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Casie Walker, District Clerk
Burnet County, Texas
By: Amy Tippie, Deputy

CAUSE NO. 48292

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

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

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

INTRODUCTION/GROUNDS FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

EVIDENCE IN SUPPORT OF SUMMARY JUDGMENT MOTION

Exhibit 1: Declaration of Dana Martin

Exhibit 2: Declaration of Bob Mebane

Exhibit 3: Declaration of Pat Mulligan

Exhibit 4: Declaration of Mike Madden

Exhibit 5: Declaration of Bill Earnest with exhibits

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

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

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

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

Exhibit 6: Declaration of Joe Gimenez

Exhibit 7: Declaration of Dorothy Taylor

Exhibit 8: Declaration of Mike Nelson with exhibits

Exhibit 8-A: WOWSC Articles of Incorporation

Exhibit 8-B: WOWSC Bylaws

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

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

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

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

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

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

Exhibit 8-I: Settlement Statement

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

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

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

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

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

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

Exhibit 8-P: Burnet Central Appraisal District Appraised Value

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of the Parties to this Lawsuit

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

Plaintiffs

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

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

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

Defendants

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

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

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

2015 Board of Directors ("2015 Board"):

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

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

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

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

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

2019 Board of Directors ("2019 Board"):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT IN SUPPORT OF SUMMARY JUDGMENT

I.
Summary Judgment Standard

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

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

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

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

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

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

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

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

1. Legal Framework

In relevant part, section 20.002 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BOC § 22.230(b) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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