

CAUSE NO. 48292

<b>RENE FFRENCH,</b> <i>Intervenor Plaintiff</i>	§	<b>IN THE DISTRICT COURT</b>
	§	
	§	
<b>JOHN RICHARD DIAL,</b> <i>Intervenor Plaintiff</i>	§	
	§	
	§	
<b>STUART BRUCE SORGEN,</b> <i>Intervenor Plaintiff</i>	§	
	§	
	§	
<i>And AS REPRESENTATIVES FOR</i>	§	
<b>WINDERMERE OAKS WATER</b>	§	
<b>SUPPLY CORPORATION</b>	§	
	§	<b>33<sup>RD</sup> JUDICIAL DISTRICT</b>
v.	§	
	§	
<b>FRIENDSHIP HOMES &amp; HANGARS,</b>	§	
<b>LLC, WINDERMERE OAKS WATER</b>	§	
<b>SUPPLY CORPORATION, AND ITS</b>	§	
<b>DIRECTORS WILLIAM EARNEST;</b>	§	
<b>THOMAS MICHAEL MADDEN;</b>	§	
<b>DANA MARTIN; ROBERT MEBANE;</b>	§	
<b>and PATRICK MULLIGAN,</b>	§	
<i>Defendants.</i>	§	<b>BURNET COUNTY, TEXAS</b>

**MOTION FOR PROTECTIVE ORDER FROM TRIAL SUBPOENA**  
**AND RULE 21(b) MOTION TO SHORTEN TIME**

Windermere Oaks Water Supply Corporation (the “WOWSC”) moves for *immediate* protection under Texas Rules of Civil Procedure 176.6(e), 176.7 and 21(b) from the trial subpoena (the “Subpoena”)<sup>1</sup> served on its counsel of record, Jose de la Fuente. Plaintiffs seek to call Mr. de la Fuente as a witness during the trial in the above-captioned matter set to begin August 22, 2022; that should not be allowed. In support of its Motion<sup>2</sup>, the WOWSC shows as follows:

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<sup>1</sup> A true and correct copy of the Subpoena is attached hereto as **Exhibit A** and incorporated by reference.

<sup>2</sup> The WOWSC further incorporates by reference all argument and briefing in its August 17, 2022 Bench Brief: The Court Should Prohibit Plaintiffs from Calling Counsel for the WOWSC as Trial Witnesses.

## EXECUTIVE SUMMARY

On August 17, 2022, Mr. Jose de la Fuente accepted service of the Subpoena issued by counsel for Intervenor/Plaintiffs Rene Ffrench, John Dial, and Stuart Sorgen (together “Plaintiffs”). The Subpoena—served days before trial—is not a good-faith attempt to ensure a properly designated witness is available for trial. Rather, it is an attempt to unfairly disrupt WOWSC’s defense in this case. Law and policy strongly weigh against calling trial counsel as a witness. There is no admissible evidence Mr. de la Fuente could provide. His being forced to testify would only distract from his trial preparation and confuse the jury, prejudicing WOWSC.

Accordingly, the Court should prohibit Plaintiffs’ gamesmanship and grant this Motion for Protection for Mr. de la Fuente as a potential trial witness. Further, because this matter should be resolved as soon as possible prior to trial, the WOWSC moves the Court to shorten the time required for notice and hearing as permitted by Tex. R. Civ. P. 21(b), and grant this Motion by the end of the day on Friday, August 19, 2022.

## ARGUMENT AND AUTHORITIES

The testimony purportedly sought by Plaintiffs from Mr. de la Fuente 1) is inadmissible, and 2) creates significant risk of prejudicial effect for WOWSC and its defense in this case. Accordingly, the Court should therefore grant a protective order shielding Jose de la Fuente from having to testify at the trial in this matter.

### **A. There is no admissible testimony that counsel is expected to offer during trial.**

The Court should not allow Plaintiffs to call a witness who has no relevant testimony to provide at trial. Irrelevant evidence is inadmissible. Tex. R. Evid. 402. Mr. de la Fuente cannot offer evidence relevant to any live claim in this case.

The Court dismissed the claims as to the individual director defendants’ decision-making and actions through summary-judgment practice. Order on Defs.’ Mot. for Summ. Judg., May 3,

2021. It follows that there is no pending question of whether any director relied on Mr. de la Fuente or Lloyd Gosselink's advice as to any matter, as the individual directors are no longer parties to this suit.

The remaining claims in this case do not present any fact question for which counsel could provide relevant testimony. First, Plaintiffs' remaining claim arising from Chapter 20 of the Texas Business Organizations Code—the question of whether any act of the WOWSC is outside its purpose or the authority of its directors—is a purely legal one. Likewise, Plaintiffs' sole claim under Chapter 22 of the Texas Business Organizations Code, regarding the Board's October 2019 ratification action, presents narrow questions that are answered by the record of the Board's action, not testimony of WOWSC's counsel. Even if there were fact questions relating to the 2015 transaction that underlies this suit, no attorney at Lloyd Gosselink represented the WOWSC at that time. *See* Tex. R. Evid. 602 (requiring witness to have personal knowledge).

Though it is clear that there are no fact questions for a jury to decide, the testimony would still not be admissible as Lloyd Gosselink's representation of the WOWSC overlaps entirely with the pendency of litigation and/or anticipation of litigation, and thus functionally all testimony would be protected by attorney-client and work-product privileges. Tex. R. Evid. 503.

Finally, it is likely that much of such testimony Plaintiffs might attempt to adduce would facially constitute (improper and impermissible) expert testimony and, importantly, Mr. de la Fuente was not designated as an expert witness by any party in this case.

**B. The prejudicial effect weighs in favor of prohibiting Plaintiffs from calling counsel as a witness.**

Mr. de la Fuente should be protected from compliance with Plaintiffs' Subpoena not only because it seeks inadmissible testimony, but because it is nothing more than gamesmanship. Even if there was some relevant testimony that could conceivably be gleaned from permitting

examination of Mr. de la Fuente during trial, Texas Rule of Evidence 403 gives the Court broad discretion to exclude even relevant evidence if the probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. Tex. R. Evid. 403.

As the Texas Supreme Court has stated, the dual role may place the attorney “in the unseemly and ineffective position of arguing his own credibility.” *In re Keenan*, 501 S.W.3d 74, 77 (Tex. 2016) (quotation marks and citations omitted). Moreover, it is confusing to the finder of fact “when one person acts as both advocate and witness.” *Id.*

Plaintiffs’ threat to call counsel as witnesses also implicates the issue of Mr. de la Fuente’s continued representation pursuant to Texas Disciplinary Rule of Professional Conduct 3.08, which generally provides that a lawyer should not continue as an advocate in a proceeding if the lawyer will be compelled to provide testimony to the client, unless the client consents. Thus, calling counsel as witness threatens disqualification of counsel, which would be disruptive to this case and prejudicial to the WOWSC in denying it its choice of counsel.

Plaintiff here has not taken reasonable measures to avoid undue burden on WOWSC and its trial counsel. At no time during the pendency of this litigation have Plaintiffs deposed or even noticed the deposition of Mr. de la Fuente to ascertain what relevant information he may have. Plaintiffs first designated Mr. de la Fuente as a person with relevant knowledge in their April 14, 2021 response to requests for disclosures. At no time in the last 16 months have they made any efforts to understand the substance of his potential testimony and now, days before the trial, want to call him as a live witness. Thus, it’s unclear what possible questions might be asked of Counsel for the WOWSC, and that lack of sufficient and reasonable notice places Counsel in a difficult position in defending his client in this case.

If indeed the testimony sought places counsel and WOWSC in an adverse situation and WOWSC finds it cannot consent, after years of serving as lead counsel and in the middle of trial, Mr. de la Fuente would face the very real possibility of needing to withdraw. Even without that, as evidenced by this Motion, Plaintiffs service of this Subpoena is taking away time that should be spent in preparation of defense of a case that goes to trial on Monday. It is unquestionable that the weight of the burden placed on WOWSC and its counsel by allowing Plaintiffs to call Mr. de la Fuente as a witness is too great.

Calling witnesses is an important part of the adversarial process meant to aid the trier of fact. It should not be used as a stunt or a weapon. There is no admissible testimony expected from examining Mr. de la Fuente. The only thing that can be gained by Plaintiffs is confusion of a jury and potential disqualification of lead trial counsel for WOWSC, neither of which is fair or in the interest of judicial economy. Accordingly, the Court should grant this Motion for Protection and prohibit Plaintiffs from calling Mr. de la Fuente as a trial witness.

### **CONCLUSION AND PRAYER**

There is no admissible testimony to be gained from Mr. de la Fuente as a trial witness, and even if there were, the prejudicial effect of such a tactic far outweighs any probative value. The Court should not entertain such tactics or reward Plaintiffs' failure in properly advancing their case.

Windermere Oaks Water Supply Corporation therefore asks the Court to grant its Motion for Protective Order under Texas Rules of Civil Procedure 176.6(e) and 176.7 from the trial subpoena served on its counsel, prohibit counsel for any party calling Mr. de la Fuente as a witness at trial, to grant the relief requested by the end of the day on August 19, 2022 as permitted by Rule 21(b), and grant such further and additional relief to which it may show itself justly to be entitled.

Respectfully submitted,

**LLOYD GOSSELINK  
ROCHELLE & TOWNSEND, P.C.**  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701  
Telephone: (512) 322-5800  
Facsimile: (512) 472-0532

By:           /s/ Jose E. de la Fuente            
JOSE E. de la FUENTE  
State Bar No. 00793605  
[jdela Fuente@lglawfirm.com](mailto:jdela Fuente@lglawfirm.com)  
MICHAEL A. GERSHON  
State Bar No. 24002134  
[m gershon@lglawfirm.com](mailto:m gershon@lglawfirm.com)  
GABRIELLE C. SMITH  
State Bar No. 24093172  
[gsmith@lglawfirm.com](mailto:gsmith@lglawfirm.com)

**ATTORNEYS FOR WINDERMERE OAKS  
WATER SUPPLY CORPORATION**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys via the Court's electronic filing case management system and electronic mail on this 19th day of August, 2022:

Mr. Bill Aleshire  
[bill@aleshirelaw.com](mailto:bill@aleshirelaw.com)  
AleshireLAW, P.C.  
700 Lavaca, Suite 1400  
Austin, Texas 78701  
**ATTORNEY FOR INTERVENOR-  
PLAINTIFFS**

Ms. Kathryn E. Allen  
[kallen@keallenlaw.com](mailto:kallen@keallenlaw.com)  
The Law Office of Kathryn E. Allen, PLLC  
114 W. 7<sup>th</sup> Street, Suite 1100  
Austin, Texas 78701  
**ATTORNEY FOR INTERVENOR-  
PLAINTIFFS**

Ms. Molly Mitchell  
[mollym@abdmlaw.com](mailto:mollym@abdmlaw.com)  
Almanza, Blackburn, Dickie & Mitchell, LLP  
2301 S. Capital of Texas Hwy., Bldg. H  
Austin, Texas 78746  
**ATTORNEY FOR FRIENDSHIP HOMES  
AND HANGARS, LLC**

Ms. Shelby O'Brien  
[sobrien@enochkever.com](mailto:sobrien@enochkever.com)  
7600 N. Capital of Texas Hwy  
Building B, Suite 200  
Austin, Texas 78730  
**ATTORNEYS FOR DEFENDANT  
WINDERMERE OAKS WATER SUPPLY  
CORPORATION DIRECTORS  
WILLIAM EARNEST; THOMAS  
MICHAEL MADDEN; DANA MARTIN;  
ROBERT MEBANE; PATRICK  
MULLIGAN;  
JOE GIMENEZ; MIKE NELSON;  
and DOROTHY TAYLOR**

Mr. Andrew Oliver  
[aolive@oliverlawoffice.com](mailto:aolive@oliverlawoffice.com)  
Oliver Law Office  
13785 Research Blvd., Suite 125  
Austin, Texas 78750  
**ATTORNEYS FOR DEFENDANTS  
JOHANN MAIR and MICHAEL MAIR**

*/s/ Jose E. de la Fuente*  
\_\_\_\_\_  
JOSE E. de la FUENTE

# **EXHIBIT A**



commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(c) *Trial subpoenas.* A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, may object or move for protective order before the court at the time and place specified for compliance.

**Contempt.** FAILURE BY ANY PERSON WITHOUT ADEQUATE EXCUSE TO OBEY A SUBPOENA SERVED ON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA IS ISSUED OR A DISTRICT COURT IN THE COUNTY IN WHICH THE SUBPOENA IS SERVED, AND MAY BE PUNISHED BY FINE OR CONFINEMENT OR BOTH. TEX. R. CIV. P. 176.8(A).

This subpoena is issued on the 16<sup>th</sup> day of August 2022, at the instance of RENE FFRENCH, JOHN RICHARD DIAL and STUART BRUCE SORGEN, Plaintiffs in the above-referenced cause, by and through their attorney of record, Kathryn E. Allen, State Bar of Texas Number 01043100, whose address and telephone number are:

THE LAW OFFICE OF KATHRYN E. ALLEN, PLLC  
114 W. 7th Street, Suite 1100  
Austin, Texas 78701  
Telephone: (512) 495-1400  
Facsimile: (512) 499-0094  
Email: kallen@keallenlaw.com

By: Kathryn E. Allen  
Kathryn E. Allen

PROOF OF SERVICE OF SUBPOENA

I, JOSE DE LA FUENTE, accept service of the attached subpoena and agree to appear at the time and place directed therein.

Dated: August \_\_\_, 2022.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed name)

OR

I, \_\_\_\_\_, am over the age of 18 years. I am not a party in the above-entitled cause of action. On the \_\_\_ day of August 2022, at \_\_\_\_\_ .m., I served a subpoena, of which this is a true and correct copy, and tendered any witness fees required by law, on JOSE DE LA FUENTE, by personally handing said subpoena and said witness fees to the named individual or in accordance with Tex. R. Civ. P. 176.5(a).

Dated: August \_\_\_, 2022.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed name)

### **Automated Certificate of eService**

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Cathy Daniels on behalf of Jose de la Fuente

Bar No. 00793605

cdaniels@lglawfirm.com

Envelope ID: 67464947

Status as of 8/19/2022 10:19 AM CST

Associated Case Party: FRIENDSHIP HOMES & HANGARS, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Molly Mitchell		mollym@abdmlaw.com	8/19/2022 10:16:27 AM	SENT
Ethan Ranis		eranis@abdmlaw.com	8/19/2022 10:16:27 AM	SENT
Elizabeth Hom		ehom@abdmlaw.com	8/19/2022 10:16:27 AM	SENT

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Cathy Daniels on behalf of Jose de la Fuente

Bar No. 00793605

cdaniels@lglawfirm.com

Envelope ID: 67464947

Status as of 8/19/2022 10:19 AM CST

Associated Case Party: WILLIAM EARNEST

Name	BarNumber	Email	TimestampSubmitted	Status
Shelby L.O'Brien		sobrien@enochkever.com	8/19/2022 10:16:27 AM	SENT
Laci Lindsey		llindsey@enochkever.com	8/19/2022 10:16:27 AM	SENT

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Cathy Daniels on behalf of Jose de la Fuente

Bar No. 00793605

cdaniels@lglawfirm.com

Envelope ID: 67464947

Status as of 8/19/2022 10:19 AM CST

### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jose E. De La Fuente	793605	jdela Fuente@lglawfirm.com	8/19/2022 10:16:27 AM	SENT
Michael Allan Gershon	24002134	mgershon@lglawfirm.com	8/19/2022 10:16:27 AM	SENT
Louis Andrew Oliver	24046556	aoliver@oliverlawoffice.com	8/19/2022 10:16:27 AM	SENT
BILL @ALESHIRE LAW		Bill@AleshireLaw.com	8/19/2022 10:16:27 AM	SENT
Gabrielle C. Smith		gsmith@lglawfirm.com	8/19/2022 10:16:27 AM	SENT
Shelby O'Brien		sobrien@enochkever.com	8/19/2022 10:16:27 AM	SENT
Jose De la Fuente		jdela Fuente@lglawfirm.com	8/19/2022 10:16:27 AM	SENT
Andrew Oliver		aoliver@oliverlawoffice.com	8/19/2022 10:16:27 AM	SENT

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Cathy Daniels on behalf of Jose de la Fuente

Bar No. 00793605

cdaniels@lglawfirm.com

Envelope ID: 67464947

Status as of 8/19/2022 10:19 AM CST

Associated Case Party: LAWRENCERFFRENCH

Name	BarNumber	Email	TimestampSubmitted	Status
Kathryn E.Allen		kallen@keallenlaw.com	8/19/2022 10:16:27 AM	SENT

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Cathy Daniels on behalf of Jose de la Fuente

Bar No. 00793605

cdaniels@lglawfirm.com

Envelope ID: 67464947

Status as of 8/19/2022 10:19 AM CST

Associated Case Party: JOHN RICHARD "DICK" DIAL

Name	BarNumber	Email	TimestampSubmitted	Status
Kathryn E.Allen		kallen@keallenlaw.com	8/19/2022 10:16:27 AM	SENT

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Cathy Daniels on behalf of Jose de la Fuente

Bar No. 00793605

cdaniels@lglawfirm.com

Envelope ID: 67464947

Status as of 8/19/2022 10:19 AM CST

Associated Case Party: STUARTBRUCESORGEN

Name	BarNumber	Email	TimestampSubmitted	Status
Kathryn E.Allen		kallen@keallenlaw.com	8/19/2022 10:16:27 AM	SENT