

CAUSE NO. 48292

RENE FFRENCH, JOHN RICHARD §
DIAL, AND STUART BRUCE SORGEN, §
INTERVENOR PLAINTIFFS §
§
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 §
§
IN THE DISTRICT COURT
33RD JUDICIAL DISTRICT
BURNET COUNTY, TEXAS

DEFENDANTS WINDERMERE OAKS WATER SUPPLY CORPORATION
DIRECTORS WILLIAM EARNEST, THOMAS MICHAEL MADDEN, PATRICK
MULLIGAN, MIKE NELSON, ROBERT MEBANE, JOE GIMENEZ, DANA MARTIN,
AND DOROTHY TAYLOR'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO
DIRECTOR DEFENDANTS' SUMMARY JUDGMENT EVIDENCE

Defendants Windermere Oaks Water Supply Corporation (“WOWSC”) Directors William Earnest, Thomas Michael Madden, Patrick Mulligan, Mike Nelson, Robert Mebane, Joe Gimenez, Dana Martin, and Dorothy Taylor (“Directors”) file this response in opposition to Plaintiffs Rene Ffrench, John Richard Dial, and Stuart Bruce Sorgen’s (“Plaintiffs”) Objections to the Directors’ Summary Judgment Evidence (“Objections”). The Directors’ summary judgment evidence complies with all applicable procedural and evidentiary rules. This Court should deny Plaintiffs’ Objections or, alternatively, give the Directors an opportunity to supplement to correct any evidence this Court determines is inadmissible.

RESPONSIVE ARGUMENT & AUTHORITIES

Plaintiffs object to the Declaration of Director Mike Nelson (“Nelson”) and five attached exhibits, as well as certified transcripts of certain WOWSC board meetings. As required, Nelson’s

declaration is “made on personal knowledge, … set[s] forth such facts as would be admissible in evidence, and … show[s] affirmatively that the affiant is competent to testify to the matters stated therein.” TEX. R. CIV. P. 166a(f). Further, his testimony as WOWSC’s business records custodian complies with the requirements of Rule 902(10) of the Texas Rules of Evidence. *See* TEX. R. EVID. 902(10). Defendants’ objections to Nelson’s declaration and exhibits are meritless.

A. Nelson is the WOWSC Business Records Custodian and Gave Competent Testimony.

Plaintiffs object to paragraph 10 of Nelson’s Affidavit, claiming it “does not demonstrate that Mr. Nelson is competent to testify concerning” his exhibits 8-N, 8-O, 8-Q, 8-FF, and 8-P, and they further object that those documents “are not the business records of [WOWSC] and are not authenticated by any person having knowledge of the document or the information set forth therein.” Motion at ¶¶ 1-2. Plaintiffs misstate the business records exception to the hearsay rule.

The predicate for admission of business records may be established through testimony of the custodian of records or by an affidavit that complies with Texas Rule of Evidence 902(10). TEX. R. EVID. 803(6), 902(10). The Rules of Evidence “do not require that the qualified witness who lays the predicate for the admission of business records be their creator, be an employee of the same company as the creator, or have personal knowledge of the contents of the record—personal knowledge of the manner in which the records were kept will suffice.” *Iqbal v. Fed. Nat'l Mortg. Assoc.*, No. 03-15-00667-CV, 2017 WL 2856737, at *4 (Tex. App.—Austin June 29, 2017, pet. denied) (mem. op.) (citations omitted). Nelson’s averments in paragraph 10 that he is the records custodian for WOWSC, that WOWSC kept these records in the regular course of its business, and that the records are original or exact duplicates satisfy this requirement. *See id.*

In addition, documents authored or created by a third party can become the business records of an organization and, consequently, admissible under Rule 803(6), if the documents are (1) “incorporated and kept in the course of” the testifying witness’s business, (2) the business

“typically relies upon the accuracy of the document’s contents,” and (3) “the circumstances otherwise indicate the document’s trustworthiness” *Roper v. CitiMortgage, Inc.*, No. 03-11-00887-CV, 2013 WL 6465637, *12 (Tex. App.—Austin Nov. 27, 2013, pet. denied) (mem. op.). Courts’ “primary concern with the admission of third-party business records is their reliability.” *Id.* at *13 (citation omitted). Exhibit 8-N is an appraisal obtained in 2015 at WOWSC’s request of WOWSC’s airport property. Exhibit 8-O is an appraisal of WOWSC airport property that was conducted in 2019. Exhibit 8-Q is an appraisal of WOWSC airport property made back in 2006 to value it as security for a loan to WOWSC. Exhibit 8-P is the Burnet Central Appraisal District’s value of WOWSC airport property for the year 2016. And Exhibit 8-FF is a 2005 letter of intent from William Keller to WOWSC offering to purchase part of WOWSC’s airport property. The five complained-of exhibits may have been created by third parties, but they have unquestionably been kept in the course of WOWSC’s business and are part of its files, and Plaintiffs have not even asserted, much less established, that any of these exhibits are not trustworthy. *See id.* WOWSC has produced all of these documents in this lawsuit. Further, Plaintiffs rely on some of these appraisals in its Response to the Directors’ summary judgment motion. *See, e.g.,* Plaintiffs’ Response to the Director Defendants’ Traditional and No-Evidence Motion for Summary Judgment at pp. 11-12 & n.30, p. 15 & n.54., p. 18, and pp. 30-31.

B. The Five Exhibits Are Not Hearsay and Are Relevant to These Proceedings.

Plaintiffs also object that Exhibits 8-N, 8-O, 8-P, 8-Q, and 8-FF are “hearsay (and not within any exception)” and “are not relevant.” Motion at ¶¶ 1-2. Directors do not offer any of these exhibits into evidence to prove the truth of the matter asserted—the value of any of the subject WOWSC property. *See* TEX. R. EVID. 801(d). Further, these exhibits are directly relevant to the subject matter of this lawsuit. Plaintiffs seek to hold the Directors personally liable for purported ultra vires acts for selling WOWSC property to a former sitting board member for less than

Plaintiffs believe it was worth. The primary issue in defending such a claim is whether the Directors acted in good faith and within their business judgment—not the actual value of the property sold. In discharging their duties related to the sale, the Directors were entitled to rely on opinions, reports, or statements of appraisers and other persons with professional expertise in valuing property. *See* TEX. BUS. ORGS. CODE §§ 3.102, .105. The Directors offered the five complained-of exhibits to show the information they had at hand and relied on when voting to approve the challenged sale. This evidence is relevant to defending the claims against them, and they did not offer this evidence to prove the “true” value of the sold property. Additionally, Plaintiffs make no effort to explain or show how Exhibit 8-P, containing the public records of the Burnet County Appraisal District, are unfairly prejudicial to a conclusion of whether the Directors acted in good faith or committed purported ultra vires acts.

This Court should deny Plaintiffs’ objections to paragraph 10 of Nelson’s Declaration and Exhibits 8-N, 8-O, 8-P, 8-Q, and 8-FF.

C. The Certified Transcriptions of the WOWSC Meetings Are Admissible.

Plaintiffs finally object to Directors’ Exhibits 16 through 21, transcriptions of recorded WOWSC Board meetings, because “Nelson testified he has no personal … knowledge regarding them and cannot vouch for their accuracy.” Motion at ¶ 3. As with the above exhibits, Nelson signed a business records declaration as WOWSC’s business records custodian regarding the recordings of the board meetings at issue, which were produced by WOWSC in this lawsuit. Exhibit 15, ¶¶ 3 and 4. Links to the recordings were provided and authenticated in Nelson’s declaration as well. *Id.* ¶ 4. Mr. Nelson’s declaration stated that the recordings were being transcribed by a court reporter and were also being entered in the summary judgment record. *Id.* ¶ 3. The court reporter, in turn, certified each transcript as a true and accurate record of those recordings. Exhibits 16 through 21. Nelson is not required to have personal knowledge of the

contents of the transcripts or “vouch for the accuracy” of the transcripts. *See supra* at 2-3; *Roper*, 2013 WL 6465637, at *11.

As with the other exhibits, Plaintiffs have not even asserted, much less established, that any of these transcriptions are not trustworthy. Nor can they. On January 6, 2021, this Court ordered Defendants to produce “all records, all versions … of the minutes and all certified agendas reflecting Board discussion items, discussions or actions during open or executive sessions at the WSC Board meetings on March 7, 2015, April 6, 2015, July 16, 2015, October 1, 2015, October 31, 2015, December 7, 2015, December 19, 2015, and February 22, 2016....” *See Order Granting Plaintiffs’ Motion to Compel*. In response, the next day WOWSC produced seven MP3 files containing audio recordings of some of those Board meetings, labeled as WOWSC002222-2236, and minutes from those meetings.

In support of its summary judgment motion, the Directors rely on some portions of those recordings. Their counsel determined the best way to attach this evidence for this Court’s ease of reference (so that the Court would know who was speaking in the recordings and could peruse a transcript rather than listen to hours of recordings), and also to preserve this evidence in the event of appeal, was to have the recordings transcribed by a certified court reporter. *See TEX. R. CIV. P. 203.6; see also Pinnacle Anesthesia Consultants, P.A. v. Fisher*, 309 S.W.3d 93, 97, 101 (Tex. App.—Dallas 2009, pet. denied) (“true and accurate transcript” of audio recording was “was submitted as evidence during the summary judgment proceedings and was also admitted into evidence at trial”). And like with deposition transcripts, the court reporter certified that the transcripts are “true and accurate” records of the audio recordings. *See id.*; Directors’ Supplement to Evidence in Support of Their Traditional and No-Evidence Motion for Summary Judgment at pp. 145, 176, 226, 257, 340, and 365. In fact, Plaintiffs themselves rely on five of these very

transcriptions in their Response to the Directors' summary judgment motion. *See, e.g.*, Plaintiffs' Response to the Director Defendants' Traditional and No-Evidence Motion for Summary Judgment at Exhibits 31, 40-43.

Plaintiffs' baseless objection to the admissibility of these transcriptions should likewise be denied.

PRAYER

For the reasons set forth above, the Directors pray the Court to DENY Plaintiffs' Objections to Director Defendants' Summary Judgment Evidence. Alternatively, the Directors request permission to supplement to correct any inadmissible evidence. The Directors further request that the Court grant them such other relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2021, a true and correct copy of the above and foregoing has been served by electronic filing service on the following:

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