

I.

DISCOVERY PLAN

1. Plaintiff intends to conduct discovery under Level 1 of Rule 190 of the Texas Rules of Civil Procedure.

II.

PARTIES

2. Plaintiff Lawrence R. Ffrench Jr. is resident of Travis County, Texas and is a principal of Double F Hangar Operations, LLC and Triple F Hangar Operations, LLC which owns two lots and two airplane hangars at Spicewood Airport located in Burnet County, Texas.

3. Plaintiff James Thomas Nelson is a resident of Burnet County, Texas and is principal member owner of Quad F Hangar Operations, LLC which owns a lot and an airplane hangar at Spicewood Airport located in Burnet County, Texas.

4. Plaintiff J. Richard Dial is a resident of Burnet County, Texas and owns a lot and airplane hangar at Spicewood Airport located in Burnet County, Texas.

5. Spicewood Airport Pilot's Association is a Texas non-profit located in Burnet County, Texas and its principal place of operation is located at Spicewood Airport at 111 Piper Ln, Spicewood, TX 78669.

6. Defendant Daniel L. Black owns a lot and airplane hangar located at Spicewood Airport located in Burnet County, Texas.

7. Defendant Patricia Gerino is a resident of Burnet County, Texas and owns a lot and airplane hangar at Spicewood Airport located in Burnet County, Texas.

8. Defendant Leslie Partridge owns a lot and airplane hangar located at Spicewood Airport located in Burnet County, Texas.

9. Wesley Perkins is a resident of Travis County, TX and owns a lot and airplane hangar located at Spicewood Airport located in Burnet County, Texas.

10. Richard Schaefer is a resident of Burnet County, Texas and owns a lot and an airplane hangar at Spicewood Airport located in Burnet County, Texas.

11. John Wissler is a resident of Burnet County, Texas and owns a lot and an airplane hangar at Spicewood Airport located in Burnet County, Texas.

12. Zachary Wright is a resident of Burnet County, Texas and owns a lot and home in an adjoining subdivision located in Spicewood, Texas.

13. Paragraph's 6 through 12 are incorporated for identifying those directors as ("Individual Defendants").

14. Individual Defendants are engaging as the Board of Directors (the "'22-'23 Board") collectively (the "Defendants") of SAPA.

III.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over this cause pursuant to Article V, Section 8 of the Texas Constitution and Section 24.007 of the Texas Government Code.

16. This Court has personal jurisdiction over Defendants because they own property located in Burnet County, TX and are acting as the '22-'23 Board for a non-profit association operating with its home office located in Burnet County, Texas managing an airport located in Spicewood, Texas a city of Burnet County, Texas. The Defendants committed the acts giving rise to Plaintiff's causes of action in Texas.

17. Venue is proper in Burnet County, Texas under Section 15.002 of the Texas Civil Practice and Remedies Code because all, or a substantial part of the events, acts and refusals to act giving rise to

the claims occurred in Burnet County, and Plaintiff's are all property owners in Burnet County, Texas or are residents of Burnet County.

IV.

FACTUAL BACKGROUND

18. This derivative action brought by Defendants concerns the operations and management of the Spicewood Airport (the Airport) by '22-'23 Board concerning Defendants knowing and intentional *ultra vires* acts and the repeated breach of fiduciary duties owed by the Individual Defendants separately and as Defendants collectively to the members of SAPA.

19. SAPA was originally incorporated as a Texas non-profit under the name Windemere Airport Taxiway Association, Inc and is controlled by the following corporate documents: Amended Articles of Incorporation (Exhibit 8), Covenants, Conditions and Restrictions ("CC&R's) (Exhibit 1) Amended Bylaws (Exhibit 3) and Plat's (Exhibit 2).

20. SAPA operates a 4,185 foot runway and multiple taxiways ("Airport") that are open to public use along with operation of a large fuel farm that houses thousands of gallons of aviation gas and jet fuel.

21. The Airport also includes numerous privately owned property lots with hangars and has approximately 134 aircraft that are hangered and use the Airport as a home base. The Airport sees an approximate daily average of 50 takeoffs or landings of aircraft, a fair number of which are aircraft that are not based at the Airport.

22. The Airport's significant number of daily aircraft operations requires that safety must be of paramount concern for all aircraft and Airport operations.

23. The CC&Rs define the lots and hangars (see Exhibit 1, Article 1, Section 2) ("Properties") that are subject to the authority of SAPA. The first tranche of Properties subject to SAPA are identified in

the CC&Rs in the first “WHEREAS” section which identify a Plat for “Windermere Airpark” (“Plats”) (Exhibit 2).

“WHEREAS, Declarant is the owner of certain property in the County of Burnet, State of Texas, known as Windermere Airpark, which is more particularly described in the Plat recorded in Cabinet 2, Slide 106 D, of the Plat records of Burnet County, Texas”

24. The second tranche of Properties subject to SAPA are brought under SAPA via the Plat identified as “Windermere Airpark II” and is expressly brought under the jurisdiction of the CC&R’s pursuant to Note 5 on the Windermere Airpark II Plat.

“5. This Plat is subject to Declaration of Covenants, Conditions and Restrictions as recorded in Volume 805, Page 54.”

25. Members of SAPA are defined by the CC&R’s of SAPA (Exhibit 1) under Article 1 “Definitions”, Sections 2, 4 and 13.

“Section 2. “Property” or the “Subdivision” shall mean and refer to that certain real property hereinafter descried (sic) and such additions thereto a (sic) may hereafter be brought within the jurisdiction of the Association.”

“Section 4. “Owner” shall mean and refer to the record whether on or more persons or entities, of a fee simple title, to any lot which is a part of the Property, or a person or entity that has been assigned the rights to use the taxiway and runway, including contract sellers and lessors, but excluding those having such interest merely as security for the performance of an obligation.”

*“Section 13. “Member” or “Membership” shall mean every person or entity, whether Class “A” members or Class “B” members, who holds a membership in the Association.
Class “A” members are property owners of a lot/s in the Windermere Airpark*

subdivision, including future phases of the Windermere Airpark. Class “B” members are non-property owners that have been granted the easement use of the of the taxiways and/or runway, by deed, easement, or rental status.”(emphasis added)

26. Members are ultimately determined by their ownership of Properties that are located within the Plats identified as subject to the CC&R’s (“Member Owners”). As noted in paragraph 8, Member Owners are deemed Class A members under CC&R’s Article I, Section 13.

27. The Properties available for inclusion in Class “A” membership are certain and fixed by the Plat’s in Exhibit 2. Furthermore, Burnet County property records confirm there were no more Plats filed by the developers for “...future phases of Windermere Airpark” as suggested in the CC&R’s. Exhibit 2 is the exclusive list of properties included and subject to the CC&R’s.

28. The right of membership for Member Owners are set exclusively by CC&R’s Article III, Sections 1 (Exhibit 1).

“Section 1. Membership. Every owner of a Lot which is subject to assessment shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot which is subject to assessment.”

29. The criteria for qualifications to serve as a Director are set forth in Article 4.02 of the SAPA Bylaws (“Bylaws”) (Exhibit 3) which designate that six of the seven Board positions are to be filled by Class A members.

“4.02. The number of Directors will be seven (7) Directors consisting of six (6) Class A members and one (1) Class B member. Directors need not be Texas residents. Each Director will serve for a term of two years. Each Director shall be subject to a term limit of three terms followed by a minimum of two years (1 full term) of ineligibility. After that period, a qualified member is again eligible to be elected.”

30. Sometime in 2018, unbeknownst to the vast majority of Member Owners, the '18-'19 Board quietly adopted amended Bylaws attempting to radically redefine the definition of Members (See Exhibit 3, Article 2.01). This *ultra vires* effort was in direct contradiction of the controlling CC&R's which at that time required that any amendment to the CC&Rs could only be accomplished through a 75% vote of the Member Owners (see Exhibit 1, Article IX, Section 3). Due to the passage of time the language in Section 3 has since reduced the vote necessary to amend the CC&Rs to 60% of Member Owners.

31. Notwithstanding that the CC&Rs are a superior hierarchy document over both the Articles of Incorporation and the Bylaws and therefore supersede conflicting language in the Bylaws and Articles, the Bylaws also expressly provide in Article 14.08 "Controlling Provisions", that:

*"To the extent there is a conflict between the provisions of these Bylaws and the Declaration of Covenants, Condition (sic) and Restrictions of Windermere Airpark, a subdivision of Burnet County, Texas, **the provisions of the Declaration shall prevail over these Bylaws.**" (emphasis added).*

32. The '18-'19 Board's attempt to circumvent the CC&Rs with a new definition of membership were void at their inception and have no force or effect on the definition of membership in SAPA. The CC&Rs are the sole controlling definition of membership as reaffirmed by the Bylaws, Article 14.08.

33. There has never been a vote of Member Owners to amend any provision of the CC&Rs in the entire existence of SAPA.

34. The '21-'22 Board first learned of the questionable amendments to the Bylaws late in its tenure and determined that a possible conflict appeared to exist between the CC&R's and the Bylaws.

35. The '21-'22 Board was concerned and hired legal counsel to evaluate and provide guidance as to which definitions controlled the definition of membership.

36. SAPA's legal counsel provided a detailed legal memorandum ("Memorandum) dated May 9, 2022 (Exhibit 4). The Memorandum concluded that the '18-'19 Board action attempting a radical change to the definitions of SAPA membership was void as the acts were done in direct conflict with the controlling CC&R's which exclusively control the definition of membership and the exclusive requirements for changing the definitions of membership (see Exhibit 4, Discussion Sec. 2).

37. Individual Defendants Gerino, Partridge, and Perkins, were members of the previous '21-'22 Board and therefore already had that prior knowledge of the Memorandum in advance of the '22-'23 Board's inaugural meeting. Additionally, Defendants Black, Gerino, Partridge, and Perkins were notified in writing by immediate past '21-'22 Board Director and Member Owner David Kerley (Exhibit 5) on May 31, 2022 prior to the inaugural Board meeting of the Memorandum and the Memorandum's conclusions and requested compliance with the CC&R's. A second notice requesting compliance was given verbally by David Kerley at the beginning of the '22-'23 Board's inaugural meeting. He then provided a third notice in writing after the inaugural Board meeting on July 9, 2022 (Exhibit 5). All notices to the Defendants referenced the binding legal Memorandum obtained by the '21-'22 Board concerning issues of improper and *ultra vires* actions taken by a prior Board ('18-'19 Board) revising the Bylaws that had been recently uncovered by the '21-'22 SAPA Board. The notices all requested that the Defendants heed the legal advice and requested the Defendants abide by the CC&R's definitions of membership.

38. Immediately after the clear verbal presentation of the Memorandum contents by David Kerley, and the Defendants receipt from him of a hard copy of the Memorandum, the Defendants moved to immediately fill by appointment a Director vacancy that had occurred after the annual member meeting but before the inaugural '22-'23 Board meeting.

39. The Defendants, by majority vote (Individual Defendant Perkins voted against), committed an *ultra vires* act by knowingly and intentionally filling the vacancy by the appointment of Individual

Defendant Zachary Wright who they knew does not meet the CC&R's definitions for Member Owners of SAPA.

40. The Defendants then doubled down on their *ultra vires* acts by knowingly and intentionally voting, by the same majority vote in paragraph 22, to grant membership status to additional persons (Dana Martin and Malcom Bailey) who they know do not meet the CCR's definition of membership and further asserted these persons would have the full rights of Member Owners, including voting rights. Defendants compounded the *ultra vires* act by then appointing at least one of these persons (Dana Martin) to committees of the Board.

41. Since their inaugural Board meeting, the Defendants stopped holding the regular meetings with Member Owners and at least two more Directors resigned after the inaugural Board meeting.

42. Member Owner meetings with the Board have typically occurred on a monthly to bi-monthly basis for many years.

43. In light of the Defendants ceasing all meetings with Member Owners, Member Owner David Kerley made email written requests to Defendant Black as Secretary dated October 24, 2022, October 31, 2022 and November 9, 2022 (Exhibit 7) seeking corporate records pursuant to section 8.02 of the Bylaws (Exhibit 3).

44. Member Owner David Kerley then printed the email requests for the corporate records and sent them by certified mail to the registered agent of SAPA and to the Defendants at the business address of SAPA (see Exhibit 7);

45. Rather than comply and provide the records within five days as required by section 8.02 of the Bylaws, the Defendants have refused all efforts of Plaintiffs and Member Owners to secure the requested corporate records thereby denying Member Owner's their rights. Defendant's conduct has

forced the Plaintiffs and the Member Owners into a ten month blackout devoid of almost no information about the status of their Association or actions taken in the name of their Association.

46. Safety must be of paramount concern for all aircraft and Airport operations.

47. During the tenure of the '21-'22 Board, an inspection by that Board of a powerline overhanging the north taxiway entrance to the runway was found to be increasingly sagging and posed a threat to large aircraft using the taxiway with higher tails which may, if tall enough, contact the powerline. There are several helicopters operating at the airport and taxiing under powerlines is inherently dangerous. There was great concern among most Member Owners that if left unaddressed, the powerline would get caught by the tail of a larger aircraft or rotors of a taxiing helicopter which could potentially cause catastrophic loss of life and damage to property and the surrounding community. The '21-'22 board sought to remove the safety hazard by having Pedernales Electric Corp. (PEC) bury the powerline. The '21-'22 Board entered into contracts with PEC to remove the safety hazard and bury the powerline at the expense of SAPA. SAPA put down all of the money required by PEC to lock the contract and go forward with the project. At the time this decision was made by the '21-'22 Board, it was known that Individual Defendant Wright had some objections to the planned burying of the powerline. But the decision was overwhelmingly supported by Member Owners and other users of the Airport. The '21-'22 Board determined that the paramount safety concerns of operations at the Airport required resolution of the growing safety hazard posed by the sagging powerline.

48. Plaintiff's and other Member Owner's learned just a few weeks ago that shortly after being appointed as a Director, Defendant Wright contacted PEC verbally and in writing and instructed PEC to cancel the contract to bury the powerline and refund the payment to SAPA. See Exhibit 9.

49. The reasoning given to PEC's Mr. Noack to justify termination of the project was specious and misleading. The powerline in question has been in the same location (approximately late 1970's) and

predates the Airport's existence and construction. At the time of installation, PEC had no reason to contact the FAA. Individual Defendant Wright's reference to the Obstruction Evaluation / Airport Airspace Analysis (OE/AAA) applies per the FAA only to "*any construction or alteration that exceeds an imaginary surface extending **outward and upward** at any of the following slopes (emphasis added):*

- *100 to 1 for a horizontal distance of 20,000 ft. from the nearest point of the nearest runway of each airport described in 14 CFR 77.9(d) with its longest runway more than 3,200 ft. in actual length, excluding heliports*
- *50 to 1 for a horizontal distance of 10,000 ft. from the nearest point of the nearest runway of each airport described in 14 CFR 77.9(d) with its longest runway no more than 3,200 ft. in actual length, excluding heliports*
- *25 to 1 for a horizontal distance of 5,000 ft. from the nearest point of the nearest landing and takeoff area of each heliport described in 14 CFR 77.9(d)*

<https://oeaaa.faa.gov/oeaaa/external/portal.jsp>

50. Since the powerline burial project involved construction **downward** below the actual ground level and not upward from an imaginary surface above the actual ground level, an OE/AAA study was wholly inapplicable. Individual Defendant Wright's directing the PEC to an OE/AAA in response to the PEC lawyers request for information from SAPA verifying the FAA's position and as additional basis for termination of the contract was at best, misleading. Individual Defendant Wright had specific reason to have intimate prior personal knowledge of the true nature of the OE/AAA process as the construction of his buildings at the north end of the Airport in a neighboring subdivision were subjected to an OE/AAA study in 2022 and the buildings were found to pose an unsafe hazard to aviation. (Exhibit 10). Exhibit 10 is also part of the Burnet County Property records.

51. On April 6, 2023, Plaintiff's participated in a special meeting called by the Member Owners pursuant to Article 3.02 of the SAPA Bylaws. At that meeting the Member Owners unanimously voted to remind the Board of the CC&R's and to instruct the Defendants not to appoint any individuals to the vacancies and instead leave them open to be filled by vote of the Member Owners at the Annual meeting required to occur in less than 60 days.

52. On April, 15, 2023 as a response to growing frustration of Owner Members as demonstrated by paragraph 31, Defendants called a Board meeting with Member Owners, the first time in over ten months. Yet during the Board meeting, when Plaintiff's and Member Owners sought to advise the Defendants of the written demands of the Plaintiff's and Member Owner's that Defendants comply with the CC&R's, Individual Defendants Gerino, Black and Wright were entirely dismissive of the special meeting and actions taken by the Plaintiff's and Member Owners. Defendants refused to allow Defendant Director Perkins a full opportunity to discuss the special meeting or introduce into the '22-'23 Board records the Member Owner written demands he had been given from the special meeting. However, Defendant Perkins was able to make enough verbal statements that the Defendants knew and understood the nature of the Member Owners requests and demands of the Board.

53. In defiance of Plaintiff's and Owner Members special meeting written demands of Defendants, Defendants Gerino, Black, Partridge and Wright immediately moved to knowingly and intentionally appoint two persons to fill the seats that had been vacant for nine (9) months and six (6) months (Individual Defendants Schaefer and Wissler). Neither individual meets the CC&R's definition of membership. Individual Defendant Wissler was then designated President. This conduct further demonstrates the ongoing willful, knowing and intentional *ultra vires* acts by Defendants.

54. Plaintiffs filed written demands for corrective action dated April 27, 2023 (Exhibit 6) with the Defendants now allegedly comprising the '22-'23 Board (Black, Gerino, Partridge, Perkins, Schaefer, Wissler and Wright).

55. Late on May 12, 2023 the Defendants provided eight (8) days' notice announcing an annual "party" of the members would take place on May 20, 2023 and that elections would take place prior to the party to fill available Director seats on the Board. Member Owners and Individual Defendant Perkins immediately notified Defendants that the notice of an annual member meeting and election of Directors failed to comply with the minimum notice requirements of the Bylaws. Specifically, Article 3.04 which requires no less than ten (10) days' notice for the annual meeting.

56. Individual Defendant Wissler has made it clear the annual meeting will proceed knowing they had a failure of proper notice and that the '22-'23 Board is developing and using a membership roll that will include dozens of non-members deemed eligible to vote, as well as allowing those non-members to run for open seats on the Board of Directors all in knowing and intentional defiance of the CC&R definition of membership.

57. Plaintiffs have submitted written notice of demand for corrective action necessary to maintain a derivative action on behalf of SAPA (Exhibit 6). Plaintiffs also incorporate by reference the demands for corrective action from immediate past Director and Member Owner David Kerley (paragraph 20 and Exhibit 5). Plaintiffs believe the written demands collectively satisfy the 90 day notice requirement for a derivative action. Plaintiffs also rely on TBOC § 21.553; TBCA art. 5.14(C)(2) which provide exemptions for the 90 day notice requirement, specifically relying on the Plaintiffs being on notice that Defendants have through their conduct rejected all of the numerous prior written demands. Plaintiffs also rely on the irreparable injury exemptions in the Code. Providing additional time for Defendants to respond

after more than nine months of written demands have gone ignored will be futile and would only allow Defendants additional opportunity for conduct causing irreparable harm.

58. Defendants have gone rogue, abandoning any semblance of their fiduciary duties to SAPA, Plaintiff's and the Member Owners of "obedience, loyalty, and due care"; *Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014); citing *Gearhart Indus., Inc. v. Smith Intern., Inc.*, 741 F.2d 707, 723-24 (5th Cir. 1984). Ongoing conduct by Defendants and the inclusion of multiple nonmembers on the Board as well as committees of the Board are immediately and irreparably denying the rights of Member Owners to take necessary actions to protect their paramount safety interests at the Airport and denying their rights to self-govern and protect their property interests.

59. Due to the imminence of the annual meeting and election for Directors, Defendants are immediately and irreparably disenfranchising the rights Plaintiff's and Member Owners for the coming two year terms.

V.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

AND FURTHER INJUNCTIVE RELIEF

60. Plaintiffs repeat and incorporate paragraphs 1 through 39. It is clear the Defendants have intentionally gone rogue, are acting in contradiction to the paramount safety interests of the Airport, blatantly refuse to comply with clear unambiguous language in the corporate documents and are proactively denying Plaintiffs and Member Owners their rights under the corporate documents.

61. While being largely kept in the dark the past 10 months, Member Owners have uncovered information which evidences conduct of Defendants acting in their self-interests rather than in protecting the paramount safety of Airport operations. The unresolved power line exposure poses an immediate and

irreparable catastrophic harm to large aircraft using the Airport, to the Plaintiff's, to Member Owners as well as the surrounding community.

62. Defendants are in the midst of taking further action through arrangements and candidate selection for the open Director seats to immediately and irreparably damage and deny Plaintiff's and Member Owner's interests in self-governance for the next two years.

63. The ongoing conduct of the Defendant's poses an immediate and irreparable harm to the property interests of Plaintiff's and Member Owners.

64. Pursuant to Texas Rule of Civil Procedure 684, Plaintiff is willing to post a bond. Plaintiff notes that the Court may also dispense with the requirement of security where it appears unlikely a defendant would incur any significant cost or damages as a result of this injunction. *See Incubus Inv., LLC v. City of Garland*, 2003 WL 23095680 at *4 (N.D. Tex. 2003). Here, the Defendants will not incur any costs or damages complying with this injunction as there is simply no cost or damage arising from complying with the CC&R's rules governing membership.

VI.

BENCH TRIAL

65. Plaintiffs seek a bench trial of all claims so triable.

VII.

REQUEST FOR DISCLOSURE

66. Under Rule 194 of the Texas Rules of Civil Procedure, Plaintiffs request that Defendants disclose, within thirty (30) days of the service of this request, the information or material described in Rule 194.2 of the Texas Rules of Civil Procedure.

VIII.

CONCLUSION AND PRAYER

WHEREFORE, Plaintiffs request that on final trial, they obtain the following:

1. An order requiring the Defendants and all future successors to remove from the Defendants Board of Directors any person who does not meet the definition of member under the CC&R's;
2. An order prohibiting the Defendants and all future successors from appointing any person who does not meet the definition of member under the CC&Rs to fill any vacancy of the Board;
3. An order prohibiting the Defendants and all future successors from retaining or appointing any person who does not meet the definition of member under the CC&Rs to any committee of the Board named in the corporate documents or created by the Board;
4. An order requiring the Defendants and all future successors to immediately update the membership rolls to remove all persons who do not meet the definition of membership under the CC&Rs;
5. An order requiring the Defendants and all future successors to strictly adhere to all SAPA corporate documents;
6. An order requiring the Defendants and all future successors to timely produce all corporate records requested by Member Owners pursuant to the SAPA corporate documents;
7. An order requiring the Defendants and any future successors to make final arrangements to bury the hazardous powerline across the north taxiway;
8. Award Plaintiffs' reasonable and necessary attorneys' fees in prosecuting its claims through trial and, if necessary, through appeal;

9. Award all costs of suit; and

10. Such other and further relief, at law or in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/ Keith G. Hopkinson

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Associated Case Party: Spicewood Airport and Pilots Association, Inc.

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