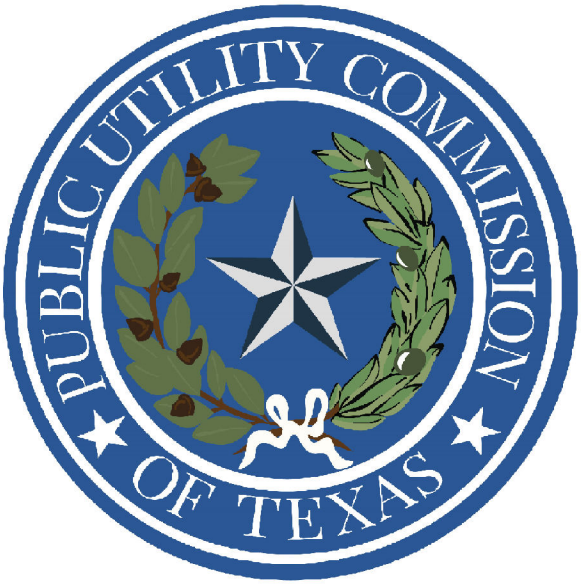

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RATEPAYERS APPEAL OF THE BEFORE THE STATE OFFICE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

RATEPAYERS' RESPONSE TO WINDERMERE'S OBJECTIONS AND MOTION TO STRIKE SUPPLEMENTAL DIRECT TESTIMONY OF KATHRYN E. ALLEN

TO THE HONORABLE CHRISTIAAN SIANO AND DANIEL WISEMAN, ADMINISTRATIVE LAW JUDGES:

THE REPRESENTATIVES OF THE RATEPAYERS OF WINDERMERE OAKS WATER SUPPLY CORPORATION ("Ratepayers") file this their Response in opposition to Windermere's Objections and Motion to Strike the Supplemental Direct Testimony of Kathryn E. Allen and would show as follows.

Timeliness of the Response

1. Ratepayers received Windermere's Objections and Motion to Strike the Supplemental Direct Testimony of Kathryn E. Allen ("Objection") on December 15, 2022. Pursuant to Rule §§22.4(a) and 22.78(a), this Response is required to be filed by the 5th "working day" thereafter, beginning with December 16, 2022. The Commission was closed for business on December 21 – 23 and December 26 – 27, therefore those were not "working days." The fifth "working day" is December 29, 2022. This response is timely filed.

Overview

2. Throughout this proceeding, Windermere has peppered the record with a host of opinions and conclusions from nonlawyer witnesses concerning litigation and other legal matters

arising from the 2016 land sale to director Dana Martin. None of this is accurate or reliable. None has yet withstood cross-examination; these witnesses are qualified to parrot words their lawyers have written for them, but that is the extent of their knowledge on these topics. It is telling that Windermere has yet to present a knowledgeable witness to testify about these matters.

3. For all its bluster about how nothing about the lawsuits or other legal proceedings is relevant, Windermere nonetheless continues to falsely portray what has occurred. In its Objection, Windermere states that the jury's verdict "vindicated WOWSC's legal decisions related to Cause No. 48292."[1] That is nonsense. In its Objection, Windermere states that the plaintiffs were awarded "a mere $70,000."[2] That is false. There is no judgment, but the plaintiffs have received a jury verdict that authorizes the trial court to exercise its equitable power to set aside the land sale and require Martin to disgorge the profit she received from the Mair transaction. In its Objection, Windermere continues to assert that it merely "retain[ed] counsel to defend itself."[3] That is false. Windermere received a full release from Martin and Friendship, after which there was nothing for Windermere to "defend." Even its own Board President has admitted that Windermere did not "defend"; it spent enormous resources on affirmative steps to prevent Friendship from losing title to the property and to prevent the ratepayers from holding their fiduciaries accountable for the financial consequences of the fraudulent transaction.

4. So far as Ratepayers can tell, every tribunal that has considered whether outside litigation costs are recoverable has determined that issue on a case-by-case basis in light of the details of the underlying proceeding. They find no authority to suggest the Commission will do otherwise. Nor do they find authority to suggest the Commission will approve the development

[1] Objection at p. 2.
[2] Objection at p. 2.
[3] Objection at p. 2.

of a record that includes only Windermere's version of events. For that reason, Ratepayers have presented probative evidence from a qualified witness concerning the factors that have been considered in determining whether and to what extent outside legal costs for litigation matters are recoverable from ratepayers. If the opinions of their expert are deemed "unreliable," Ratepayers request that the entirety of the testimony of Windermere's nonlawyer witnesses be stricken from the record.

Ms. Allen is Qualified

5. Windermere complains that Ratepayers have "fail[ed] to provide Ms. Allen's qualifications to serve as an expert witness in a rate case proceeding."[4] This is not a "rate case proceeding," and Windermere cites no authority suggesting that some special expertise would be required it were. The law requires that an expert witness have expertise in the subject about which she is offering an opinion, without regard to the venue in which the opinion is offered.[5] Further, the test is not whether there is an adequate recital of an expert's qualifications or the bases for her opinions, but rather whether the witness is in fact qualified to render the opinions. Ms. Allen is qualified, and it is disingenuous for Windermere to suggest otherwise.

6. Since 2019, Windermere has paid (or obligated itself to pay) a team of attorneys and staff to prevent the company's recovery of the land sold to Martin in 2016 and to prevent the company's recovery of compensation for its financial losses.[6] No one knows better than Windermere's legal team that from the time she appeared in the case in 2019, Ms. Allen has performed all of the legal work on behalf of the plaintiffs in Cause No. 48292 and personally

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[4] Objection at p. 3.

[5] *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006).

[6] Windermere's representative testified during the hearing that these were the purposes for which the legal expenses were paid or incurred. Hearing testimony of Joe Gimenez, Day 2, pp. 291:13 – 292:13 ("victory" in TOMA case when company did not recover its land) and p. 297:17-23 (every dollar spent on Double F devoted to preventing the reversal of the land transaction and preventing imposition of liability on director defendants). The approximate amount of the expenses is calculated from the invoices Windermere received from its attorneys.

participated in every aspect of the pretrial proceedings and the trial, including the jury's verdict. Windermere's legal team was present when the trial court issued the order of October 2020, expressly ruling that plaintiffs could have the land sale set aside based on breaches of duty by Martin and when the court reaffirmed that ruling during the August 2022 pretrial. Windermere's legal team was present when Ms. Allen testified at the trial about her education, training, licensure, work experience and the history of the litigation and explained how Windermere's legal maneuvering caused the joinder of parties that were never intended to be part of the case and prompted an extraordinary level of additional work and expense to preserve the opportunity to obtain a recovery for the benefit of the company and its ratepayers. Windermere's legal team did not challenge her qualifications, her personal knowledge or the reliability of her analysis then, and Windermere articulates no good faith basis upon which to challenge those matters now. Windermere certainly cannot claim in good faith that Ms. Allen is somehow less qualified or less knowledgeable about these matters than the nonlawyer witnesses through which is has attempted to proffer a host of opinions concerning the litigation.[7]

7. Windermere acknowledges that there are "fact issues" to be determined in this appeal concerning whether outside legal costs meet the standards for inclusion as operating expenses; Windermere concedes that management's "imprudence" in connection with the litigation is a "fact of consequence."[8] Ms. Allen's testimony concerns the litigation, which is particularly within her expertise, and is directed primarily to that "fact of consequence." Her testimony shows that Windermere's expenditures of corporate funds and credit for the legal services funded a costly strategy to preserve a land transaction that was known to be fraudulent at

[7] From an abundance of caution, Ms. Allen has provided additional information concerning her qualifications and opinions in her Second Supplemental Direct Testimony filed herewith.
[8] Objection at 4.

the time of the rate increase and was subsequently confirmed to be fraudulent by the jury's verdict. Her testimony shows that Windermere's costly effort to prevent or minimize any recovery of monetary compensation from members of management was at least partially successful. Accordingly, not only have Windermere's ratepayers have been deprived of a full and fair opportunity to receive compensation, but they have also been required to pay for the legal services that brought about such a prejudicial result.

8. The development and presentation of opinions concerning causes of action, pleas in avoidance, the meaning and impact of court rulings, and risk-reward analysis have been an integral part of Ms. Allen's litigation practice for over 30 years. She personally managed virtually every aspect of the litigation to which her opinions relate. She is qualified to give such opinions.

Relevance of Ms. Allen's Testimony

9. Windermere acknowledges that the ALJs must evaluate whether the appealed rates meet the statutory standards, including whether the inclusion of outside legal costs will result in just and reasonable rates, and that this necessarily requires inquiry into the "imprudence" of Windermere's decision-making.[9] Citing no authority, Windermere's Objection asserts the inquiry is limited to the $171,337 in outside legal costs that Windermere claims it paid in 2019.[10]

10. As Ratepayers have briefed extensively in the past, tribunals across the country have considered whether outside legal costs for litigation are recoverable in rates, or from ratepayers at all. See *State of North Carolina, Ex Rel. Utilities Commission v. Public Staff, North*

[9] It should not be forgotten that Windermere's outside legal costs are not costs of service. Windermere's own representatives have confirmed that the outside legal costs bear no relationship to Windermere's provision of utility service.

[10] By way of reminder, this is the figure included in the TRWA rate model that, until recently, Windermere claimed yielded the appealed rates. It is now undisputed, however, that the appealed rates were not yielded by the TRWA rate model or any other rate model that included $171,337 in outside legal expenses. Instead, Windermere made an entirely different calculation to engineer a rate that would generate enough additional monthly cash flow to pay a minimum amount to the lawyers each month and to accrue corporate debt for the unpaid portion of each invoice balance.

Carolina Utilities Commission, 343 S.E.2d 398, (N.C. 1986). These determinations are consistently made on a case-by-case basis, based on the details of the particular proceeding involved. Relevant factors include (i) whether the legal fees are a reasonable and necessary expense for the utility in providing its services,[11] (ii) whether the underlying proceeding will provide a specific benefit for the ratepayers,[12] (iii) whether the legal fees were incurred in good faith (also articulated as whether the underlying proceeding alleges some error or misconduct by management)[13], and (iv) whether the legal expenses could have been avoided through prudent management.[14]

11. The Commission has been clear that just and reasonable rates recover only the utility's reasonable and necessary expenses, do not recover expenses that bear no relationship to the provision of utility service, and collect only expenses actually realized or which can be

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[11] This testimony from the *Iroquois Gas* proceeding – where legal expenses were disallowed – parallels the testimony of Windermere's representatives in this appeal:

Q: Mr. Drennan, do you know whether the FBI investigation costs at issue in this case have increased Iroquois' capacity to transport gas?
A: I don't see how that could happen.
Q: Can you tell us whether the investigation costs that Iroquois has incurred has in any way increased the pipeline's efficiency?
A: I doubt it.
Q: Can you describe any benefits to the ratepayers that may result from Iroquois's incurrence of these costs?
A: Well, I can't-I can't describe anything because we don't know all the facts. I mean, there is the possibility that the ratepayers benefit from these costs.

Iroquois Gas Transmission Sys., L.P., 77 FERC ¶ 61,288, 62,280 (1996).

[12] See also *Iroquois Gas Transmission Sys., L.P.*, 77 FERC ¶ 61,288, 62,280 (1996) (the Commission does not find anything in the record to support the idea that Iroquois' actions provided an economic benefit to its ratepayers that, in fact, saved time or money, and that such savings were passed along to Iroquois' ratepayers in the form of lower rates.); *accord Mountain States Tel. & Tel. Co. v. F.C.C., 939 F.2d 1035, 1046 (D.C. Cir. 1991)* (if the activity resulting in the lawsuit was for the benefit of the carrier, rather than for that of the ratepayers, there is no reason for requiring ratepayers to pay the cost).

[13] See also *In re Carolina Water Serv., Inc.*, 2021 WL 3910693, at *1 (S.C. 2021) (allowing CWS to recover its litigation expenses brought about by its own failure to abide by the Clean Water Act would provide no incentive for the utility to operate in compliance with federal, state, or local laws.)

[14] See also *In Re: Application of Duke Energy Progress, LLC for Adjustments in Elec. Rate Schedules & Tariffs*, 351 P.U.R.4th 239 (May 21, 2019) (company bears the burden of showing that the legal action was a genuine value-adding proposition that did not arise out of imprudent conduct by the utility; an expense can "not be considered reasonable or necessary" where "the utility could have avoided the expense" by fulfilling its obligations).

anticipated with reasonable certainty.[15] The Commission has disallowed legal expenses (even though "trifling" in amount) incurred in litigation where the expenses could have been avoided by prudent management and do not appear to have benefitted ratepayers.[16] Accordingly, evidence that tends to prove (or to disprove) any of these matters is relevant in this proceeding.

12. Ms. Allen's testimony is based on the filings and orders in the litigation matters, materials produced by Windermere and/or members of its management, the court's pretrial rulings, the evidence admitted (and excluded) at trial, the testimony of Windermere's representatives in this proceeding and her knowledge of the substantive and procedural aspects of the litigation. These are the sources of information routinely relied upon by experts in her field.

13. Ms. Allen's testimony shows that as a result of this rate increase, Windermere funded a legal strategy whereby over $2 million of corporate funds and credit has been appropriated for purposes of preventing or minimizing any recovery for the benefit of the company and its ratepayers.[17] Her testimony explains that Windermere did not "take a neutral stance" or "opt to let the matter go," as it now claims, and how the affirmative steps taken by its outside legal counsel significantly impacted the trial and the information available to the jury. Ms. Allen's testimony also explains how the plaintiffs did not plan or intend to join the company itself or other former and current directors as parties in the case, but were required to do so in response to Windermere's efforts to have plaintiffs' claims against Martin and Friendship dismissed; that is,

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[15] *Petition of Paloma Lake Municipal Utility Dist. No. 1 et al. Appealing the Ratemaking Actions of the City of Round Rock,* Docket No. 48836, Order at p. 3.

[16] *Petition of Texas Electric Service Co. for Authority to Change Rates*, Docket No. 2606 (October 16, 1979), Order at p. 1, Examiner's Report at p. 19.

[17] As has been briefed extensively in the past, Windermere's representatives have confirmed that these expenditures were devoted to the purposes of (i) preventing recovery of the land sold to Martin and (ii) preventing the recovery of financial compensation from any of the director defendants. See, e.g., Hearing testimony of Mike Nelson, Day 1, pp. 198:6 – 199:25 (rate calculation) and Hearing testimony of Joe Gimenez, Day 2, pp. 291:13 – 292:13 ("victory" in TOMA case when company did not recover its land) and p. 297:17-23 (every dollar spent on Double F devoted to preventing the reversal of the land transaction and preventing imposition of liability on director defendants).

had Windermere taken a "neutral stance," the representative suit would have proceeded solely against Martin and Friendship, the enormous legal costs would have been avoided and the jury would have been allowed to hear (and make findings upon) all of the evidence concerning liability and damages.

14. Ms. Allen's testimony also shows that the jury's findings on liability were entirely consistent with the information Windermere's board had at the time of the rate increase, including the opinions of two separate general counsels that Martin engaged in corporate misconduct and that the land sale was subject to reversal by a court.

15. Finally, Ms. Allen's testimony provides a chronological context within which the "imprudence" of Windermere's management can be properly analyzed. In particular, the testimony explains that at the time the rate increase was approved Windermere knew (i) that the company had no exposure vis-à-vis the plaintiffs (because they expressly disclaimed any right to recover against the company) or vis-à-vis Martin and Friendship (because they fully released the company in October 2019), and (ii) that, while the company would be the beneficiary of any recovery the plaintiffs obtained through their representative suit, Windermere would not be required to expend corporate resources on litigation (because the plaintiffs were expending their personal resources).[18] In these circumstances, Windermere's enormous legal expenditures did not benefit the company or its ratepayers, and Windermere's board could not reasonably have expected they would. Those expenditures benefitted only the parties with exposure: Friendship (which held title to the land plaintiffs sought to recover); and Martin and the other director defendants (who

[18] Through its order granting summary judgment to the director defendants other than Martin, the trial court concluded that the directors who made the decision not to expend a modest amount to have the company pursue litigation against Martin/Friendship could not be held personally liable for the consequences of that omission. The directors neither sought nor obtained a summary judgment concerning the decision to expend millions in funds and credit for purposes of preventing or minimizing any recovery for the company and its ratepayers.

plaintiffs sought to hold personally accountable for the financial consequences of the land transfers).

16. These are precisely the types of circumstances that this Commission and other tribunals have considered in determining whether (or to what extent) to allow recovery of outside legal costs from ratepayers. Windermere provides no authority suggesting the Commission should or will depart from past precedent here. Accordingly, there is no basis upon which to conclude that Ms. Allen's testimony is not relevant.

No Analytical Gap

17. Ms. Allen stands behind every statement of law and fact set forth in her supplemental direct testimony. The statements are straightforward and could readily be controverted if they were not true. They are true, and Windermere does not identify any particular statement as to which it claims otherwise. Windermere certainly makes no effort to controvert any statement of fact or law. As explained above, the only "gross misstatements of fact or law" have been authored by Windermere.

18. Likewise, Windermere identifies no "facts in the record" from which Ms. Allen's testimony is claimed to vary – materially or at all. It requires no leap of faith to conclude that the expenditure of millions of dollars for legal work by competent lawyers to prevent or minimize proof of damages would, in all reasonable probability, have an impact on the trial and the jury's verdict on damages. This is particularly true where, as here, the jury was not allowed to hear critical evidence establishing causation. That said, what seems to matter most for present purposes is that the minimization of any damages recovery against the director defendants was admittedly one of management's primary objectives when the outside legal costs were authorized, paid or incurred and that no one could have thought this would benefit the ratepayers. That this objective

appears to have been accomplished, at least in part, is useful information; however, the result would be the same had the effort been wholly successful.

Personal Knowledge

19. Ms. Allen has personal knowledge of each matter addressed in her supplemental direct testimony. Windermere does not identify any statement as to which it contends Ms. Allen lacks personal knowledge.

20. Ms. Allen has not speculated on the internal deliberations of Windermere's board. Windermere's steps to have plaintiffs' claims thrown out of court are well documented in Windermere's filings in Cause No. 48292; that is not speculation. Windermere's trial representatives have testified that the enormous outside legal costs were expended to prevent recovery of the property and/or recovery of damages as against the director defendants; that is not speculation. Windermere's legal invoices speak for themselves as to the amounts incurred for legal services; that is not speculation. That the expenditure of over a million dollars (much of which continues to be carried as debt[19]) of corporate resources by a utility this size for purposes of preventing a recovery for the company's benefit constitutes "pulling out all the stops" is a rational perception based on Allen's personal knowledge. That the legal maneuvering of Windermere's board to obtain dismissal of the claims against Martin and Friendship made it necessary to join otherwise unnecessary parties and claims is also reflected in the filings in Cause No. 48292; that is not speculation.

[19] After Windermere's representatives were criticized during the December 2021 hearing for failing to disclose this debt in any financial reporting, Windermere's board began to include the debt balance on a spreadsheet each month. That is not speculation.

21. Ms. Allen has not speculated on how the plaintiffs proceeded in this case or would have proceeded under different circumstances. She has been directing this litigation on plaintiffs' behalf since 2019 and has personal knowledge of such matters.

22. Ms. Allen has not speculated on matters of law. Every opinion that involves a legal issue was thoughtfully researched and is based on applicable law. Windermere does not take issue with the principles of law set forth in Ms. Allen's testimony.

23. Ms. Allen has not speculated on matters that likely influenced the jury verdict. She was present for the entire proceeding. She heard all of the evidence, including what was excluded. She heard the argument of counsel that emphasized the absence of evidence of causation, exactly as she had suggested during pretrial would be the consequence of the court's exclusion of such evidence. Her conclusion is based on her rational perceptions, not on speculation.

Hearsay

24. Ms. Allen's testimony is not hearsay.

25. Ms. Allen's testimony does not incorporate hearsay. Page 6, line 17 – 18 is a description of what was originally sought in Cause No. 48292; it is not an out of court statement offered for the truth of the matter asserted. Page 7, line 6 – 16 is a description of defense efforts to obtain dismissal for lack of jurisdiction; to the extent this constitutes an out of court statement, it is not offered for the truth of the matter asserted. Page 7, line 18 – 21 is a description of what occurred; to the extent this constitutes a statement of some kind, it was made during the appeal hearing by witnesses under oath.

Absence of Specific Objection/Challenge

26. Windermere's Objection should be rejected on the additional grounds that it fails to specifically identify each opinion or portion of testimony it contends is inadmissible and to state

a specific challenge to each opinion or portion so identified. Texas law requires such specificity; "blanket" challenges to evidence on topic areas or to blocks of testimony are not sufficient.

27. Rule 103(a)(1)(B) requires that evidentiary objections be specific. For each item of evidence to which objection is made, the objecting party must (i) identify the evidence (or portion of the evidence) claimed to be inadmissible and (ii) state the legal and factual bases for the objection. Rule 103(a)(1)(B), T.R.E.; see, e.g., *Int. of L.M.*, 572 S.W.3d 823, 832 (Tex. App. – Houston [14th Dist.] 2019, no pet.) (hearsay objection that does not identify which parts of a document contain hearsay is not sufficiently specific). Windermere's Objection meets neither of these requirements. To the contrary, Windermere's Objection asserts generalized complaints about, for example, "misstatements of law and fact,"[20] "speculation,"[21] and "hearsay"[22] as to topic areas or blocks of testimony.

28. Similarly, an objection to an expert must specifically identify each expert opinion or conclusion a party seeks to exclude. Rule 104(c), T.R.E; *Merrill Dow Pharms. v. Havner*, 953 S.W.2d 706, 709 (Tex. 1997). The party seeking exclusion must then specifically state the grounds as to each opinion or conclusion so identified. *Id.* Windermere's Objection, on the other hand, does not meet these requirements. Windermere asserts that Ms. Allen's testimony does not state "qualifications to serve as an expert witness in a rate case proceeding" or that her analysis has "analytical gaps," but does not identify any opinion Ms. Allen has rendered Windermere claims

[20] Objection at p. 5. Windermere fails to identify a single such "misstatement."
[21] Objection at p. 6. Windermere fails to identify any opinion or testimony it contends is speculative. As counsel for the parties bringing suit, Ms. Allen is particularly well-positioned to have firsthand knowledge about what those parties were attempting to accomplish and how the case would have proceeded had Windermere "taken a neutral stance," as it has insisted in this appeal, or "opted to let the matter go," as it portrayed during the trial.
[22] Objection at p. 7-8. Windermere fails to identify any hearsay statement in the testimony. For example, the testimony "Instead, the board took steps to have the suit – which sought only to recover the land – thrown out of court" is not a hearsay statement; it is a description of what actually occurred is the case. Even the testimony "It was asserted that, because the board could only act as a whole, Plaintiffs were required to sue all the directors who approved the transfers" is not hearsay. It is a description of the position taken by Windermere and is not offered for the truth of the matter asserted.

she is not qualified to give or has too great an "analytical gap." While acknowledging that its "alleged imprudent legal strategy" is at issue in this appeal, Windermere boldly asserts that nothing Ms. Allen says about that imprudent legal strategy could possibly be relevant.

29. Windermere's Objection falls far short of the applicable specificity requirements. Ratepayers reserve their right to further respond in the event the ALJs are inclined to allow Windermere an opportunity to replead.

WHEREFORE, Ratepayers respectfully request that Windermere's Objection be denied in all respects and that they receive such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

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Certificate of Service

I hereby certify that, unless otherwise ordered by the Presiding Officer, notice of this filing was provided to all parties of record via electronic mail on December 29, 2022.

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Attorneys for Ratepayers

SECOND SUPPLEMENTAL DIRECT TESTIMONY OF
KATHRYN E. ALLEN

SOAH DOCKET NO. 473-20-4071.WS

PUC DOCKET NO. 50788

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

SECOND SUPPLEMENTAL DIRECT TESTIMONY OF
KATHRYN E. ALLEN

I. INTRODUCTION

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

A. My name is Kathryn E. Allen. I am an attorney licensed to practice law in Texas and other jurisdictions. My business address is 114 w. 7th Street, Suite 1100, Austin, Texas 78701.

Q. DID YOU PROVIDE DIRECT TESTIMONY IN THIS DOCKET?

A. Yes.

II. PURPOSE FOR SECOND SUPPLEMENTATION

Q. WHAT IS THE PURPOSE OF YOUR SECOND SUPPLEMENTAL DIRECT TESTIMONY?

A. The purpose for this testimony is (i) to provide additional information to address certain challenges set forth in Windermere's Objections and Motion to Strike my Supplemental Direct Testimony ("Objection"), and (ii) to correct various inaccuracies set forth in the Objection.

III. PROFESSIONAL AND EDUCATIONAL BACKGROUND

Q. PLEASE SUMMARIZE YOUR PROFESSIONAL AND EDUCATIONAL BACKGROUND.

A. I graduated from the University of Texas at Austin in 1981 with a Bachelor of Arts degree with honors following completion of a 4-year multi-disciplinary honors program known as Plan II. I received a law degree with honors from the University of Texas School of Law in 1984. I was licensed to practice law in Texas in 1984 and have been a member in good standing of the Texas bar continuously since then. I have been admitted to practice before the Fifth Circuit, as well as the federal courts in the Western, Northern and Southern Districts of Texas. Since 1986, I have maintained a full-time practice focused almost exclusively on commercial litigation matters. Before I left to open my own practice as of January 1, 2017, I was a shareholder at the Austin firm of Graves, Dougherty, Hearon & Moody. Most of the litigation matters in which I have participated over the past 30+ years have involved interests in real property and breaches of duty or other misconduct. Most of them have also involved an analysis as to whether the legal fees and other expenses incurred by one or more of the parties were reasonable and/or necessary under the circumstances in light of controlling legal standards. The development and presentation of opinions and recommendations concerning litigation strategies and risk-reward decision-making has also been an integral part of my litigation practice for over 30 years.

Q. ARE YOU INVOLVED IN ORGANIZATIONS AND/OR ACTIVITIES THAT ENHANCE YOUR PROFESSIONAL EXPERTISE IN COMMERCIAL LITIGATION MATTERS?

A. Yes. I am Board Certified in Civil Trial law. This reflects that I have handled, and continue to handle, more litigation matters than most civil trial lawyers and that I have

successfully completed a rigorous examination covering a wide variety of substantive and procedural litigation issues. To maintain board certification, I am also required to complete considerably more continuing legal education hours than would otherwise be required and to concentrate that additional CLE on matters related to the practice of civil trial law. I am a member of the American Board of Trial Advocates ("ABOTA"), whose purpose is to foster improvement in the ethical and technical standards of practice in the field of trial advocacy. Like board certification, membership in ABOTA requires a high level of active trial experience, as well as adherence to rigorous standards of professionalism and integrity. I am a past member of the Robert W. Calvert American Inn of Court, which is also a professional organization dedicated to professional education and the enhancement of advocacy skills. In addition, I have taught classes on trial advocacy and civil procedure and have presented on these topics at numerous bar-approved CLE and other events. I have also made presentations on numerous occasions concerning the prosecution and defense of claims for breach of fiduciary duty.

Q. HOW IS IT THAT YOU ARE PERSONALLY FAMILIAR WITH THE SUBSTANTIVE AND PROCEDURAL ASPECTS OF THE LEGAL MATTERS THAT HAVE ARISEN FROM THE 2016 LAND SALE TO DANA MARTIN?

A. I began working on the matter pending under Cause No. 48292 in the summer of 2019. At that time, I reviewed the pleadings and briefing on file in the case and in the TOMA litigation. I also performed independent research. After I appeared as counsel of record, I personally handled all aspects of the legal work in Cause No. 48292. This includes, without limitation, personally participating in every aspect of the briefing, pretrial and trial of the case. I also assisted another Windermere member, Danny

Flunker, when Windermere twice filed suit against the Texas Attorney General in an effort to avoid providing information deemed public under the Texas Public Information Act. Windermere produced copies of correspondence in which its insurance carrier Allied World denied coverage and declined to furnish defense costs in connection with Cause No. 48292. I have reviewed most of the filings in the lawsuit Windermere filed against Allied and have discussed that case from time to time with Windermere's counsel Jose de la Fuente. Typically, I find that hearing transcripts, the filings in the case, discovery materials and discussions with knowledgeable professionals involved in the case are reliable sources of information about a litigation matter. I found no reason to think otherwise as to the legal matters arising from the 2016 land sale involving sitting director Dana Martin.

IV. CLAIMS IN CAUSE NO. 48292

Q. IS IT ACCURATE THAT THE TRIAL COURT "FOUND THAT THE STATUTORY CLAIMS BROUGHT BY THE PLAINTIFFS DO NOT PROVIDE ANY MECHANISM FOR HER PROPOSED RELIEF," AS WINDERMERE ASSERTS ON PAGE 5 OF THE OBJECTION?

A. No. Had the court made such a determination, there would not have been a trial. In fact, the trial court determined just the opposite. In its order of October 20, 2020 (which denied Friendship's motion for summary judgment), the trial court expressly ruled that plaintiffs had the right under Section 20.002(c)(2) to "unwind" a transaction – even a fully completed transaction – based on breaches of fiduciary duty and other misconduct by a director or her transferee who acted with knowing involvement and

participation.[1] The trial court reconfirmed this ruling during the pretrial hearing on August 23, 2022.[2] Those are exactly the claims the plaintiffs asserted when this lawsuit was originally filed.[3]

Q. PLEASE EXPLAIN HOW YOU HAVE APPLIED YOUR SPECIALIZED KNOWLEDGE AND EXPERTISE IN CONCLUDING THAT WINDERMERE'S OUTSIDE LEGAL COSTS PROVIDED NO BENEFIT TO ITS RATEPAYERS.

A. This is explained in more detail in my direct testimony and supplemental direct testimony. In summary, Windermere's hearing representatives have testified uniformly that neither this litigation nor Windermere's enormous outside legal costs have anything to do with providing water and/or sewer services; I have accepted that testimony as accurate. Windermere's sworn testimony is that its outside legal costs have been incurred exclusively for purposes of (i) preventing recovery of the property from Friendship, and/or (ii) preventing recovery of damages as against former and current directors to compensate the ratepayers for their loss.[4] That testimony is consistent with my observations and experience in the case, and I have accepted it as accurate. Accordingly, the legal expenditures have benefitted Friendship, which continues to have title to the land, and the director defendants, who have avoided financial accountability for their actions. Windermere itself had no exposure in the case after receiving a full release from Martin and Friendship, therefore the legal expenditures did not benefit the

[1] A true and correct copy of such order is attached hereto as *Exhibit 1*.
[2] Excerpts from the hearing transcript are collected in *Exhibit 2* attached. This is the same transcript from which Windermere provided an excerpt in its Objection.
[3] A true and correct copy of the Original Petition filed in Cause No. 48292 is attached as *Exhibit 3*.
[4] Hearing testimony of Joe Gimenez, Day 2, pp. 291:13 – 292:13 ("victory" in TOMA case when company did not recover its land) and p. 297:17-23 (every dollar spent on Double F devoted to preventing the reversal of the land transaction and preventing imposition of liability on director defendants).

company. They have not benefitted Windermere's ratepayers in any respect I can identify.

CAUSE NO. 48292

RENE FFRENCH,	**S**	**IN THE DISTRICT COURT**
JOHN RICHARD DIAL,	**S**	
STUART BRUCE SORGEN,	**S**	
Individually and as Representatives	**S**	
of WINDERMERE OAKS WATER	**S**	
SUPPLY CORPORATION	**S**	
Plaintiffs	**S**	**33RD JUDICIAL DISTRICT**
	S	
V.	**S**	
	S	
FRIENDSHIP HOMES &	**S**	
HANGARS, LLC, and WINDERMERE	**S**	**BURNET COUNTY, TEXAS**
OAKS WATER SUPPLY CORPORATION,	**S**	
and its Directors WILLIAM EARNEST	**S**	
THOMAS MICHAEL MADDEN,	**S**	
DANA MARTIN, ROBERT MEBANE,	**S**	
PATRICK MULLIGAN, JOE GIMENEZ,	**S**	
DAVID BERTINO, MIKE NELSON,	**S**	
DOROTHY TAYLOR, NORMAN MORSE	**S**	
Defendants		

ORDER

Came on to be Considered Defendant Friendship Homes & Hangars, LLC's Motion for Partial Summary Judgment on Plaintiffs' Claims Seeking to Void or Annul the Sale of Real Property to Defendant. Further, Came on to be Considered Defendant's Objections to Plaintiffs' Summary Judgment Evidence. Having Considered said Motions, Plaintiffs' Response, and Defendant's Reply, the Court Rules as follows:

The Court recognizes a distinction between (1) ultra vires acts of the Corporation, and (2) ultra vires acts by officers and directors. Plaintiffs' allegations encompass both. As for the causes of action based on ultra vires acts by officers and directors under Texas Business Organizations Code sec. 20.002(c)(2), there is no limitation on the remedy. Plaintiffs' allegations against the defendant officers and directors of the corporation include claims of breach of fiduciary duty, misrepresentations, and fraud, combined with claims of alter ego, and lack of bona fide purchasers. Plaintiffs seek to unwind fully performed transactions that allegedly improperly benefitted defendant directors and officers who acted with knowing involvement and participation by transferees of the real property, and to recover damages on behalf of the corporation. In the absence of a limitation on the remedy under Section 2.002(c)(2), the Court Concludes that Defendant's Motion for Partial Summary Judgment is without merit.

Accordingly, Defendant's Motion for Partial Summary Judgment is Hereby **DENIED.**

Further, Defendant's Objections to Plaintiffs' Summary Judgment Evidence are Hereby **DENIED** as Moot.

IT IS SO ORDERED.

SIGNED this 20th Day of October, 2020.

Judge Margaret G. Mirabal
Presiding Judge

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, PATRICK MULLIGAN, JOE GIMENEZ, MIKE NELSON, AND DOROTHY TAYLOR	)	
Defendants.	)	33RD JUDICIAL DISTRICT

PRETRIAL HEARING

On the 23rd day of August, 2022, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Margaret G. Mirabal, Judge presiding, held in Burnet, Texas, Burnet County, Texas;

Proceedings reported by machine shorthand.

that that's not what they prefer because setting for trial, reserving that time is difficult. But I think 30 days' notice is probably going to be workable. The Court approves the Rule 11 agreement, and we'll work with that. But the sooner the better to let us know if that has to be changed.

MR. DE LA FUENTE: And for the record, Your Honor, WSC agrees.

MS. MITCHELL: Likewise, Your Honor.

MR. OLIVER: And the Mairs do.

THE COURT: Okay. Thank you. We will then proceed with the pretrial hearing.

I'm going to start off stating for the record some of the relevant prior rulings in this case, which are in existence and in effect right now governing this case.

On February 24th, 2020, the Court entered an order on defendants' pleas to jurisdiction and motion for summary judgment. And in that order, the Court upheld and acknowledged part of the order -- acknowledged that there was an agreement among the parties as far as some of the standing issues. But what the order confirms is the plaintiffs lack standing to bring suit as individuals, seeking individual damages against the

officers and directors of the water company. The water company for purposes of this hearing is WOWSC.

Two, the plaintiffs do have standing as members under Section 20.002(c)(2) of the Business Organization Code to bring suit as members on behalf of the water company against officers and directors for exceeding their authority. Plaintiffs have that standing.

Three, that plaintiffs have standing to sue for declaratory judgment to determine the validity of the effectiveness of the corporate acts or ratification -- the ratification part of this.

And then four, that the plaintiffs have standing and can assert claims in support of those standing abilities based on breach of fiduciary duty, constructive fraud and other theories.

On October 20th, 2020, the Court issued an order on FHH's motion for summary judgment -- now that's Friendship Homes and Hangar -- motion for summary judgment on plaintiffs' claim seeking to void or annul the sale of the real property to FHH.

The Court denied that motion for summary judgment, stating that that would not be a -- could not be -- at that point, no summary judgment annulling or voiding the sale because the ultra vires

acts of directors under 20.00(c)(2) has no limitation on remedy and that plaintiffs are entitled to seek to unwind fully-performed transactions that allegedly and properly benefited the directors who acted with knowing involvement and participation by the transferees and the ability to recover damages.

Implied in that ruling was the ultra vires acts of the corporation and any claim on that under 20.002(c)(1) to enjoin or set aside the transfer by a member, plaintiffs don't have a right to enjoin a corporation because the transaction was completed. And the Court cannot order the corporation to set aside through a suit by the members.

That ruling specifically acknowledged a right to try to unwind the transaction because of a suit against the directors individually, but implied in that ruling was that the corporation could not be ordered and enjoined because it was a completed transaction. And we'll talk about that further, but the case law -- that's what the case law is under 20.002(c)(1).

On May 3rd, 2021, the Court entered an order granting summary judgment to all the directors except Director Dana Martin. And the ruling was that

who were not part of that from pursuing this. That's something we haven't really discussed much, but I know you-all have a motion in here saying that, and my thought right now is no.

MS. O'BRIEN: And, Your Honor, just to be clear, would that be a claim against the company, then? Because the 2019 board, there are no claims against them anymore.

THE COURT: I'm just saying it doesn't preclude the members from pursuing whatever they are pursuing. It's not a -- the company -- I'm not saying the company is liable or the directors are liable for having entered into the settlement in the ratification. I've already ruled summary judgment: No personal liability for that. Therefore -- that the board was able to do it, I'm just saying my thought right now is that does not affect the members' rights to continue with their suit and try to get a judgment that will be against the remaining directors to allow the property to come back, maybe. This hasn't been conveyed to the Mairs. I'm afraid that's gone. But is it -- anyway -- or damages. I'm just saying I think this lawsuit can go forward without ratification and settlement does not keep the members from pursuing. So does that answer your