO is paid only when working on PIAs. There were no PIAs prior to this year.
17. Joe has moved WOWSC business forward
18. There is more to do to stop all ongoing litigation

34. Review of motion
    1. Motion made by Bill and seconded by Joe to accept the terms for the amended and superseding contract.
        1. Discussion around item 'six': Restricted covenant for purchaser to become airport Class A member if land is used as airport property.
            1. Bill proposed deleting item six
                1. Bill: If person who buys property as airport property, they will build hangars which will make them become a Class A member
                2. Dorothy: Member feedback requested removal of Class A member restriction
                3. Mike: OK with removing Class A member restriction
                4. Joe: Not our concern. It's an airport concern. Okay with removing.
                5. Jose de la Fuente: Not a major component of mediation agreement.
    2. Motion made and carried by all to delete item# 6
    3. Motion made and carried by all to adhere to our agenda item with deletion of item# 6 (restrictive covenant of Class A members)
    4. Motion made and carried by all to authorize Joe and Mike to be our WOWSC Board legal subcommittee
    5. Motion made and carried by all for Joe and Mike to generate member communication reporting on this meeting and outcome

7. New business and discussion and possible action on agenda for next meeting.
    1. Member Comment
        1. None
    2. Petition for removal of Joe Gimenez from Board
    3. Replacement of Board Vacancy
    4. Manager's Report
    5. Annual Member Meeting
    6. October financials review

8. Set date, time, and place for next board meeting.
    1. Wednesday, November 20th, at 6:00PM at Spicewood Community Center, 7901 County Road 404, Spicewood TX, 78669

9. Motion made and carried to adjourn at 1:21PM

Submitted by: Mike Nelson
APPROVED BY WOWSC Board on December 19, 2019

Billing Questions: (830) 598-7511 Ext 1
Water or Sewer Emergency: Phone (830) 598-7511 Ext 2

Windermere Oaks Water Supply Corporation

424 Coventry Rd
Spicewood, Texas 78669

Windermere Oaks Water Supply Corporation (WOWSC) meeting held: Saturday, February 1, 2020 at the Spicewood Community Center, 7901 Co Rd 404, Spicewood TX, 78669

2019 - 2020 Board Members Present: Patricia Gerino, Joe Gimenez, Mike Nelson, Rich Schaefer, Dorothy Taylor

Minutes

The meeting was called to order at 11:15AM by Joe Gimenez.

1. Presiding director announces the total number of members present at the meeting. Presiding director will then announce that a quorum of the membership is present and that the meeting may proceed.
    a. Announced total number of members present: 38 and meeting may proceed.

2. Comments from citizens and members who have signed sign-up sheet to speak (3-minute limit per person).[1]
    a. Patti Flunker
        i. Requested four minutes for members to speak
        ii. Change in ByLaws for Membership fee
            1. Informed Board the Tariffs and ByLaws do not match
            2. Believes State law says to send out ballot to all members to vote on ByLaws change
            3. All members do not have opportunity to vote as not all members attended today's Annual Members meeting
            4. Mark Zeppa wrote how to become an investor owned utility when members no longer want to be a non-profit water supply corporation.
            5. Proposes dissolving water supply corporation and become investor owned utility
    b. Danny Flunker
        i. Requested at last meeting a PowerPoint presentation for Annual Meeting
        ii. Recommends folks review depositions
        iii. No attorney was involved in the land deal
        iv. Brought binders and handouts and placed them on the tables for folks to review
        v. Easements showed up that were not previously recorded
    c. Bruce Sorgen
        i. Dana bias on our Boards shown with the two vacancy replacements
        ii. Volunteers are on our Boards and not paid professionals
        iii. Believes WOWSC is a water coop and not a non-profit water supply corporation
        iv. Board meetings are difficult to sit through
        v. Legal representatives attend every Board meeting
    d. Dick Dial
        i. Discovered land sale January 2017
        ii. WOWSC legal representatives are ethically challenged

[1] The Board is not allowed to take action on any subject presented that is not on the agenda, nor is the Board required to provide a response; any substantive consideration and action by the Board will be conducted under a specific item on a future agenda at a regular meeting of the Board.

iii. Handed out copies of WOWSC's Demand Letter to Friendship Homes and Hangars and asked folks to read the Demand Letter
iv. Why isn't D&O paying for attorney fees?
1. To date, insurance has refused to pay attorney fees
a. At the Jan 23rd WOWSC Board Meeting, Board approved retaining an attorney to provide insurance coverage advice and counsel

e. Robert Wells
i. Windermere Oaks owner for 28 years
ii. WOWSC Boards have been good and Boards have been bad
iii. Legal defense is costing our community money
iv. Need to come to a resolution and stop wasting money on legal fees
v. Appears to be a witch hunt against one of our neighbors
vi. Need to move forward

f. Marsha Westerman
i. Budget questions
1. Meals and entertainment: TRWA conventions, conventions
2. Legal: $250,000

g. Charlene Freesom
i. Budget
1. $250,000 for attorney fees is obscene
2. How to resolve the lawsuit and stop wasting money on legal fees?
3. When do members get to vote on it?
4. What do the litigants want?
a. Answer: Litigants want the sold property returned to WOWSC
5. Believes it will take several people to work on a solution

h. Sandy Nielsen
i. Thanks community members who have served on Boards
ii. How can we expect volunteers to serve on Boards when they get sued
iii. Has been in Windermere Oaks for ten years
iv. Cares about Windermere Oaks and our community
v. Understands stress placed on Board members who are under suit
vi. Lawsuits are not always as they seem
vii. Similar group of people are involved in filing the lawsuits

i. Josie Fuller requested update on AG lawsuit

3. Approval of Member Meeting minutes of March 9, 2019.
a. Motion made and carried by all to approve the minutes for our March 9, 2019 Annual Member Meeting Minutes

4. Presiding Director to read the December 19, 2019 Board approved Resolution declaring unopposed candidate of WOWSC election. Presiding director introduces newly elected director and declares them as board member to assume the position of director immediately.
a. Joe read the following resolution that was previously read at the December 19, 2019 WOWSC Board meeting:

A RESOLUTION OF THE BOARD OF DIRECTORS OF WINDERMERE OAKS WATER SUPPLY CORPORATION DECLARING UNOPPOSED CANDIDATE DOROTHY TAYLOR AS DIRECTOR OF WINDERMERE OAKS WATER SUPPLY CORPORATION AND CANCELLING FEBRUARY 1, 2020 DIRECTORS ELECTION

WHEREAS, Windermere Oaks Water Supply Corporation ("WOWSC") is a nonprofit water supply corporation, operating under the authority of Chapter 67 of the Texas Water Code and the holder of retail water utility and sewer service Certificates of Convenience and Necessity Nos. 12011 and 20662 issued by the Public Utility Commission of Texas;

WHEREAS, the terms of WOWSC Director Place 4 and WOWSC Director Place 5 expire in 2020;

WHEREAS, WOWSC posted notice of the opportunity for candidates to submit applications to run for the two open positions on its Board of Directors (the "Board") pursuant to Texas Water Code Section 67.0052(b);

WHEREAS, WOWSC made director candidate application forms available at WOWSC's main office, made director candidate application forms available by mail or electronically, upon request, and such forms remained available until December 13, 2019, the deadline to submit such forms;

WHEREAS, only one (1) person submitted an application for Director Place 5, Dorothy Taylor, thus creating an unopposed election for WOWSC Director Place 5 pursuant to Texas Water Code Section 67.0055; and

WHEREAS, WOWSC received no candidate applications for Director Place 4.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF WINDERMERE OAKS WATER SUPPLY CORPORATION THAT:

1. The above recitals are true and correct.

2. The Directors Election was duly called, and the Secretary of WOWSC has duly certified in writing that Dorothy Taylor is unopposed for election to the office of WOWSC Director, Place 5, in accordance with applicable Texas law.

3. Dorothy Taylor is declared elected to serve a two (2) year term on the Board of Directors of WOWSC, subject to her taking her oath and any other appropriate actions, as required by law.

4. No candidate submitted an application for WOWSC Director Place 4, and thus Director Place 4 will remain vacant until that position's term expires or until the

WOWSC Board appoints a director to Place 4 in accordance with WOWSC Bylaws and applicable law, whichever occurs first.

5. The directors election called for February 1, 2020 will not be held, and a copy of this Resolution Declaring Dorothy Taylor as Director of WOWSC and Canceling the February 1, 2020 Director's Election will be posted at the WOWSC main office and read into the record at the annual meeting.

6. It is further found and determined that notice of the date, place and subject of this meeting was posted in accordance with the terms and provisions of Texas Government Code § 551 at least 72 hours preceding the scheduled time of this meeting and that the terms and provisions of said Texas Government Code § 551 have been complied with.

7. The Board of Directors of WOWSC authorizes its President, General Manager, and WOWSC legal counsel to take any action necessary to implement the terms of this Resolution.

This resolution is hereby PASSED AND APPROVED this 19th day of December, 2019 by vote of 5 in support ( ) against, and ( ) abstaining.

WINDERMERE OAKS
WATER SUPPLY CORPORATION

Joe Gimenez, President

ATTEST:

12/19/19
Mike Nelson, Secretary/Treasurer

Dorothy Taylor ran unopposed for Director Place 5

5. Update reports
    a. Report of corporation manager (to include report on system's operations, update of projects and strategic plan for 2020.
        i. George Burriss is WOWSC's manager
        ii. 12 new taps were installed last year vs ~3 per year historically
        iii. Operations:
            1. WOWSC use two CPAs
                a. First does taxes
                b. Second does all bookkeeping
            2. Continued and completed repairs from Y2018 flood
            3. WOWSC has 253 members
            4. Enlarged area that WOWSC serves. Updated permit with state of Texas.
            5. Improved website
            6. Reports were sent to TCEQ

a. Zero violations in Y2019
7. New water treatment plant (WTP) was built in 2007
8. New waste water treatment plant (WWTP) was built in 2014

iv. 2020 projects
1. Complete installation of WTP generator
2. Water reduction projects at WTP and WWTP
3. Airport to use treated effluent water on grass landing strip
4. Maintenance projects
5. Help WO POA with projects

v. Five year plan
1. Installation of generator at WTP to maintain water pressure
a. Generator is in place and electrical connections have been completed
b. Installing 1000 gallon propane tank in the next few weeks
2. Pretreatment replacement and upgrade is on hold as WOWSC is spending 40% of revenue on legal defense

vi. Named WOWSC WTP after George Burriss

b. Treasurer's report of Board approved 2020 Budget, Y2019 Balance Sheet, Y2019 P&L
i. Reviewed handouts with members
1. Y2019 Summary of Income/Expense
2. Y2019 Balance Sheet
3. Y2019 Profit and Loss Budget Performance
a. Ordinary income from water services was $113K higher than budget
b. Operating expenses were $128.8K higher than budget
i. Legal expenses were $128.6K higher than budget
c. Net ordinary income was $2.7K less than budget

ii. Y2020 Budget
1. Reviewed Y2020 budget handout
2. Legal expenses budget = $250K
3. Projected loss = $137.5K with revenue projection using current rates
a. This budget does not include rate increase in water services revenue projection

6. Report of Board President to summarize events and accomplishments of the corporation in the past year as well as the financial challenges going forward, and discuss possible options to address the significant budgeted defecit caused by ongoing litigation, including but not limited to: (a) rate increases; (b) declaration of bankruptcy; or (c) sale of the corporation to a private utility company.
a. Did not anticipate the nuclear bomb lawsuit
b. George did great job on repairing the barge
c. Received an LCRA grant for the WTP and WWTP water saving projects
d. Airport project is at no cost to WOWSC and it increases WOWSC's effluent water dispersent field area
e. WOWSC water is better than at many other utilities
f. WOWSC operations are solid
g. WOWSC issues are with legal defense costs and could possibly affect ability to qualify for loans
h. Pretreatment needs to be replaced and upgraded. Need loan to fund pretreatment project.
i. The Texas State Attorney General lawsuit stems from a PIA response and is with respect to protection of WOWSC's attorney client privilege.
j. $15,000 cost to WOWSC to hold the recall vote. Board worked to follow our ByLaws and state laws on the recall petition. Distracted by some members actions to hold their own meeting.
k. Nuclear bomb lawsuit was filed in May 2019 and was recast in November 2019 & December 2019.
i. Joe encourages members read the second lawsuit
ii. Defending the second lawsuit is the majority of the budgeted $250,000 for attorney fees
iii. Bruce Sorgen, Rene Ffrench, Dick Dial are suing for $1M from current and previous Board Directors
l. Rate increases to generate cash to pay attorney fees.
i. Discuss rate increase in Board meeting immediately after this Annual Member Meeting
ii. Working with legal team to pay legal invoices spread over months

m. 46 PIA requests since last Annual Member Meeting. After three months of free PIA services, Joe requested $416 per month for role at WOWSC's PIO. ~$2400 billed to date for PIO.
n. Per Bruce Sorgen second lawsuits wants $1M from WOWSC Board Directors.
o. Action Item: Can insurance responses be shared? Attorney, Troupe Brewer to determine if insurance denial of coverage for legal fees can be shared.
p. WOWSC has engaged legal representation for insurance to cover legal costs of second lawsuit (nuclear bomb). Insurance company has denied paying legal costs for second lawsuit.
q. Sale of the corporation to a private utility company would increase rates
r. TRWA does rate analysis of all Texas utilities

7. Approval of Bylaw Amendment regarding Membership Fees – The Board previously took action to increase membership fees, i.e. one-time fees for initiating a WOWSC membership, from $350 to $402.50. The change in membeship fee is reflected in WOWSC's tariff but the current Bylaws still provide the former fee of $350. WOWSC Byalws require member approval (by quorum vote) of bylaw amendments involving matters affecting memberships, i.e. membership fees, and thus this amendment to Article 10, Section 6 is presented to our members for approval:

> All persons lawfully receiving or applying to receive public utiltiy service from the Corporation shall pay a membership fee of ~~$350.00~~ $402.50 as a condition precedent to lawfully receiving utility service…All applicants for restored service whose memberships have been forfeited to the Corporation shall pay a member ship fee of ~~$350.00~~ $402.50 in addition to any reconnection charges. All transferees of memberships as provided by these bylaws shall pay a membership fee of ~~$350.00~~ $402.50.

a. Patti Flunker recommends removing Membership Fees from the ByLaws and only have it in the Tariff.
b. Vote:
    i. Cast: 30
    ii. For: 20
    iii. Against: 10
c. Motion passes

8. Closing comments by presiding director and announcement of New Board of Directors meeting to elect officers, appoint new board member, consider rate hike, and select audit type upon adjournment.

1) Motion made and carried by all to adjourn at 1:12PM

Submitted by: Mike Nelson
APPROVED BY WOWSC Board on March 27, 2021

Filed: 11/4/2019 12:00 AM
Casie Walker, District Clerk
Burnet County, Texas
By: Amy Tippie, Deputy

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD DIAL and STUART BRUCE SORGEN,	§	IN THE DISTRICT COURT
Intervenor Plaintiffs,	§	
vs.	§	BURNET COUNTY, TEXAS
FRIENDSHIP HOMES & HANGARS, LLC, WINDERMERE OAKS WATER SUPPLY CORPORATION, and its Directors WILLIAM EARNEST, THOMAS MICHAEL MADDEN, DANA MARTIN, ROBERT MEBANE, and PATRICK MULLIGAN,	§	
Defendants.	§	33rd JUDICIAL DISTRICT

FIRST AMENDED ORIGINAL PETITION
(Including Request to Enjoin or Set Aside Actions in Furtherance of "Amended and Superseding Agreement Regarding Sale of Piper Lane Property" and Request to Enforce a Constructive Trust and Other Equitable Relief)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW LAWRENCE RENE FFRENCH, JR., JOHN RICHARD DIAL and STUART BRUCE SORGEN, each as a member/customer and owner of the assets and revenues the water supply and sewer service cooperative operated through the instrumentality known as WINDERMERE OAKS WATER SUPPLY CORPORATION ("WSC") and, to the extent necessary or appropriate, as a representative pursuant to Section 20.002(c)(2), Tex. Bus. Orgs. Code, as Plaintiffs, file this First Amended Original Petition complaining of FRIENDSHIP HOMES & HANGARS, LLC, and DANA MARTIN, WILLIAM EARNEST, THOMAS MICHAEL MADDEN, ROBERT MEBANE, PATRICK MULLIGAN, JOE GIMENEZ, DAVID BERTINO, MIKE NELSON, DOROTHY

TAYLOR and NORMAN MORSE, in their official capacities as current or former Directors and/or Officers of the WSC and in their individual capacities. As has always been the case, the WSC entity is a party defendant herein solely to ensure that the property wrongfully diverted or encumbered is restored to its rightful owners and not for the purpose of seeking money damages from the non-Director Owners of the WSC. Plaintiffs would show the Court as follows:

I.

Discovery Control Plan

1.01 Discovery is intended to be conducted under Level 3, pursuant to Rule 190.4, Texas Rules of Civil Procedure. Plaintiffs have prepared and have circulated to all current parties a proposed order in an effort to develop an agreed discovery control plan tailored to the circumstances of this specific suit. Defendants have insisted upon a ruling on their pleas to the jurisdiction before entertaining Plaintiffs' request.

II.

The Context of This Dispute

Those who place themselves in a position of power over money and property that belong to others take on the duty to exercise that power with the greatest care. They must be good, faithful and honest stewards. They must manage it solely for the owners' benefit; they may not use it for their personal benefit or for the personal benefit of others. They have a duty to use diligence to recover value lost or compromised by wrongdoing, including their own wrongdoing. The law requires nothing less, and the WSC Board does not fall within an exception.

Unlike a typical corporate enterprise, however, the WSC Directors owe these duties directly to the member/customers they serve. This is because the WSC is a cooperative in which the member/customers don't own interests in a business entity (as do shareholders); rather, collectively the member/customers own the assets themselves and the revenues those assets generate.[1] The Board has the power to manage the assets to provide the Owners with water and sewer service, but for no other purpose. The Board has the duty to maximize the assets' value and productivity. When the Board exceeds its powers or breaches its duties, the Owners -- and not the WSC entity -- pay the price directly out of their pockets through rate or fee increases, assessments under the Tariff or otherwise, based on their levels of patronage.

In 2016, the Board exceeded its powers *and* breached its duties. Martin, a sitting Director with strict duties to place the Owners' interests ahead of her own, quite literally made out like a bandit. The immediate loss to the Owners was in the range of *$4,500 - $5,000 per Owner*, and the Owners have been struggling to make it up ever since.

Every Board since then has had the duty to recover what the Owners lost or to otherwise make them whole. Every Board since then has done just the opposite. As a result, hundreds of thousands of the Owners' dollars have been wasted with absolutely nothing to show for it. Now, having denied for years there is any dispute between the WSC and Martin, the Board has voted to throw good money after bad to "settle" the dispute they have steadfastly insisted does not exist.

At a special meeting on October 26, 2019, the Directors surprised everyone when they claimed to have negotiated a "mediated settlement agreement" with Martin, her

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[1] As explained below, this is so because the WSC is required to operate as a water supply and sewer service cooperative. Accordingly, the WSC's member/customers are hereinafter referred to "Owners."

alter ego FHH and Stewart Title (which insured title in the 2016 fire sale and has been defending FHH in this lawsuit). For years, Owners had been begging for the Board to take steps to unwind the egregious 2016 fire sale transaction and its aftermath, with some Owners spending their own money to do what the Board refused to do and watching the Board spend even more of their money trying to prevent them from being successful.

At the October 26 special meeting, the Directors unveiled the terms of their "mediated settlement" proposal, which they described not as a good deal for the Owners but as "a way out" for the Board. They propose to leave largely intact what their attorney's January 25, 2019 demand letter referred to as a "*self-interested transaction*" by Martin, a fiduciary, taken in *violation of the Open Meetings Act*, procured with a "*fraudulent appraisal*" provided by Martin and "*improper and unfair*" to the Owners, for which many of the same Directors determined to pursue "*all* available avenues of *relief.*" [2] (emphasis added) They propose that Martin will give up the illegal right of refusal on the remainder tract, but no court would ever have enforced a right procured without consideration by an interested Director anyway. While they acknowledged Martin and her cohorts on the prior Board committed to furnish taxiway access to the remainder, their proposal does not require Martin to provide a taxiway. Instead, the proposal requires only that Martin try to persuade the Mairs (the buyers from whom Martin made a profit) to furnish a 50' taxiway and 25' setback on their property. Unless the Mairs are complicit (and it's likely they are) they have no incentive to take steps that will make their property virtually unbuildable. Ironically, these Directors propose to

[2] A copy of the Board's demand letter, sent to Martin and her alter ego FHH, is attached as *Exhibit 1*. All Exhibits identified herein are incorporated herein by reference. The Board's attorney has never shared any different opinion with the Owners.

give Martin an additional ½ acre of valuable airport property – Piper Lane – a conveyance that could separate the Mair taxiway (if there is one) from the runway and once again landlock the remainder. The "mediated settlement" proposal provided that the Board would burden the Owners' remainder tract with a restrictive covenant for the benefit of Martin's Spicewood Pilots' Association. Martin will give a release of claims that do not exist (and certainly have never been asserted) and would agree to "bear her own attorneys' fees," which have already been paid with the Owners' money. This is a better deal for Martin than the 2016 fire sale.

The Directors could not justify what they were about to do. They made lots of excuses for what the Board had done, what it hadn't done and what it was about to do. Here are just a few of the Board's excuses, and the truth about them:

Excuse	Truth
We need to stop spending money on legal fees.	*The Board exceeded its powers by spending the Owners' money to defend the Directors' statutory violations and their excesses and breaches of duty. The Directors are personally accountable for the money they spent doing that. They had a duty to use the Owners' money to pursue relief for the Owners' loss, or to get out of the way when others pursued such recovery and not spend any money.*
We might not have won a lawsuit against Martin.	*Why on Earth would anyone think that? A sitting Director pocketed over a half million dollars that belonged to the Owners. The other Directors were complicit, resulting in further loss. The Board's attorney opined in writing the case against Martin is very strong. The attorney has never issued a different opinion and the facts haven't changed.*

It is not illegal for the WSC to do business with a Director.	*False. It is illegal when the transaction is grossly unfair (even fraudulent, according to the Board's attorney) and the Board has failed to comply with the legal requirements for approval of interested Director transactions.*
It is legal for the Board to dispose of surplus property by any process and in any manner it chooses.	*Absolutely false. The Board has a duty to obtain the highest possible price for all surplus property. All transfers must be properly (and actually) approved by Directors acting diligently and authorized by an "appropriate resolution." None of that happened in the 2016 Martin fire sale transaction.*
The Board's 2018 appraisal was "influenced" by other litigants.	*False, and what difference (if any) did that supposedly make anyway? The Board neglected to inform Bolton that it sold a comparable hangar lot just across Piper Lane in May 2015 for $12.75 per SF. At that price, the 2 platted hangar lots Martin obtained for herself were worth well over $1 million. Bolton's appraisal is low.*
Setting aside the transfer of the hangar lots and ROFR isn't worth the effort.	*False. At $12.75 per sq. ft., Martin got hangar lots worth more than $1 million (after a hefty "volume discount") for $200,000. Separated from the taxiway, the remainder was damaged by more than $500,000. The Owners lost well over $1,000,000, an amount well worth pursuing by anyone's standards.*
Restricting the remainder of the airport land to require aviation purchasers to assume the obligations of a Class A member of Martin's Pilots' Assn. will make it more marketable as hangar property.	*False. Provided the Owners keep Piper Lane, purchasers don't need to incur costs associated with membership in Martin's Assn. to have full access to and use of runway. Covenant would benefit Martin but would make land less*

	marketable and would provide ZERO benefit to Owners.
WSC is obligated to give "correction deed" conveying the Piper Lane taxiway to Martin.	*False. The Board never approved a deal to transfer Piper Lane to Martin. Martin, an experienced real estate professional, did not make a "mistake" when she had the Board deed 2 platted hangar lots to her. She didn't pay nearly enough for the hangar lots and ROFR she got; giving her more land for nothing compounds this wrong.*

At the end of the meeting, the Directors voted to leave largely intact what their attorney unequivocally opined is, at minimum, a transaction the Owners can and should avoid. They did not approve the restrictive covenant on the remainder tract, but that is inconsequential. With ownership and control of the Piper Lane taxiway, Martin can hold WSC purchasers (and others) hostage far more effectively than she could with the covenant.

No judge or jury has ever scrutinized the substance of the March 2016 fire sale transaction.[3] The TOMA suit examined only the Board's misconduct in taking action (or claiming to take action) that had not been properly noticed. No judge or jury has considered the impact of the January 2019 demand letter detailing Martin's wrongful conduct, written by the same legal counsel who opposed the granting of relief just a few months earlier. No judge or jury has had the benefit of the report prepared by the

[3] The Board's claim that the court "validated" the fire sale in the TOMA case is completely false. The Court chose not to exercise discretion set the transaction aside solely for TPIA violations; the egregiously unfair, improper and financially devastating consequences of Martin's misconduct was not before the Court. The Supreme Court may well determine that the March 2016 fire sale transaction should have been set aside as a result of the blatant statutory violations found in the TOMA lawsuit. Plaintiffs' requests for relief in this lawsuit, however, are not premised on the relief provisions of the Texas Public Information Act.

Board's appraiser reflecting the loss in excess of $1 million or the Board's sale of a comparable hangar lot just across Piper Lane for $12.75 per square foot just months before the same Directors allegedly approved the Martin fire sale transaction. That is about to change, and that change will likely change everything.

This is a suit to hold the current and former Directors responsible for whatever portion of the loss cannot otherwise be recovered, and they surely saw it coming.[4] But for the egregious misconduct of the Directors themselves, no one would need a "way out" of this mess. The only proper "way out" is for Martin to return the valuable property and cancel the preferential purchase right she obtained through a fire sale she orchestrated while a sitting WSC Director. Or she can pay the Owners what their valuable property interests are really worth. Or the other Directors can pay what they are unwilling to require Martin to pay.

Wasting money and giving away property that is needed to further the operations of the Cooperative enterprise is not the legitimate business of a water and sewer cooperative. No Board has the discretion, or the power, to do that. Since the Board refuses to do its duty, Plaintiffs have no alternative but to invoke the Court's power to restore the Owners' property and to hold the Directors and others responsible fully accountable for the Owners' loss.

III.

Parties

3.01 Plaintiff Lawrence Rene Ffrench, Jr. ("Ffrench") is a resident of Travis County, Texas. Ffrench is and was at all times relevant hereto recognized as a Member

[4] They unilaterally increased the limits of their D & O coverage just a month or so ago.

and Customer of the WSC. The last three digits of his driver's license number are 768. The last three digits of his social security number are 866.

3.02 Plaintiff John Richard Dial ("Dial") is a resident of Burnet County, Texas. Dial is and was at all times relevant hereto recognized as a Member and Customer of the WSC. The last three digits of his driver's license number are 446. The last three digits of his social security number are 924.

3.03 Plaintiff Stuart Bruce Sorgen ("Sorgen") is a resident of Burnet County, Texas. Sorgen is and was at all times relevant hereto recognized as a Member and Customer of the WSC. The last three digits of his driver's license number are 560. The last three digits of his social security number are 492.

3.04 As and to the extent necessary or appropriate to recover the Owners' property and/or to prevent further waste and misappropriation of the Owners' assets, Ffrench, Dial and Sorgen also appear herein as representatives of the WSC, pursuant to Section 20.002(c)(2), Tex. Bus. Orgs. Code, and as members with voting rights pursuant to Section 22.512, Tex. Bus. Orgs. Code.

3.05 Friendship Homes & Hangars, LLC ("FHH") is a Texas limited liability company owned or controlled by Defendant Martin and her alter ego at all relevant times. FHH has appeared and has answered herein.

3.06 Dana Martin ("Martin") is a former Director of the WSC who has appeared and has answered herein. Martin is personally accountable to the WSC's Owners for the full financial and other loss associated with the events giving rise to this lawsuit.

3.07 Defendants William Earnest, Thomas Michael Madden, Robert Mebane and Patrick Mulligan each held a position on the WSC Board of Directors that orchestrated and carried out the March 2016 fire sale transaction. On information and

belief, each of these Defendants has accepted illegal distributions of WSC funds to pay the cost associated with defending such wrongful conduct. Each of these Defendants is personally accountable to the Owners for the full amount of such illegal distributions of cooperative funds and for the full financial and other loss associated with March 2016 fire sale transaction. Each has appeared and has answered herein.

3.09 Defendants William Earnest, Joe Gimenez, Mike Nelson, David Bertino, Dorothy Taylor and Norman Morse are or until recently were Directors on the WSC Board. They received the analyses and conclusions of legal experts and independent valuation professionals engaged with the Owners' funds to the effect that the March 2016 fire sale transaction was unfair and illegal and resulted in massive damage to the Owners. They chose not to pursue relief on behalf of the Owners. Instead, they distributed the Owners' funds to pay for the defense of the unfaithful fiduciaries who carried out the fire sale transaction and personally benefitted from it and to throw one roadblock after another in the path of those who were pursuing the interests of the Owners. The Board has now voted to compromise alleged claims between the Board, on the one hand, and Martin and FHH, on the other hand, that the Board has made clear will never be asserted, to the extreme disadvantage of the Owners. As a result of the acts and omissions of these Defendants, the Owners have been dispossessed of hundreds of thousands in property and value and will be dispossessed of even more, and their collectively owned resources continue to be used against them.

3.10 Defendant Joe Gimenez ("Gimenez") is a Director and the President of the current Board. Gimenez may be served by delivering citation, with a true and correct copy of this First Amended Original Petition attached, to him at 424 Coventry, Spicewood, Texas 78669.

3.11 Defendant Mike Nelson ("Nelson") was a Director and an Officer in late 2018 and continues to serve in both positions. Nelson may be served by delivering citation, with a true and correct copy of this First Amended Original Petition attached, to him at 424 Coventry, Spicewood, Texas 78669.

3.12 Defendant David Bertino ("Bertino") was a Director until his recent resignation from the Board. Bertino may be served by delivering citation, with a true and correct copy of this First Amended Original Petition attached, to him at his residential address.

3.13 Defendant Dorothy Taylor ("Taylor") is a Director appointed to replace Norman Morse. She has also served as Director and Officer in the past. Taylor may be served by delivering citation, with a true and correct copy of this First Amended Original Petition attached, to her at 424 Coventry, Spicewood, Texas 78669.

3.14 Defendant Norman Morse ("Morse") has been a Director since 2018 and until very recently, when he apparently was removed for neglecting his duties and excessive absences. Morse may be served by delivering citation, with a true and correct copy of this First Amended Original Petition attached, to him at his residential address.

3.14 In its capacity as nominal respondent herein, the WSC has appeared and has answered. Plaintiffs do not now, nor have they ever, pursued the WSC for monetary or other relief that would impose a further burden the Owners.

IV.

Jurisdiction

4.01 Plaintiffs' claims are within the jurisdictional limits of the Court.

4.02 Plaintiffs plead their claims and causes of action independently and in the alternative, making no election whatsoever as to any claims and/or remedies and seeking the full recovery to which they may show themselves and the WSC Owners entitled under applicable law and principles of equity.

4.03 Plaintiffs bring this lawsuit to correct the consequences of acts and omissions of the Owners' unfaithful fiduciaries and to restore and prevent further waste of their resources. Should money damages be necessary to restore the Owners, the individual wrongdoers, and not the Owners, must be held accountable. As specifically required by Rule 47, Plaintiffs plead verbatim the following language of that Rule concerning recovery of monetary relief against the WSC's unfaithful fiduciaries: "(4) monetary relief over $1,000,000."

4.04 The individual Defendants did not act in good faith, with ordinary care or in a manner reasonably believed to be in the best interest of the Owners. Accordingly, they are not statutorily shielded from liability herein.

4.05 Plaintiffs have standing because (i) they seek to recover damages for wrongs done to them individually where the wrongdoers have violated duties arising from contract or otherwise, and owing directly by them to the Plaintiffs, (ii) they are WSC Members seeking under §20.002 to enjoin or annul the performance of an act or the transfer of property by or to the WSC that is *ultra vires*; (iii) they are WSC Members bringing a representative suit under §20.002 against current and former officers and directors of the WSC for exceeding their authority; and (iv) they are WSC Members bringing suit under §22.516 for a declaration that any purported ratification of the 2016 fire sale transaction is not effective and/or for measures to remedy or avoid harm to any

person substantially and adversely affected by a ratification. As co-owners of the property at issue in this lawsuit, Plaintiffs are entitled to receive a full recovery for the benefit of all Owners.

4.06 The business judgment rule does not affect Plaintiffs' recovery in this case because (i) the acts and omissions alleged herein resulted from ultra vires acts, fraud and/or self-dealing, were grossly negligent, constituted an abdication of their responsibilities or otherwise were not within the exercise of the individual Defendants' discretion and judgment, therefore the rule is inapplicable; (ii) there is no presumption of lawfulness in connection with the individual Defendants' acts and omissions alleged herein; (iii) the acts and omissions alleged herein involve assets or property (including causes of action) that belong to the Owners, and not to some corporate entity; and (iv) the acts and omissions alleged herein were not within the honest exercise of the individual Defendants' business judgment and discretion.

4.07 This case is not moot. The Board did not purport to independently approve the transfer of the 2 platted hangar lots, the transfer of the 0.5151 acres that comprise Piper Lane or the omission of an adequate taxiway and setbacks for the remainder tract. It is not at all clear the Board purported to ratify any of the foregoing, however it cannot ratify an act or transaction that was *ultra vires*, fraudulent or otherwise tainted by self-dealing or other misconduct. Ratification of the March 2016 fire sale transaction is no more within the powers of the Cooperative than was the original approval (if there was any) and the fire sale transaction itself. The Board has a nondiscretionary duty to unwind the illegal performance intact and not to make matters worse by giving Martin even more valuable airport property for no consideration at all.